# Lupin Ltd v 7-11 Princes Gate Ltd (1) and Princes Gate Partnership LLP (2)

---

Although only a decision of the County Court, this case has some significant implications for those who practice in the field of leasehold enfranchisement.

Background

In 1989, the freehold owner of a block of flats just south of Hyde Park ("the Building") granted a long lease ("the Lease") of the top floor flat ("the Flat") to Lupin Ltd ("C"). The Lease did not include the roof which remained in the possession of the freeholder. The Lease granted the tenant various easements over the remainder of the Building in the usual form that would be expected in a block of communal flats. Less usually, the Lease also contained a restrictive covenant by the freeholder with the tenant "*not to build or erect any structure on the roof of the Building*" ("the Roof Covenant").

A notice of the Lease was entered in the registered freehold title. However, no specific particulars were entered of the Roof Covenant.

In August 2010, the freehold interest in the Building was acquired by 7-11 Princes Gate Ltd ("D1")

In September 2010, D1 granted to Princes Gate Partnership LLP ("D2"), an associated entity, a 999-year overriding lease of the Flat ("the Overriding Lease"). The Overriding Lease included the same easements over the rest of the Building as had been granted by the Lease. The Overriding Lease did **not** however contain a Roof Covenant by D2.

In April 2018, C served on D2 a Notice under s.42 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the April Notice") claiming a new lease of the Flat. One of the proposals put forward by C in the April Notice was that the new lease should contain a Roof Covenant.

In June 2018, D2 served on C a Counter-Notice under s.45 of the 1993 Act admitting the claim. One of the counter-proposals put forward by D2 in the Counter-Notice was that the new lease should not contain a Roof Covenant.

In October 2018, C served on D1 and D2 two further s.42 Notices. The first notice ("the First Notice") identified D1 and D2 as together the landlord. The second notice ("the Second Notice") identified D1 as the landlord and D2 as a "third party" to the Lease. The notices were otherwise in substantially the same terms as the April Notice. The covering letter said that it was C's primary contention that the First Notice was valid, but that if it was not, C reserved the right to rely on either the April Notice or the Second Notice.

In December 2018, D1 and D2 served s.45 counter-notices to the First Notice and the Second Notice, each not admitting the claim. Their grounds can be briefly summarised as follows:

- The April Notice continued in force and no further s.42 notice could therefore be given – s.42(6)
- Alternatively, by serving the First Notice and the Second Notice, C had effectively withdrawn the April Notice which thereby precluded the service of any further s.42 notice prior to October 2019 – s.42(7)
- Finally, D1 and D2 relied upon the definition of "the landlord" in section 40 of the 1993 Act. They alleged that the First Notice was invalid because D1 was not a landlord within the meaning of that section.

The Proceedings

In December 2018, C issued its claim. The relief sought in the details of claim was a declaration that:

- the First Notice was validly given;
- alternatively, a declaration that the Second Notice was validly given;
- alternatively (and as a last resort) a declaration that the April Notice was validly given.

In January 2019, D1 and D2 filed an acknowledgment of service. They sought declarations that:

- the First Notice and Second Notice were not validly given
- the April Notice was deemed to be withdrawn on 19th October 2018.
- Pursuant to s.46(1), C had no right in October 2018 to acquire a new lease as claimed in the First Notice and Second Notice.

The case was heard in the Central London County Court on 3rd and 4th February 2020 and HH Judge Hellman gave judgment on 31st March 2020. There were in overall terms, two primary issues; what the Judge described respectively as "the Landlord Issue" and "the Notice Issue".

The Landlord Issue

C's case came down to three principal submissions [33].

- D1 is included in "the landlord" (with D2) because it retains the reversion in respect of the Building other than the Flat ("Submission 1").
- D1 is included in "the landlord" (with D2) because only it has an estate in the roof and the roof is subject to the Roof Covenant which is an "appurtenance" of the Flat let with the Flat ("Submission 2"); and
- D1 is a "third party" (with D2 being "the landlord") because it is a "party to the lease" and it is bound by the Roof Covenant, albeit not as an immediate landlord" ("Submission 3").

Submission 2 was rejected [74]-[93]. In simple terms, the judge found that, in the context of s.62(2), "appurtenances" are something positive. The easements and advantages which they consist of do not include negative easements, even if that is how the Roof Covenant could be described, actually or impliedly. The Roof Covenant was not an "appurtenance".

Submission 3 was also rejected [94]. D1 accepted that the question of whether or not it could possibly be a "third party" as defined in s.62(1) would only arise if the Roof Covenant was enforceable against it; D1 not being the original covenantor. The first question to be decided therefore was whether that was so. The Roof

Covenant would only be enforceable against a purchaser or lessee of the Building if it was protected by registration on the Land Register. After a review of the relevant provisions of the Land Registration Acts and Land Registration Rules, the Judge decided that D1 was not bound by the covenant. He held that, the mere fact of registration of the lease would not be sufficient to protect the tenant's right to enforce the Roof Covenant. For that to happen, the Roof Covenant would have to be specifically mentioned in the short particulars entered on the Register. Here, when D1 purchased the Building, the Lease was registered against the freehold title but the particulars did not include specific reference to the Roof Covenant. Since the Roof Covenant was not enforceable against D1, it could not be a "third party".

That left Submission 1 [34]-[73]. The issue here was whether D1 and D2 were together "the landlord" within the meaning of s.40(1). C's case was that the grant of the Overriding Lease severed the reversion on the Lease. In consequence, D2 became the reversioner in respect of the Flat whilst D1 remained the reversioner in respect of the Building other than the Flat [39]. Following a review of the provisions of ss.140–142 of the Law of Property Act 1925 and various cases decided thereunder, the Judge accepted C's case. The way the Judge put it was this [70]:

*"………… as freeholder of the Building, D1 is the owner of the reversion expectant upon the termination of the easements over the Building granted by the Original Lease. It follows that D1 as owner of the reversion expectant upon the termination of the easements over the Building and D2 as owner of the reversion expectant upon the termination of the Original Lease of the Flat itself were together "the landlord" for purposes of giving notice under the 1993 Act."*

Further, the judge decided that under s.140 of the 1925 Act, the landlord's covenants in the Lease had to be apportioned and the Roof Covenant would therefore be apportioned to D1 [72]. The covenant touched and concerned the Building but not (as argued by C) any of the easements granted by the Lease. Therefore, D1 remained bound by the Roof Covenant pursuant to s.142 of the 1925 Act and was in consequence obliged to enter into the new lease to repeat it for the additional term of 90 years.

The Notice Issue

The Judge commented that this issue was "*…..quite straightforward*" [95]. He does not refer in his judgment to the Second Notice so we must assume that, through silence, it is held to be of no effect; since he held that D1 was in any event not a "third party" that must follow. He decided that there is no requirement under the 1993 Act that, if "the landlord" consists of more than one person (as decided here), they are served with a joint notice rather than separate notices, or that the notices are issued or served on the same date [95]. He held therefore that the April Notice was the valid notice given to D2 and that the First Notice was the valid Notice given to D1 [96]. The time for D1 and D2 to give a counter-notice ran from the date specified in the First Notice. Thus, the First Notice had the effect of extending the time given in the April Notice for D2 to give a counter-notice (notwithstanding that he had already given one) [97].

Thoughts

It is probably fair to say that the judgement is driven by what the Judge perceived to be a potentially unfair outcome for the tenant, contrary to the overriding policy of the Act, if it was not able to include the Roof Covenant in the new lease. What he said was that [72]:

*"The intention of the legislature would be defeated if a landlord could evade an inconvenient covenant by the simple expedient of giving an overriding lease of the flat which benefited from the covenant to another vehicle*

*which the landlord owned and controlled.''*

The judgment is perhaps surprising and certainly will create issues for practitioners when faced with preparing and serving a s.42 notice in circumstances where there is an overriding lease of the flat with easements over common parts. The finding that, in such a case, there is a severed reversion is not dependent on the issue of the Roof Covenant. What the judge effectively said is that you cannot create an easement in reversion to another easement; an easement granted by the overriding lease is not subject to the easement granted in similar terms by the occupational lease but (so it would appear) exists separately and alongside it.

An interesting submission made by Counsel for D1 and D2 during the course of the hearing was that a consequence of the judgment is that ''the landlord'' would need to include every tenant of the Building who has a lease containing easements over the Building, granted after the date of the subject lease [73]. The judge declined to deal with the point, stating that ''the submission was raised too late''.

One question must be: is this a pyrrhic victory for C? Despite the fact that D1 is held to be part of ''the landlord'' because it is the reversioner to the Roof Covenant [72], nevertheless that covenant is held to be unenforceable by C [93]. If D1 is not currently bound by the covenant through C's failure to register it, why should C be entitled to revive the Roof Covenant by requiring D1 to include it in the new lease?

The part of the judgment dealing with the various notices is clearly wrong; it is difficult to follow the reasoning (which is distinctly lacking for this element of the judgment) in holding that serving a second notice some six months after the first notice (and after service of a counter-notice for the first notice) has the effect of (i) combining the first notice and the second notice into a single notice and (ii) effectively setting aside that counter-notice which had admitted the claim. It is hard to follow the logic of doing that.

Would it not have been more sensible to have found (as the mechanism to give effect to his findings on the Landlord Issue) (i) the April Notice invalid and of no effect on the ground that it had never been served on the landlord, thereby also rendering its counter-notice a nullity (ii) the First Notice valid and effective, setting aside its counter-notice and ordering service of a fresh counter-notice admitting the claim and (iii) the Second Notice of no effect on the ground that the First Notice continues in force.

The Judge has given permission to appeal to D1 and D2 and ordered that the appeal be heard by the Court of Appeal. The existence of overriding leases is not uncommon and there will therefore likely be a significant number of cases affected by this judgment. However, it will no doubt be some time before an appeal is heard; in the meantime, practitioners have the difficult task of deciding how to formulate new lease claims under the 1993 Act where there is an overriding lease of the flat.