Neutral Citation Number: [2020] EWCA Civ 371

Case No: C3/2019/0394

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Mr Martin Rodger QC Deputy Chamber President
LRA/16/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE LINDBLOM
and
LORD JUSTICE LEGGATT

- -

Between :

(1) L M HOMES LIMITED **(2) JOHN TOBOLE EMORE & FLORENCE ESIAKPOBERUO EMORE** **(3) DALVIR KAUR**	**Appellants**
- and -	
QUEEN COURT FREEHOLD COMPANY LIMITED	**Respondent**

- -
- -

Mr Edward Denehan (instructed by **Wallace LLP**) for the **1st and 3rd Appellants**
(instructed by **Peppers LLP**) for the **2nd Appellants**
Mr Philip Rainey QC & Mr Carl Fain (instructed by **Cripps Pemberton Greenish**) for the **Respondent**

Hearing date : 5th March 2020

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Approved Judgment

Lord Justice Lewison:

Introduction

1. Part 1 Chapter 1 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") gives qualifying tenants of flats contained in premises to which that Chapter applies the right to have the freehold of those premises acquired on their behalf. Qualifying tenants of Queen Court, Queen Square, London WC1 ("Queen Court") have claimed to exercise that right. The issues raised by these appeals concern the question whether the qualifying tenants are also entitled to acquire certain leasehold interests in or connected with Queen Court. More specifically the areas in dispute are:

    i) The airspace above Queen Court;

    ii) Part of the basement of Queen Court; and

    iii) Sub-soil underlying Queen Court.

2. The Upper Tribunal (Martin Rodger QC, Deputy President), affirming the decision of the First Tier Tribunal, held that the qualifying tenants were entitled to acquire the leasehold interests in all three areas. His decision is at [2018] UKUT 367 (LC).

The facts

3. I can take the relevant facts from the careful decision of the Upper Tribunal.

4. Queen Court is a purpose-built block of flats comprising 45 flats on ground and seven upper floors (the top floor is a relatively recent addition to the original structure). The main entrance to the building is on Queen Square in Bloomsbury, with a second entrance at the opposite end of the building on Guilford Street. At the northern end of the building it has a frontage to Guilford Street from which external steps lead down to a basement containing the water tanks, boilers, oil tanks and electrical switchboards which serve the whole building. A second entrance to the basement is available by a set of steps leading from a small external courtyard on the west side of the building which is assessible only from the ground floor hallway. The basement boiler room occupies about a third of the building's total footprint and there is no basement under the remainder.

5. The whole building was the subject of a headlease granted in 2015 for a term of 99 years by West End & District Properties Ltd to Regal Estates Ltd.

6. On 3 December 2015 West End & District Properties Ltd granted Regal Estates Ltd a lease of the "roof area and air space up to a height of 7 metres above the surface of the roof" of the building for a term of 999 years. The demise excluded "any part of the building lying below the surface of the roof". The lease conferred full rights to develop the air space in accordance with any planning permission which the lessee might obtain. It reserved to the lessor rights of access over the air space to the extent that they were necessary either for emergency purposes or for the proper performance of the lessor's obligations to the owners or occupiers of any of the flats in Queen Court. Exercise of that right is conditional on the lessor making good and reinstating any damage caused; and compensating the lessee both for such damage and for loss of

use. The lease contains no covenant against the making of alterations, whether structural or otherwise. The reversioner thus has no control over what development is carried out (provided that it complies with planning legislation). That lease is now owned by LM Homes Ltd.

7. On 7 October 2015 West End & District Properties Ltd granted a lease of about two thirds of the basement to Regal Estates Ltd. The basement is a relatively open area with two large rooms and a corridor running the width of the building at one end. The lease envisages further sub-division and the area demised is therefore represented by red lines on the lease plan rather than by any existing physical feature. Planning permission has been granted for the conversion of the area into a one-bedroom flat. The lease excludes the area for the time being occupied by two boilers, two hot water tanks and a number of electricity meters but includes areas occupied by an oil storage tank, a gas meter, a water pump and other service installations. Those installations are not confined to one part of the basement, but are arranged around the perimeter of the rooms, with various substantial pipes and conduits rising up the walls and across the ceiling. The basement lease also includes the staircase leading down from Guilford Street, but not the staircase from the internal courtyard. It, too, confers full rights for the lessee to develop the demised part of the basement in compliance with any planning permission which might be obtained, including the right to alter or remove any structural part of the building and full rights of access to and from the remainder of the building to facilitate such development. Rights of access are reserved to the landlord for emergency purposes or for the proper performance of its obligations to other lessees in similar terms to the reservation in the airspace lease. It contains a covenant against alterations without the lessor's consent; but that covenant does not apply to the carrying out of works in accordance with the planning permission. That lease is now owned by Mr and Mrs Emore.

8. On the same day, West End & District Propeties Ltd granted a second lease, again to Regal Estates Ltd, of what were referred to in the lease as "basement areas" and noted in the register of title as being "at basement level", but which at the date of grant comprised the sub-soil beneath the whole of Queen Court (including the sub-soil underlying the external courtyard on the western side of the building, and two small gravelled areas on the eastern side) with the exception of the existing basement. Once again the term was 999 years. The sub-soil supports Queen Court. Like the other two leases, this lease also included full rights to develop the demised premises in compliance with planning permission, similar reservations of rights of access; and contains no covenant against alterations. That lease is now owned by Mrs Kaur.

9. The areas comprised in all three leases are within the footprint of the built structure of Queen Court, except that the sub-soil lease also underlies the two small gravelled areas on the eastern side of the block and the external courtyard on the western side which, we were told, houses the dustbins.

The statutory framework

10. Section 1 (1) of the 1993 Act entitles "qualifying tenants of flats contained in premises to which this Chapter applies" to have the freehold of "those premises" acquired on their behalf. Section 1 (2) provides that the qualifying tenants are also entitled to have acquired the freehold of any property which is "not comprised in the

relevant premises" but to which section 1 (3) applies. That subsection applies to any property if at the relevant date:

> "either—
>
> (a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or
>
> (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not)."

11. But section 1 (6) provides:

> "Any right or obligation under this Chapter to acquire any interest in property shall not extend to underlying minerals in which that interest subsists if—
>
> (a) the owner of the interest requires the minerals to be excepted, and
>
> (b) proper provision is made for the support of the property as it is enjoyed on the relevant date."

12. Section 3 of the Act provides, so far as relevant:

> "(1) Subject to section 4, this Chapter 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; and …
>
> (2) For the purposes of this section a building is a self-contained building if it is structurally detached… "

13. In addition to the freehold the qualifying tenants are also entitled to acquire certain leasehold interests. These are described in section 2 (3) as:

> "… the interest of the tenant under any lease … under which the demised premises consist of or include—
>
> (a) any common parts of the relevant premises, …
>
> where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, … on behalf of the tenants by whom the right to collective enfranchisement is exercised."

14. Section 4 of the Act contains certain exclusions from the right to enfranchise. Section 4 (1) excludes premises where the internal floor area of premises which are neither residential nor common parts exceeds 25 per cent of the premises taken as a whole. Section 4 (5) excludes premises if the freehold of the premises includes track of an operational railway. For this purpose "track" includes tunnels.

15. Common parts are defined by section 101 (1) as follows:

> "common parts", in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it"

16. The question is whether all or any of the areas demised by the three leases fall within this definition; and, if they do, whether it is reasonably necessary to acquire the leases themselves for the proper management or maintenance of those common parts.

The freehold

17. It is, I think, convenient to begin with the freehold. It is now accepted that, in principle, the qualifying tenants were entitled to have the freehold of Queen Court. It is theoretically possible to create a flying freehold; but they are fraught with problems, and it seems unlikely that Parliament intended to do so. The basic proposition of English law is that the owner of the surface of land is also entitled, within limits that are irrelevant for present purposes, to the airspace above it, and the subterranean strata below it: Megarry & Wade: The Law of Real Property (9th ed para 3-013); *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380.

18. Thus an ordinary conveyance of the freehold will carry with it the freehold in all the areas subject to the three leases. This will be the case even if the property conveyed is simply described as "Queen Court" (although in practice it is likely to be described by reference to its title number at HM Land Registry). In the first place, the basement areas are within the built envelope of the building. Second, the sub-soil will pass on an ordinary conveyance of Queen Court. As Stamp LJ put it in *Grigsby v Melville* [1974] 1 WLR 80:

> "It is, however, axiomatic that a conveyance of land carries with it all that is beneath the surface and it is quite clear that the parcels in the conveyance whether you regard only the verbal description "all that dwellinghouse and premises," or whether you pay regard to the plan thereon, did convey the surface over the cellar. And be it never so unlikely that Holroyd intended to include the cellar, it was not in terms excepted from the property conveyed. Read without regard to the surrounding circumstances, it could not, in my judgment, be doubted that the conveyance operated to convey all that was beneath the surface of what was admittedly conveyed."

19. That is consistent with the further general principle of English land law that once constructed, a building becomes "part and parcel of the land itself": *Elitestone Ltd v Morris* [1997] 1 WLR 687.

20. The same general principle applies to the airspace above the built structure. In the case of a lease of a whole building, the grant of the lease will carry with it the airspace above the building: see, for example *Straudley Investments Ltd v Barpress Ltd* [1987] 1 EGLR 69 (Nicholls LJ); *H Waites Ltd v Hambledon Court Ltd* [2014] EWHC 651 (Ch). The case in relation to a freehold is even stronger: see for example *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* [1987] 2 EGLR 173.

21. Mr Denehan submitted, however, that these common law principles did not apply to the right of enfranchisement under the 1993 Act. The qualifying tenants were entitled to have the freehold of the building. Although the building included the area comprised in the basement lease (because it was within the built envelope), it included neither the airspace nor the sub-soil. Nor did those areas fall within the categories of property referred to in section 1 (2). They were not demised by a lease held by a qualifying tenant of any flat within the building; nor were they property which such a tenant is entitled to use in common with other occupiers. The result would therefore be that the qualifying tenants were entitled to have only the filling in a sandwich, with the two outer slices being the airspace and the sub-soil respectively.

22. As Lord Millett explained in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at [116]:

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless."

23. In addition, as Lord Browne-Wilkinson explained in *R v Secretary of State for the Home Department Ex p Pierson* [1998] AC 539, 573:

> "It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions: …As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication."

24. In my judgment, the ordinary principles of the common law apply to the qualifying tenants' right to have the freehold of the building. There is nothing in the Act to suggest otherwise. In addition it is, I think, also the underlying premise of Mr Denehan's argument which takes as its unspoken starting point the proposition that the qualifying tenants are entitled to the reversion to each of the three leases in dispute. If they are not, then what right could they have to acquire the leases?

25. Those general principles are reinforced by section 1 (6) of the Act. If a conveyance of Queen Court (or the qualifying tenants' right to have that freehold) did not extend to the subjacent ground, section 1 (6) would be unnecessary. Moreover, it is implicit in section 1 (6) that if the freeholder does not require the mines and minerals to be excluded, they will pass with the freehold. In addition, the exclusion of freeholds

falling within section 4 (5) with its express reference to tunnels also supports the view that (absent that exclusion) a subjacent tunnel would be included in the premises to be acquired.

26. To come to the contrary conclusion would produce a result which, although not theoretically impossible, is virtually unknown in ordinary conveyancing. It would produce a result which is undesirable and impracticable, if not actually absurd. The nominee purchaser would not be entitled to enter the airspace to repair the roof; nor would it be entitled to disturb the sub-soil for the purpose of repairing the foundations of the building. I also note that in *Cadogan v Panagopoulos* (see below) HHJ Marshall QC applied the test: what anyone buying the building would expect to get. That is clearly a common law test. Her test was approved by Roth J on the first appeal: see [2011] Ch 177 at [67]. I agree too.

27. I therefore reject Mr Denehan's submission under this head.

28. It must follow that, for the purposes of the 1993 Act, the airspace and the sub-soil form part of the "premises" to the freehold of which the qualifying tenants are entitled. The primary term used in the definition of premises to which Chapter 1 applies is "building" in section 3 (1).

29. Neither the airspace above the built structure, nor the sub-soil beneath it, is specifically mentioned in the 1993 Act (with the exception of the reference to mines and minerals). Accordingly, if I am right so far, it is necessary to find in the definition of the "premises" something which would include them. The most promising candidate is "building."

30. One meaning of "building" is "merely a built structure"; but the word is not used with any degree of precision: *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013 at [47] (Lord Millett). Although the primary meaning of a "building" may well be a built structure, it is clear that the context may require a broader meaning.

31. In *Victoria City Corporation v Bishop of Vancouver Island* [1921] 2 AC 384 the question related to exemption from tax which applied to "every building set apart and in use for the public worship of God". The Privy Council held that the land upon which a cathedral stood was entitled to the same exemption as the built fabric. As Lord Atkinson put it:

> "The thing most necessary for the use of the cathedral as a place for public worship is that the congregation which frequents it should be able to stand or kneel upon the ground embraced within its walls and forming the floor of it, or sit upon chairs resting upon that floor. The use of the floor is infinitely more essential than the use of a roof. In fact, it is impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls, as it is impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth."

32. A little further on, referring to hospitals he said that:

> "… the word "building", *as used in ordinary language*, comprises not only the fabric of the building, but the land upon which it stands." (Emphasis added)

33. Their Lordships concluded that, in that context, the "natural and ordinary meaning" of "building" included "the fabric of which it is composed, the ground upon which its walls stand, and the ground embraced within those walls." Whether that is the "ordinary" meaning of the word "building" may or may not be correct; but it is plainly a *possibl*e meaning.

34. In *Dartmouth Court Blackheath Ltd v Berisworth Ltd* [2008] EWHC 350 (Ch), [2008] 2 P & CR 3 Warren J referred to the decision of this court in *Denetower Ltd v Toop* [1991] 1 WLR 945. In the latter case Sir Nicolas Browne-Wilkinson V-C held that the word "building" in Part I of the Landlord and Tenant Act 1987 included the grounds in which the built structure stood. He said:

> "I accept the tenants' second argument. They submit that the word "building" is not necessarily confined to the bricks and mortar of which the building is constructed. In *Governors of St Thomas's Hospital v Charing Cross Railway Co* (1861) 1 J & H 400 it was held that section 92 of the Lands Clauses Consolidation Act 1845 (which provided that the owner of land being compulsorily acquired could not be required to convey "a part only of any house, or other building or manufactory") required the purchase not only of the whole house but also of the gardens and appurtenances of the house.
>
> In the present case, it would be to attribute to Parliament an entirely capricious intention if we were to hold that the tenants' right to purchase did not extend to the gardens and other appurtenances of the flats which are expressly or impliedly included in the demises of the flats to the tenants. In my judgment we are not forced to adopt such an unreasonable construction since it is a perfectly legitimate meaning of the word "building" that it includes the appurtenances of the building."

35. In *Dartmouth*, also in the context of the Landlord and Tenant Act 1987 ("the 1987 Act") , Warren J said at [70]:

> "In my judgment, it is perfectly legitimate meaning of the world "building" that it includes the airspace necessary to enable maintenance to be carried out."

36. In *York House (Chelsea) Ltd v Thompson* [2019] EWHC 2203 (Ch), [2020] Ch 1 Zacaroli J applied the approach in *Denetower* to another case under the 1987 Act. What appears to have been debated was the precise meaning to be given to the word "appurtenances". In my judgment that debate was a distraction. The word "appurtenances" is not part of the statutory definition in the 1987 Act (although it does feature in Chapter 1 of the 1993 Act as property which the qualifying tenants are entitled to acquire). To treat Sir Nicolas Browne-Wilkinson V-C's observations as if

they were themselves part of the statute and then to debate their precise meaning is not the right approach. What was relevant was the meaning of "building" in the 1987 Act. At [132] Zacaroli J held, following and agreeing with *Dartmouth*, that airspace above the building was appurtenant to it; and at [138] he held that sub-soil was equally appurtenant to the building. Although he expressed himself in terms of appurtenances, what he in fact decided was that both the airspace and the sub-soil were part of the "building" as statutorily defined.

37. In *Cadogan v Panagopoulos* [2010] EWHC 422 (Ch), [2011] Ch 177 Roth J referred to *Darmouth* at [65] and said that he could not see any difference between the 1987 Act and the 1993 Act "when considering the ordinary concept of building". In *Merie Bin Co (UK) Ltd v Barrie House (Freehold) Ltd* [2015] 1 L & TR 21 the Upper Tribunal (presided over by Sir Keith Lindblom) concluded at [148] that in the context of the 1993 Act the airspace immediately above the roof of a building can be regarded as part of the building. I agree with both of them.

38. I conclude, therefore, that all three areas demised by the leases in issue are parts of the building, as that word is used in section 3.

Common parts

39. The next question is whether any or all of the areas demised by those leases fall within the definition of "common parts" in section 101 (1). Whether something is or is not within the definition of common parts depends on the facts at the relevant date. That is the date on which the qualifying tenants serve notice exercising their right to collective enfranchisement under section 13: *Cadogan* at [45] (Roth J).

The basement

40. So far as the basement area is concerned, there are two aspects to consider. The first is whether the installations and the space in which they are housed fall within the expression "common facilities". The second is, even if they do not, whether they fall within the general meaning of "common parts" which is an inclusive rather than an exclusive definition.

41. Mr Denehan argues that this depends on the terms of the basement lease. The boiler equipment and service installations were not within the demise. They were left in the possession of the lessor as part of the Reserved Property described in paragraph (g) of Schedule 2 (which reserves hot water service boilers and, more generally, all equipment and services not used exclusively for any one part of the Building). Full rights of access over the basement itself were reserved to the lessor by paragraph (c) of the Schedule 5 for the proper performance of the lessor's obligations including the repair and maintenance of the equipment and services. If Mr and Mrs Emore were to develop the premises comprised in the basement lease as a flat (as their lease entitles them to do) access would still be available. The area containing the boilers would be separated from the newly constructed flat; and access would be gained through a door from the internal courtyard.

42. In *Cadogan v Panagopoulos* [2010] EWHC 422 (Ch) and [2010] EWCA Civ 1259 both reported at [2011] Ch 177 Roth J and this court considered the ambit of the definition of common parts. There were two areas in contention: a caretaker's flat and

a lightwell. The lessor had granted a lease of the caretaker's flat and the floor of the lightwell to an associated company. Roth J said at [43]:

> "The statutory definition is inclusive not exhaustive. It clearly encompasses more than the ordinary meaning of common parts, which would not cover the exterior of the building. Without attempting a comprehensive definition, I consider that it is intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all. Thus, I consider it will cover the boiler room or a room housing the lift machinery, although those rooms may be kept locked and no resident ever goes into them. It will encompass a covered atrium that all the residents can use, and also a sunken garden in the centre of the building to which the residents do not have access but which is a common amenity that is to be regarded as part of the building; or a banked rockery at the front of the building over which the residents do not pass but which is maintained for their common benefit and should be considered as part of the "exterior" although not part of the structure. Furthermore, there is no requirement that the part must actually be used by all the residents: for example, the fact that the residents on the ground floor may never use the lift does not prevent it from being a common part."

43. At [54] he described his approach as "a functional basis".

44. In this court Carnwath LJ said at [19]:

> "For example, the "facility" represented by a boiler is not just the physical structure, but also includes the service of hot water provided from it. If the lessees have the right to obtain hot water from a common boiler, then, whether or not they have access to the boiler room, it can in my view properly be regarded as a "common facility", and therefore within the common parts."

45. As Carnwath LJ said at [20] the caretaker's flat had been identified as "a distinct part of the building with a distinct function." This, too, is a functional test. A similar test was applied by Mann J in *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch), [2014] L & TR 28 at [284].

46. What matters, then, is how the parts of the property are used: not the title under which they are held. Application of those observations leads to the conclusion that the common parts in our case include not only the physical plant and machinery which provide the services, but also the spaces in which they are housed. The Deputy President said at [49]:

> "It is necessary to have regard to the function served by an area when considering whether it is or is not a common part. If the purpose to which a particular room is put is to accommodate service installations used for the benefit of the whole Building that is sufficient to render the whole of the space part of the common parts of the Building."

47. I agree. He went on to say at [48]:

> "By any ordinary understanding of the expression, the whole of the basement which houses the service installations for the whole of the Building is one of the common parts of the Building."

48. Again, I agree. Whether the Deputy President was focussing on the general meaning of "common parts" or the meaning of "common facilities" does not matter.

The airspace and sub-soil

49. Mr Denehan stressed that part of the definition of "common parts" which referred to "common facilities *within*" the building. Neither the airspace nor the sub-soil is within the envelope of the built structure. But, for the reasons I have given, in my judgment both are within the meaning of "building" as used in section 3. It would, in those circumstances, be natural to regard them either as part of the building itself or as part of the "exterior of the building" for the purposes of section 101 (1). Since the definition in section 101 (1) is an inclusive rather than an exclusive definition, I consider that both those areas fall within the definition of "common parts".

Did the areas cease to be common parts on the grant of the leases?

50. Does it make any difference that the three areas in dispute are held under separate leases? In my judgment it does not. I do not accept Mr Denehan's argument that if the basement areas were once common parts they ceased to be so on the grant of the lease. In the first place, as I have said, the test is a functional test, not a matter of title. Section 2 (3) is, to my mind, explicit on the point. One of its avowed purposes is to enable the qualifying tenants to acquire a leasehold interest which "consists of" common parts. If the grant of a lease of common parts were to remove it from the ambit of common parts, section 2 (3) would be fatally undermined. Moreover, in the *Cadogan* case the caretaker's flat in issue was the subject of a separate lease, but that did not prevent it from being within the common parts. Where alterations have been carried out before the relevant date to what had been common parts, the position is different. In that event, the alterations may cause them to cease to be common parts: *Barrie House* at [146]. But the mere grant of a lease does not have that effect.

Reasonably necessary to acquire?

Development leases

51. Having concluded thus far that each of the areas in dispute is within the definition of "common parts", the remaining question is whether, in each of the three cases, the

acquisition of the leasehold interest is reasonably necessary for the proper management or maintenance of those common parts.

52. Mr Denehan submits that the answer is "no". The question posed is not a simple question of fact. In order to answer it, it is necessary to consider what rights the freeholder already has. Each of the three leases reserves to the landlord the right to enter the demised property either for emergency purposes or for the proper performance of the lessor's obligations to the owners or occupiers of the flats. In addition, the basement lease contains an additional right for the lessor to access the boiler room (whether in its current position or a different location) so as to connect into, repair, maintain or renew any plant or equipment. With the benefit of these rights, the freeholder can properly manage both the building and the common parts without the need to acquire the leasehold interests themselves.

53. In the *Cadogan* case Roth J considered the question whether acquisition of the caretaker's flat was reasonably necessary. He said at [62]:

> "If the caretaker's flat is therefore a common part, is it [reasonably] necessary for the respondents to acquire it "for the proper management or maintenance of those common parts"? In my judgment, it clearly is, since if they did not acquire the interest under the lease they would not be able to use that flat to accommodate a caretaker. Indeed, if the lease remained in force, the basement flat would not be maintained as a common part at all."

54. He thus held that the acquisition was reasonably necessary because it would preserve the caretaker's flat as part of the common parts. In this court Carnwath LJ quoted that passage and said at [26] that he agreed with it. It is necessarily implicit in the statutory question that what must be asked and answered is the question whether acquisition of the leasehold interest is reasonably necessary for the proper maintenance etc of the common parts *as such*. The nub of the decision in *Cadogan* was that, in the absence of the acquisition of the caretaker's flat, it would cease to be a common part at all, and that therefore the new freeholder would be unable to manage or maintain the flat as such. The question of rights over the flat was not, therefore, relevant.

55. But Roth J reached a different conclusion in relation to the lightwell. That, too, was comprised in the lease of the caretaker's flat. There was no suggestion that any physical alteration of the lightwell was proposed. In the case of the lightwell, Roth J considered that the freeholder would require access to the floor of the lightwell (and the airspace immediately above it) for the purpose of maintenance and repair of those systems and media, as well as of the exterior walls of the structure facing towards the light-well. But he held that there were sufficient rights reserved in the lease under which it was held as to negate the necessity for acquiring the leasehold interest in the lightwell itself. The latter point did not arise for decision in this court.

56. Building on *Cadogan*, Mr Rainey QC argued that where, as here, each of the three leases envisaged that what had been common parts at the relevant date would be changed into a private residential flat, thus ceasing to be a common part at all, it was reasonably necessary to acquire those leases. Otherwise it would no longer be possible properly to manage them as common parts. In the case of common parts

which will not be physically altered (as in the case of the lightwell considered in *Cadogan*) the reversioner may be sufficiently protected by reservations in the lease. But where the leases in question allow wholesale development, such that following development the demised property will no longer be common parts at all, reservations do not solve the problem. I agree. This submission is, to some extent, reflected in section 19 (1) (ii) of the 1993 Act which prohibits the grant of a lease of common parts after the date when an initial notice exercising the right of enfranchisement has been registered. As Mr Rainey put it, the qualifying tenants are entitled to insist on the common parts remaining as they were.

57. That is sufficient to dispose of the appeal. But there are additional reasons for concluding that it was reasonably necessary for each of the three leases to be acquired.

Basement lease

58. As far as the basement lease is concerned, I consider that Mr Denehan's argument founders on the finding of fact made by the FTT following their site visit. They found the *current* access to the basement through double doors on the Guilford Street side of the building was "designed for, and [was] essential to the maintenance of the boiler equipment". They regarded the alternative access through the communal ground floor hallway (and then down into the internal courtyard) as inappropriate for the transfer of large pieces of boiler equipment or for regular maintenance. They found that it was not reasonably possible for works of repair and replacement to the boiler to be undertaken in the area which Mr and Mrs Emore intended should remain available; nor would there be any space for the spare parts and equipment currently stored in the basement and which are reasonably required to ensure the smooth running of the boilers and the electrical apparatus. In summary the FTT found that the proposed development of the basement by Mr and Mrs Emore would significantly interfere with the reasonable maintenance and upkeep of the communal heating and electrical supply provided to the individual flats and the common parts.

59. Mr Denehan argued that there was no evidence to support that finding; alternatively, it was one which no reasonable tribunal could have reached. I disagree. As Megarry J said in *Tito v Waddell* [1975] 1 WLR 1303:

> "What a judge perceives on a view is itself evidence, in the same way as what he sees and hears in the courtroom."

60. What the FTT saw on their view was plainly evidence; and it is not for this court to interfere with their findings of fact based on that view.

61. I do not regard the possibility of reliance on reserved rights in the basement lease as overcoming the practical problem as found by the FTT.

Sub-soil

62. The UT rejected Mr Denehan's argument concerning the sub-soil by applying the reasoning in the *Cadogan* case. The Deputy President said at [67]:

> "Applying that reasoning to the sub-soil, it is clear that it is reasonably necessary that the tenants acquire it. The absence of any requirement for active management or maintenance in the short or medium term does not matter. What matters is that, if implemented, the appellant's intentions with regard to the lease will cause the subsoil to cease to be a common part to the extent required to create the appellant's proposed new residential accommodation. It is reasonably necessary to the tenants' management of the ground on which the Building stands that it should be within their possession, since otherwise the function performed by that ground will change. The fact that support will continue to be enjoyed by the Building from the stratum below that on which it currently stands is beside the point; it is not the management of that stratum which is in issue, but of the stratum which currently provides support and which has been demised."

63. Thus in order to maintain the sub-soil as a common part, it was necessary to acquire the lease. In those circumstances the question of rights of support reserved by the lease did not arise.

64. In addition, the FTT found that the proposed development by excavation of the sub-soil would necessitate the creation of lightwells to illuminate the new flat. Those lightwells would have to be created by excavating what are currently amenity areas available to the residents. For that reason also, the proposed development would remove common parts; and therefore the acquisition of the lease was reasonably necessary for the proper management of the common parts. The Deputy President considered that this was in itself a sufficient reason for the acquisition of the sub-soil lease. It is (to put it no higher) also possible, that if the lightwell is created on the eastern side of the block it will prevent access to one of the staircases leading into the area where the boilers etc are located. That would make it impractical to service the boilers and other plant at all.

65. I agree with both these reasons, although it is doubtful whether the sub-soil lease actually gives the lessee the right to let down the surface in order to create the lightwells.

Airspace

66. The last area that the UT considered was the airspace. The Deputy President found that the airspace provided access to the roof of the building, which was required whenever work of repair or maintenance was to be undertaken. The "proper management" of the airspace entailed its retention as a means of access to the structure of the building to enable inspection and repair when necessary. Proper management of the airspace might also involve its use as a location for facilities serving the building (such as aerials, dishes or air conditioning plant).

67. He continued at [85]:

> "As with the boiler room and sub-soil, the appellant intends, if planning permission can be obtained, to undertake work which

> will cause the airspace no longer to be accessible. Convenient access to the structure would become impossible because of the presence of an additional flat or flats on top of it, and any change in the structure would be unnoticed and difficult to monitor. In my judgment the risk of these consequences makes it reasonably necessary for the proper management of the airspace that the airspace lease be acquired. If the lease is not acquired the airspace will be incapable of being managed as it currently is. It does not matter that the respondent will presumably still have access to a new roof over the Building, or that it will have access to the existing structure in the exercise of the rights reserved in the airspace lease, since the former will relate to a different structure and the latter will involve a very much more complex and inconvenient operation than is currently possible."

68. Again, I agree.

69. In addition, as Mr Denehan accepted, if and when new flats are built on the roof of the building, whatever new roof covering is constructed would become part of the Building as defined in the leases. It would therefore be the responsibility of the freeholder to keep in repair a roof structure over which it had no design control. That is, in my judgment, plainly a question of the maintenance of common parts, which gives rise to a legitimate concern on the part of the freeholder.

The reservations

70. The form of the reservation in each of the three leases provides another reason for concluding that acquisition of the leases is reasonably necessary for the proper management or maintenance of the common parts. If the reserved right is exercised, it may entail causing damage and disturbance to the areas once developed as flats. In that event the lessor would be obliged not merely to make good damage, but also to compensate the lessee both for damage caused and for loss of use of the flat while the right was being exercised. That would make the maintenance and management of those common parts more complicated and expensive, at the ultimate cost of the qualifying tenants through the service charge. Acquisition of the three leases would avoid that consequence.

The development rights

71. During the course of the hearing a number of potential defects in the development rights were identified. In the case of the basement lease there is no obvious right to relocate the plant and equipment in parts of the building that are not within the demise.

72. In the case of the sub-soil lease there is no obvious right to let down the superjacent surface so as to create the lightwells which would be needed to provide natural daylight to a newly created flat. Nor is there any obvious right to create a staircase from any other part of the building.

73. In the case of the airspace lease there is no obvious right to cut into the roof surface so as to anchor any new construction on the roof. Nor is there any obvious right to break into the structure of the building to create an access to the roof; or to extend the lift up to what would be an eighth floor flat; or to alter any staircase now existing within the remainder of the building.

74. Mr Rainey submitted, correctly in my judgment, that we should not decide this appeal on the assumption that none of the three leases in fact achieved their avowed purpose. That is an argument which, if it arises at all, is an argument for another day.

Result

75. I would dismiss the appeal.

Lord Justice Leggatt:

76. I agree.

Lord Justice Lindblom:

77. I entirely agree with the analysis and conclusions lucidly set out by Lewison L.J. in his judgment, and therefore with his final conclusion that, for the reasons he gives, the appeal should be dismissed.

78. In my view, the conclusions reached by Lewison L.J. on the issues before us are consistent with the general considerations on the statutory scheme identified in Hague on Leasehold Enfranchisement (sixth edition, 2014, at paragraph 1-62), and also with the three basic points to which the Upper Tribunal (Lands Chamber) referred in *Barrie House* (at paragraph 51): first, that the statutory scheme is self-contained and comprehensive, and, though complex, ought to be regarded as "coherent and complete"; secondly, in the interests of both landlord and tenant, that the scheme should be interpreted and applied to provide a clear and certain outcome; and thirdly, in the words of Millett L.J., as he then was, in *Cadogan v McGirk* [1996] 4 All E.R. 643 (at p.648B), that "[it] is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy".

79. The last of those three points, I think, reinforces the view that the decisions of the tribunals below on the preliminary issues for determination in this case were correct.