UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2016] UKUT 467 (LC)
UTLC Case Number: LRA/41/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – intermediate leasehold interest – flat and parking space held on separate leases and intermediate leases – division of landlord's share of marriage value – para. 10(2), Sch 13, Leasehold Reform, Housing and Urban Development Act 1993 – s. 3, Human Rights Act 1998 – Art. 1 of the First Protocol to the European Convention on Human Rights – appeal dismissed

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) THE PORTMAN ESTATE NOMINEES (ONE) LTD
(2) THE PORTMAN ESTATE NOMINEES (TWO) LTD

Appellants

and

STARLIGHT HEADLEASE LTD

Respondent

Re: 70 Portman Towers and Parking Space
30 George Street
London
W1H 7HN

Martin Rodger QC, Deputy President

Royal Courts of Justice
On
17 October 2016

Ms Ellodie Gibbons, instructed by Pemberton Greenish LLP, for the appellants
Mr Stan Gallagher, instructed by Shoosmiths LLP, for the respondent

The following cases are referred to in this decision:

Cooper-Dean Charitable Foundation v Greensleeves [2015] UKUT 320 (LC)

Earl Cadogan v Sportelli [2010] 1 AC 226 (HL)

Ghaidan v Godin-Mendoza [2004] 2 AC 556

James v United Kingdom (1986) 8 EHRR 123

Money v Cadogan [2013] UKUT 2011 (LC)

Papachelas v Greece (1999) 30 EHRR 923

Introduction

1. How is the landlords' share of the marriage value created on the grant of a new lease of a flat and appurtenant property under Chapter II of Part I, Leasehold Reform, Housing and Urban Development Act 1993, to be divided between the competent landlord and an intermediate landlord where the flat and the appurtenant property were originally held under separate leases?

2. That is the question in this appeal from a decision of the First-tier Tribunal (Property Chamber) given on 21 January 2016 on an application under section 48 of the 1993 Act by Behbehani Real Estate Company ("BREC") for a determination of the price to be paid for the grant of a new lease of Flat 70, Portman Towers, George Street, London W1, together with its appurtenant parking space (number 30) in the basement of the same building. The issue is agreed to be one of statutory interpretation of paragraph 10(2) of Schedule 13 to the 1993 Act which plays a small but important place in the valuation exercise to be undertaken under Schedule 13.

3. By the time of the hearing of the tenant's application the sole issue for the FTT concerned the apportionment required by paragraph 10(2) between the appellant, as competent landlord, and the respondent, as intermediate landlord, of that element of the (agreed) premium payable by the tenant attributable to the landlord's share of the marriage value determined under paragraph 2(b) of Schedule 13.

4. The FTT determined that the apportionment should be ascertained by a single calculation of the proportions in which each party's interests in the flat and the parking space together would be diminished by the grant of the new lease. On that basis it is agreed that the total marriage value of £128,162 should be apportioned so that the appellant receives £87,755 and the respondent £40,407.

5. With the permission of the FTT the appellant now appeals to the Tribunal. Its case is that the proper apportionment of the marriage value should be ascertained by undertaking not one, but two calculations, the first being of the proportions in which the parties' respective interests in the flat alone would be diminished by the grant of the new lease, the second being of the proportions in which their interests in the parking space would be diminished. The marriage value referable to the flat should then be apportioned using the first ratio, while the second should be applied to the marriage value attributable to the parking space. An apportionment of the agreed marriage value on that basis would result in the appellant receiving £97,219 and the respondent £30,943.

6. Although the difference between the two approaches in this case is a relatively modest sum of less than £10,000, both parties have interests in a number of other flats and appurtenant parking spaces in the building. I was told that in Portman Towers alone there are a further 27 flats with appurtenant parking spaces where the same issue will arise in the event of a claim being made to acquire a new lease. The same issue will arise whenever there is a claim to a new lease in respect of a flat and appurtenant property where the properties are currently held under separate leases.

7. At the hearing of the appeal the appellant was represented by Ms Ellodie Gibbons and the respondent by Mr Stan Gallagher. I am grateful to them both for their submissions.

The leases

8. Portman Towers is a purpose built apartment block constructed in the 1960s and located a little to the north of Marble Arch. It has a large underground car park. The appellants, The Portman Estate Nominees (One) Ltd and The Portman Estate Nominees (Two) Ltd, own the freehold interest in Portman Towers.

9. The whole of the building and the underground car park are comprised in a headlease granted by Portman in 2007 for a term of 125 years commencing on 24 June 1962. The respondent, Starlight Headlease Ltd, is the owner of that headlease.

10. The headlease is subject to three underleases, each of which is also vested in Starlight. All three underleases were granted on 4 June 1962 for a term of 125 years (less 2 days). One of the underleases is of the whole of the building excluding 89 parking spaces in the underground car park. Each of the other underleases is of a number of those parking spaces.

11. Starlight's underlease of the building is subject to occupational leases of the individual flats. The lease of Flat 70, on the sixth floor, was granted on 1 August 1969 for a term of 120 years (less 3 days) from 24 June 1967. It is now vested in BREC.

12. The car park underleases are also subject to occupational leases of the individual parking spaces. The lease of Parking Space 30 as also now vested in BREC having been granted on the same day and for the same term as the lease of Flat 70. It includes an absolute covenant against the assignment of the parking space lease separately from the occupational lease of Flat 70.

The statutory scheme

13. Under Chapter II of Part I of the Act the qualifying tenant of a flat held on a long lease has the right to acquire, in substitution for the existing lease, a new lease at a peppercorn rent for a term expiring 90 years after the term date of the existing lease. The right is exercisable by the qualifying tenant serving notice on the person who is the competent landlord and following the statutory procedures that lead to the grant of a new lease by that person on payment by the tenant of a premium determined under the Act. The competent landlord is the owner of an interest in the flat that fulfils two conditions: first, that it is an interest in reversion expectant (whether immediately or not) on the termination of the tenant's lease; and secondly, that it is either a freehold interest or a leasehold interest of sufficient duration to enable the new lease to be granted.

14. Often there will be intermediate interests between those of the tenant and the competent landlord, i.e. leases which are due to expire after the term date of the existing lease but before the term date of the new lease. The Act makes specific provision for such interests, including provisions for payment to be made to the intermediate leaseholder to compensate for the reduction in the value of its interest. An intermediate interest is not extinguished on the grant of the new lease by the competent landlord to the tenant. It continues, without the expectation of possession on its termination but with the obligation to pay the rent in accordance with its original terms.

15. In an application by a qualifying tenant for a new lease the Act provides for the competent landlord to act on behalf of the owners of all intermediate interests in relation to proceedings under the Act, except that the owner of the intermediate interest is entitled, on giving notice, to be separately represented in any legal proceedings, including for the determination of the amount that is payable to him.

The property to be acquired

16. Chapter II confers the right to a new lease of a flat: section 39(2)(a). The term "flat" is given an extended definition by section 62(2) (the interpretation section for Chapter II of the Act), which, so far as is material, provides as follows:

> "…, references in this Chapter to a flat, in relation to a claim by a tenant under this Chapter, include any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with the flat and let to the tenant with the flat …"

17. It follows that an appurtenance such as a parking space will be treated as being included in the flat (and therefore will be part of the property for which a claim may be made for a new lease) if it is "usually enjoyed with the flat and let to the tenant with the flat". The requirement that the appurtenance be let with the flat is explained in section 101(7) (the interpretation section for Part I of the Act):

> "For the purposes of this Part property is let with other property if the properties are let either under the same lease or under leases which, in accordance with section 7(6), are treated as a single lease."

18. Section 7(6) is found in Chapter I of Part I of the Act (which confers on the qualifying tenants of flats in a building the right collectively to acquire the freehold of the building), but it is incorporated into Chapter II by section 39(3)(b). It provides as follows:

> "Where in the case of a flat there are at any time two or more separate leases, with the same landlord and the same tenant, and –

(a) the property comprised in one of those leases consists of either the flat or a part of it (in either case with or without any appurtenant property), and

(b) the property comprised in every other lease consists of either a part of the flat (with or without any appurtenant property) or appurtenant property only,

then in relation to the property comprised in such of those leases as are long leases, this Chapter shall apply as it would if at that time –

(i) there were a single lease of that property, and

(ii) that lease were a long lease;

but this subsection has effect subject to the operation of subsections (3) to (5) in relation to any of the separate leases."

In some respects this is an anti-avoidance provision designed to prevent rights under Part I from being frustrated by the letting of a flat, or a flat and its appurtenant property, under more than one lease. It also simplifies the operation of the statutory procedure by treating any number of leases of a flat and its appurtenances as if they were a single lease, provided the landlord and the tenant are the same in the case of each lease. It is by that device that Chapter II ensures that a qualifying tenant is entitled to acquire an interest in appurtenant property.

The price payable

19. Schedule 13 of the Act makes provision for the premium and other amounts payable by the tenant on the grant of a new lease. It is in 3 parts: Part I is a definition provision, Part II is concerned with the premium payable by the tenant, while Part III concerns the amount payable to the owner of an intermediate leasehold interest.

20. Paragraph 1 in Part I, read with section 40(4)(c), defines "intermediate leasehold interest" as: "the interest of any person [in whom there is vested a concurrent tenancy intermediate between the interest of the competent landlord and the tenant's lease], to the extent that it is an interest in the tenant's flat subsisting immediately before the grant of the new lease." In this case each of Starlight's underleases is an intermediate leasehold interest to the extent that it is an interest in either Flat 70 or Parking Space 30.

21. The premium payable by the tenant is the aggregate of three elements, identified in paragraph 2, namely:

(a) First, the diminution in value of the landlord's interest in the tenant's flat as determined in accordance with paragraph 3. This is the difference between the value of the landlord's interest in the tenant's flat before the grant of the new lease, and its value after the grant. In each case the value is determined

by considering the amount the interest would be expected to realise if sold on the open market, subject to certain assumptions.

(b) Secondly, the landlord's share of the marriage value as determined in accordance with paragraph 4. This stipulates that the marriage value is the difference between the aggregate of the values of all of the interests in the tenant's flat (i.e. the tenant's, the landlord's and any intermediate leaseholder's interests) prior to the grant of the new lease, and the aggregate of all those interests after the grant of the new lease. The landlord's share of the marriage value is taken to be 50% of that sum.

(c) Finally, additional compensation for loss arising out of the grant of the new lease under paragraph 5; as there is no additional compensation in this case no more need be said about this element of the premium.

22. Paragraph 6 secures the right of the owner of any intermediate leasehold interest to receive payment from the tenant for its interest. The amount payable is the aggregate of the diminution in the value of the intermediate leasehold interest determined in accordance with paragraph 7 and compensation for any additional loss arising out of the grant of the new lease.

23. Paragraph 7 directs that the diminution in value of any intermediate leasehold interest is the difference between the value of that interest before and after the grant of the new lease. Each of those values is to be determined in accordance with paragraph 8, which applies the same open market valuation hypothesis (found in paragraph 3(2)) as is used to ascertain the value of the landlord's interest, with appropriate modifications to reflect the fact that the intermediate interest is subject to the tenant's lease and any other leases intermediate between it and the tenant's lease.

The division of the landlord's share of marriage value

24. It will be noted that the calculation required by paragraphs 6 and 7 of the sum payable by the tenant to the owner of an intermediate leasehold interest does not include any payment in respect of marriage value. That is because marriage value has already been accounted for in the single calculation directed by paragraph 4 to determine the sum payable by the tenant to the landlord; that sum includes the landlord's share of the marriage value attributable to all interests in the tenant's flat (whether belonging to the landlord or not), including intermediate interests. The function of paragraph 10 is to apportion that share between the landlord and the holders of intermediate leasehold interests in the tenant's flat.

25. Paragraph 10(2) is the focus of this appeal. It applies in any case in which there are intermediate interests and the premium payable by the tenant in respect of the grant of the new lease includes an amount in respect of the landlord's share of the marriage value. That will not be all cases including intermediate interests, as no marriage value is payable where the unexpired residue of the tenant's existing lease is more than eighty years.

26. Paragraph 10(2) describes how the landlord's share of marriage value is to be apportioned, as follows:

> "10(2) The amount payable to the landlord in respect of his share of the marriage value shall be divided between the landlord and the owners of such intermediate interests in proportion to the amounts by which the values of their respective interests in the flat will be diminished in consequence of the grant of the new lease."

27. Paragraph 10(3) then explains how the respective diminutions in value are to be ascertained for the purpose of the comparison required by paragraph 10(2):

> "10(3) For the purposes of sub-paragraph (2) –
>
> (a) the amount by which the value of the landlord's interest in the flat will be so diminished is the diminution in value of that interest as determined for the purposes of paragraph 2(a);
>
> and
>
> (b) the amount by which the value of any intermediate leasehold interest will be so diminished is the diminution in value of that interest as determined for the purposes of paragraph 6(a)."

As already noted above, paragraph 2(a) and 6(a) each require the assessment of diminution in value by the application of the same open market valuation hypothesis found in paragraph 3(2) before and after the grant of the new lease.

The proceedings

28. On 17 October 2014 BREC gave notice under section 42 of the Act exercising its right to claim a new lease of the Flat and the Parking Space. By a counter-notice given on 16 December 2015 Portland, as competent landlord, admitted that entitlement in principle but made a counter-proposal in respect of the premium payable for the new lease.

29. On 17 February 2015 Starlight exercised its entitlement to be separately represented in any subsequent proceedings to determine the premium payable on the grant of the new lease. Separate representation is generally only required where there is a disagreement between the competent landlord (in this case Portman) and the owner of an intermediate interest (Starlight).

30. At first, no agreement was reached on the terms of acquisition of the new lease, and BREC duly applied to the FTT under section 48 of the 1993 Act for a determination of the terms of acquisition.

31. By the time the application came to be heard it had been agreed that the premium payable by BREC would be "in the region of £246,882" (I assume a precise

figure has subsequently been agreed). As a result, BREC played no part in the hearing of the application.

32. The dispute before the FTT was not about the amount of marriage value, 50% of which is payable to the landlords. That sum could be determined as a matter of arithmetic from the other agreed valuation inputs. Although the marriage value figures calculated by the parties differed by a few pounds, it was accepted by Mr Gallagher at the hearing of the appeal that the higher of the two figures should be adopted and that the landlord's share of the marriage value was £128,162. The matter in dispute was how that sum was to be apportioned between Portman and Starlight.

33. Each party relied on the evidence of an experienced valuer: Mr French MRICS for Portman and Ms Ellis FRICS for Starlight.

34. In his report Mr French valued the diminution in value of Portman's and Starlight's interests in the Flat and the Parking Space separately, in each case using the valuation criteria in paragraph 3(2) of Schedule 13. He then used those separately determined values to ascertain the marriage value referable to the Flat and, separately, the Parking Space, from which he derived the landlord's 50% share of the marriage value. Having valued separately the diminution in value in the parties' respective interests, Mr French then kept those interests separate when determining how the landlord's share of marriage value fell to be divided.

35. Ms Ellis had originally undertaken a single calculation, treating the Flat and the Parking Space as if they were held under a single lease. Having seen Mr French's evidence she provided a supplemental report in which she calculated the diminutions in value separately for each party's interest in the Flat and in the Parking Space. Having calculated separate diminutions in value and having ascertained the total marriage value and the landlord's share, Ms Ellis then undertook a single calculation, treating the separate interests as if held under a single lease, to determine how the landlord's share of the marriage value fell to be divided between Portman and Starlight.

36. Thus, the issue for the FTT was whether, both experts having treated the Flat and Parking Space separately for the purpose of determining the diminution in value of the parties' respective interests, Mr French was right to continue to keep the interests separate when calculating how the landlord's share of the marriage value was to be divided, or Ms Ellis was right at that stage to treat the separate interests as if they were held under a single lease. To determine that issue the FTT was required to construe paragraph 10(2) of Schedule 13.

The FTT's decision

37. At paragraph 26 of its decision the FTT recorded that the only issue for determination was the division of the landlord's share of marriage value. As the

parties' experts had agreed all of the valuation inputs, the application of paragraph 10(2) to those inputs would enable the amount payable to Starlight in respect of its intermediate interests to be calculated.

38. The FTT approached that issue by considering first whether paragraph 10 required that the separate underleases of the Flat and the Parking Space, which jointly comprise the property comprised in the new lease should be treated as a single, composite lease for the purpose of valuation. The FTT answered that question affirmatively, accepting the argument of Mr Gallagher on behalf of Starlight that the effect of section 7(6) was that the underleases were required to be treated as if they were a single lease of the Flat and the Parking Space. As a result the reference in paragraph 10(2) to the interests of the landlord and the owners of intermediate interests "in the flat" meant their interests in the Flat and the Parking Space. The tribunal described that construction of paragraph 10(2) as both its literal construction and as simple, clear and certain.

39. The second matter which the FTT considered was whether marriage value should be assessed, and then apportioned, in separate calculations for the Flat and for the Parking Space, or by one composite calculation. The significance of that choice was said to be that the outcome would influence the outcome of the apportionment of the landlord's share of the marriage value. I will explain why that is so shortly.

40. The FTT again accepted the argument of Mr Gallagher on behalf of Starlight and adopted the single assessment approach to the calculation of marriage value which had been put forward in the evidence of Ms Ellis. It explained its reasons in paragraphs 52 to 54 of its decision, as follows:

> "52. Taking paragraphs 4(2) and 10(2) together, the tribunal concludes that paragraph 4(2) requires there to be one marriage value figure, calculated in a straightforward way, by finding the difference in two aggregate values, before and after the grant of the new lease; and the literal wording of paragraph 10(2) is to look at the marriage value in total, as one "amount" in the singular; not as separate elements. In the tribunal's view, Mr French wrongly calculates two separate marriage values – one for the flat on its own and another for the parking space – which he then aggregates. That would be the correct approach if the parking space were another flat, but it is not: It is appurtenant property to flat 70; and the tribunal accepts that flat 70 and parking space 30 are <u>one</u> "flat" for valuation purposes.
>
> 53. The tribunal also accepts that in the present case such an approach results in a dilution of the landlord's shared marriage value under the Act. This might be at variance with what may occur in an open market negotiation, but that is what paragraphs 4 and 10 of schedule 13 direct.
>
> 54. Mr Fieldsend says that paragraph 10(2) does not express the denominator for the apportionment of the landlord's marriage value. However, the tribunal disagrees. There is in effect a denominator in the formula set out in paragraph

10(2). The division of marriage value is to be "in proportion" to the amounts by which the values of the landlord's and intermediate landlords' interests in the flat will be diminished in consequence of the grant of the new lease. The diminutions in value in the present case are those of Portman and Starlight in the flat including the parking space. The words "in proportion" can only mean a ratio: a ratio of those diminutions in value as against each other."

41. The FTT also rejected a submission on behalf of Portman that to interpret paragraph 10(2) in the manner contended for by Starlight and accepted by the tribunal would offend Article 1 of the First Protocol of the European Convention on Human Rights and, for that reason, Portman's alternative approach should be adopted. The tribunal held that the provisions dealing with marriage value removed a landlord's right to full compensation in the interests of simplicity (by removing any entitlement for where the existing lease was for more than eighty years, and by deeming that in all cases the landlord's share was 50%). The formula in paragraph 10(2) for the apportionment of the landlord's share of marriage value reflected the same preference for simplicity and certainty "even though it might, at the same time, be seen as diluting the landlord's interest in the marriage value in the present case.

Why the method of apportionment matters in this case

42. Neither the total landlords' share of the marriage value, which is agreed to be £128,162, nor the amount of the diminution in the value of the respective reversionary interests in the Flat and the Parking Space on the grant of the new lease, will be influenced by the approach taken to apportionment. Nevertheless the rival methods of apportionment produce significantly different results. In the circumstances of this case the approach of determining one marriage value figure for the flat and the appurtenant property and then carrying out a single apportionment calculation, which was preferred by the FTT, happens to favour the owner of the intermediate interest, Starlight, but that will not always be the case. Different circumstances may produce an outcome which gives the intermediate landlord a smaller share of the marriage value than would be produced by adopting separate calculations for the marriage value attributable to the flat and the appurtenant property.

43. The difference in outcome of the two approaches for the owners of the freehold and the intermediate interests is a consequence of important differences between their respective reversionary interests in the Flat and the Parking Space. As Mr Gallagher explained, it is not just that the Flat is more valuable than the Parking Space. It is also that the values of the parties' respective interests in both the Flat and the Parking Space reflect, on the one hand, the entitlement of Starlight to receive the rents under the current occupational leases, which differ between those leases, and on the other hand Portman's entitlement to possession on the expiry of the occupational leases and (three days later) the intermediate interests in 2087.

44. The occupational lease of the Flat reserves only a modest ground rent, payable to Starlight as intermediate landlord; thus, the reversionary value in the Flat largely comprises the deferred value of the future right of possession (which will accrue to

Portman as freeholder). The value of Starlight's interest in the Flat is the capitalised value of the rents, which is agreed to be £1,993. The value of Portman's reversion is agreed to be £79,365.

45. The relative values of the parties' respective interests in the Parking Space are rather different. The Parking Space is let under the existing occupational lease at a market rent of £2,500 pa with five-yearly rent reviews. As the landlord entitled to receive that rent, the value of Starlight's intermediate leasehold interest in the Parking Space is therefore considerable, and is agreed to be £35,424. In contrast, the deferred value of Portman's right to possession of the Parking Space in 2087 is agreed to be the much more modest sum of £2,915. On the grant of the extended lease the value of Starlight's intermediate lease will be reduced to nil, as it will no longer be entitled to receive a rent.

46. Because of these differences, the relationship between the diminution in value of the parties' respective interests in the Parking Space is not the same as the relationship between the diminution in value of their respective interests in the Flat. Nor is either relationship the same as the relationship between the diminution in value of their respective interests in the Flat and the Parking Space considered together. As a result of the different characteristics of the leases of the Flat and the Parking Space, whether the apportionment of the landlord's total share of marriage value is undertaken on a composite basis or separately makes a significant difference in this case.

47. If the marriage value is calculated and apportioned (by reference to the diminution in the value of the parties' respective interests) separately for the Flat and the Parking Space, Starlight will be entitled to 92.48% of the (smaller) marriage value attributable to the Parking Space, and only 2.479% of the (larger) sum attributable to the Flat; in aggregate these two figures total £30,943, leaving the remaining £97,219 for Portman.

48. If a single calculation approach is adopted Starlight will receive 31.608% of the landlord's share in the total marriage value, a sum of £40,407, leaving only £87,755 for Portman.

The appeal

49. On behalf of Portman Ms Gibbons submitted that the FTT had been wrong to conclude that the direction in section 7(6) to treat two or more leases as a single lease required the valuation exercise under Schedule 13 to be conducted as if there was a single lease with a single reversion. The Act did not require that approach and in principle it was appropriate to undertake the apportionment as it would be undertaken in the open market, and reflecting the reality of the existence of separate leases of the Flat and the Parking Space.

50. The FTT's focus on section 7(6) was described by Ms Gibbons as a red herring, and she accepted that Chapter II applied to Starlight's separate underleases of the Flat

and the Parking Space as if they were a single lease. In her submission section 7(6) was mainly an anti-avoidance provision with a subsidiary function in Chapter II as the route by which appurtenances let separately could be included in the new lease. But the section made no difference to how the landlord's share of marriage value should be divided in accordance with paragraph 10(2) for two reasons. First, because paragraph 10(2) made no reference to the existing lease and was concerned only with the landlord's interest, and secondly because to treat the Flat and the Parking Space as if they were held on a single lease does not require that they be treated as having a single reversion. As Mr Gallagher was subsequently inclined to concede, section 7(6) is concerned only with the tenant's interests and does not require any counter-factual assumption about how the interest of the landlord is held. Its effect in this case is that it must be assumed for the purpose of Chapter II that the Flat and the Parking Space are held under a single lease but with a split reversion.

51. Ms Gibbons next drew attention to the fact that, when determining the diminutions in value of the parties' respective interests, as required by paragraphs 2(a) and 6(a) of Schedule 13, which in each case directed an assessment in accordance with paragraph 3, in practice the interests in the Flat and the Parking Space were valued separately. The experts had agreed that separate valuations were permissible, as the FTT noted. It was Mr French's evidence, which was not challenged and was acknowledged in paragraph 53 of the decision, that that was also the approach which would be taken in a negotiation to divide marriage value in the open market. Each landlord would expect a share of the marriage value released on the grant of a new lease to the tenant, and would negotiate for a division which reflected the contribution to the total marriage value made by their interest. That being the case, it was inconsistent to insist on dividing the landlord's share of marriage value by reference to the aggregate diminution in value of the interests in both the Flat and the Parking Space taken as a single unit. Nor was there anything complicated, unclear or uncertain in reflecting the open market practice when applying paragraph 10(2) since the rival approaches were simply different arithmetical exercises.

52. Ms Gibbons therefore submitted that although paragraph 4 directs the calculation of a single figure for marriage value, where the values which go into that calculation derive from different properties the marriage value attributable to each of them should be determined separately before being aggregated to arrive at the total figure to be divided between all interested parties. Once that total figure has been identified and the landlord's 50% share calculated, there should be no objection in principle to reverting to the component valuations for the purpose of dividing the landlord's share. Paragraph 10(2) did not prevent that approach, and it was consistent with the open market hypothesis on which the valuation exercise was based.

53. If section 7(6) required a counterfactual assumption that the Flat and the Parking Space were held on a single lease with a single reversion, Ms Gibbons suggested that paragraph 3(4) of Schedule 13 nonetheless permitted the making of any "appropriate assumption" in determining the amount which any interest would be expected to realise on a sale in the open market. If an interest in the Flat and the Parking Space would be valued in the open market as if they were two separate interests, it would be

appropriate, Ms Gibbons said, to value them separately for the purpose of Schedule 13.

54. These submissions on the proper construction of paragraph 10(2) were supplemented by Ms Gibbons with a reference to section 3 of the Human Rights Act 1998 and the requirement to construe any statutory provision in a manner which was compatible with the European Convention on Human Rights, and in particular with Article 1 of the First Protocol. The effect of the FTT's approach was, she submitted, to dilute Portman's share of the marriage value in a manner at variance with what may occur in the open market. That interference was contrary to Article 1 and should be avoided, and instead paragraph 10(2) should be interpreted "with the grain of the statute" to provide fair compensation.

55. The Tribunal was referred to *Ghaidan v Godin-Mendoza* [2004] 2 AC 556, [25-35] for the basic principles of construction in the light of section 3 of the 1998 Act. Any interference with the peaceful enjoyment of possession, of which the right of a tenant to require his landlord to grant him a further 90 year was an example, must strike a fair balance between the means employed in furtherance of the general interest identified and the protection of the individual's fundamental rights: *James v United Kingdom* (1986) 8 EHRR 123, [50]. She emphasised that she intended no wholesale attack on the statutory scheme for valuation on the grant of new leases under Chapter II, but a focused assault on the interpretation of paragraph 10(2) accepted by the FTT, which failed to strike a fair balance. Moreover, that paragraph was concerned only with the division of the premium payable by the tenant, and not with the quantification of that premium or the rights conferred on tenants, which were the primary focus of the statutory provisions.

56. The counter-factual treatment of separate leases as if they were a single lease for the purposes of the valuation exercise was arbitrary, Ms Gibbons suggested; as such it was a breach of Article 1: *Papachelas v Greece (1999) 30 EHRR 923*. The breach could be remedied by not treating the interests as if held under a single lease.

Discussion and conclusion

57. Paragraph 10(2) requires that the amount payable to the landlord in respect of his share of the marriage value is to be divided between the landlord and the owners of intermediate interests "in proportion to the amounts by which the values of their respective interests in the flat will be diminished in consequence of the grant of the new lease."

58. As Mr Gallagher emphasised, the effect of section 62(2), which provides that references to a flat include references to its appurtenances, is that in this case the landlord's share of marriage value is to be divided between Portman and Starlight in proportion to the amounts by which the values of their respective interests in the Flat (including the Parking Space) will be diminished in consequence of the grant of the new lease.

59. On first considering paragraph 10(2) it seemed to me to be clear that it requires the identification of the relationship between the diminution in value of the intermediate leaseholder's interests in the Flat (including the Parking Space) as a result of the grant of the new lease and the diminution in the value of all landlords' interests in the Flat (including the Parking Space) as a result of that grant. In the case of each landlord, whether competent or intermediate, this relationship or ratio can be expressed as a fraction in which the denominator is the total diminution in the value of all of the landlords' interests in the Flat (given its extended meaning) and the numerator is the diminution in that landlord's interest or interests.

60. The paragraph struck the FTT in the same way, and for the same reason, namely because the Flat includes the Parking Space. In paragraph 39 of its decision the FTT said that cumulatively, sections 62(2), 101(7) and 7(6) direct the reader of the Act to understand that where a flat and appurtenant property are held on separate leases they are to be treated as one single lease. That is now common ground on the appeal (although it was not before the FTT) and I agree that paragraph 7(6) is not simply an anti-avoidance provision but carries through into all references to the Flat, including those in Schedule 13.

61. It is also now common ground, and again I agree, that paragraph 10(2) is concerned only with the relative diminution of the value of the interests of each landlord or intermediate landlord in the Flat and Parking Space. To that extent section 7(6), which is concerned with the treatment of the tenant's interest, is not determinative of the issue in this appeal. What is determinative is that paragraph 10(2) clearly requires a comparison by reference to the reversionary interests in the flat including its appurtenant property viewed as a single parcel of property; the flat and appurtenances may be held separately, but there must nevertheless be identified a single relationship or ratio of the diminution in value of all interests. That requirement precludes the exercise undertaken by Mr French of ascertaining and comparing the diminutions in value of the separate parts of the property to be comprised in the new lease.

62. Portman's reversionary interest is in the whole of the freehold interest in the Flat (including the Parking Space). The diminution in the value of that interest, by however many steps it is calculated, is a single figure which paragraph 10(2) requires should be compared to the total diminution of the interests of all landlords in the Flat and Parking Space to determine Portman's share of the marriage value. To make a different comparison, of the diminution in value of the Flat alone and the Parking Space alone is to undertake an exercise which is different from the one required by paragraph 10(2). To make that comparison, and then to apply the resulting ratios to marriage values ascertained separately for the Flat and for the Parking Space would also be inconsistent with the marriage value being a single sum calculated in accordance with paragraph 4, and with the landlord's 50% share of the marriage value necessarily also being a single sum.

63. I am not persuaded that this single comparison approach is in any way inconsistent with the requirement to ascertain the diminutions in value of the interests

of the landlord and the holders of intermediate leaseholds by reference to a sale of their respective interests in the open market. It is undoubtedly the case that paragraphs 2(a), 7(1) and 8(1) require the diminutions in value of the parties' respective interests to be ascertained by an open market valuation in accordance with paragraph 3(2), but the exercise required by paragraph 10(2) is not in any sense a valuation – it is a purely arithmetical process to derive ratios between given amounts (and for that reason there is no room to introduce any additional "appropriate assumption" such as is permitted by paragraph 3(4) when valuing the parties' interests). The valuation techniques to be employed to determine the open market value of reversionary interests in a flat and appurtenances held under a single lease but with separate reversions are not prescribed by the statute, but once the necessary valuations have been undertaken and the results assembled, paragraph 10(2) leaves no doubt about how they are to be employed in the division of marriage value and is not concerned with how a comparable exercise would be approached in an open market negotiation.

64. Therefore, while I agree with Ms Gibbons that there would be nothing complicated, unclear or uncertain in an apportionment conducted as Portman suggests, it is not what paragraph 10(2) requires.

65. I am also satisfied that reference to Article 1 of the First Protocol does not strengthen Portman's case. It has been held consistently that statutory rights of enfranchisement are compatible with Article 1: *Earl Cadogan v Sportelli* [2010] 1 AC 226 (HL) [47]-[48]; *James v United Kingdom* (1986) 8 EHRR 123. The valuation provisions of the 1993 Act have been considered by this Tribunal and not found incompatible in *Cooper-Dean Charitable Foundation v Greensleeves* case [2015] UKUT 320 (LC), [34]-[47] and in *Money v Cadogan* [2013] UKUT 2011 (LC), [77]-[78]. It is true that this case is concerned not with the sum payable by the tenant for the new lease, but with the apportionment of part of that sum between landlords, but that does not seem to me to be a difference of significance in the context of Article 1.

66. Parliament could have directed that the landlord's share of marriage value was to be be divided amongst those entitled to a share in it in proportion to the contributions which their respective interests made to the total marriage value. But it did not do so. It chose instead to make the relative damage sustained by the parties' in respect of their original interests the measure of their entitlement. As a result of paragraphs 2(a) and 6 both landlords are fully compensated for the diminution in the value of their respective interests as a result of the grant of the new lease. As no marriage value would have been released but for the exercise of the tenant's statutory right to require a new lease, and as the creation of the new lease gave rise to the damage to the parties' respective interests, it does not seem to me to be irrational or arbitrary to divide the marriage value in proportion to the damage sustained. It is an approach falling within the wide margin of appreciation afforded to signatories to the Convention.

67. It follows that I am satisfied that the FTT came to the correct conclusion on the effect of paragraph 10(2) and the appeal is dismissed.

68. There is no dispute between the parties to the appeal, or between them and BREC, over the total premium payable on the grant of the new lease, which is £246,882. The landlord's share of marriage value is also agreed at £128,162. In the light of this decision, that sum is to be divided so that Portman receive £87,755 and Starlight receive £40,407.

Martin Rodger QC,
Deputy President

1 November 2016