

Leasehold Reform News

Bishop
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Earl Cadogan and other (Respondents) v 26 Cadogan Square Limited (Appellants) Howard de Walden Estates Limited (Respondents) v Aggio and others (Appellants) [2008] UKHL 44

The owner of a long lease which comprises one or more flats and which may also include the structural and exterior parts of a building can now claim an extended lease in respect of those flats under the 1993 Act.

In this issue of Leasehold Reform News we look at one of the big decisions of the summer and indeed one of the biggest recent decisions in the field of Leasehold Reform, the House of Lords' judgement in *Les Aggio*. This has given us all something to think about whilst we await their decision hearing of the combined appeals on Hope Value in *Pitts v Wang* and of course, *Sportelli*.

In something of an intellectual 'tour de force' Lord Neuberger takes us through a somewhat complex – but entirely logical analysis of the provisions of the 1993 Act and the parties' argument in the Court of Appeal to come to the very clear conclusion that *Maurice v Hollow-Ware Products Limited [2005] 2 EGLR 71* was correctly decided and, in short, that a long leasehold owner whose lease comprises one or more flats can use the 1993 Act to extend the lease in respect of each of these flats.

The decision of the Court of Appeal which we looked at in a previous issue has been reversed.

What does the House of Lords' decision in *Les Aggio* mean in practice ?

In short, the owner of a lease which comprises for instance the upper parts of a property comprising, say, 3 flats and perhaps also the common parts and exterior of the building can, provided that the lease is a 'long lease' within the meaning of the legislation (i.e. a lease for more than 21 years at grant) and provided also that the owner of the lease has the occupational interest in respect of the flats (i.e. that there are no subleases that would constitute long leases) purchase an extended lease in accordance with the provisions of the 1993 Act in respect of each flat.

Why is this not obvious from the statute as it stands ?

The 1993 Act confers the right to extend on the 'tenant of a flat' (section 39). This could be interpreted narrowly to mean the flat and not other property. However, Lord Justice Neuberger preferred a wider interpretation and it was held that the flat means property including (but not limited to) the flat in question.

Why did the Court of Appeal come to a different conclusion ?

In part because they preferred a narrow interpretation of what made up the flat. Also because of numerous other arguments advanced to deal with the technical

complexities of drafting a new lease in such a situation.

What else did the House of Lords deal with ?

In an attempt to defeat the tenants, the landlords advanced numerous arguments as to why the owner of a head lease or a lease of multiple interests should not be able to extend in this way. Partly these were to do with 'public policy' (in the sense that the 1993 Act was not designed for use in this way) and partly these were technical. We will look at some of these (in summary) briefly below:-

The Policy argument - the 1993 Act was not designed to help non-resident commercial interests extend their leases

Whilst this might originally have been the case, the legislation has not differentiated between residents and non-residents since the 2002 Act reforms; therefore the court decided that this argument could not apply.

Extending a head lease causes conveyancing 'difficulties'

True, but the 1993 Act and clever drafting can find away around these. A perceived problem is that the provisions of section 57 do not go far enough to allow a court or tribunal to impose a new scheme of covenants in respect of the flat. The House of Lords considered that an LVT could deal with such complexities.

Bishop & Sewell LLP Solicitors
46 Bedford Square
London WC1B 3DP

DX 278 London/Chancery Lane
mail@bishopandsewell.co.uk
www.bishopandsewell.co.uk

T +44 (0) 20 7631 4141
F +44 (0) 20 7636 5369

There would be a 'patchwork' of ownership

Using the head lease as the starting point for the new lease could potentially cause problems. This is because the new lease is granted in substitution for the old lease under section 56(1)(a).

When this is done there will be a surrender of the head lease in so far as it relates to the flat. This is not a problem in itself, but the Respondents argued that if this were done wholesale across the block the intermediate landlord would be left with a 'rump' lease comprising the exterior and common parts.

The rump lease would be reversionary in so far as it related to the rights granted by the new lease over the areas outside the flat. The landlords in this case argued that such a lease would have negative value.

The House of Lords held that whilst the remaining 'rump' might not be an attractive proposition, this in itself was not enough to prevent a permissive reading of the 1993 Act.

Because the head lease and the new flat lease will have the same owners, rights cannot be granted over the common parts

Because the flat and the head lease would be in identical ownership at the time that the new lease is granted by the freeholder these rights would need to take effect against the head lease. As an accepted legal principle a party cannot grant rights to itself, the grant of these rights in the flat lease would be defective until the end of the un-extended term of the remainder of the head lease.

Lord Neuberger trounced this suggestion by pointing out that the owner of the head lease will of course be in occupation of the remainder of the building under the terms of head lease. As such the rights that it needs at the time of grant will already exist under another lease. One solution is that the owner of the head lease could grant an under lease of the flat which would contain rights over the common parts. Alternatively, when the lease was to be assigned to a third party the terms of any deed of assignment could also contain

an express grant of the rights required in respect of the common areas from the owner of the head lease.

There was also a 'Human Rights' argument raised by the landlords, but this was also rejected.

Comment

Surely the purpose of the legislation was not to ensure that the owner of a head lease of residential flats whose business was letting could use the statute to extend the leases of these units on an individual basis? However, as Lord Justice Neuberger points out, just because the draftsman did not necessarily have this in mind, does not mean that it cannot be done.

This case is a wake up call for anyone with a lease of this nature in their portfolio. It is also an opportunity for the initiated to improve the value of an existing asset or to take a different look at potential opportunity in a property of this nature. Even those selling should consider carefully whether notices should be served, and it may well be because of the 2 year qualifying period that any buyer will want this done.

It goes without saying that anyone who wants legal advice on a problem of this nature should by all means get in touch.

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Mark Chick

Tel: 020 7631 4141

Email: mc@bishopandsewell.co.uk

Position: Member of the LLP

