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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2024

Before:

MR JUSTICE CHAMBERLAIN

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Between:

ABACUS LAND 1 (HOLDCO 1) LIMITED AND OTHERS **THE TRUSTEES OF THE PORTAL TRUST** **ANNINGTON PROPERTY LIMITED AND OTHERS** **JOHN LYON'S CHARITY** **ARC TIME FREEHOLD INCOME AUTHORISED FUND AND OTHERS** **WALLACE PARTNERSHIP GROUP LIMITED AND OTHERS** **CADOGAN GROUP LIMITED AND OTHERS**	**Claimants**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**

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Malcolm Birdling (instructed by **Fieldfisher LLP**) for the **First Claimants**
Sarah Steinhardt (instructed by **Gunnercooke LLP**) for the **Second Claimants**
Monica Carss-Frisk KC (instructed by **Linklaters LLP**) for the **Third Claimants**
Sam Jacobs (instructed by **Howard Kennedy LLP**) for **Fourth Claimant**
Monica Carss-Frisk KC and Christopher Knight (instructed by **Mishcon de Reya LLP**) for the **Fifth Claimants**

Tim Buley KC and Julia Smyth (instructed by **Hogan Lovells International LLP**) for the **Sixth Claimants**
James Maurici KC and Natasha Jackson (instructed by **Herbert Smith Freehills LLP**) for the **Seventh Claimants**
Galina Ward KC and Katherine Elliot (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 30 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 This hearing was listed to consider the defendant Secretary of State's applications to stay three judicial review claims ("the Unstayed Claims"). The claims challenge various provisions ("the Enfranchisement Measures") of the Leasehold and Freehold Reform Act 2024, (the "2024 Act") as contrary to their rights under Article 1 of Protocol 1 ("A1P1") to the European Convention on Human Rights ("ECHR"), in that they amount to an expropriation of the value of their property without any or any adequate compensation.

2 The claims were originally brought following the enactment of the 2024 Act and have all been listed together as the issues overlap. The Claimants in the Unstayed Claims are (i) The Trustees of the Portal Trust ("Portal Trust"), (ii) John Lyon's Charity (**"**John Lyon'**s**"), and (iii) Wallace Partnership Group Ltd and Others ("Wallace"). A further four judicial review claims have also been brought but have been stayed by orders of the Court ("the Stayed Claims").

3 Two issues arose for consideration at the hearing: first, whether the Defendant's applications to stay the Unstayed Claims should be granted; and second (assuming that the applications were refused), whether the stays imposed in the Stayed Claims should be lifted so that those cases can proceed.

4 At the close of the hearing, I refused the Defendant's applications and directed the parties to file an agreed draft order containing directions leading to a permission hearing in the first week of the Hilary Term. I indicated that I would hand down my written reasons in due course. These are my written reasons.

Submissions

Secretary of State for Housing, Communities and Local Government

5 Galina Ward KC for the Secretary of State expressly disavowed any argument that the court lacked jurisdiction to hear a challenge to provisions that had received Royal Assent but not been commenced. She submitted, however, that on the facts of the present case,

the Court should exercise its procedural discretion to stay the Unstayed Claims in the interests of sound case management. A stay in the Unstayed Claims was both proportionate and necessary. The Government was in the process of drafting the secondary legislation required to commence the Enfranchised Measures. That secondary legislation would include the deferment and capitalisation rates to be prescribed under para. 27(8) and 28(7) of Part 5 (calculating the market value of freehold enfranchisements), and para. 39(1) of Part 7 (calculating the term value, or the value of the right to receive rent) of Schedule 4 to the 2024 Act.

6 No decision has yet been made about how those rates should be set. A small change to either or both rates would significantly impact the premium payable on enfranchisement, and therefore the overall balance between freeholders' and leaseholders' interests. It follows, it is said, that without the commencement regulations, it is not possible for the Court to assess whether the 2024 Act complies with A1P1, since that question can be assessed only on the basis of the legislative scheme as a whole, including the secondary provisions.

7 In relation to the Unstayed Claims, the Secretary of State submitted that the alleged impact caused by the 2024 Act was either exaggerated or, in the case of Portal Trust, non-existent. The evidence filed by Wallace on the projected impact of the 2024 Act upon their business could not be definitively stated without making assumptions as to the deferment and capitalisation rates, and property price inflation. As to the evidence filed by John Lyon's, the only point of comparison for their figures dated back to 2016/17, and there was no other indication of how that year had compared to others before or since.

The Unstayed Claims

8 Counsel for the claimants in the Unstayed Claims all submitted that the Enfranchisement Measures were having real effects on them already and that they should not have to endure those effects for an indefinite period. There was no proper basis for a stay.

9 Tim Buley KC for Wallace submitted that claimants were entitled to proceed with their claims as pleaded. There was no special rule that required the Court to stay so-called *ab ante* claims. Any claimant seeking a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 would have to show that the impugned provisions could

not be implemented compatibly with A1P1 (i.e. that the scheme could be shown to be incompatible without reference to the secondary provisions). The Defendant had not sought to argue that the claims were unarguable; indeed, it had not set out the substance of its arguments at all. However, if the Defendant wished to argue that the claims were unarguable as pleaded, the appropriate time to do so would be at the permission stage.

10 In any event, Mr Buley submitted that the Defendant's arguments were without merit for two reasons. First, the Defendant's discretionary rate-setting power is limited by the fact that the rates have to be set at a level which reflects market value. Accordingly, the power could not be used lawfully to compensate freeholders or otherwise mitigate the impact of the Enfranchisement Measures on them. To depart from market value in order to compensate freeholders would inevitably disadvantage leaseholders. Second, the financial benefits that could accrue to freeholders were the rates to be set in a favourable way are irrelevant to the proportionality of the Enfranchisement Measures. It is for the Defendant to justify the public interest need for a "pound for pound" transfer of assets from freeholders to leaseholders. The actual value of the assets transferred will be of marginal relevance. Further, the impact of the Enfranchisement Measures (once commenced) would be felt over time, and the Court could not rely on the initial levels of the rates to conclude that the Enfranchisement Measures themselves are compatible with A1P1: any mitigation or compensation supposedly achieved now could be reversed again in the future.

11 Sam Jacobs for John Lyon's submitted that the effect of a stay would be to determine the substantive applications for judicial review. If the question of compatibility with A1P1 turned on the terms of commencement alone, then it would follow that the 2024 Act itself would be likely to be compatible with A1P1. The Defendant would thus be able to resist the claim as currently pleaded on its merits. However, if the Defendant is instead acknowledging the fundamental incompatibility of the Enfranchisement Measures and is considering whether these can be resolved through the secondary legislation commencing the provisions, that should be stated in terms. It would also be antithetical to the principle of good administration to stay clearly formulated claims challenging primary legislation until after the commencing regulations had been made, given "the need for speedy application": see *R (British Aggregates) v HM Treasury* [2002] EWHC 926 (Admin) (Moses J).

12 Mr Jacobs also submits that the Enfranchisement Measures (although not yet commenced) have already impacted ongoing negotiations about enfranchisement premiums, with both freeholders and leaseholders anticipating the provisions being brought into force in due course. There was evidence that John Lyon's has already seen a significant drop in its revenue from enfranchisement premiums.

13 Sarah Steinhardt for the Portal Trust submits that the Trust will be exposed to a risk of irrevocable prejudice if the claim is stayed until after the provisions have been brought into force, as it will become vulnerable to an application to enfranchise one of its two estates. The estimated loss arising from the (loss of) marriage value alone would exceed £50 million. She further submits that changes to the deferment and capitalisation rates would not affect the Portal Trust's claim, since it would remain undercompensated in respect of the loss of marriage value. Deferment rates and capitalisation rates only affect the valuation of the reversion and term value respectively.

14 Ms Steinhardt also submits that the compensation regime delivers capricious results depending upon the various properties which a person or entity may or may not hold. Although some freeholders which own a large or diverse range of properties across their whole portfolio may suffer less impact (depending on the rates that are set and the properties they hold), the Trust has only one asset subject to the new regime which is vulnerable to both the loss of marriage value and term value. The Trust holds no other assets against which the losses can be offset or balanced "overall".

15 Ms Steinhardt submits further that to stay the Unstayed Claims would be to risk irremediable prejudice to the Claimants. On the one hand, the Defendant is entitled to commence the Enfranchisement Measures separately from setting the deferment and capitalisation rates, and could do so well in advance of bringing the provisions into force. Moreover, no consideration has been given to how to compensate or mitigate the disadvantage suffered by landlords if the Enfranchisement Measures are indeed found to be incompatible with A1P1, or whether provision can be made to ensure parties in that position are not affected pending the outcome of the claim(s).

The Stayed Claims

16 The position of the Claimants in the Stayed Claims is that all of the claims (including the Unstayed Claims) should be stayed on materially similar terms, pending the commencement of the Enfranchisement Measures. However, if the Unstayed Claims are allowed to proceed, then all the claims ought to proceed together, and the Court should proceed to make consequential case management directions.

17 Monica Carss-Frisk KC for the claimants in the ARC and Annington claims and Malcolm Birdling for the Abacus claimants echoed the defendant in submitting that a holistic assessment of the A1P1 fair balance of the regime provided for by the 2024 Act would depend upon further information, including the deferment and capitalisation rates. There is presently no reliable way of measuring the impact of the 2024 Act on the market value of the Claimants' property rights until that further information is known. The Court would be best placed to determine all the claims together once the full factual picture is available. Any potential future challenge to the rate-setting power should be considered together with the wider A1P1 claim.

18 James Maurici KC for the Cadogan and Grosvenor claimants was neutral as to whether the Unstayed Claims should be stayed. As to the Cadogan and Grosvenor claim, the stay was agreed solely to enable a more detailed quantification of the level of impact after commencement and to avoid procedural complexities should the Enfranchisement Measures be commenced whilst the claims were proceeding.

Discussion

19 I approach the question of a stay on the following agreed basis.

20 First, there is no jurisdictional reason why the court cannot entertain a challenge seeking relief in the form of a declaration of incompatibility in respect of primary legislation that has received Royal Assent but has not yet been commenced. The question whether to grant the stays sought by the Secretary of State therefore involves an exercise of the court's case management discretion pursuant to CPR 3.1(1)(g). The discretion must be exercised in accordance with the overriding objective (CPR 1.1).

21 Second, whilst it was undoubtedly sensible to allow a period of time for the new Government to consider its position on legislation passed under the previous administration, the Secretary of State has now made clear that she intends to lay regulations to commence the Enfranchisement Measures.

22 Third, the process of preparing the commencement provisions will involve policy decisions and is likely to take many months, if not years. The Secretary of State was not willing to give a timescale. So, if a stay were granted, it would be likely to delay the resolution of the challenges for a considerable time.

23 Against this background, the case for a stay depends largely on the submission that it would be difficult for the Court to decide on the proportionality of the challenged provisions without knowing the outcome of decisions yet to be made, in particular as to the deferment and capitalisation rates. On analysis, however, that is an argument of substance rather than procedure. If correct, the claimants in the Unstayed Claims will be unable to show that the primary legislation itself (the current target of the challenge) arguably gives rise to a disproportionate interference with their property rights; and permission to apply for judicial review will be refused. At this stage I am in no position to determine whether the argument is correct. The Secretary of State has not produced Summary Grounds of Defence. The permission stage has not yet been reached.

24 I accept that, if the challenges proceed before decisions about deferment and capitalisation rates have been made, there will be a risk of the court having to hear two separate challenges, one to the 2024 Act and a second to the commencement provisions, when it could otherwise hear all challenges to the legislative regime in one go. But in deciding whether to grant a stay, the balance of convenience must be considered. At this stage, before the substance of the arguments has been determined, that involves comparing the position if a stay is granted and the challenge as currently pleaded (to the 2024 Act alone) in due course succeeds against the position if a stay is refused and the challenge as currently pleaded fails, with the result that a second challenge to the commencement regulations may be necessary.

25 On the case advanced by the claimants in the Unstayed Claims, the claimants are suffering and will continue to suffer potentially considerable financial losses. I have

considered carefully the Secretary of State's criticisms of the claimants' evidence about the effects of the legislation on them, but – at this early stage in the litigation – it is not possible to dismiss that evidence as fanciful or even implausible. Accordingly, I proceed on the basis that the legislation may *already* be exposing the claimants in the Unstayed Claims to potentially considerable financial losses. If they succeed in establishing the incompatibility of the challenged provisions, the law affords them a remedy, but the remedy will not be damages. It will be a declaration of incompatibility, which triggers a power to make a remedial order removing the incompatibility. There will be no right in domestic law to recover losses incurred before the remedial order is made. That makes it very important from the claimants' perspective that, if a declaration of incompatibility is to be made, it should be made as soon as possible.

26 Against that, the main benefit of a stay is that it may mean only one set of proceedings, rather than two. Whilst I agree that this is a benefit both to the Secretary of State and to the Court (see CPR 1.1(2)(e)), its extent should not be overstated. Any judgment in the first proceedings is likely to reduce substantially the number of issues falling to be determined as part of the second challenge. If the Secretary of State succeeds in defeating the claims as currently pleaded, she is likely to recover the costs of doing so.

27 Accordingly, at this stage, the balance of convenience seems to me to favour allowing the Unstayed Claims to proceed, at least to the stage of determining whether permission to apply for judicial review should be given. I have accordingly given directions leading to a permission hearing in the first week of the Hilary Term. At that hearing, the Court will hear argument on the arguability of the claims as pleaded. It will be in a much better position to consider the future conduct of the litigation. If the Court decides that it would not be practicable to hear the claims before the commencement regulations are made, it may reconsider whether a stay is warranted.

28 At this stage, however, the Secretary of State's application to stay the Unstayed Claims is refused. It was common ground that, if the application failed, I should lift the stays in respect of the Stayed Claims. I accordingly lift those stays.