

BETWEEN:

- (1) JENNIFER MICHELLE COLEGATE**
- (2) PETER CHARLES COLEGATE**
- (3) RICHARD JAMES COLEGATE**

Claimants

and

- (1) GJB ESTATES LIMITED**
- (2) GORDON JAMES BRODIE**
- (3) CAROLINE ANNE BRODIE**

Defendants

JUDGMENT

1. This is a Part 8 Claim for a declaration that the transfer of the freehold of 16 Church Road, Bournemouth BH6 4AT (“the Property”) should be transferred to the Claimants’ nominee pursuant to the Landlord and Tenant Act 1987 by virtue of the failure by the First Defendant and its predecessor in title (Brodie Group Ltd (“BGL”)) to serve the requisite notices provided for under that Act enabling the Claimants (as qualifying tenants) to assert the statutory “right of first refusal” provided for under the 1987 Act. The real point at issue is whether that transfer should take effect with or without the freehold being incumbered by a 999 year lease granted in respect of Flat 1 in the building, which lease was granted by the First Defendant (“GJB”) to the Second and Third Defendants after the First Defendant had been put on notice that the qualifying tenants wished to purchase the freehold.
2. References to the trial bundle are expressed as page numbers e.g. [100-101].
3. The background and facts of the matter are largely undisputed (though the Defendants’ motives and state of knowledge are – hotly so). Mr Cowen, Counsel for the Claimants, and

Mr Fain, Counsel for the Defendants, both produced helpful written skeleton arguments. Mr Cowen's skeleton could be described as somewhat fuller in setting out the background and legal framework and, in drawing on his skeleton argument for those purposes, I mean no disrespect to Mr Fain. As I say, there is little contentious in any of this.

The 1987 Act

4. The 1987 Act places a prohibition on a landlord of premises to which the Act applies on making a "relevant disposal" affecting those premises without the landlord first serving on the qualifying tenants of flats contained in the premises a notice under s5 of the 1987 Act offering them a right of first refusal to acquire the interest to be transferred at the same price and on the same terms as is proposed for the relevant disposal. The premises to which the 1987 Act applies are, in general terms, premises which consist of the whole or part of a building and contain two or more flats held by qualifying tenants where more than half of the flats are held by qualifying tenants.
5. In general terms and subject to a number of important exceptions, a "relevant disposal" is a "*disposal by the landlord of any estate or interest (whether legal or equitable) in any such premises including the disposal of any such estate or interest in any common parts of any such premises ...*". A disposal includes a surrender of a tenancy and the grant of an option.
6. A relevant disposal need not necessarily encompass the reversionary interests in the qualifying lessees' flats themselves. So, a transfer of the freehold interest in or the grant of a lease of the common parts of the block will be a "relevant disposal". That will ordinarily include, for instance, the grant of a lease of the airspace above the block of flats in respect of which the lessees formerly held no interest: *Dartmouth Court Blackheath v Berisworth* [2008] EWHC 350 (Ch).
7. Section 5 of the 1987 Act provides that where the landlord proposes to make a relevant disposal, he must serve a notice complying with the relevant part of s5 on the qualifying tenants of flats within the premises offering to enter into a contract with the qualifying tenants for the disposal of that interest on the terms upon which the relevant disposal was to be effected. The notice must contain details of the principal terms of the disposal including, in every case, the property or interest in the property to which the disposal relates and the

principal terms of the disposal including the consideration for the disposal. The notice must give a period of not less than two months within which the offer can be accepted.

8. It is a criminal offence for a relevant disposal to be effected without the landlord first serving the requisite notice under s5 of the 1987 Act¹. I am not tasked with deciding whether any party committed a criminal act in deciding this matter. I was not addressed on the elements of the criminal offences contained in the relevant statutory provisions nor, indeed, on any potential defences. Accordingly, and in the interests of brevity, where I refer in this judgment to any act or omission constituting a criminal offence, that should be taken as being *prima facie*.
9. The landlord cannot carry out the relevant disposal during the period that the qualifying tenants have to respond to the notice. If the offer is not accepted within the relevant period, the landlord is free to go ahead with the relevant disposal. If the offer is accepted, however, then the 1987 Act sets out the steps which each party must take to effect the disposal to the qualifying tenants.
10. The 1987 Act also provides for what is referred to in the Act as “enforcement” of the qualifying tenants’ rights against the landlord in the event that the landlord fails to comply with its obligations under the 1987 Act.
11. In the event of a relevant disposal which amounts to the assignment of the landlord’s interest in qualifying property and which did not comply with the rights contained in the 1987 Act, the “new landlord” is obliged, pursuant to s3 and 3A of the Landlord and Tenant Act 1985 to give notice to the qualifying tenants that the disposal to the new landlord was a disposal to which the 1987 Act applied and that the tenants have the right to obtain information about that disposal and, more importantly, to acquire the landlord’s interest which was transferred to the new landlord within a fixed time period. The notice under s3A must be served (at the latest) within two months of the disposal being effected. By this method, the qualifying tenants ought to obtain the information which they need in order to decide whether to acquire the landlord’s interest and the new landlord can protect itself by

¹ Landlord and Tenant Act 1987 s.10A

serving notice and then waiting until the qualifying tenants' time limit for acquisition has expired before dealing with its interest.

12. Because this is therefore an important feature of the right of first refusal procedure, a failure to serve a notice complying with ss3 and 3A of the 1985 Act is also a criminal offence².
13. By s11A of the 1987 Act, the requisite majority of qualifying tenants in the block may serve notice on the purchaser of the interest which was the subject of the relevant disposal requiring him to give particulars of the terms on which the relevant disposal was made and to provide a copy of the contract. A person served with a notice pursuant to s11A of the 1987 Act is required to comply with it within one month of receipt and a failure to do so, whilst not a criminal offence, is a breach of a statutory duty imposed by the 1987 Act to protect lessees.
14. Section 12B of the 1987 Act applies where (as here) the relevant disposal did not involve entering into a contract before the disposal was effected. The section provides that the requisite majority of the qualifying tenants may serve a notice on the purchaser (referred to in the Act as a "purchase notice") of the interest requiring him to dispose of "the estate or interest which was the subject-matter of the original disposal on the terms on which it was made" to a nominated person. There is, usually, a time limit for the service of such a notice linked to the service of information pursuant to the s11A request but because, in the present case, GJB did not comply with its statutory duty to respond to the s11A notice served upon it and because GJB failed to serve any notice which complied with s3A of the 1985 Act (which may have been a criminal offence) nor provided the qualifying tenants with documents which met the requirements of s12B3(b)(ii), the time limit does not apply in this case.
15. Section 12B(5) with which the court is principally concerned in this case provides as follows:

² Landlord and Tenant Act 1985 s.3A(3)

*“(a) Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal become subject to any charge or other incumbrance, then, **unless the court by order directs otherwise***

....

(b) in the case of any other incumbrance, the property shall be so disposed of subject to the incumbrance but with a reduction in the consideration payable to the purchaser corresponding to the amount by which the existence of the incumbrance reduces the value of the property”

Factual Background

16. The factual background which is largely undisputed is set out in the Witness Statement of Stephen Charnock dated 29 September 2017 which was served with the Part 8 Claim.
17. The property is a block containing five flats. The freehold interest in the block is registered at the Land Registry under Title No. DT95975. GJB was registered as proprietor of the freehold interest on 15 January 2015 pursuant to a transfer of the freehold interest dated 31 December 2014 for a consideration of £100,000. As described by the Defendants’ solicitor, Mr Price, GJB is a company “*controlled and effectively owned*” by Mr Brodie. Mrs Brodie is also a director of GJB and Mr and Mrs Brodie are the only directors of GJB.
18. It is said by the Claimants that Mr Brodie is an experienced Chartered Surveyor, which Mr Price accepted in cross-examination (Mr Brodie did not give evidence). He acts as a consultant to Charterhouse Standard Holdings Limited “*that has predominantly focused on purchasing portfolios of residential properties in London and the South-East*” according to his company’s website. It was said by the Claimants (and not challenged) that GJB owns the freehold interest in 14 properties comprising residential flats. The Claimants describe Mr Brodie as a ‘professional landlord’.
19. The Claimants are members of the same family. Ms Colegate is the registered proprietor of the long leasehold interest in Flat 2 at the property which is registered at the Land Registry under Title No. DT172243. The lease under which Ms Colegate holds Flat 2 is dated 22 September 1989 and demises Flat 2 for a term of 125 years from 31 January 1989.

20. Peter and Richard Colegate are the registered proprietors of the long leasehold interest in Flat 3 at the property which is registered at the Land Registry under Title No. DT170427. The lease under which Peter and Richard Colegate hold Flat 3 is dated 20 June 1989 and demises Flat 3 for a term of 125 years from 31 January 1989.
21. Peter Colegate is additionally the registered proprietor of the long leasehold interest in Flat 4 at the property which is registered at the Land Registry under Title No. DT17263. The lease under which Peter Colegate holds Flat 4 is dated 12 October 1989 and demises Flat 4 for a term of 125 years from 31 January 1989.
22. The leasehold interest in Flat 5 within the premises is registered at the Land Registry under Title No. DT310427. The registered proprietor of that flat is Benjamin James Douglas who is not a party to and is not involved in this claim.
23. Until the events giving rise to this claim, Flat 1 within the premises was not demised under a long lease. Flat 1 had historically been let out to a protected tenant, a Mrs Hoskins, who left in March or April 2016.

The December 2014 Transfer

24. Prior to 31 December 2014, the freehold interest in the premises was owned by BGL. The shareholders in BGL at that time were Mr Brodie and his brother, Paul Brodie. On 31 December 2014, BGL transferred the freehold interest in the premises to GJB. That transfer effectively included the freehold interest in Flat 1 which was held with the freehold and not subject to any long leasehold interest.
25. Prior to the transfer of the freehold interest in the premises, BGL did not serve on the qualifying tenants of the flats within the premises a notice pursuant to s5 of the 1987 Act. Subject to any potential defences this was a criminal offence. As I will turn to in due course, reasons for the failure to do so were advanced by Mr Price, based on instructions and to some extent surmise, but (tellingly, say the Claimants) not by any of the Defendants or BGL.
26. Following the transfer of the freehold interest in the premises, it is again common ground that GJB did not serve on the qualifying tenants of the flats within the premises a notice complying with the requirements of s3A of the Landlord and Tenant Act 1985 (“the 1985

Act”). Again, subject to any possible defences, this was a criminal offence. No charges have been brought, and I have not been seized of that issue, save in the context of the Defendants’ behaviour and culpability in the failure to serve notices, and thus the possible effect such behaviour might have on the exercise of my discretion.

27. The only communication which was received by the Claimants from GJB following the transfer of the freehold interest in the premises was a letter from GJB stating that following a company reorganisation, the property was now held by a subsidiary of BGL, and that future service charge payments should be made to GJB. It is again common ground that this letter did not meet the requirements of s3A of the 1985 Act.

Post-2014 Transfer

28. Nothing of substance happened until on or around 15 January 2016 when the Claimants received letters from a different firm of Solicitors acting for the Defendants, Messrs Downs, enclosing a notice purporting to be a notice pursuant to s5 of the 1987 Act relating to a potential future sale of the freehold interest in the premises for the sum of £10,000. This sale was intended to be to an independent third party rather than within the Brodie family or their group of companies. It therefore does differ in character from the earlier sale, at least in respect of one of the purported reasons for the failure to serve a s5 notice in 2014: that the solicitors in 2014 were said to have been possibly mistaken in believing that a sale within the Brodie family or their companies, would be exempt from Part I of the 1987 Act by virtue of s4(2)(h) (family dispositions).
29. For the avoidance of doubt (and it was not alleged by the Defendants), neither the letter nor the s5 notice met the requirements of s3A of the 1985 Act in relation to the by then historic 2014 transfer of the freehold interest in the premises to GJB.
30. The s5 notice was accepted by the requisite majority of qualifying tenants of flats in the premises, but then immediately withdrawn by the First Defendant. The (suggested) reasons for the withdrawal were again dealt with by Mr Price, but in summary, he is instructed that GJB had realised that the sale of the freehold would have included the reversion of the protected tenancy to Flat 1 which, despite being protected, was (by then) imminently to be surrendered. In those circumstances, the consideration for the transfer was considered by

GJB to be far too low, it being an appropriate amount for the value of the freehold with Flat 1 having been leased on a long-term lease. The granting of such a long-term lease, it is said by the Defendants, was the intention of GJB since 2014.

2017 Notices and the Lease of Flat 1

31. On 25 May 2017, the Claimants served on GJB a notice pursuant to s11A of the 1987 Act. The notice required GJB to give particulars of the terms on which the disposal to GJB was made and to provide a copy of any contract entered into within one month of the date of receipt of the notice.
32. No response was received to the s11A notice within the specified time period. The Claimants say that no proper response was ever received; Mr Price's position is that the letter of 21 July 2017 (see below) constituted a response, albeit not complying with the required information – a somewhat literal interpretation of “response”. Either way, it is common ground that the failure to respond in time was a breach of GJB's statutory duty under the 1987 Act.
33. On 5 July 2017, the Claimants sent a further letter to GJB. The letter recorded that no response had been received to the Claimants' s11A notice. The letter also enclosed a notice pursuant to s12B of the 1987 Act. The s12B notice required GJB to transfer the freehold interest in the premises to 16 Church Road Freehold Limited, a company formed by the Claimants as the nominated purchaser to take the freehold interest in the premises on the terms on which it was made including the consideration paid. The letter enclosing the s12B notice required GJB to respond to the notice within fourteen days and was delivered on 7 July 2017.
34. No response was received to that letter and s12B notice. the Claimants wrote to GJB again on 21 July 2017 requiring GJB to transfer the property to 16 Church Road Freehold Limited and enclosing a draft TR1 for execution.
35. At around 4.25pm on 21 July 2017, the Claimants received by fax a letter dated 20 July 2017 from TWM Solicitors on behalf of GJB. The letter acknowledged receipt of the Claimants' letters of 25 May 2017 and 5 July 2017. No reference was made, nor explanation advanced, as to why the s11A notice had not been complied with. The letter revealed for the first time that it was said that GJB had granted a 999 year lease of Flat 1 and stated that “*any sale of*

the freehold will be subject to that incumbrance in accordance with Section 12(5)(b) of the Act". The letter asked whether the Claimants wished to proceed with the purchase of the freehold interest in the light of that information.

36. The Claimants made inquiry of the Land Registry to see whether any 999 year lease of Flat 1 had been registered at 4.51pm on that same date, 21 July 2017. The Land Registry response shows that Mr Brodie had applied for a priority search through his solicitors TWM Solicitors "*in respect of an intended lease*" on 5 July 2017 following the service upon GJB of the s11A notice.
37. The Claimants wrote to TWM Solicitors on 29 August 2017 asking them to supply a copy of the 999 year lease which they had asserted had been granted and a copy of the registered title to the new leasehold title. The letter reserved the Claimants' rights generally.
38. No response was received to that letter. The Claimants wrote to TWM Solicitors again on 19 September 2017 asking them to supply a copy of the 999 year lease said to have been granted. No response was received to that letter. On 26 September 2017, the Claimants made enquiry of the Land Registry to see whether any new leasehold interest had been registered in respect of Flat 1. The Land Registry confirmed that there was an application for registration pending for a new leasehold interest created out of the freehold interest in the premises. On 27 September 2017, the Claimants made further enquiry of the Land Registry on the telephone. Mr Charnock of Bishop & Sewell LLP, the Claimants' solicitors was told that the lease of Flat 1 was granted on 19 July 2017, well after GJB had received the s12B notice requiring the freehold interest in the premises to be transferred to the Claimants' nominated person.
39. As a result, on 29 September 2017, the Claimants commenced this claim for relief pursuant to s12B(5)(b) of the 1987 Act.
40. It is again common ground that, by s17(3) of the 1987 Act, where three months have elapsed since the service of a notice pursuant to s12B of the 1987 Act and (i) no binding contract for the transfer of the freehold has been entered into and (ii) no application has been made to the court in connection with the notice, then the purchaser – here GJB - can serve notice stating that the s12B notice is to be treated as not having been served. The Claimants' s12B notice was served on 7 July 2017 so a protective application had to be made before 7 October 2017 and was made on 29 September 2017.

41. The Claimants obtained a copy of the lease of Flat 1 from the Land Registry on 3 October 2017. The Defendants did not provide a copy of the lease of Flat 1 until it was exhibited to the Second Witness Statement of Adrian Price on 3 May 2018.
42. The Claimants point out that the lease of Flat 1 differs from the other leases of flats in the block in that:-
 - (i) it grants a term of 999 years whereas the other leases are for 125 years. This grants Mr Brodie and Mrs Brodie a longer (and therefore arguably more valuable) interest than any of the other lessees and has the effect of depriving any future landlord of any possibility of a lease extension premium in the foreseeable future;
 - (ii) it is granted for a peppercorn rent whereas the other leases reserve a rent of £100 doubling every 33 years. This, it is pointed out, has the effect of reducing the expenditure of Mr Brodie and Mrs Brodie, increasing the value of their leasehold interest and depriving the Claimants' nominee (as future freehold owner) of a ground rent income stream from this flat. This, it is argued, may in turn affect the future saleability of the freehold reversion in the block;

The Evidence

43. For the Claimants, their solicitor Mr Charnock's witness statement was accepted.
44. Mr Price, the Defendants's solicitor gave evidence as to the process. In summary, he was only able to say what he had been told by Mr Brodie as to Mr Brodie's state of knowledge of the 1987 Act. The fee earner who had done the majority of the work, Ms Sian Prentice, had left the firm in 2014/15. Mr Price explained that his instructions were that the Brodie family wished to rearrange the property ownership for tax reasons, the advice for which had been obtained from a different firm, he assumed, in March 2014; that only those properties which had a mortgage required due diligence, and that he had instructed Ms Prentice otherwise just to check for restrictions on the titles of the properties. He was firmly of the view that Ms Prentice would have reported to him had Mr Brodie instructed her to ignore the 1985/1987 Act procedures. He was of the view that the Brodie family had always intended to grant a lease to "themselves" since 2014, but did not know why it had taken until 2017 to do so, and he cited the withdrawn s5 notice in 2016. Mr Price was very "matter-of-fact" in

cross-examination regarding the failure to respond to the correspondence and notices in 2017, merely acknowledging that delays had occurred. He said that the failure to disclose the lease and the name of the landlord was to allow the lease to be registered without any difficulties. He said the Defendants were always happy to dispose of the freehold, but that that had always been subject to a long lease having been granted to Flat 1. Mr Price also said that there was no nefarious intent regarding the delays. As regards the consideration, Mr Price said that he had been told by the accountants that the loan was recorded in the management accounts (but provided no copy thereof).

The Law and Submissions

45. It is now common ground that the December 2014 Transfer was a relevant disposal which was subject to the 1987 Act and that by failing to serve any s5 notice in advance of the transfer of the freehold interest, Brodie Group Limited was in breach of the 1987 Act. It is also common ground that the Claimants' nominee is entitled to acquire the freehold interest in the property pursuant to s12B of the 1987 Act.
46. It is also common ground, I think (and would in any event hold), that the lease of Flat 1 granted by GJB to Mr Brodie and Mrs Brodie is an "incumbrance" on the freehold interest in the property for the purposes of s12B(5): see *Belvedere Court Management v Frogmore Developments* [1997] QB 858³. In *Englefield Court Tenants v Skeels* [1990] 2 EGLR 230, the FTT decided that a lease of roofspace in which the lessees had no interest was an incumbrance.
47. The only issue for the court is whether, GJB having granted the long lease of Flat 1 to Mr Brodie and Mrs Brodie on 19 July 2017, the transfer of the freehold to the Claimants' nominee ought to be subject to the long lease which will require an adjustment to the consideration to be paid, which would be determined by the First Tier Tribunal or whether, as the Claimants contend, this is a clear case where the court should "by order direct otherwise" and declare that the transfer to the Claimants' nominee should be free from the long lease.

³ At p.878

48. There is no guidance in s12B(5) or anywhere else in the 1987 Act as to how the court is intended to exercise this jurisdiction. However, both parties submit that as part of the process the court should look to the purpose of the 1987 Act to determine whether the jurisdiction ought to be exercised. The parties disagree as to the breadth of that purpose.
49. The Claimants submit that the general purpose of the 1987 Act is to enable the qualifying tenants to have a legal right of first refusal to acquire any estate or interest which the landlord proposes to make the subject of a relevant disposal. Mr Cowen argues that Parliament has already dictated, through the exceptions in the 1987 Act, which disposals by a landlord are not intended to be subject to that right of first refusal, and that the real intention is to put the tenants in the shoes of the original buyer.
50. Mr Cowen argues that the distinction between s5 and s12B is that the latter is more complex because it deals with a potentially more complex position, namely the situation where a notice is served perhaps years after the relevant disposal. But, he argues, the intent is the same: to put the tenants in the same position as the original purchaser wherever possible. He acknowledges the difficulties that are created by the creation of legal interests in the meantime, and concedes that, where there is a *bona fide* purchaser for value without notice, the Court will rarely, if ever, interfere. However, this is not that case, he argues: GJB is not a *bona fide* purchaser for value without notice. The Defendants as a group cynically exploited the legislation once it had become clear that the 1987 Act did apply to the original disposal, and deliberately sat on their collective hands to enable a lease to be granted before the Claimants could apply to the Court. Accordingly, Mr Cowen submits, this case falls within the exception anticipated by Sir Thomas Bingham MR in the only authority on this specific issue, *Belvedere Court Management v Frogmore Developments* [1997] QB 858, a case concerned with the pre-amendment 1987 Act, where, at p.877, the MR said that “*The circumstances in which a court could properly order that property should be disposed of not subject to an incumbrance would be very rare, since the court would never be willing to expropriate a bona fide third party purchaser for value*”. Mr Cowen says that the corollary of that is that in cases, such as this, where the purchaser is not a *bona fide* third party purchaser for value, the rationale for the rarity of such an order disappears.
51. Mr Cowen develops his argument to submit that the court should take into account the actions of the purchaser when assessed against the purpose of the 1987 Act as he contends for. He points to the fact that GJB is the *alter ego* of Mr Brodie and Mrs Brodie; this was not an

arm's length transaction; the purchase "price" was a soft loan, so that no money changed hands, the stamp duty having been a small price pay to pay. He points to the lack of disclosure in this regard and to the misleading way that the consideration was initially described by Mr Price. Mr Cowen also argues that the failure to serve the s5 (1987 Act) and s3A (1985 Act) Notices cannot have been inadvertent, given Mr Brodie's long experience as a chartered surveyor and his status as a "professional landlord"; and Mr Price's evidence is contradictory on the issue. He submits that the Court should draw an adverse inference from Mr Brodie's failure to provide a witness statement. It is also relevant to the exercise of my discretion, he argues, that criminal offences have been committed.

52. Mr Cowen also submits that Mr Brodie and Mrs Brodie have taken the opportunity to grant themselves (through their control of GJB) a leasehold interest in Flat 1 which is more advantageous to Mr Brodie and Mrs Brodie (and therefore less advantageous to the Claimants when the Claimants' nominee comes to acquire the freehold interest in the block) than the other leases within the same building. The Second and Third Defendants will have a longer term, reducing the possibility of a lease extension claim on Flat 1 at any time in the foreseeable future and thus reducing the value of the freehold interest. The Defendants have deprived the future landlord of any income stream from Flat 1 which will have some (limited) impact on the value of the reversion. The purpose of the 1987 Act is not to enable a landlord to flaunt its requirements and then, later if forced to sell the interest it acquired, to adjust in the meantime the rights of the parties including the future landlord and the other lessees to its own advantage.
53. Finally, Mr Cowen argues that the Claimants cannot be compensated for the windfall achieved by the Defendants because the maximum reduction in the price from £100,000 to take into account the fact that Flat 1 has been leased out would always be less than the £140,000 gained by the Defendants and 'lost' by the Claimants in not having Flat 1 to deal with as part of the freehold, as the Claimants should have had, had the freehold been dealt with properly by BGL and the Defendants.
54. In closing, Mr Cowen submitted that the purpose of the Act was wider than just the management of the block, and he cited *Dartmouth Court v Berisworth* [2008] EWHC 350 (Ch) in which Warren J held that the disposal of reversionary leases on one floor of a notional block of flats would be a relevant disposal.

55. Mr Cowen was scathing of the Defendants' protests of innocence: they were culpable of criminal conduct and cynical manipulation of the system. If they genuinely wanted to rearrange their affairs for tax purposes, they should not be able to do it at the expense of the Claimants.
56. Mr Fain, Counsel for the Defendants pithily put his arguments against the court exercising its discretion. He submitted that these are not the very rare circumstances in which Sir Thomas Bingham MR in *Belevedere* envisaged that the discretion should be exercised for the following reasons:-
- a. The purpose of Part I of LTA 1987 is give tenants the opportunity to acquire their reversions and the power to manage the block and *not* to be able to purchase a flat with vacant possession at a significantly discounted price. It should be noted, Mr Fain submitted, that the 1993 Leasehold Reform Housing and Urban Development Act gives the landlord the opportunity to take a leaseback of such a flat. Further it has been held that a landlord can even grant a lease of that flat during the collective enfranchisement process⁴;
 - b. The Claimants (via their nominee) will still obtain the freehold reversions of their flats and the management of the Property. This will not be for £100,000 (which was the value with a protected tenant in Flat 1), but for a much-reduced premium. The purpose of the Act is still satisfied, even if the Claimants' nominee does not obtain vacant possession of Flat 1;
 - c. The original disposal was *not* on the basis that the purchaser would obtain vacant possession of Flat 1. It was sold subject to the protected tenancy, which significantly depressed the value of the freehold, Mr Fain submitted;
 - d. The grant of a tenancy of single flat is not a relevant disposal – s 4(1)(a) LTA 1987;
 - e. There is nothing preventing a landlord from granting a tenancy of a flat at any time after the relevant disposal, or indeed the service of a purchase notice;

⁴ *Queensbridge Investment Ltd v 61 Queens Gate Freehold Ltd* [2015] L&TR 8

- f. S.12B(5) recognises that the Property can become subject to incumbrances after a disposal and the subsequent transfer should be subject to those incumbrances;
 - g. Mr Brodie and Mrs Brodie are bona fide purchasers for value. The lease has been registered. Stamp Duty has been paid. The premium was £140,000. There is nothing unusual about the terms of the lease. It contains lessor and lessees' covenants, a forfeiture clause and service charge provisions for which the lessees are liable for 1/5th of the relevant costs of the Property. In fact, save for the length of the term and rent, the lease is materially the same as the other leases in the Property;
 - h. The Original Disposal was part of a family re-structuring, and it was wrongly considered that this disposal was exempt because it fell within s4(2)(h) LTA 1987;
57. Mr Fain argued further that the vacation of the regulated tenant was a change of circumstances within the meaning of s12B(7) (*Twinsectra Ltd v Jones* [1998] 2 EGLR 129), hence, even if the court were to direct a transfer free of the lease of Flat 1, the consideration payable would need to be increased to the amount that might reasonably have been obtained on a corresponding disposal made on the open market at the time of the original disposal if the change of circumstances had already taken place.
58. In closing, Mr Fain argued that the purpose of the 1987 Act was restricted to giving tenants the opportunity of managing their property; it was not to allow them to acquire valuable property interests from which they could profit. He referred to the passages cited by Bingham MR in *Belvedere* from Edward Nugee QC's Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats (1985) and the preamble to the Act itself.
59. Distinguishing the authorities which found that specific areas within a building could be relevant disposals (which it was argued by Mr Cowen indicated that the purpose of the 1987 Act was wider than Mr Fain suggested), Mr Fain submitted that those cases involved areas such as airspace and common-parts which could interfere with the management of the block, whereas here, we are dealing with an exempt disposal of a single flat for a premium. Motive, Mr Fain argued, was irrelevant. No adverse inference could be drawn by the Defendants' refusal to disclose the conveyancing file (see Phipson on Evidence ¶23-22); nor should it be

drawn from Mr Brodie's failure to give evidence: Mr Price was sufficient, and Mr Brodie could add little. If a crime has been committed, Mr Fain submitted, then the sanction is contained in the criminal code, and it is no part of this jurisdiction to punish such an act, still less by interfering with property rights. To allow the lease to stand, the Claimants would still be getting what, under the 1987 Act, was intended: the freehold and ability to manage the flats.

Consideration and Decision

60. Having set out the parties' arguments quite extensively, I can be relatively brief in my discussion of the matter.
61. In terms of evidence, Mr Price came across as a dispassionate and honest witness. He was unable to assist directly on the question of the motivation of the relevant disposal, nor as to its timing. He relayed the instructions he had received in the relevant areas, but could only really speak to the timetable of his instructions and his actions. He did feel able to say that he believed that Mr Brodie had a long-standing intention to deal with Flat 1 separately from the freehold, and this is, of course, corroborated by the 2016 Notice which was withdrawn when the error in the price (given the then availability of Flat 1) was noticed. Those events of 2016 also suggest to me that Mr Brodie was not as *au fait* with the 1987 Act as Mr Cowen suggests. They also reveal a significant weakness in the Claimants' case to which I shall turn in due course, namely the ability of a landlord to withdraw from a disposal at will.
62. The Claimants' case is in many ways predicated on the premise that either BGL or GJB have achieved something by their failures to comply with the 1987 Act which they could not otherwise lawfully have achieved. Or that BGL or GJB could have been forced to sell the property without a long lease having been granted in respect of Flat 1. It is these sorts of

considerations which form the basis, on the Claimants' case, for the moral or equitable position which takes the instant matter out of the ordinary, so that the "court should otherwise order" that the nominee should take subject to the incumbrance.

63. The fact is, however, there was nothing preventing BGL or GJB from granting a lease in respect of Flat 1 at any point right up to the transfer of the freehold. That is illustrated by *Belvedere* itself. It would not have fallen within Warren J's example of the grant of reversionary leases on the second floor of his illustrative block of flats in *Dartmouth Court* because the letting of a single flat is not a relevant disposal by virtue of s4(1)(a) of the 1987 Act. Furthermore, the Claimants could never have forced a sale of the freehold to their nominee without a long lease of Flat 1 if the Defendants and/or BGL had been properly advised, whether from BGL or from GJB: had BGL issued the requisite notice, upon realising that Flat 1 had no long lease in place, it could simply have withdrawn the notice and not proceeded with the transfer to GJB; alternatively, it could have granted a lease at any time prior to the sale being completed (see e.g. *61 Queens Gate Freehold Ltd v Queensbridge Investment Ltd* [2014] UKUT 437, albeit that that was under the 1993 Act, but the principles would apply under the 1987 Act). Likewise, had BGL failed to issue the proper notice, but GJB had done so in January 2015, then there was nothing preventing GJB from granting the lease prior to the completion of the transfer to the Claimants' nominee. Admittedly, that would have arguably brought into play the same question of the exercise of the discretion as I am being asked to exercise here, but the point is that the attaining of the desired outcome from the Defendants' point of view did not depend on the moral turpitude alleged by the Claimants against the Defendants as regards the delay and underhand behaviour in 2017. If the 2017 delays etc. were cynical, that is largely down to a failure to act sooner, rather than the creation of circumstances to allow for something that could not otherwise have been achieved.

64. In addition to the foregoing, I take into account the fact that the dominant purpose of the 1987 Act must be as per its preamble: to enable tenants to take control of their freehold so as to allow them to manage their own building. There are peripheral purposes as demonstrated by the authorities to which Mr Cowen took me. What the Defendants and BGL have done does not affect the management functions acquired along with the freehold: I accept that the length of the Flat 1 lease means that the reversion is delayed and the freehold is of less value than had a 125 year lease been granted; and that the ground rent income is less for Flat 1 than for the other flats, but that is merely a function of the ability to grant a long lease under the legislation rather than the taking advantage of an unlawful omission.
65. I accept, too, that the potential criminality of the omissions of BDL and GJB is something for the criminal code and, whilst it might well have been different if the same ends could not have been achieved without those omissions (assuming, without deciding, that they were criminal), there is a danger of double jeopardy if the criminality were enough, in itself, to invoke the exception to s12B(5). In any event, there may be defences to a criminal charge to which I have not been taken, and I have not been asked to make any findings on criminality.
66. Although I accept that the behaviour of the Defendants in 2017 was suspicious and could be regarded as cynical, it was really no more than a rear-guard action allowing them to achieve what they were always able, legitimately and lawfully, to achieve from December 2014. In those circumstances, the Claimants have missed out on a bonus, but it would, in any event, have been a windfall for them (in the scheme of the 1987 Act); and the other side of the same coin is that if GJB has obtained an advantage, then it is at the expense of Mr Brodie and Mrs Brodie, and no more than could have been achieved had the relevant parties acted in December 2014 or January 2015. I do not consider the mechanics by which the lease purchase was financed to be anything more than a rather hurriedly arranged legal vehicle, but, as in *Belvedere*, I have no evidence to find that it's a sham in the legal sense.

67. I therefore conclude that the circumstances of the instant matter, when assessed standing back and from an objective perspective, do not bring the granting of the lease of Flat 1 in 2017 within the exception to the usual position as provided for by s12B(5), and therefore the Claimants' nominee shall take the transfer of the freehold of the property subject to the 999 year lease of Flat 1. The consideration payable for the transfer will have to be decided by the First Tier Tribunal (Property Chamber) in due course.
68. If the parties can agree the question of costs, then they should inform me along with the corrections and omissions referred to at the head of this judgment. If they cannot agree, I shall give directions for a hearing (probably by telephone) on costs.

HHJ Berkley
5 November 2018