

ENFRANCHISEMENT

by

Anthony Radevsky
Falcon Chambers

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Anthony Radevsky has been a member of Falcon Chambers for over 10 years, specialising in the law of landlord and tenant and real property. He has over 110 reported cases (including 3 in the House of Lords and more than 40 in the Court of Appeal), In 2008, he appeared in two enfranchisement cases in the House of Lords, *Boss Holdings v Grosvenor* and *Howard de Walden Estates Ltd v Aggio*.

Chambers & Partners 2009 says "When it comes to leasehold enfranchisement, there is no doubt that Anthony Radevsky is "the absolute leader in this field". He has handled a number of highly significant valuation cases, in addition to arguing *Boss Holdings v Grosvenor* in the House of Lords and acting on behalf of the tenants in the largest enfranchisement claim made to date, valued at £100 million. Clients love the "wonderful chemistry" you get when working with him."

He is the co-author of *Hague on Leasehold Enfranchisement*, the 5th edition of which is due to be published in June 2009, and of *Tenants' Right of First Refusal*, the 2nd edition having come out last year.

FALCON CHAMBERS

Falcon Court
Temple
London EC4Y 1AA

Telephone: 020 7353 2484
Fax: 020 7353 1261
Email: radevsky@falcon-chambers.com
Website: www.falcon-chambers.com

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Picture Quiz

Definition of “house” in s. 2 of the Leasehold Reform Act 1967:

2.— Meaning of “house” and “house and premises”, and adjustment of boundary.

(1) For purposes of this Part of this Act, “house” includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and—

(a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate “houses”, though the building as a whole may be; and

(b) where a building is divided vertically the building as a whole is not a “house” though any of the units into which it is divided may be.

(2) References in this Part of this Act to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house.

Delegates were asked whether 11 properties, which were described briefly, and of which photographs of the exterior were provided, had been held by the courts to be houses within the meaning of the 1967 Act. A prize was awarded to the winner.

Talk

It is remarkable that, in an era following the relaxation of the rules relating to enfranchisement of flats and houses, litigation continues unabated.

This can best be shown by the fact that between January 30 2008 and December 10 2008, a period of less than 11 months, the House of Lords delivered 4 judgments on

enfranchisement appeals (*Boss Holdings Ltd v Grosvenor West End Properties* [2008] 1 WLR 289, *Majorstake Ltd v Curtis* [2008] AC 787, *Howard de Walden Estates Ltd v Aggio* [2009] 1 AC 39, *Cadogan v Pitts and Sportelli* [2009] 2 WLR 12). The House of Lords only hears appeals which raise a point of law of general public importance, which average about 60 cases a year over the whole of the United Kingdom. In the 40 years of enfranchisement prior to the *Boss Holdings* judgment¹, the House of Lords heard a total of only 7 appeals on this topic².

Normally, a House of Lords decision is the last word on the problem before their Lordships. In the case of none of these 4 recent appeals can it be said that the decisions have completely clarified the areas they were dealing with.

Perhaps I can mention the areas which look set for further litigation following their decisions.

In *Boss Holdings*, a case concerning the meaning of a “house”, Lord Neuberger tantalisingly left open the question, at the end of his speech, whether a building originally designed as a house, remains properly described as “designed for living

¹The Leasehold Reform Act 1967 came into force at the beginning of 1968.

²*Parsons v Henry Smith* [1974] 1 WLR 435, *Jones v Wrotham Park Estate* [1980] AC 74, *Tandon v Spurgeons Homes* [1982] AC 755, *Johnston v Duke of Westminster* [1986] AC 839, *Dixon v Allgood* [1987] 1 WLR 1689, *Malekshad v Howard de Walden* [2003] 1 AC 1013, *Shalson v John Lyon* [2004] 1 AC 802.

in” (within the meaning of s. 2(1) of the 1967 Act) if it has been substantially altered by the date of claim. He hinted that his view was that it would not. In the most recent case on the subject, *Grosvenor Estates Ltd v Prospect Estates Ltd* [2008] EWCA Civ 1281, the trial judge (His Honour Judge Dight) held that subsequent alterations could change the design for this purpose, but on the facts these had not been sufficient, i.e. he disagreed with Lord Neuberger’s hint. The Court of Appeal held, reversing the trial judge, that the building was not a house reasonably so called, because 88.5% of it could only lawfully be used as offices, with the only permitted residential part being a small flat on the top floor which had to be occupied by someone connected with one of the office uses. The terms of the lease preventing residential use in the great majority of the premises was the decisive factor. In the case of *Tandon v Trustees of Spurgeons Homes* (above), Lord Roskill, giving the majority’s judgment in the leading House of Lords case had said that the terms of the lease were a relevant factor. The *Prospect* case is of interest, not least because it is the first reported case where it has been held that a building is not a house reasonably so called. The tenant petitioned the House of Lords for leave to appeal, but was withdrawn before being heard.

Prospect Estates Ltd was only able to launch an enfranchisement claim at all because of the abolition of the general residence test by the Commonhold and Leasehold Reform Act 2002. It did not have to satisfy the limited residence test

now applicable in two exceptional cases, because it did not occupy the premises for business purposes, and did not sub-let the flat on a long lease.

The abolition of the residence test (a complete abolition in claims under the 1993 Act) was the trigger for the cases heard by the House of Lords in the *Aggio* case. The House held that a lessee of premises containing a flat was a qualifying tenant of the flat even though its lease demises other property. The other property may comprise common parts, business premises or other flats. The lessee is entitled to claim a new lease of each of his flats under Chapter 2 of the 1993 Act. The restriction which still applies is that, if more than two flats are held, then the tenant cannot make a collective enfranchisement claim³.

The landlords' main argument in the *Aggio* appeals was that practical difficulties in deciding the terms of the new lease militated against the tenant's construction of the statute. Take a case whether the tenant held a headlease of a building containing numerous flats, and claimed a new lease of a single flat. The headlease is a full repairing and insuring lease. Some of the flats are underlet on long leases; others are sublet on assured shorthold tenancies. The head lessee's claim for the new lease is made in respect of one of the flats let on an AST⁴. The grant of the new lease

³Section 5(5) of the 1993 Act.

⁴In the case of a flat held on a long underlease, it is only the underlessee who is the qualifying tenant: s. 5(4) of the 1993 Act.

would leave the remainder of the headlease in existence. The House of Lords considered that any practical problems were not such as to displace the prima facie meaning of the words of the 1993 Act. They considered that, in a case such as I have described, the existing repairing and service charge structure could be preserved while the headlease exists. After it expires, the flat lessee could pay a service charge, with the freeholder undertaking repairing and insuring liabilities for the block. As one of the counsel for the tenants, who sought to play down the difficulties, it remains to be seen what solutions are put into place in practice. These thoughts of Lord Neuberger are, I would suggest, only suggestions, and it is up to the parties or the LVT to devise practical solutions in different cases. This could be a tricky exercise.

In *Majorstake v Curtis*, the issue was a narrow one, which has not arisen much in practice, and it is perhaps surprising to some that the House of Lords saw fit to grant leave to appeal in the first place. The landlord sought to resist a claim for a new lease of a flat on the ground that it intended to redevelop premises in which the flat was contained. The flat was on a 7th floor of a large block. The landlord's intention was to combine the tenant's flat with the one immediately beneath to form a duplex apartment. Whereas the Court of Appeal, by a majority (including Neuberger L.J.) found for the landlord, the House of Lords unanimously reversed the decision in favour of the tenant. They held that the premises containing the flat

meant the whole block of flats, and the work to combine two flats into one was did not involve a substantial part of those premises. It was not for the landlord to define the premises of which the flat formed part by the nature of what he proposed to do.

What is not clear from the judgments is whether the result would have been the same had the landlord proposed to redevelop the entire floor of the building containing the tenant's flat. Although the tenant had conceded that would be sufficient, the law lords were unconvinced that that was correct, and several different views were expressed. The decision is, perhaps, of more interest to landlords in the context of s. 61 of the 1993 Act, which is more frequently referred to than s. 47. That provision allows the landlord to terminate a new lease for the purposes of redevelopment at the end of the original term. The redevelopment test is expressed in exactly the same terms as the one in s 47. The s. 61 termination right is relied on by landlords to support an argument that they would be able to convert a house divided into flats back into a house at the expiry date of the original lease. *Majorstake* will be applicable where the landlord intends to convert the whole building back into a single house and substantial structural work is intended, but works to a lesser part of the building would seemingly be insufficient.

The most recent House of Lords decision was *Sportelli*. The ultimate appeal was concerned solely with hope value, the prospect of the freeholder being able to do a deal in the future with the sitting tenant or tenants to extend the lease or sell the

freehold. The existence in the real world of hope value was not in issue. The question was whether its recovery was permissible in an enfranchisement claim where the tenant was the person acquiring the freehold and paying marriage value where appropriate). Their Lordships were unanimous in rejecting the recovery of hope value in claims relating to houses under the 1967 Act and individual new flat lease cases. They were satisfied that the payment of marriage value was inconsistent with the recovery of hope value in addition; that would amount to double counting. The position was more difficult in the case of a collective enfranchisement claim where not all of the long lessees were participating. Lord Neuberger was scathing about the draughtsmanship of the 1993 Act, which he described as “inept” (paragraph 111), unfair on landlords who are being deprived of their property and on residential tenants, the very people who are intended to benefit from the legislation. Despite a powerful dissenting speech from Lord Hoffmann, the majority held that hope value could be recovered in respect of non-participating tenants’ flats. Lord Hoffmann pointed out that the Neuberger solution was not put forward in any of the parties’ written cases.

A clear preference was expressed for calculating hope value as a separate figure, a proportion of marriage value, rather than, say, adjusting the yield (Lord Neuberger at paragraph 69). However, the amount of hope value in the appeal cases was not before the House of Lords, and presents interesting questions. The level of

marriage value varies with the unexpired term. At say 70 years unexpired it is small, but increases and reached a peak at around 35 years, and then declines as the lease shortens. Consequently, if one is going to take as hope value a proportion of marriage value calculated at the valuation date, that proportion will surely depend to some extent on the unexpired term. The 1993 Act presumes an open market sale of the freeholder's interest, and so the hope value will depend on what would be paid as hope value on the open market. Unfortunately, given that, in the open market, all long flat lessees have 1993 Act rights, and given that these must be ignored in carrying out a valuation under the Act, the evidential exercise is particularly difficult.

The other point left open by the Lords in *Sportelli* concerns hope value in the value of the tenant's lease. This was referred to in Paragraph 93 of Lord Neuberger's speech on s. 9(1A) of the 1967 Act. He thought it might be unfair if the landlord is precluded from seeking hope value in circumstances where the tenant's interest included it. While, as a matter of principle, under s. 9(1A), the valuation of the landlord's interest should not include hope value "if it could be shown that the valuation of the tenant's interest included hope value and that this was illogical and unfair on the landlord, then an adjustment would have to be made." I confess it is not clear to me how this could be shown and what adjustment would have to be made. The same comment was not made about the value of the tenant's interest in

1993 Act claims. It is difficult to see how the tenant's interest could include an additional amount hope value; landlords are not known for being generous to tenants in negotiations outside the Acts.

The problem of having to value while ignoring 1993 Act rights now runs throughout the valuation process in enfranchisement cases. The Lands Tribunal has developed a formula for determining the deferment rate based on financial evidence, having rejected the approach of looking at market evidence because it is tainted. In assessing marriage value, market transactions of shorter leases are similarly affected by 1993 Act rights and are regarded as unreliable as a result. This seems unfortunate, given the amount of market evidence of the sale of ground rent portfolios available. All that is required is a notional adjustment for statutory enfranchisement rights, which can sometimes be agreed by valuers.

Discussion Points

1. Relativity in Valuation

In *Nailrile v Cadogan* [2009] PLSCS 31, the Lands Tribunal had to consider relativity. The Tribunal's conclusion was not entirely helpful for future cases. Graphs of relativity may be used, as may evidence of transactions (doing the best one can, given that they take place in the real world). There is no firm guidance as to the correct adjustment to make to real world

transactions to reflect 1993 Act rights, nor as to which graph is preferable. The RICS has set up a working party. It has not yet reported, and seems unlikely to produce a single graph, given the different views of experts in the field. One may hope, however, that it will provide clear evidence as to how the various graphs and tables in circulation were compiled, so that their reliability can be taken into account.

2. Notices – proposed figures

One area which seems to have settled down concerns challenges to the validity of notices, where the recipient claims that the price quoted is either far too high or far too low. First case - Court of Appeal in *Cadogan v Morris* [1999] 1 EGLR 59, where a nominal proposed premium of £100 rendered a s. 42 notice void, in a claim concerning involving a 6-figure premium. The fact that such an extreme figure was regarded as obviously on the wrong side of the line obscured the principle as to where the line should be drawn. Subsequently it was suggested that the proposal should be justified by valuation evidence, a test which was not based on anything in the statute. The latest Court of Appeal case - *9 Cornwall Crescent London Ltd v Kensington & Chelsea RLBC* [2006] 1 WLR 1186 indicates that a test of good faith is all that is required. An opening shot in negotiations is a proposal put forward in good faith.

3. Signature

The signature of notices has taken over as a source of problems. It has been held in the county court that a limited company tenant can only sign a s.13 or s. 42 notice by executing it in accordance with Companies Act requirements: *City & Country Properties Ltd v Plowden Investments Ltd* [2007] L & TR 15. This would require the company seal to be affixed, or for two directors or a director and the company secretary to sign. The Act does not require the notice to be “executed”, only signed. There is, by contrast, in s. 34(1) of the Act, reference to a conveyance being “executed”. Given that a company is an artificial person, and therefore can only sign by instructing a human being to do so, suggest that a duly authorised person can sign a notice on the company’s behalf. However, unless and until the *Plowden* decision is overruled, it would be safer for companies to execute notice in accordance with Companies Act requirements.

4. What must be signed?

In *Cascades and Quayside Ltd v Cascades Freehold Ltd* [2008] L & TR 23,

the Court of Appeal held that an initial notice was not validly signed when the tenants had not seen the initial notice but signed blank signature pages in advance of the notice being drafted. The notice was drafted and compiled with the signature sheets added later by the tenants' agent. The decision on those facts is understandable. However, what should the tenants' advisers do when faced with a large block of flats, with many lessees not living there? It would be impracticable to send a single notice round the world, perhaps over a period of many months, to collect the various participating tenants' signatures. Is the current practice, of having separate signature sheets forming part of the final notice unobjectionable, provide the tenant signing the notice has a copy of the notice in front of him? The signature sheets can be compiled with the top copy of the notice and served on the landlord. One area remains unclear, and in *Cascades* the Court of Appeal declined to give any guidance - the extent to which the initial notice must be completed by the time the various tenants sign their signature sheets. For example, the notice must specify a date for service of the landlord's counter-notice, which must be not less than 2 months after service of the initial notice: s. 13(3)(g), (5). Since the initial notice will take an unknown time to be circulated to and

signed by the various participating tenants, the version seen by the tenants will not be able to contain that date. It cannot be the case, I would suggest, that the initial notice is not validly signed merely because that date is inserted later. A more difficult problem concerns the proposed price. Marriage value is payable only in respect of participating tenants' flats, so until it is known how many participants there will be, a final figure cannot be calculated. If it is intended to include as the tenants' proposal an accurately calculated figure, that cannot be done until it is seen how many tenants actually sign up, which provides a problem of circularity. Presumably in most cases the approximate number of participants will be established before the notice is sent out for signature. The proposed price can be inserted on the basis of a low number of participants, in case some decide not to sign up. That would be bona fide, and would not invalidate the notice. In due course, when negotiations with the landlord take place, the actual number of participants will be known and the marriage value figure will be clarified. Is the initial notice likely to be held to be invalid if no figure is inserted at the time when the tenants sign it?

5. Deemed withdrawal – terms agreed

Care must be taken once the terms of acquisition in a 1993 Act claim have been either (i) agreed, or (ii) finally determined by a tribunal, or (iii) determined partly by agreement and partly by a tribunal. Once this has occurred, the Act provides a period of 2 months for a contract to be entered into (collective) or a new lease to be granted. If that is not done, there is a further period of 2 months to apply to the county court for a vesting order, failing which the initial notice/ s. 42 notice is deemed withdrawn: s. 24(3)-(6), s. 48(3)-(6). This is obviously problematic, and can lead to a claim being made to the solicitor or other professional representing the tenants. There are no forms of prescribed notice under the Act containing warnings that this may happen. It should also be noted that once an application is made to the LVT to determine terms (under s. 24(1) or 48(1)), the tribunal has jurisdiction to determine terms which have not been terms even if they are not referred to in the application: *Goldeagle Properties Ltd v Thornbury Court Ltd* [2008] 45 EG 102, C.A. They can revisit other unagreed terms at a later hearing.

6. Landlord and Tenant Act 1987 – estate of blocks of flats

Imagine a single freehold title with 4 detached block of flats, all of which are

let on long leases, and a freeholder who which wishes to sell his freehold interest as a single transaction. Is he entitled under Part I of the Landlord and Tenant Act 1987 (Athe Act \cong) to sell the whole of his interest together or does it need to be divided up into parcels of individual blocks.

- (a) By s. 1(2) of the Act, Part I applies to premises if they Aconsist of the whole or part of a building \cong . By s. 5(3) of the Act, if the sale by the landlord involves Amore than one *building* \cong the freeholder is obliged to sever the transaction so as to deal with each *building* separately.
- (b) The word Abuilding \cong is not defined in the Act. It has, however, been considered in a number of reported cases under the Act, which are of some assistance, and are referred to here in chronological order.
- (c) In *30 Upperton Gardens Management Ltd v Akano* [1990] 2 EGLR 232, the leasehold valuation tribunal (ALVT \cong) determined an application under s. 13 of the Act where the landlord of 4 separate blocks of flats had disposed of them without offering the tenants the right of first refusal. The LVT held (p. 235J-M, 236J-K) that although each block of flats was a separate building, the draftsman of the Act could not have intended that a building scheme should be split up in order to comply with the

provisions of the Act. Although only a decision of an LVT, and therefore merely persuasive, it was referred to in *Long Acre Securities Ltd v Karet* [2005] Ch 61 (see below) and, in effect, approved on different grounds. It should be noted that both sides wished the LVT to deal with the estate as one.

- (d) In *Denetower v Toop* [1991] 1 WLR 945, the premises consisted of two blocks of flats, each containing 4 flats. A roadway runs between the two blocks (p. 949B). The freehold was transferred in a single transaction without offering the tenants the right of first refusal. A single purchase notice under s. 12 of the Act was served claiming both buildings and appurtenant property. Sir Nicolas Browne-Wilkinson V-C assumed (p. 952H, 953G) that the term building in s. 1(2) could apply to more than one separate structure: see the analysis in *Long Acre Securities Ltd v Karet* (above) para. [54]. The report does not suggest that the contrary was argued or suggested. In neither *30 Upperton Gardens* nor *Denetower* was reference made to s. 5(5) of the Act, the Aconvoluted \cong (*Long Acre* para. [55]) predecessor of the current s. 5(3).
- (e) *Saga Properties Ltd v Palmeira Square Nos 2-6 Ltd* [1995] 1 EGLR

199 was a decision of the Lands Tribunal, on appeal from the LVT. Again, there had been a disposal in breach of the Act: p. 200B-C, followed by a purchase notice under s. 12. The landlord appealed contending that one of the main issues was whether 6 Palmeira Square was a separate building or whether it formed part of 2-5 Palmeira Square (p. 201D-F). If it was a separate building, there would have been an insufficient number of qualifying tenants in it to acquire No. 6, and the tenants would only be able to acquire Nos. 2-5. If it was not a separate building i.e. Nos. 2-6 were together to be regarded as one building, then there were a sufficient number of qualifying tenants in Nos. 2-6 to acquire Nos. 2-6.

- (f) The Lands Tribunal held that they had no jurisdiction to determine the issue, which was for the court to decide, and not for the LVT or the Lands Tribunal on appeal from the LVT: p. 207G-K. However, they went on to express their view, *obiter*, in case they were wrong as to their jurisdiction. They held that Nos. 2-5 were a separate building from No. 6: pp. 209K-210BM. Reference should also be made to the description of the properties at p. 201J-K. The important factors were that there were

separate entrances to the two buildings, which were each completely self-contained and completely vertically divided. The Lands Tribunal referred to *Bardrick v Haycock* (1976) 31 P & CR 420, a Rent Act case, in which the Court of Appeal had held that *Abuilding*≅ was an ordinary English word and could not be given a defined or precise meaning as a matter of law. Cairns LJ said at p. 425:

When an Act of Parliament uses the word Abuilding≅ without defining it there must be some structures or pairs of structures which as a matter of law could be said to be two buildings within the meaning of the Act and some which as a matter of law could be said to be one building.≅

- (g) In that case, there was a main house containing flats and a subsequently constructed extension to the house which was occupied by the landlord. It was held that the extension, was a separate building from the main house. There was no internal communication between it and the main house and it had its own front door.
- (h) *Kay-Green v Twinsectra Ltd* [1996] 1 WLR 1587 was another s. 12 purchase notice case, where the landlord had disposed of several buildings in a single transaction without offering the tenants the right of

first refusal. None of the buildings was attached or linked to another. The tenants served a single purchase notice in respect of the landlord=s disposal, the validity of which was unsuccessfully challenged by the landlord. The decision is not of particular relevance to our example, since there is no challenge to the form of a s. 12 notice here. The fact that the tenants included more than one building in their s. 12 notice was attributed by Staughton L.J. (at p. 1604C-D) to the landlord=s failure to serve offer notice under s. 5, and in doing so to sever the transaction as required by the then s. 5(5) [N.B. now replaced by s. 5(3)]. The ratio of the case is correctly stated at paragraph [60] of *Long Acre*.

7. Most recently, in *Long Acre Securities Ltd v Karet* [2005] Ch. 61, a decision of the High Court (Deputy High Court Judge Vos Q.C.), the issue concerned the validity of s. 5 offer notices, where a single notice was served on the tenants of four blocks of flats on a residential estate. The landlord obtained a declaration that its notice was valid, notwithstanding that the notice concerned more than one building. The tenants in the different blocks shared certain appurtenant areas which were managed as part of a single estate: paragraph [9].
8. It was held that >building= must have been intended by Parliament to include more than one structure in some circumstances e.g. two structures

with a shared access: paragraph [71]. In the particular circumstances of the case, building was held to mean more than one building because the occupants of the flats share the use of the same appurtenant premises: paragraphs [74], [81].

9. The tenants did not appear at the hearing, except that one of them sought to resist an order for costs. Nevertheless, it is a detailed reserved judgment, which considered all the relevant authorities. It has come in for some academic criticism: >Building a case for a single notice= by Douglas Readings, NLJ 23 April 2004, p. 622. One practical consequence of that decision is that a number of qualifying tenants in one block might be deprived of the right of first refusal solely because there are an insufficient number of qualifying tenants in another block sharing appurtenant premises.
10. On the basis of *Long Acre Securities Ltd v Karet* it appears that the test of whether premises are a building under the Act is not a purely physical one in the sense of structural connection. In order for the Act to apply the building must contain flats let to qualifying tenants. The rights given to the tenants (e.g. over parts of the building), and the management of the building are relevant considerations.
11. Let us assume that the flat leases give rights to the lessees over the common parts of the estate including the gardens, roadways and grounds, for the maintenance of which they contribute a service charge. If *Long Acre*

Securities Ltd v Karet is correct, then a single disposal of the Estate would be permitted under the Act. As a decision of the High Court, it binds the county court (*Howard de Walden Estates Ltd v Aggio* [2008] Ch. 26 paras. 86-95) and would be followed in a future High Court case, since it is not *per incuriam*. It would be open to being challenged in the Court of Appeal, and there is a chance that it would then be overruled. Bearing in mind that there is a criminal sanction, what would you advise your client to do?

12. Landlord and Tenant Act 1987 – disposal of part of a building.

Suppose there is a building falling within Part I of the 1987 Act, part of which is commercial premises e.g. a shop on the ground floor. There are 6 flats demised on long leases on the upper floors. Your client, the freeholder, wishes to grant a lease of the ground floor shop. Does he have to offer it to the residential tenants first? A recent High Court decision suggests the answer may be Yes. In *Dartmouth Court Blackheath Ltd v Berisworth Ltd* [2008] L & TR 12, a lease of parts of a building was caught by the Act. Warren J accepted the tenants' argument that it was necessary to identify the relevant premises that fall within the Act. Once that has been done, a disposal of any part of those premises is subject to the tenants' right of first refusal, unless it is an exempt disposal. The grant of a lease of commercial premises is not exempt. At paragraph 44, counsel for the landlord's

argument is referred to, in which he pointed out that the lease of a shop would be caught on this construction and this could not possibly have been intended by Parliament. Warren J accepted the tenants' argument without endorsing, in terms, the consequence concerning the shop lease. It certainly seems surprising that the tenants could obtain a shop lease after it had been granted, putting the shopkeeper out of business. What would you advise your clients to do? The process of offering the lease to the tenants takes a considerable time, and it may well be desirable to let the shop quickly, in November say to catch the Christmas trade.

13. Right to Participate – still not in force

Although litigation has been rampant recently the pace of legislative change has slowed - the RTE company provisions of the 2002 Act are not yet in force. The important innovation they were meant to introduce was the right to participate in a collective enfranchisement claim being granted to all qualifying tenants in the building. This was a good idea, but the poor drafting has resulted in that part of the Act being put on the shelf to rot away. There does not seem any prospect of these provisions being brought into force. It is generally accepted that they could not be without substantial amending primary legislation. It would be simpler from the practitioner's point of view if they were repealed rather than being left on the statute book, where they are apt to confuse some readers. This is a pity, because the ides of

all being able to participate seems a good one, even though flats owned by the landlord, perhaps through members of his family, would be included.

Anthony Radevsky