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## Leasehold reform **Kintyre Ltd v Romeomarch Property Management Ltd**

Adjudicator to HM Land Registry

4 November 2005

Mr Michael Mark, sitting as deputy adjudicator  
[2006] 08 EG 176

**Leasehold Reform, Housing and Urban Development Act 1993 – Lease of roof space – Registration of title – Collective enfranchisement – Landlord granting lease of roof space following initial notice of enfranchisement – Whether lease of roof space would have been liable to acquisition under section 2(1)(b) of 1993 Act before initial notice registered – Whether lease void under section 19 of 1993 Act – Whether Land Registry should accept application to register title to roof-space lease**

B was the registered proprietor of the freehold interest in a block of flats. The flats were subject to long leases. In December 2002, a number of the lessees served on B a notice of collective enfranchisement, under the Leasehold Reform, Housing and Urban Development Act 1993, naming the respondent as the nominee purchaser. Following a dispute as to the enfranchisement price, the leasehold valuation tribunal determined the price payable in March 2004. Approximately three months later, B granted the applicant a lease of the surface of, and the airspace above, the flat roof of the block for a term of 999 years. The permitted user was the development of a flat or flats, in respect of which a draft lease was attached, and the locating of telecommunications apparatus. The applicant applied to the Land Registry to register the lease under the Land Registration Act 2002. The application was disputed by the respondent, and it was referred to the Adjudicator to HM Land Registry.

**Decision: The application was dismissed. The roof space was required for the proper management of the roof, and proper management would not be possible were the applicant to build flats or place mobile masts upon it. Had the lease of the roof space existed prior to the initial notice of collective enfranchisement, it would have been liable to acquisition under section 2(1)(b) of the 1993 Act. The lease was therefore void under section 19 of the Act.**

This was an application by the applicant, Kintyre Ltd, for an order that the Land Registry should register a lease under the Land Registration Act 2002; the respondent was Romeomarch Property Management Ltd.

Edward Peters (instructed by Wallace LLP) appeared for the applicant; Christopher Heather (instructed by Charles Russell) represented the respondent.

Giving his decision, **Mr Michael Mark**, sitting as deputy adjudicator, said:

1. For the reasons given below, I direct the Chief Land Registrar to refuse the applicant's application to register the lease dated 15 June 2004 (the lease) made

between Buildinvest Ltd and the applicant (Kintyre) on the ground that it is void by virtue of section 19(1) of the Leasehold Reform Housing and Urban Development Act 1993 (the 1993 Act).

2. Buildinvest is the registered freeholder of Baronsclere Court, 23 Avenue Road, London N6, (Baronsclere) under title EGL 307179. Baronsclere includes a purpose-built block of 14 flats (the block) and grounds, including garages for the flats. The flats were sold in the 1980s on 99-year leases. All contain similar terms.

3. In December 2002, various leaseholders gave notice of their claim to exercise their right to collective enfranchisement with respect to Baronsclere, pursuant to section 13 of the 1993 Act. The respondent (Romeomarch) was named as the nominee purchaser, pursuant to section 15 of the 1993 Act. On 24 December 2002, Romeomarch registered a caution against dealings with Baronsclere. There was a dispute as to the price to be paid for the freehold, but, on 17 March 2004, the leasehold valuation tribunal determined the price payable for the freehold at £32,657.

### Lease

4. The lease was purportedly granted some three months later. In consideration of a premium of £5,000, Buildinvest purported to grant to Kintyre (an associated company of Buildinvest) a lease of the surface of the flat roof of the block and the structure beneath the surface, comprising everything above the ceiling joists of the flat or flats on the floor immediately beneath the roof and the airspace above the flat roof, "including all additions alterations improvements thereto and any constructions or development now or at any time in the future erected thereon (subject to clause 5.5 hereof)". The lease was for 999 years. The permitted user was the locating of one or more telecommunications aerials or mobile telephone masts and/or following development as one or more residential flats.

5. The lessee's and lessor's covenants were as set out in a draft lease of a flat annexed to lease (the flat lease), but with certain modifications in an attempt to make those covenants relate appropriately to the subject matter of the lease. By clause 5.5, it was provided that following completion of "the Development", that is, the construction of one or more units capable of occupation, references to the roof in the flat lease were to be deemed to be references to the roof of the development, which was not to form part of the demised premises and was to be treated as the roof of the block and was to be the roof referred to in para 1 of the third schedule of the flat lease.

6. I interpose that the flat roof was not the entire roof of the block. There were two smaller roofed areas outside the area of the purported demise under this lease.

7. Clauses 5.1 to 5.4 of the lease contain further provisions as to the repair of the demised area prior to the completion of the development. By clause 5.1, prior to the development taking place or Kintyre using the premises for the permitted user, the premises were to be repaired by Buildinvest in accordance with its covenants and obligations as lessor in the flat lease.

8. By clause 5.2, it was provided that:

After the Development or after the Lessee commences using the Premises for the Permitted User the Premises shall be repaired in accordance with the respective covenants and obligations of the Lessee in the Flat Lease or if deemed necessary by the Lessor's surveyor after the Development in accordance with such alternative covenants and obligations as are appropriate and are agreed between the Lessor's surveyor and the Lessee's Surveyor (the Surveyors) (acting in each case reasonably and in good faith) taking into account the nature of the Development in relation to the remainder of [Baronsclere] principles of good estate management and any other relevant factors and/or circumstances.

9. Clause 5.3 provides for such matters as are agreed by the surveyors to be recorded in a deed to be executed by "all relevant parties" and registered at the Land Registry. Clause 5.4 provides for arbitration by a chartered surveyor in the event of any dispute.

10. Thus, after any permitted user started or after any development commenced either: (a) Kintyre, as lessee, became liable to repair the demised roof; or (b) the roof had to be repaired as determined by one or more surveyors. Once the development had been completed, the repair of the old roof area was to become the responsibility of Kintyre (so far as I can see whether or not the development covered the entirety of that roof area) and the new roof of the development (that is, the one or more units capable of occupation) was to be the roof referred to in the third schedule to the flat lease.

11. The flat lease is expressed to be between: (i) an unidentified lessor; (ii) an unidentified lessee; and (iii) Baronsclere Court Residents Association (described as "the Company"). The company was not consulted in relation to the lease and has not agreed to be party to it. It recites, at recital V, that there has been an agreement between the lessee and the lessor and the company by which the lessee has agreed to enter into covenants with the company and, in consideration thereof, the company has agreed to enter into covenants with the lessor and the lessee as set out in the third schedule to the flat lease. In fact, there has been no agreement involving the company.

12. The third schedule is headed "The obligations of the Company". It includes covenants for the company to repair and insure the common parts, including the roof of the block.

13. It is also relevant to note that the combined effect of the lease and the flat lease is that rights of entry and repairing rights are reserved by the lease to the lessor and to the company. Thus, Kintyre covenants that it will permit the company and the lessor and others "at all reasonable hours in the daytime after reasonable notice (except in case of emergency) to enter on and pass through the demised premises for the purpose of executing repairs or alterations to or upon any part of the block (whether hereby demised or not) or (in the case of the Lessor or the Company) neighbouring premises" or for various other related matters "all damage thereby occasioned being made good by whomsoever shall exercise the rights hereby granted": see clause 2.2 of the lease and clause 3(b) of the flat lease.

14. By clause 2.2 of the lease and clause 2(x) of the flat lease, Kintyre also covenants to permit the lessor or its agents "at any reasonable hour in the daytime after reasonable notice except in case of emergency to enter the flat and examine the state and repair thereof".

15. There is also a reservation out of the lease in favour of the lessor, added by para 2 of the schedule to the lease, of:

The right to enter upon the Premises (but only where the purpose of such entry cannot reasonably without undue difficulty or expense be fulfilled without such entry) at all reasonable times and upon reasonable prior notice for the purpose of cleansing maintaining and executing repairs to the Building (including the Premises) or otherwise as may be reasonably necessary for the proper management or maintenance of the Building (including the Premises) the party exercising such right causing as little inconvenience as possible thereby and making good all damage thereby occasioned.

16. Finally, power is reserved by para 1(b) of the second schedule to the flat lease for the company and the lessor at all reasonable times on notice (except in case of emergency) to enter the demised premises for the purpose of carrying out their obligations under the third schedule of this lease.

#### Leases of individual flats in the block

17. The flat lease follows the terms of the leases of the individual flats in the block, to which the company is a party. In those leases, of which two have been included in the trial bundle, a distinction is drawn between "the Block" and "the estate". "The estate" is defined as the whole of the areas edged blue on the plan, which appears to correspond with the registered freehold estate, while the block is defined to mean "the block of 14 flats erected on part of the land...". The leases go on to recite that the lessor has offered to lease parts of the block in accordance with a general scheme and intends that every such lease will impose upon the lessee of that part and upon the company in accordance with the general scheme the obligations and restrictions set out in the third and fourth schedules to the leases. They also identify the company as having been incorporated to manage the estate.

18. Clause 4 of each lease contains a covenant by the lessee with the lessor and with the company to contribute and pay on demand a proportionate part of the costs, expenses and outgoings mentioned in the third schedule, that is, the costs, etc, of managing the estate. By clause 5 of each lease, the lessor granted the company an unfettered right to enter the estate to perform its management duties and the company covenanted with the lessor to perform those duties. By clause 6(ii), the lessor covenanted with the lessee not to dispose of any of the other flats on the estate save by a lease in "the form of the present Lease or as near thereto as the circumstances may admit or require".

19. Paragraph 1 of the third schedule to each lease includes a covenant to "keep the foundations main walls timbers and floors and doors of the block (other than those included in any other demise) and the roof structure and main drains thereof in good and substantial repair and condition".

**Kintyre Ltd v  
Romeomarch Property  
Management Ltd (cont)**

\* Editor's note:  
*Meadowside Freehold Ltd  
v Shellpoint Trustee Ltd*

**Provisions of the 1993 Act**

20. By section 2(1)(b) of the 1993 Act, where the right to collective enfranchisement is exercised, the tenants are entitled to have acquired on their behalf (by cross-reference to section 2(3)) any common parts of the relevant premises "where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, or (as the case may be) that property on behalf of the tenants by whom the right to collective enfranchisement is exercised".

21. By section 101 of the 1993 Act, common parts includes the structure and exterior of that building or part and any common facilities within it.

22. By section 19(1)(a) of the 1993 Act, once the initial notice had been registered, the freeholder was precluded from granting out of its freehold interest "any lease under which, if it had been granted before the relevant date, the interest of the tenant would to any extent have been liable on that date to acquisition by virtue of section 2(1)(a) or (b)". Any transaction is void by virtue of that section "to the extent that it purports to effect any such disposal or any such grant of a lease as is mentioned in" that subsection.

**First issue**

23. The principal question before me therefore is whether the lease grants an interest that, had it existed before the initial notice had been registered, would have been liable to acquisition under section 2(1)(b) of the 1993 Act. In essence, this turns on whether the acquisition of that interest would have been reasonably necessary for the proper management or maintenance of the common parts.

24. I have come to the clear conclusion that Romeomarch succeeds on this issue for the following reasons, which, taken together and separately, would make the acquisition of the lease reasonably necessary for the proper management or maintenance of the common parts of the block:

(1) I agree with the views of the leasehold valuation tribunal in LON/ENF/1177/04\* that the maintenance of the roof itself, or any structure placed upon the roof, such as an aerial, depends upon the proper management of the airspace and that where, as here, the management of the roof space affects the maintenance of the roof as a whole, such management is reasonably necessary for the proper management of the roof.

(2) In particular, I find it impossible to see how there can be proper management of the roof space by the management company when Kintyre is building flats upon it or placing mobile telephone masts upon it.

(3) I accept the uncontradicted expert evidence of Mr Terence Firrell that: (i) although the roof is described as a flat roof, it is in fact pitched and tiled; (ii) development of the roof to form one or more residential units cannot be undertaken unless the existing roof structure is demolished and reconstructed; (iii) this will cause substantial disruption; (iv) the installation of mobile telephone masts cannot be undertaken without reconstruction of the existing roof; and (v) access to the existing roof space, including the electric lift motor

room, is necessary at all times and without hindrance for the proper management of the block.

(4) I am unable to see how the management company can effectively manage the roof of the block if Kintyre can at any time demolish it, reconstruct it and even take over responsibility for it by constructing a dwelling over all or part of it, imposing new liabilities on the management company in respect of a new roof over which it has no control.

(5) During the period covered by clause 5.2 of the lease, that clause purports to remove control of the roof from the management company and place it either in the hands of Kintyre or, as agreed, between two surveyors or as determined by an arbitrator.

(6) There is a possible contradiction between clause 2(x) of the flat lease, which is drafted on the basis that the primary responsibility for the roof is placed upon Kintyre and that the management company can carry out repairs only if Kintyre fails to do so after being required to do so, and the need for the management company to be able to manage the roof itself.

(7) The requirement of reasonable notice in the case of repair to the roof space impedes the proper execution by the management company of its management obligations, in that it requires service on Kintyre at a post office address in the Channel Islands. The flat lease does provide for service if "left addressed to him in the flat" (see clause 7(4)), but if the flat is to be construed as the roof, there would be clear room for dispute as to whether service was in fact effected by notice being left in or on the roof, and whether such notice was reasonable in all the circumstances.

(8) The reservation in para 2 of the schedule to the lease also, in my view, creates uncertainty that would inhibit the management company in carrying out its management obligations.

25. I therefore conclude that the lease is void under section 19 of the 1993 Act and that the application to register it must be refused by the Chief Land Registrar.

26. In those circumstances, it is unnecessary to decide the remaining issues. However, it appears to me at present that the company is not a party to the lease and execution by the company is not required for it to be binding if it is otherwise valid. It also appears to me that the fact that the lease is not in the form of the other leases is not something about which Romeomarch has any right to complain. If that fact puts Buildinvest in breach of covenants in the other leases, that may give a cause of action to the other lessees, but not to Romeomarch.

*Application dismissed.*