



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UQ/OCE/2019/0037

Property : 7 Montacute Gardens, Tunbridge Wells,
Kent TN4 8HG

Applicant : 7 Montacute Limited

Representative : Collins Benson Goldhill LLP

Respondent : (1) 42 Leisure Estates Limited
(2) Randolph Whitney Sheffield
(3) Caxton Homes Limited

Representative : (1) Wedlake Bell LLP
(2)(3) Collins Benson Goldhill LLP

Appearances : For the Applicant:

Mr Philip Rainey QC of counsel

For the First Respondent:

Mr Michael Buckpitt of counsel

Type of Application : Collective Enfranchisement – Section 24
Leasehold Reform, Housing and Urban
Development Act 1993

Tribunal Member(s) : Judge M Davey
Judge J Dobson
Mrs J Coupe FRICS

Date of decision : 26 October 2020

The Application

1. By an application (“the Application”) to the First Tier Tribunal (Property Chamber) (“the Tribunal”), dated 10 October 2019, the Applicant, 7 Montacute Limited, as Nominee Purchaser, seeks a determination from the Tribunal under section 24 of the Leasehold Reform Housing and Urban Development Act 1993 (“the 1993 Act”) of (a) the premium to be paid and (b) the terms of acquisition in respect of a collective enfranchisement claim to the property, 7 Montacute Gardens, Tunbridge Wells, Kent.

Directions

2. On 20 January 2020 the Tribunal asked the parties to identify the questions that they wished the Tribunal to decide, together with draft directions. The request was prompted by the failure of the parties to settle their differences at mediation held on 15 January 2020.
3. The parties agreed a preliminary issue to be decided but could not agree on whether an oral hearing was required to determine the issue. The Applicant considered that an oral hearing was not necessary. The First Respondent requested an oral hearing. On 30 January 2020 the Tribunal (Judge Tildesley) issued Directions to the effect that an oral hearing was not necessary to decide the preliminary issue but that in the light of the witness statements and submissions this might change. The Tribunal directed that all further proceedings were to be stayed until determination of the preliminary issue or further order.
4. Judge Tildesley stated that the preliminary issue to be determined was “whether or not the Applicant is entitled to include in its claim the Additional Freeholds (being the two areas of garden edged blue and green on plan 1 attached to the section 13 notice) under section 1(2)(a) of the 1993 Act.”
5. The Applicant subsequently sought an extension of time, which was not opposed by the First Respondent, and the Tribunal granted the extension. The Tribunal (Judge Tildesley) issued amended directions, dated 15 April 2020, which set out a timetable requiring service of all witness statements by 5 June 2020 and written submissions by 19 June 2020. The Tribunal received, both the First Respondent’s written submissions on the

preliminary issue, which were dated 17 June 2020, and the Applicant's written submissions, dated 19 June 2020.

6. Having considered the representations of the parties, the Tribunal (Judge Tildesley) decided that an oral hearing of the matter should be held. This was because the Applicant wished to cross-examine Mrs Joanna Au Brey, a witness for the Respondent, whose witness statement contradicted evidence given by the witnesses produced by the Applicant in their witness statements. The Tribunal accordingly issued amended Directions on 23 June 2020 stating that an oral hearing would be held on the CVP platform on 13 July 2020. Paragraph 16 of those Directions stated that, "The oral hearing will be restricted to cross examination and re-examination of Mrs Au Brey. Her witness statement will be admitted as evidence in chief and limited oral submissions from both parties to supplement their written submissions." Paragraph 17 stated that, "Judge Tildesley does not agree that a site inspection is necessary. The existing evidence includes plans and photographs. The Tribunal may also decide to look at the property on the internet."

The hearing of 13 July 2020

7. The Tribunal was composed of Judge M Davey (Chairman), Judge J Dobson (Deputy Regional Judge) and Mrs J Coupe FRICS. Mr Philip Rainey QC, of counsel, instructed by Collins Goldhill LLP, solicitors, represented the Applicant and Mr Anthony Radevsky QC of counsel, instructed by Wedlake Bell LLP, solicitors, represented the First Respondent. Also present were Ms Chi Collins, solicitor for the Applicant; Mr John Muncey, solicitor for the First Respondent; Mr Robert Hunter (director of Saints Hill Properties); Mr Randolph Sheffield and Mr Graham Todman (director of Caxton Homes Ltd. and Edbury Estates Ltd.)
8. At the opening of the hearing Mr Radevsky requested an adjournment to permit the First Respondent's witness, Mrs Au Brey, to give oral evidence and to be cross-examined by counsel for the Applicant. The application for an adjournment had been made earlier on 9 July 2020. However, on 10 July 2020 the Tribunal (Judge Dobson) refused the application on paper but stated that the application may be renewed at the start of the hearing if the First Respondent was so advised. The ground given by the First Respondent for an adjournment was that Mrs Au Brey was caring for her aged and infirm parents and was not in a position to give undistracted evidence by telephone on 13 July 2020. Mr Radevsky submitted that if Mrs Au Brey could not be cross-examined her evidence would not have the appropriate weight it deserved.

9. Mr Radevsky referred to a letter of 17 June 2020 in which the First Respondent's solicitor sought clarification from the Applicant as to what aspect of Mrs Au Brey's evidence was challenged by the Applicant so that his client could give a written response. Mr Radevsky said there was no reply to that letter. Mr Rainey said that this was because the Tribunal fixed a hearing date shortly thereafter. Furthermore, Mr Rainey said that there was a second reason for challenging Mrs Au Brey's evidence. This related to a planning application made by Mr Todman, in respect of another property at Montacute Gardens, which Mrs Au Brey had opposed. Mr Todman's companies were the qualifying tenants of two of the three flats at 7 Montacute Gardens.
10. Mr Rainey opposed the application for an adjournment on the ground that:
 - (1) the witness was available;
 - (2) her evidence and examination would require no more than one hour;
 - (3) it was not highly technical;
 - (4) no medical evidence had been provided;
 - (5) the Applicant had agreed to every concession;
 - (6) breaks would have been offered and
 - (7) the First Respondent did not wish to challenge the Applicant's witnesses.

He therefore asked the Tribunal to proceed in the absence of Mrs Au Brey and to accept the unchallenged evidence of the Applicant's witnesses.

11. The Tribunal, having considered the submissions of the parties, decided that despite the force of Mr Rainey's submission, it was not satisfied that it had been established that Mrs Au Brey would be able to give undistracted evidence by telephone and therefore natural justice required that an adjournment should be granted. The Tribunal accordingly adjourned the matter until a date to be agreed, which was subsequently fixed as 17 September 2020.

The hearing of 17 September 2020

12. The Tribunal was again composed of Judge M Davey (Chairman), Judge Dobson and Mrs J Coupe FRICS. Mr Philip Rainey QC, of counsel, represented the Applicant and Mr Michael Buckpitt of counsel now represented the First Respondent. Also present were Ms Chi Collins, of Greenwoods GRM LLP, instructing solicitor for the Applicant; Mr John Muncey, of Wedlake Bell LLP, instructing solicitor for the First Respondent; Mr Soloman Balas (director of the First Respondent, 42

Leisure Limited), Mr H Balas, Mr Randolph Sheffield and Mrs Joanna Au Brey.

Preliminary matters

13. At the start of the hearing Judge Davey explained that on 14 September 2020 the First Respondent sought permission of the Tribunal to rely on witness statements from two further witnesses. The Tribunal refused this request on 16 September 2020 for the reasons set out in the direction issued by Judge Dobson on that date.
14. Judge Davey also referred to the “Applicant’s Supplemental Note on the preliminary issue”, prepared by Mr Rainey and dated 14 September 2020 and a document headed “Further Written Submissions on behalf of the First Respondent”, prepared by Mr Buckpitt and dated 16 September 2020. After hearing representations from both counsel as to whether these documents should be admitted the Tribunal decided that it would consider them with one qualification. In his Supplemental Note Mr Rainey had gone beyond the Applicant’s submissions of 19 June 2020 in so far as he sought to raise an alternative ground on which his case would be made, should he fail on his initial ground.
15. The Tribunal decided that it would not consider that argument at the hearing. The adjourned hearing of 17 September 2020 was, in accordance with the Directions of 23 June 2020, limited to the cross examination of Mrs Au Brey and “brief oral submissions to supplement the written submissions of the parties.” That is to say the written submissions made on 17 and 19 June.
16. In his submission of 19 June 2020, Mr Rainey says (at paragraph 4) that “The Preliminary Issue turns on whether or not section 1(3)(a) of the 1993 Act is satisfied. For the reasons developed below, in this case the issue turns on whether or not at the Relevant Date the disputed areas were “belonging to or usually enjoyed with” the Upper Maisonette at 7 Montacute Gardens.”
17. With this in mind the Tribunal decided not to hear Mr Rainey’s alternative case, based on section 1(3)(b) of the Act, which was not foreshadowed in his submission of 19 June 2020 and to which the Respondent would need time to respond if it were to be considered by the Tribunal. This decision would not prevent Mr Rainey from applying to raise the argument in the appropriate manner, should he so wish, on a future occasion, although Mr Buckpitt reserved the right to oppose such a request.

18. Mr Buckpitt's Further Submissions document was accepted because it was mostly (but not entirely, as to which see later) concerned with making supplementary submissions to those set out in Mr Radevsky's written submission of 18 June 2020 and summarising points that Mr Buckpitt would make in his oral submission at the hearing.

The statute law

19. Section 1 of the 1993 Act provides:

(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats, contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf

- (a) by a person or persons appointed by them for the purpose, and
- (b) at a price determined in accordance with this Chapter;

and that right is referred to in this chapter as "the right to collective enfranchisement".

(2) Where the right to collective enfranchisement is exercised in relation to any such premises ("the relevant premises") -

- (a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and
- (b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.

(3) Subsection (2)(a) applies to any property if at the relevant time either –

- (a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises;
or
- (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with occupiers of other premises (whether those premises are contained in the relevant premises or not).

Section 1(7) provides that

“Appurtenant property,” in relation to a flat means any garage, out-house, garden, yard or appurtenance belonging to or usually enjoyed with the flat.”

The preliminary issue – factual background

20. The Tribunal, which did not inspect the property but relied on plans and other photographic evidence provided with the trial bundle, finds that the background, as revealed by the evidence and submissions, is as follows.
21. The subject property, 7 Montacute Gardens, is one of a row of eight semi-detached Victorian properties numbered 1 to 8 Montacute Gardens. All eight properties are converted and laid out as flats. Each property has a garden to the rear. Opposite the front of 5-8 is a communal garden, referred in the witness statements as the Ornamental Garden (“the OG”). There is a similar garden opposite numbers 1 to 4 Montacute Gardens. Access to the properties is by a T shaped private access road the “cross” of which separates the front of the row of buildings from the two communal gardens and the “stem” of which separates the two communal gardens from each other.
22. Number 7 consists of four stories (including a lower ground floor) and contains three flats; 7a on the lower ground floor, 7b on the ground floor and a maisonette on the upper two floors (referred to as “the Upper Maisonette”). About halfway down the rear garden of number 7 there is a thick hedge with an arch in the middle that divides the garden in two. The half beyond the hedge is the private garden of the Upper Maisonette (as to which see further below).
23. So far as relevant to the Application the title history is as follows. On 1 January 1936 a headlease (“the Headlease”) was granted by the then freeholder, for a term of 99 years, of the whole row 1-8 Montacute Gardens, together with the land on which the communal OG and the adjacent garden opposite 1 to 4 Montacute Gardens now lie. The Headlease permitted the conversion of each of the properties into not more than four flats. It also included a covenant by the headlessee to
“...lay out and plant [the OG and equivalent in front of numbers 1 to 4] and at all times during the said term maintain the same as an ornamental or pleasure garden with proper lawns beds shrubberies roads and paths...”
As noted above, all the properties were duly converted into flats and the OG laid out in accordance with the covenant in the Headlease.
24. In 1946 the Headlease was part assigned. The part that comprised 5-8 Montacute Gardens and the OG was assigned to Arthur Hunter. His

descendants remain the joint owners of the head lease so far as 7 Montacute Gardens and the OG is concerned today. In the 1980s the three flats at 7 Montacute Gardens were sold off on long underleases. The underlease of the Upper Maisonette was granted on 26 September 1980 to Barclay Sheffield, brother of the Third Respondent, Randolph Whitney Sheffield (“aka “Ruby Sheffield”), who has lived in the Upper Maisonette since 1983 and became the underlessee by transfer from his brother in 1995. None of the long underleases conferred an express right to use the OG as a communal garden. However, the underlease of the Upper Maisonette extended (or was thought to extend, as to which see below) to the half of the rear garden beyond the hedge.

25. Since 1946 there have been numerous dealings with the titles to the freehold, the Headlease and the various underleases of the flats within number 7 as well as numbers 5, 6 and 8. These include transactions consequent on past lease renewal and enfranchisement claims under the 1993 Act, most recently a collective enfranchisement in 2015 with regard to number 7 (as to which see below).
26. By 2014 Caprisol Investments Limited (a company controlled by Mr Solomon Balas) owned the freehold of 7 Montacute Gardens and the rear garden. The freehold of the OG was owned by Virtus Trust Limited (as Trustee of the Balas Family Trust). The underlease of flat 7a was owned by Edbury Estates Limited (a company controlled by Graeme Todman) and the underlease of flat 7b by Caxton Homes Limited (a company also controlled by Graeme Todman). As noted above Ruby Sheffield owned the underlease of the Upper Maisonette which underlease included the private part at the far end of the rear garden. The Headlease comprising 7 Montacute Gardens, the rear garden to no 7 and the OG was owned by Saints Hill Properties Limited (a company controlled by Robert Hunter and his daughters) and William Hunter, to whom it had been assigned on 30 September 1999 and registered under title No K802546). Numbers 6 and 8 and their rear gardens, which were also in this title, were removed and registered with their own titles title on 5 October 2006.
27. By a notice dated 23 January 2014, a claim to collective enfranchisement of the freehold of 7 Montacute Gardens, together with the whole of the rear garden and the OG, was made by the long underlessees of two of the three flats; viz Ruby Sheffield and Caxton Homes Limited, as Nominee Purchaser. Edbury Estates Limited, the underlessee of the third flat, was a non-participating qualifying tenant.
28. The freehold subsequently acquired in that claim by Randolph Whitney Sheffield and Caxton Homes Ltd., as Nominee Purchaser, and registered with Title No TT 37522, excluded (a) a strip, immediately beyond the hedge, of the private garden belonging to the Upper Maisonette (b) the part of the rear garden lying between the building and the hedge and (c) the OG (the area edged blue for the purposes of the preliminary issue). The

reason for their exclusion was that none of the leases held by the qualifying tenants either demised those areas or granted common use rights over them. The far part of the rear garden (save for the excluded strip) together with a path down the rear garden to access the far part was included in the freeholds acquired. The strip beyond the hedge was excluded because there was a discrepancy between the line of the hedge and the boundary of the demise of the underlease of the Upper Maisonette as shown on the underlease plan.

29. On 15 March 2017, Ruby Sheffield surrendered the underlease of the Upper Maisonette to the headlessee. The Headlease, which now demises 7 Montacute Gardens, its rear garden and the OG was at the same time transferred by the existing headlessees to themselves and Mr Sheffield. Since that date, the registered proprietors of the Headlease (under Title No. K802546) have been Saints Hill Properties Limited, William Hunter and Randolph Whitney Sheffield.
30. The effect of these transactions was to make the headlessees the qualifying tenant of the Upper Maisonette by virtue of them holding the Headlease (As to which see the decision of the House of Lords in *Howard de Walden Estates Ltd v Aggio* [2009] AC 39).
31. A fresh collective enfranchisement claim to the freehold of the building, the rear garden (including the nearer part and the strip of the far part not acquired in 2015) together with the OG was then made by a section 13 notice dated 5 June 2017. The nominee purchaser was 7 Montacute Limited. The claimant qualifying tenants on this occasion were the joint headlessees (in respect of the Upper Maisonette), Caxton Homes Limited (underlessee of flat 7a) and Edbury Estates Limited (underlessee of flat 7b). The Respondents were Randolph Whitney Sheffield and Caxton Homes Limited (freeholder of the building, path and far rear garden), Caprisol Limited (freeholder of the near part of the rear garden and strip of the far part excluded from the 2015 enfranchisement) under Title No K448284) and Virtus Trust (freeholder of the OG under Title No K952300). The section 13 notice also claimed the entirety of the Headlease of 7 Montacute Gardens and the additional areas claimed.
32. A counter notice was served by Caprisol Ltd. and Virtus Trust on 16 August 2017 disputing the acquisition of the near part of the rear garden and the OG and the price to be paid. Unfortunately for the claimants the section 13 notice was not protected by UN1s and the freehold titles to the garden areas were both transferred to 42 Leisure Estates Limited (a company controlled by Solomon Balas). This led to service of a further section 13 notice by the claimants and a dispute as to whether the first notice had ceased to have effect when the second was served and whether the second notice was thereby invalidated. Suffice to say that both notices were eventually deemed ineffective and withdrawn and there the matter rested until the service of a fresh section 13 notice dated 18 February

2019. The claim was met with a counter notice and once again the enfranchisement of the garden areas, owned now by 42 Leisure Limited, was opposed. The ground of objection was that the areas claimed were not additional freeholds because they neither belonged to nor were enjoyed with the Upper Maisonette. It is the failure of the parties to agree this matter that has led to the present application to the Tribunal.

33. This latest section 13 notice claims the freehold and head leasehold interests in 7 Montacute Gardens (“the specified premises”). The claimants are once again (1) Saints Hill Properties Limited, William Hunter and Randolph Whitney Sheffield (being jointly the qualifying tenant of the Upper Maisonette) (2) Edbury Estates Limited (a company controlled by Graeme Todman (the underlessee of flat 7a) and (3) Caxton Homes limited (a company controlled by Graeme Todman) (the underlessee of flat 7b). The notice also claims under section 1(2)(a) of the 1993 Act, the freehold of the two areas of garden of which the First Respondent is the freehold proprietor (see above). They are (a) the OG, which is shown as edged blue on Plan 1 attached to the initial notice, and (b) part of the garden at the rear of the specified premises, coloured green on Plan 1. These are the areas that were excluded from the 2015 enfranchisement because they were not leased to a qualifying tenant at that time (including the strip of land, also claimed, that belongs to the Upper Maisonette but was mistakenly excluded from the underlease of that flat and therefore from the freehold of the garden acquired in 2015).
34. The First Respondent, 42 Leisure Ltd., is as noted above the current freehold proprietor of title number K952300, which includes the OG. It is also the current freehold proprietor of title number K448284, which includes the parts of the rear garden of 7 Montacute Gardens claimed by the qualifying tenants in their section 13 notice. The freeholder of the building at 7 Montacute Gardens together with the path down the middle of the rear garden and the far part of that garden (save for the strip of the far part excluded in 2015) is Randolph Sheffield and Caxton Homes Limited (the Second and Third Respondents) these areas having been acquired in the 2015 enfranchisement.

The preliminary issue

35. The preliminary issue is thus whether the Applicant is entitled to claim the disputed garden areas under section 1(2)(a) of the 1993 Act. As Mr Rainey pointed out in the Applicant’s submission, the disputed part of the rear garden is more properly described as that area *coloured* green on Plan 1 attached to the section 13 notice and not, as the Directions state, an area *edged* green. Furthermore, the disputed area is more particularly that area of the rear garden, which is coloured green on Plan 1 and not coloured pink on Plan 2, because the counter notice accepts that the area coloured pink on Plan 2 is to be acquired. (It was part of the 2015 enfranchisement being the far end of the rear garden, which had been part of the title of the

underlessee of the Upper Maisonette until that lease was surrendered). Mr Rainey stated that the disputed area is in fact more clearly identified as that shaded yellow on the plan attached to the transfer of 8 June 2015 (as to which see above).

The Applicant's case

36. The Applicant's submission first deals with the contested issue of law. Section 1(2)(a) of the 1993 Act permits the qualifying tenants by whom the right to collective enfranchisement is exercised in relation to the relevant premises (as defined in section 3 of the Act) to acquire in like manner the freehold of any property which is not comprised in the relevant premises but to which section 1(2) applies by virtue of section 1(3). Section 1(3) provides that section 1(2)(a) applies to any property if at the relevant date either (a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with occupiers of other premises (whether those premises are contained in the relevant premises or not).
37. The Applicant relies on section 1(3)(a) being applicable to the garden areas claimed under section 1(2)(a). "Appurtenant property" is defined for this purpose in section 1(7) as meaning in relation to a flat "any "garage, out-house, garden, yard or appurtenances belonging to or usually enjoyed with the flat."
38. It is not disputed that a lease held by a qualifying tenant demises the gardens claimed. The lease in question is the Headlease, which, since 15 March 2017, demises both the Upper Maisonette of 7 Montacute Gardens and the gardens claimed by the qualifying tenants. The issue on which the parties disagree is the meaning of the words "belonging to or usually enjoyed with the flat" in section 1(7) of the Act and whether either limb of that requirement is satisfied in relation to the disputed garden areas.
39. Mr Rainey for the Applicant submits that the first limb, that is to say "belonging to" is distinct from the second limb, "usually enjoyed with". He relies on the decision of the Court of Appeal in *Buckley v Tibber* [2016] QB 706, a case on the leaseback provisions of the 1993 Act. Paragraph 1(2) of Schedule 9 provides

"In this schedule any reference to a flat or other unit, in the context of the grant of a lease of it, includes any yard, garden, garage, outhouses and

appurtenances belonging to or usually enjoyed with it and let with it immediately before the appropriate time.”

The Court recognised that the two limbs of section 1(7) were alternatives but held that because the property claimed with the flat, (part of a mezzanine landing outside the flat and a front garden) were not let with the flat they could not be included in a leaseback of the flat. Thus it was not necessary for the Court to decide whether they belonged to or were usually enjoyed with the flat or indeed what the difference was between those two alternatives.

40. Mr Rainey therefore offered his own interpretation. He submits that the former means that the appurtenant property is for the exclusive use of the flat in question whereas the latter refers to appurtenant thing property, which is enjoyed with the flat but not exclusively. That is to say by comparison with something that merely happens to be demised by the lease but really has nothing to do with the flat. He suggests that “usually enjoyed with” includes, but is not limited to, a common amenity demised by a flat lease, e.g. property which would be common use property and which would fall under section 1(3)(b) were it not for the fact that it is actually demised by one of the qualifying tenancies.
41. Furthermore, he argues that “enjoyed with” is not a particularly demanding test and does not equate to any particular degree of active use. He said that the different occupiers may make more or less use of an amenity which is nevertheless usually enjoyed with the flat; the degree to which the occupier exercises his enjoyment of the amenity may vary over time. Mr Rainey referred to authority, in the context of section 62 of the Law of Property Act 1925, that there does not need to be any actual use at the date of the conveyance for something to be enjoyed with the land (*Re Yateley Common* [1977] 1 WLR 840 at 850). He submitted that the same applies to section 1(3)(a) of the 1993 Act.
42. Mr Rainey accepts that the date at which the test in section 1(7) is to be applied is the Relevant Date, which is the date of the section 13 notice (see section 1(8)). He says that in the case of “belonging to” that is the only date to consider. However, he submits that in the case of “usually enjoyed with”, a wide range of enquiry is required in order to establish whether it can be said that the appurtenant thing was usually enjoyed with the flat at the Relevant Date and furthermore user as of right is not necessarily required.
43. Mr Rainey submits that in any event, although the old underlease of the Upper Maisonette did not confer an express right to use the other areas of the rear garden or the OG there is a strong argument that when the underlease of the Upper Maisonette was granted in 1980, section 62 of the Law of Property Act 1925 would have converted a prior permission of the

- occupier of the Upper Maisonette to use the rear garden and the OG into a legal easement thereby making the user of the nearer part of the rear garden and the OG a common use right as far as the Upper Maisonette was concerned. However, he further submits that even if section 62 did not apply, the merely permissive user of those areas would suffice to make them “usually enjoyed with” the Upper Maisonette for the purposes of satisfying the definition of appurtenant property in section 1(7) of the 1993 Act.
44. Mr Rainey drew the Tribunal’s attention to *4-6 Trinity Church Square Freehold v Corporation of Trinity House* [2018] 1 WLR 4876 (CA). That was also a case concerning a communal garden, shared between several buildings. The qualifying tenants had (in their leases) revocable licences of use of the garden. It was thus a section 1(3)(b) claim. The parties had agreed that the outgoing freeholder should retain the freehold of the garden. In those circumstances it was held that the nominee purchaser should acquire permanent fee simple rights over the garden under section 1(4) of the Act even though the lessees only had permissive revocable licences of use. Mr Rainey submitted that it would be extraordinarily bizarre if, in a case like the present, where one of the qualifying tenants actually has a lease of the garden and thus the absolute right of use, the nominee purchaser were not entitled to acquire the freehold.
 45. With regard to the strip of land beyond the hedge that was not included in the 2015 enfranchisement Mr Rainey says that it was only a quirk in the 1980 underlease conveyancing that prevented it from being included in the 2015 claim. The result was that the outgoing freeholder retained part of the freehold of the private garden and subsequently transferred it to the First Respondent. Mr Rainey said that the problem at the time of the 2015 enfranchisement, that this area was not demised by the qualifying tenancy of a flat, disappeared in 2017 when the old underlease was surrendered and the Headlease became the qualifying tenancy of the Upper Maisonette.
 46. As to the nearer part of the rear garden, Mr Rainey submits that since 15 March 2017 Mr Ruby Sheffield as joint headlessee has had the absolute right to use the rear garden. He is the actual occupier of the Upper Maisonette, and has been since 1983, and he has made actual use of the nearer part of the rear garden. Mr Rainey says that section 1(3)(a) is thereby satisfied.
 47. With regard to the OG, Mr Rainey submits that, since 15 March 2017, Mr Ruby Sheffield, as joint headlessee, has had the absolute right to use the OG. He is the actual occupier of the Upper Maisonette under that Headlease, which is a qualifying tenancy, and has made actual use of the OG. Mr Rainey says that section 1(3)(a) is thereby satisfied.

48. Finally, Mr Rainey submits that the OG was required to be laid out and maintained throughout the term as an ornamental or pleasure garden by the 1936 Headlease. Although the Headlease does not explicitly state that it is for the use of occupiers of the properties demised he asks the question, what else is it for? Mr Rainey says that the witness evidence is that in fact the OG has been treated as a common amenity for the use of all flat occupiers since 1946. Thus the occupiers of the Upper Maisonette from time to time certainly had permission, if not the right (from 1980 by virtue of section 62 of the Law of Property Act 1925), to use the OG. He concludes that the OG has therefore been usually enjoyed (in common with others) with the Upper Maisonette since 1946 and section 1(3)(a) is thereby satisfied.
49. The witnesses for the Applicant, whose evidence is relied on by Mr Rainey, are Mr Peter Hunter, Mr Robert Hunter, Randolph Sheffield and Sadhona Sheffield. Their evidence, which the First Respondent chose not to test by cross examination is as follows:

Peter Hunter

50. Mr Peter Hunter, who is 87 years old, states that his father, Arthur Hunter, purchased the Headlease of 5-8 Montacute gardens and the OG in 1946. He said that his father's priority was restoration of the OG which was in need of attention after the War. Peter Hunter lived at 8 Montacute Gardens with his parents and brother from 1946 to 1955. He remembers playing cricket and football with his father and brother on the lawn of the OG. Mr Hunter provided (1) a photograph taken around 1947 of a Miss Clayton with the Hunter family dogs. Miss Clayton lived at that time with her family in the Upper Maisonette. Peter Hunter said that the two families used to have picnics in the OG. (2) a photograph of Peter Hunter with his tennis racket and his dog in the OG taken in 1947 and (3) a photograph of his mother with their dogs in the OG in 1954. Peter Hunter says that between 1950 and 1953 his father built a wooden shed/garage in the OG to store garden equipment. This garage was later let to Ruby Sheffield to store his classic cars. Peter's father died in 1966 and left a share of the Headlease to Peter and the other share to Peter's brother, Arthur C. Hunter.
51. Peter Hunter says that his brother continued to maintain the OG until they transferred their shares in the Headlease to their respective sons in 1998. Peter Hunter said that at all times the OG had been used as a communal garden for all the residents of Montacute Gardens. He provides a photograph of his father, maintaining the garden as such, taken around 1952.
52. Peter Hunter says that in the late 1960s a Mrs B Freud and her daughters, Bella and Esther, occupied the Upper Maisonette. Esther later wrote

an autobiographical work (*Hideous Kinky*) in which she referred to the OG and which she referred to again in an article in the Daily Telegraph when she recalled frequently picnicking in what would clearly appear to have been the OG.

53. Peter Hunter states that in or around the late 1960s or early 1970s the Council removed the central floral bed to lay a sewer pipe but this did not deter communal use of the OG thereafter. He says that his son and nephew now own the Headlease, of which the OG forms a part.

Robert Hunter

54. Robert Hunter is Peter Hunter's son. He says that in 1998 his father gifted his share in the Headlease to him. His uncle Arthur sold his share to his son William, Robert's cousin. Robert's share was vested in Saints Hill Properties Ltd. ("SHP"). This company was incorporated on 23 November 1998 and is a property development company wholly owned and controlled by Robert Hunter and his daughters, Philippa and Jennifer Hunter. Thus SHP has been a joint owner of the Headlease since 1998.
55. Mr Hunter supplied evidence of payment by him to Ms Zillah Richards, the then leaseholder of 6b Montacute Gardens, for lawn mowing and other gardening tasks relating to the OG and Ms Richard's own rear garden from 2009 to 2012. He stated that he paid for the maintenance of the OG and Ruby Sheffield helped with the tree work voluntarily. Robert Hunter said that the garage, which he believed was built by his grandfather, fell into disrepair in or around 1995 and has not been rebuilt. Robert paid to have it cleared out in 2010. By that time it was very dilapidated and had ceased to be used by Ruby Sheffield for storing his cars. The garage fell down in 2012 and is no longer in situ.
56. Robert said that he and his cousin William have been responsible for the upkeep and maintenance of the OG as headlessee, but Tree Preservation Orders on trees in the OG had prevented proper pruning without Council approval and this had reduced the size of the lawn area. He confirmed that various residents of Montacute Gardens have used the OG for as long as he can remember, but particularly Randolph Sheffield who used the wooden garage for his cars and also for logging to provide fuel for his open fire. Robert said that he had no issue with Mr Sheffield using the OG at any time and neither did his father or uncle as far as he knew. He had always regarded the OG as a common amenity for the residents of Montacute Gardens.

Randolph Whitney (Ruby) Sheffield

57. Ruby Sheffield stated that his brother, Barclay Harrison Sheffield, took an underlease of the Upper Maisonette in 1980 in his sole name, although Ruby Sheffield had provided the deposit. In or around 1983, following marriage difficulties, Ruby Sheffield moved into the flat with his brother. After Ruby Sheffield's subsequent divorce in 1995, his brother left the flat and transferred the underlease to Ruby who remained there alone at first but was later joined by his mother. Ruby's daughter Sadhona, who was 10 years old at the time, stayed at weekends. She eventually came to stay with her father full-time when she was 25 and lived with him for around four years.
58. Ruby Sheffield says that in 1983 he rented a garage on the OG from the then headlessors. He had acquired a collection of classic cars at the time and stored one of them in the garage. He says that the garage became incapable of use from about 1995 and eventually fell down around 2012 following which the site was cleared. He states that, from on or around 2003, he used the OG for processing logs for the open fire in his flat. He says that he also processed logs with tenants in numbers 5 and 7 and stored some of these logs on the OG. Mr Sheffield says that he and his family and friends used the OG for recreational purposes throughout his occupation of the Upper Maisonette. He states that he used the OG for sunbathing, barbecues and parties and generally used it as a garden because it was easier to access than his own rear garden and was also more secluded. He says that he used to do tree trimming, and Zillah Richards arranged lawn mowing, for the headlessors who were responsible for the maintenance of the OG.
59. Ruby Sheffield says that in 1992, following the death of her second husband, his elderly mother came to live with him because she needed care. He says that her condition was fair until the last eight or nine years of her life when she needed more and more care. In the final three years she was very ill and needed twenty four hour care. This meant that Ruby did not have time to maintain the garden as previously. In 2017, following the death of his mother, Ruby had a heart attack followed by a more serious one a year later. He then had a heart operation, which meant that he was not physically able to maintain the OG and explains why it became overgrown between 2015 and 2018, although more recently he and Robert Hunter have tidied up the lawn and cut back some bushes. He says that he still uses the OG from time to time for logging and recreational purposes, weather permitting.
60. With regard to the rear garden, Ruby explained that he had installed the arch in the middle of the garden and planted the hedges on either side of the arch which have now grown to around 25 feet tall. However, it was discovered during the 2015 enfranchisement that the portion of garden on the 1980 underlease plan was in fact around 25 feet short of what he had

always considered to be his garden under that lease. He understands from his brother that the arch was placed there with Arthur Hunter's permission because around 25 feet of the far end of the garden was unusable because it was about 9 feet higher than the rest of the garden. Nevertheless, he says that he always used the whole area at the rear garden beyond the hedge and everybody accepted this as being his garden.

61. Ruby Sheffield explained that the occupants of the middle and ground floor flats (i.e. 7a and 7b) used the portion of the garden closest to the building but did not do so exclusively because he used and still uses two sheds in that section for storage. A tenant of the basement/ ground floor flat helps Ruby with mowing the lawn in all areas of the rear garden at present, but he says that he mowed the lawn from the date that he moved in, usually when the other occupants took no interest. He says that it is a very informal arrangement and that other occupants of the property are short-term tenants and they do not really use the rear garden at all.
62. He says that no one but himself has used the near part of the rear garden for the last five or six years. He says that he has used the middle part of the garden for parties. He says that in or around 1992 he installed a pizza oven in the middle of the garden. He supplied a photograph of Ruby, his brother, and his brother's family and Ruby's then girlfriend, Maritia, taken in or around 2002/3 in the rear garden when they were eating pizza that they had cooked using the oven. There are also photographs of Ruby and his mother sitting by the oven in around 2000 and of Maritia and her mother with the dogs in the rear garden in or around 2002/3. He also provided photographs of he and his brother using the oven in 2011/12.

Sadhona Sheffield

63. Sadhona Sheffield is the daughter of Ruby Sheffield. She says that her parents separated in 1983 when she was 10 years old and her father went to live in the Upper Maisonette at 7 Montacute Gardens. She said that she used to stay there at weekends until she was 15 years old. She says that she lived there with her father and her grandmother for around 4 years from 1998 to 2002. Sadhona remembers playing in the OG around 1984-5. She sunbathed in the OG when she was living at the Upper Maisonette and occasionally when visiting. She also remembered walking the dog in the garden. As to the rear garden, Sadhona recalled sunbathing there and attending her father's pizza parties over the years. She mainly used the rear part which belonged to the Upper Maisonette, although she was aware that her father "used the whole of the garden from time to time however as he has sheds" and a pizza oven in the middle portion of the garden.

The First Respondent's case

64. The case for the First Respondent is now set out in Mr Radevsky's written submission of 17 June 2020, together with Mr Buckpitt's supplementary written submission of 16 September 2020 and his oral submission on 17 September 2020. Mr Buckpitt's written submission for the most part elaborates that of Mr Radevsky but first immediately introduces a new submission. That is to say that that the OG had become so overgrown and neglected that at the relevant date it, or part of it, had ceased to have the character of a "garden" in which case it fell wholly or partly outside the definition of appurtenant property in section 1(7) of the 1993 Act. He submitted that it was more akin to the paddock in *Methuen-Campbell v Walters* [1979] 1 QB 525 which was held not to be a garden.
65. Mr Buckpitt then submitted that for a garage, outhouse, garden, yard or appurtenance to be appurtenant property in relation to a flat it had to be within the curtilage of the building in which the flat is situated. He relied on *Cadogan v McGirk* [1996] 2 EGLR 75 where a claim was made under the 1993 Act to a new lease of a second floor flat in a building. The tenant also had a tenancy of a storeroom on the 6th floor and argued that the storeroom should be included in the new lease because it fell within the extended definition of "flat" in section 62(2) of the Act. It was held that the new lease should contain the storeroom as well because it was an appurtenance of the flat, being within the curtilage of the building. The Court rejected the landlord's argument that the appurtenance had to be within the curtilage of the flat itself.
66. Mr Buckpitt referred to the passage below from Millet LJ's judgment.
- "as I see it it is necessary first to identify a separate set of rooms within the building which constitutes the flat; next to identify other areas within the building which or the right to enjoy which may be appurtenant to the flat; and finally to consider the grounds of the building in order to identify any garage, outhouse, garden, yard or other erection or land within the curtilage of the building which or the right to enjoy which is usually enjoyed and let to the tenant with the flat."
67. Mr Buckpitt said that the OG, separated by a road from the building was not within the curtilage of that building. He said that in *Methuen-Campbell v Walters* a paddock, let by the same lease to a tenant of a house and garden and separated by a fence from the garden, was not within the curtilage of the house. Mr Buckpitt submitted that the suggestion in *Hague, Leasehold Enfranchisement*, [at 2.16 discussing the extended meaning of house and premises in section 2(3) of the 1967 Act] that a garden may be within that definition even if separated by a road, is

erroneous and is based on an old Scottish case (*Cargill v Phillips* (1951) S.C. 67) that does not support such a bold assertion.

68. Mr Buckpitt therefore submitted that the Applicant fails at the first hurdle. Nonetheless he proceeded to engage with the main focus of the Applicant's case. That is to say whether the OG and rear garden area claimed were usually enjoyed with the Upper Maisonette. Mr Buckpitt submitted that sections 1(3)(a) and 1(7) of the 1993 Act require that at the Relevant Date the property claimed must be let to the qualifying tenant and enjoyed by such qualifying tenant. He says that there is no evidence that the OG, or any part of it, was used by Mr Sheffield as headlessee at the relevant date or indeed during the preceding two years, save perhaps for some logging by him in one corner.
69. Mr Buckpitt also said that the OG covers a large area which has fallen into disuse and become overgrown. He questions how it or all of it can be enjoyed when overgrown. He says that the Applicant's evidence does not specify which parts if any were still used at the time of the relevant date or in the years leading up to it. He said cutting logs from time to time in the furthest corner cannot trigger entitlement to acquire the whole area. Similarly, cutting trees sporadically is not the kind of use envisaged by section 1(7). At best it is maintenance not enjoyment. The Applicant does not particularise which parts of the OG were being enjoyed, save in the most general terms and then only in the dim and distant past.
70. Mr Buckpitt says that it cannot be said that at the material date the whole, or indeed any part, of the OG was "usually" enjoyed with the Upper Maisonette. The word usually requires a degree of frequency and regularity of user as the qualifying tenant, which is clearly missing in this case. Mr Buckpitt says that in any event Mr Sheffield's evidence does not give sufficient examples of regular use to support the notion that he usually enjoyed use of the whole of the OG since he became a headlessee, let alone user "with" the flat.
71. Mr Buckpitt submits that all of the Applicant's witnesses are "clients" being participating tenants on whose behalf the Applicant is bringing this claim. He said that when the witness statements are considered carefully they say very little. Mr Buckpitt said that the evidence of the main witness, Mr Ruby Sheffield, does not support the assertion of extensive use of the OG between 1983 and 2014. There is no particularisation of the geographical parameters of any use by Mr Sheffield during that period. His evidence does not support usual enjoyment and certainly not in respect of the whole of the OG.

Joanna Au Brey

72. Mr Buckpitt sought to refute the Applicant's contention that the OG had been enjoyed with the Upper Maisonette by relying on evidence from Mrs Joanna Au Brey who is the freeholder of the building at 3 Montacute Gardens. Mrs Au Brey said that she had lived in a flat at number 3, where she brought up her daughter, for 16 years. Mrs Au Brey is a solicitor who for many years worked at home. She relocated to Dorset in October 2019 to be near her parents who were in need of care, although she comes back to Montacute Gardens from time to time to check her flat and deal with any matters that might have arisen in her absence. She gave evidence that all the occupants of those properties have used the area opposite 1-4 Montacute Gardens over the years for a variety of leisure activities, such as children's play, picnics and barbecues. She said that she has been instrumental in ensuring that the area was mown, weeded and pruned by resident volunteers. She says that the OG is very different.
73. Mrs Au Brey said that since Zillah Richards left in 2012 little had been done by way of maintenance of the OG, which had become overgrown with brambles, weeds and dense overgrown shrubs. She did see a contractor scything and mowing grass in 2018 and about a year ago Ruby Sheffield asked her about advice about how to get consent for tree pruning. She could not recall anyone sitting in the garden or any other leisure activity between 2012 and 2019.
74. Mrs Au Brey's evidence was strongly challenged by Mr Rainey in cross examination during which he suggested that any view of the OG that she would have had from inside the OG was angled and limited and only available from a bedroom window in her flat. The bedroom was that of Mrs Au Brey's daughter when she was living there. He also argued that any view from passing by the OG from the car park was denied because of the trees and shrubbery. Mrs Au Brey said that she looked out of the bedroom window from time to time and when passing by the OG it was possible to see into the OG through the shrubbery when seasonal conditions permitted.
75. Mr Rainey also took Mrs Au Brey through her detailed and vigorous objection to a planning application by Mr Graeme Todman with regard to land behind 1 and 2 Montacute Gardens. Permission was granted in May 2020. Mrs Au Brey denied being unhappy about the decision. Mr Rainey suggested that this had motivated her to be biased with regard to the present enfranchisement application because she had an axe to grind. Mrs Au Brey said that she knew that Caxton Homes had plans but did not know the details nor was she particularly interested. She said that if a planning application were to be made she would consider it and make such representations as she thought fit to the Council. Mr Rainey asked Mrs Au Brey if she was aware of plans that Mr Balas had with regard to redevelopment of the whole of Montacute Gardens including no.3. She said that she had heard of a scheme but it was only a proposal as far as she

was aware. Her concerns were with no. 3 and she would look at any such scheme nearer the time. Mrs Au Brey said that she did not mind who owned the freehold, but Mr Rainey said it made an enormous difference because of Mr Balas's plans.

76. Mr Rainey took Mrs Au Brey through Mr Sheffield's evidence as to user of the OG but she simply said that she had never seen any of these uses. She said the barbecue could have been abandoned there. He also suggested that if there had not been any maintenance of the garden between 2012 and 2019 it would look like a jungle, which the photographs taken by Mr Bartholomew in 2017 and 2019 did not show to be the case. Mrs Au Brey said it depends what you mean by "jungle". She referred to weeds and brambles and the fact that the OG had needed severe scything and strimming.
77. Mr Buckpitt next argued that user "with", requires a nexus of enjoyment between the OG and the flat. At the most there has historically been common user of the OG, which precludes user exclusively with the Upper Maisonette. Mr Buckpitt said that in an *Aggio* scenario, i.e. where a claimant qualifying tenant is a headlessee of a flat and a garden area is claimed as appurtenant property, it is impossible to argue successfully that an appurtenance (*sic*) other than one with a direct nexus to the flat is used with the flat. The reality is that it is used as headlessee and owner of the OG. It is not user in connection with the flat.
78. Turning to the rear garden area, Mr Buckpitt said that he was not instructed to make any submissions seeking to resist the claim to the strip of rear garden, which had been excluded from the 2015 enfranchisement and which the Applicant contends was always treated as if it had been demised by the underlease of the Upper Maisonette. Mr Buckpitt said it is apparent that this clearly defined area separated by the hedge has been, and was, leading up to and at the relevant date, treated by all as part and parcel of the Upper Maisonette.
79. However, Mr Buckpitt submits that the remainder of the rear garden claimed by the Applicant cannot be said to have been usually enjoyed with the Upper Maisonette. With regard to that part of the garden nearest to the building he says that this was used by the middle and ground floor flats. He says that save for use of some sheds near the hedge by Mr Sheffield he has never made use of this part of the rear garden. He says that in the circumstances the claim to acquire this area must fail. He submits that cutting the grass from time to time during the period leading up to the section 13 notice is not sufficient usual enjoyment with the Upper Maisonette. With regard to the remainder of the rear garden up to the hedge, Mr Buckpitt submits that historically this has been used in common with other occupiers. In any event Mr Buckpitt submits that despite the fact that Mr Sheffield has been headlessee of

the area since 15 March 2017, his witness statement gives no evidence as to any use at all during this two-year period.

80. Mr Buckpitt concludes that in the circumstances the claim to acquire the OG and all but the strip of private garden excluded from the 2015 enfranchisement must fail.

The Applicant's response

81. In his oral submission, Mr Rainey confined himself to dealing with matters raised by Mr Buckpitt in his written and oral submissions that were either not dealt with at all or not elaborated in Mr Radevsky's brief written submission.
82. He submitted that the OG is patently a garden as shown by the photographs. It might be a less well-kept garden than that opposite 1-4 Montacute Gardens but it remains a garden just as a shabby or derelict house remains a house. What is more the Headlease required it to be set out and maintained as a garden.
83. With regard to the argument that the OG had to be within the curtilage of no 7 he says that the First Respondent is wrong. It is appurtenant property as defined in section 1(7). Mr Rainey says that Mr Buckpitt confuses the first four types of appurtenant property set out in section 1(7) with the fifth as if they were examples of appurtenance. He says that a garage, outhouse, garden, yard or appurtenance are all separate things. The first four are separate from the fifth.
84. Mr Rainey says that *Methuen-Campbell v Walters* was about a paddock let with a house and whether it fell within the definition of house and premises for the purposes of the Leasehold Reform Act 1967. He said that the paddock in that case was not a garden. Therefore to qualify at all as appurtenant property it had to be as an appurtenance. However it could not qualify as such because it was not within the curtilage of the house, which is a required element of an appurtenance. Had it been a garden it would have qualified as such.
85. Mr Rainey says that the present case is one of collective enfranchisement. He says that it is not uncommon that a site might comprise several buildings and have shared common land. It has never been suggested that if one building of several is enfranchised the common land cannot also be acquired even though it is not within the curtilage of any one building. He says that a flat may be let with a garage in another block but the fact that the garage is not within the curtilage of the building containing the flat does not mean it cannot be acquired.

86. Mr Rainey submits that in *Cadogan v McGirk* the only difference from *Methuen-Campbell v Walters* was how to apply the curtilage test to a second floor flat that does not have a curtilage. He says therefore that the test applies to the block rather than the flat. The storeroom in that case was an appurtenance and therefore had to be within the curtilage of the block. It was not an outhouse. Mr Rainey says this explains the comment in *Hague* (see paragraph 67 above) that a garden separated from the premises by a road can be appurtenant property. It would only matter that it was not within the curtilage if it was an appurtenance.
87. Mr Rainey further submitted that in any event he does not accept that the OG is not within the curtilage of no 7. He says that is a question of fact. He says that a number of blocks within a common area can have a common curtilage; e.g. 5-8 or 1-4 and both OGs. The road is a private access road.
88. Mr Rainey says that if the OG is demised by the Headlease and yet is not belonging to or usually enjoyed with the flat then what is it? He submits that it is equivalent to common use and must fall within the second limb (usually enjoyed with). Had it not been demised it would have fallen within s(1)(3)(b)). He says that there is no fourth category or hole to fall through.

Discussion

89. By their latest collective enfranchisement claim, Mr Ruby Sheffield and Mr Graeme Todman (the latter through his companies, Caxton Homes Ltd. and Edbury Estates Limited), being qualifying tenants under long leases of the three flats at 7 Montacute Gardens, seek to obtain freehold ownership of the whole of the rear garden of no 7 Montacute Gardens and the OG. They successfully acquired the freeholds of the building and the far end of the rear garden (together with an access path from the building across the remainder of that garden) in the 2015 enfranchisement but were unsuccessful in their attempt on that occasion to acquire the garden areas that they now claim once more (this time along with the other joint lessees under the Headlease) as Additional Freeholds.
90. There is a clear commercial context to the claim. During Mr Rainey's cross-examination of Mrs Au Brey he made reference to Mr Todman having development plans at Montacute Gardens. Indeed Mr Todman already has planning permission for land behind 1 and 2 Montacute Gardens. Mr Rainey also referred to plans which Mr Solomon Balas has, involving redevelopment of the whole of Montacute Gardens. As explained above, a company controlled by Mr Balas was the freeholder of

the building and rear garden at number 7 before the 2015 enfranchisement and another company controlled by Mr Balas was the owner of the OG. Mr Balas retains ownership of both the disputed garden areas through a third company (the First Respondent) to whom these areas were transferred in 2017. This transfer was clearly a tactic to defeat an enfranchisement claim to the disputed areas launched by Ruby Sheffield and Mr Todman (through his companies) in 2017 and subsequently abandoned before being revived in the fresh claim in 2019, which led to the present proceedings. Thus, as Mr Rainey observed, the ownership of the freehold of the disputed garden areas is a battle between two camps.

91. Whatever that battle might be it does not affect the function of the Tribunal, which is to determine the matter according to the law and the facts to which that law applies. Before examining the law, and its application to the facts, the Tribunal records that it adopts as fact, the evidence, summarised above, that is given in their witness statements by the witnesses for the Applicant, whose evidence was not challenged by the First Respondent. The evidence given by Mrs Au Brey for the First Respondent, whilst, in the Tribunal's view, honestly given and without ulterior motive, does not contradict that given by Mr Ruby Sheffield. Mrs Au Brey simply says that she did not see Mr Sheffield making use of the OG on the occasions when she looked out of the bedroom window in her flat or into the OG, as far as possible, when she passed by on the way to the shops. That does not mean that Mr Sheffield did not use it, as he claimed, on other occasions or indeed on occasions when she did look. She may just not have seen him if he was there on any such occasion because of an obstructed view
92. The statutory right of a tenant under a long lease of a house to obtain the freehold or an extended lease of the house was introduced by the Leasehold Reform Act 1967, which was designed to prevent a lessee under a long lease of a house which was nearing expiry from losing their home.
93. The 1993 Act extended that right to flats. The Act introduced the right of collective enfranchisement in Chapter 1 of Part 1 which enables qualifying tenants to obtain the freehold of the building in which their flats are contained. The policy context in the case of flats is different to that applicable in the case of houses. The collective enfranchisement provisions were designed to enable a group of leaseholders buy out the freeholder's interest so that tenants, who were obliged to pay for the services provided by the landlord could thereafter control those services and their cost.
94. Chapter 2 of Part 1 of the 1993 Act contains the individual right of a qualifying tenant of a flat to obtain a new lease. The underlying policy of this Part of the Act was to enable a tenant whose lease had become a wasting asset, and who was therefore at the mercy of the freeholder when

- it came to security of their investment and in their home, to obtain a new lease at a price and on terms provided for by the Act. This policy was modified later when the Commonhold and Leasehold Reform Act 2002 removed the original residence requirement in the 1993 Act.
95. Section 1 of the Act contains the right to obtain the freehold of the self-contained building or part of a building in which the flats of the qualifying tenants are contained (the “specified premises”). Furthermore, section 1(2)(a) entitles the claimants to acquire additional freehold property (“Additional Freehold(s)”) if that property falls within either section 1(3)(a) or (b) of the Act.
 96. Section 1(3) provides that section 1(2)(a) applies to any property if, at the relevant date (which is the date of service of the section 13 claim notice), (a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises or (b) it is a property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not). Where section 1(3)(b) applies the freeholder can, instead of acceding to the claim, offer permanent rights over the land claimed or of other land in lieu, under section 1(4).
 97. Qualifying tenants who enfranchise under section 1 are also required or entitled to acquire leasehold interests (section 2). Superior leases of flats *must* be acquired (section 2(2)) and leases of common parts or of property within section 1(2)(a) which the tenants are acquiring *may* also be acquired where the acquisition of that interest is reasonably necessary for the 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.
 98. Section 1(7) defines “appurtenant property,” in relation to a flat to mean “any garage, outhouse, garden, yard or appurtenance belonging to or usually enjoyed with the flat.”
 99. Section 62(2) of the 1993 Act similarly provides that in relation to the individual right to a new lease under the 1993 Act references to a flat
“include any garage, outhouse, garden, yard and appurtenance belonging to or usually enjoyed with the flat and let to the tenant with the flat on the relevant date...”
 100. The present case is of course one of collective enfranchisement. It is necessary for the Tribunal to consider the policy and structure of the Act. As to the policy of the Act Millet LJ held in *Cadogan v McGirk* that

- “It would, in my opinion, be wrong to disregard the fact that, while the Act may to some extent be regarded as expropriatory of the landlord’s interest nevertheless it was passed for the benefit of tenants. It is the duty of the Court to construe the Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy.’
101. As to the structure, the Court of Appeal has emphasised the need for section 1 of the Act to be construed as a coherent whole (*4-6 Trinity Church Square Freehold limited v Corporation of the Trinity House of Deptford Strond* [2018] EWCA Civ 764 a case involving sections 1(3)(b) and 1(4)). The difficulty that remains of course is in discerning “what Parliament must have intended.” That is particularly acute in the present case.
 102. For the purposes of this determination, the preliminary issue, as argued by the parties, turns on whether section 1(3)(a) has been satisfied. This requires the Applicant to establish that the Additional Freeholds claimed are “appurtenant property” (as defined in section 1(7)) which are demised by a lease held by a qualifying tenant.
 103. It is not disputed that a lease held by a qualifying tenant demises all the areas claimed. They are demised by the Headlease of the Upper Maisonette, which is the qualifying tenancy. This is so because of the decision in *Howard de Walden Estates Ltd v Aggio* [2009] AC 39 where the House of Lords held that a headlessee of a building containing flats could make a new lease claim of a flat as qualifying tenant of that flat (provided there was no other qualifying tenant of the flat under an inferior tenancy).
 104. What is disputed is whether, at the Relevant Date, any or all of those areas claimed are appurtenant property as defined in section 1(7) for the purposes of s.1(3)(a). Each disputed area is dealt with in turn below.

The Ornamental Garden (“the OG”)

105. Until the hearing of 17 September 2020 it had been common ground between the parties that each of the areas claimed by the Applicant was a “garden” for the purpose of section 1(7). Mr Radevsky’s submission of 17 June 2020 certainly did not dispute this. However, in his oral and written submission Mr Buckpitt argued that the OG, which was separated from the building by a roadway and is unfenced was in such an overgrown and dilapidated state as to arguably be no longer a garden at all but merely a “cut through.” He suggested that it was more akin to the rough pastureland in *Methuen-Campbell v Walters*, where the Court of Appeal rejected the submission that it was a garden. Mr Rainey rightly observed that this was a new point that was being raised for the first time with little notice. However, Mr Buckpitt conceded that it was perhaps

not his strongest point and he was right to do so. The Headlease describes the area as a garden and there is a covenant in that lease to keep it maintained as such. Furthermore, an overgrown garden is nonetheless a garden. As Mr Rainey observed, a dilapidated or shabby building is still a building. The pastureland in *Methuen-Campbell Walters* was never described or used as a garden. It was a paddock. When it was argued in that case that the paddock was a wild garden Goff LJ stated

“But when you have, as here, a cultivated garden and a piece of rough pasture ground separated from one another, and apparently marked as separate in the lease plan, I do not think it is possible to regard that rough pasture (the paddock) as being garden.”

106. In the present case the OG is a cultivated garden that has been left to deteriorate but not to such an extent that it has ceased to be a garden. The Tribunal accordingly finds that the OG is a garden for the purposes of section 1(7).
107. The question therefore remains as to whether the OG is a garden that was “belonging to” or “usually enjoyed with” the flat (i.e. the Upper Maisonette) at the relevant date. However, in his submission Mr Buckpitt argues that before one even gets to this matter the Applicant has to show that the OG is a garden belonging to or usually enjoyed with *the flat*, which means that it must be within the curtilage of the building at No 7. He relies on the decision of the Court of Appeal, whose judgment was given by Millett LJ, in *Cadogan v McGirk*.
108. In that case the qualifying tenant of a second floor flat in a building claimed a new lease (under Chapter 2 of Part I of the 1993 Act) of the flat. The contested issue was whether the new lease should include a storeroom on the sixth floor, which was let to the tenant under a separate lease. Section 7(6) of the Act provides that where there are two such leases they together constitute a single long lease. Section 62(2) gives an extended definition of “flat” whereby it includes

“any garage, outhouse, garden yard and appurtenances belonging to or usually enjoyed with, the flat and let to the tenant with the flat on the relevant date....”
109. The dispute therefore turned upon whether the storeroom fell within that definition and more specifically whether it qualified either as an “outhouse” or “appurtenance” belonging to or usually enjoyed with the flat”. The Court of Appeal, whose judgment was given by Millett LJ, held that it was not an “outhouse” because that is an outbuilding or outside building in the grounds of or adjoining a principal building. Millett LJ then stated that

“If the storeroom is an “appurtenance” of the flat within the meaning of section

62(2) of the Act, then it is “appurtenant property” within the meaning of section 1(7) which was “let with” the flat within the meaning of section 7(6) and falls within the extended definition of “the flat” in section 62(2).”

110. The freeholder having contended that an appurtenance must be within the curtilage of the flat, Millett LJ continued

“The “appurtenance” must be an appurtenance of the flat in the sense that it must belong to or be usually enjoyed with the flat and must be let with the flat. The question is whether it must also be within the curtilage (if any) of the flat or whether it is sufficient if it is contained within the premises of which the flat forms part or is situate within the curtilage of those premises.

I am of opinion that the latter is sufficient.”

His Lordship continued

“The immediate context provides further support for the construction which I have favoured. Just as the “outhouse” must be in the grounds of the block of which the flat forms part, so in my opinion the “appurtenance”, if consisting of land or a building, must be within the curtilage of the block but need not be within the curtilage (if any) of the flat. But whereas the “outhouse” must be outside the main building, the “appurtenance” may be within it.”

111. Mr Buckpitt draws from this decision the conclusion that to qualify as appurtenant property for the purposes of section 1(7) the OG must be within the curtilage of 7 Montacute Gardens.
112. Mr Rainey sought to refute this conclusion by reference to a close reading of the decision and its context. He said, as was made clear in the headnote of the law report of *Cadogan v McGirk*, that the decision was as to whether the storeroom was an “outhouse” or “appurtenance” for the purpose of section 62(2) of the Act. Thus, he submitted, whilst an appurtenance had to be within, or within the curtilage of, the building containing the flat to which it is appurtenant, that did not mean that a “garden” had to be within the curtilage of the flat (if any) or the curtilage of the building containing the flat. He said that the requirement that an outhouse had to be within the curtilage of the building followed from the settled meaning of “outhouse”. Mr Rainey said that in so far as Mr Buckpitt referred to the OG as an appurtenance he had fallen into error because an appurtenance is quite separate from the other items, including a garden, listed in the definition of appurtenant property in section 1(7).
113. Whilst agreeing with Mr Rainey that the actual decision in *Cadogan v McGirk* was a case about an appurtenance properly called, and is thereby distinguishable from the circumstances of the present case, the Tribunal considers that regard must be had to the following passage from Millett LJ’s judgment, relied on by Mr Buckpitt.

- “As I see it it is necessary first to identify a separate set of rooms within the building which constitutes the flat; next to identify other areas within the building which or the right to enjoy which may be appurtenant to the flat; and finally to consider the grounds of the building in order to identify any garage, outhouse, garden, yard or other erection or land within the curtilage of the building which or the right to enjoy which is usually enjoyed and let to the tenant with the flat.”
114. Mr Rainey valiantly argued that the reference in this passage to curtilage of the building was confined to “or other erection or land” being, he suggested, a synonym for “appurtenance”. However, that fails to explain Millett LJ’s statement that one has to “consider the grounds of the building” in relation not just to appurtenances but also any garage, outhouse, garden or yard.
115. It is clear from this passage that Millett LJ considered that for the purposes of sections 62(2) and 1(7) a garage, outhouse, garden, yard or “other erection or land” (the last mentioned not being within the building) must be within the curtilage of the building. Whilst being an *obiter dictum* uttered in the case of a new lease claim (because the storeroom in that case was an appurtenance within the building), Millett LJ’s observation is a weighty statement to which the Tribunal should have due regard in a collective enfranchisement claim that turns upon the meaning of section 1(7), which in all material respects uses the same wording as section 62(2). Furthermore, if Mr Rainey is right it would mean that a different test would apply to a garden, and presumably a garage, to that applied to an outhouse, yard or appurtenance. It is highly unlikely that this was Parliament’s intention.
116. The question therefore is whether the OG is within the curtilage of the building numbered 7 Montacute Gardens. Mr Rainey argued that even if he was wrong the OG could still be said to be within the curtilage of the building at No 7 and that this was a matter of fact. Mr Buckpitt says that the OG is not within the curtilage of any property and if it was it was certainly not within that of number 7 alone.
117. The Tribunal agrees that what is within the curtilage of a building is a question of fact in each case (as was held by Goff LJ in *Methuen-Campell v Walters*). The concept of a curtilage is usually associated with a dwelling-house, in which case it refers to land which is part and parcel of the house to which it is claimed to be related. In *Walters* the rough pasture let to the tenant of the house and garden was held not to be within the curtilage of the house because in the words of Goff LJ
- “it was clearly divided off physically from the house and garden right from the start and certainly at all material times.”
118. However, in the context of flats and the 1993 Act what amounts to the relevant curtilage is more complicated. It relates to the building of which

the flat forms a part and if *Cadogan v McGirk* is to be a guide refers to what might be described as the grounds of that building. 7 Montacute Gardens is a semi-detached building (being one of eight such buildings) containing three flats with a rear garden. Can it sensibly be said that the OG, separated from that building (and at least three others) by a private road, is within the grounds (i.e curtilage) of *that* building such that it could be said to form part and parcel of the building? The Tribunal agrees with Mr Buckpitt that *Cargill v Phillips*, a case on whether certain land was let with a dwelling-house for the purposes of the application of the Rent Acts is of no assistance as to the meaning of appurtenant property in the 1993 Act. However, it is a question of fact in each case as to whether something is within the curtilage of a house or other building. There is no rule that if separated by a path or road from the building a garden cannot be within the curtilage of that building. Nonetheless, in the present case the Tribunal finds that the OG was a communal garden that was not within the curtilage of any one building at Montacute Gardens including that at number 7.

119. This decision by the Tribunal is sufficient to dispose of the Application as far as the OG is concerned. It follows that it is not necessary to decide whether the OG was usually enjoyed with the Upper Maisonette, as claimed by the Applicant.

The rear garden

120. Is the freehold of the rear garden area claimed appurtenant property? This again turns on whether it belonged to or was usually enjoyed with the Upper Maisonette or the building of which it forms part. The rear garden claimed falls into two parts. The first part is that which lies beyond the hedge that divides the garden and which was not included in the 2015 enfranchisement. The second part is the area between the hedge and the building.
121. The First Respondent does not oppose the claim to the strip of garden beyond the hedge, which has always been treated as the private garden of the Upper Maisonette and was only omitted from the registered title to the surrendered underlease of that flat by a conveyancing error and a misleading plan. The Tribunal agrees that the evidence demonstrates that this area belongs to or was usually enjoyed with the Upper Maisonette at the Relevant Date.
122. However, the First Respondent does oppose the claim to the remainder of the rear garden (referred to hereafter as the front rear garden area; that is to say the area of garden between the building and the hedge). That claim can only succeed if the Applicant has established that this area of garden is demised by the lease of the Upper Maisonette and in addition belongs to or is usually enjoyed with the Upper Maisonette.

123. It is not disputed that the Headlease of the Upper Maisonette demises the garden, nor that that lease is a qualifying tenancy. The question is whether the front rear garden “belongs to” or is “usually enjoyed with” the Upper Maisonette. Mr Rainey submits that “belonging to” means appurtenant property which is private or exclusive to the flat in question. He does not seek to argue that this applies to the nearer part of the rear garden.
124. However, he argues that “usually enjoyed” with the flat encompasses appurtenant property which is not exclusive to the flat in question but which is nevertheless enjoyed with the flat as opposed to something which happens to be demised by the lease but which really has nothing to do with the flat. He says that the front rear garden falls into that category in that Mr Sheffield has used it with the flat since 1983. Indeed, he says that Mrs Sheffield as headlessee has a legal easement by virtue of the grant of the (now surrendered) underlease in 1980 which will have converted the previous permissive user into an easement through the operation of section 62 of the Law of Property Act 1925.
125. It is remarkable that the courts appear not to have found it necessary to distinguish between the two alternative limbs of section 1(7) which can be found in many Acts of Parliament over at least the last 100 years, let alone distinguish them in the way suggested by Mr Rainey. It is very unlikely that in adopting the well used definition of appurtenant property in section 1(7) of the 1993 Act Parliament will have intended a meaning as radical as that suggested by Mr Rainey. Had it meant to do so it could have made that clearer by more explicit words. By contrast, areas used as of right in common with others are dealt with by section 1(3)(b) of the Act.
126. It is far more likely that whether appurtenant property belongs to or is usually enjoyed with a flat depends on whether or not it is contiguous to the flat or is within the curtilage of the building and is usually enjoyed with *the flat* and not with the flat and other flats. Until 15 March 2017 the Upper Maisonette had been held since 26 September 1980 on an underlease which also demised to the underlessee the area of garden beyond the hedge (save for the strip dealt with in paragraph 115 above).
127. The remainder of the rear garden has never been let on an underlease. The occupiers of the flats at No 7, including the Upper Maisonette, have simply used it in common at different times. The garden and the Upper Maisonette are now held on the same lease but that does not mean that the garden belongs to or is usually enjoyed by that flat exclusively at the Relevant Date.
128. The Tribunal agrees with Mr Buckpitt that read together section 1(3)(a) and section 1(7) require that the appurtenant property belongs to or is usually enjoyed with the flat under the qualifying tenancy. The question is

- whether the evidence shows that the near part of the rear garden is usually enjoyed with the Upper Maisonette and that flat alone at the relevant date of 18 February 2019.
129. The Tribunal finds that the evidence does not establish that. Mr Sheffield simply says that since he became a qualifying tenant he as an individual has used and still uses the sheds in front of the fence for storage and together with a tenant of one of the lower flats has mowed the (near) rear garden lawn but that does produce the result that the whole of that garden belongs to” or is “usually enjoyed with” the flat i.e. the Upper Maisonette. It belongs to the building as a whole and is used by occupiers of the flats within it.
 130. Mr Rainey drew the Tribunal’s attention to *4-6 Trinity Church Square Freehold v Corporation of Trinity House* [2018] 1 WLR 4876 (CA). That was also a case concerning a communal garden, shared between several buildings. The qualifying tenants had (in their leases) revocable licences of use of the garden. It was thus a section 1(3)(b) claim. The parties had agreed that the outgoing freeholder should retain the freehold of the garden. In those circumstances it was held that the nominee purchaser should acquire permanent fee simple rights over the garden under section 1(4) of the Act even though the lessees only had permissive revocable licences of use. Mr Rainey submitted that it would be extraordinarily bizarre if in a case like the present, where one of the qualifying tenants actually has a lease of the garden and thus the absolute right of use, and hence section 1(3)(a) applies, that somehow the nominee purchaser were not entitled to the freehold. He says that a tenant to whom the appurtenant property is demised cannot be in a worse position than a qualifying tenant who has a mere easement of use with others.
 131. That outcome might well seem bizarre, but arguably only if a headlessee of a flat who has a lease of the garden used in common with the occupiers of other premises is somehow precluded from relying on section 1(3)(b). However, the Tribunal has not heard argument, at least so far, on the applicability of that provision in the present case.

Decision

132. **The Tribunal accordingly determines that for the purposes of**

the preliminary issue:

(1) The area contained in Title K952300 and edged blue on Plan 1 attached to the section 13 notice does not qualify as an additional freehold within section 1(2)(a) of the 1993 Act.

(2) The rear garden area at 7 Montacute Gardens in Title K448284 which area comprises the dividing hedge and beyond up to the area contained in Title TT37522 is an additional freehold under section 1(2)(a) of the 1993 Act by virtue of being appurtenant property within section 1(3)(a) of that Act.

(3) The remainder of the rear garden within title K448284 does not qualify as an additional freehold under section 1(2)(a) of the 1993 Act by virtue of section 1(3)(a) of that Act.

133. The Tribunal agrees with Mr Rainey that the preliminary issue is whether the areas claimed by the Applicant qualify as additional freeholds under section 1(2)(a) of the 1993 Act. Furthermore, the Act does not require a claimant to specify in the claim notice which limb of section 1(3) of the Act applies to the property claimed by virtue of section 1(2)(a).
134. The decision in paragraph 132 above is confined to the matter of whether the property claimed by the Applicant under section 1(2)(a) qualifies by virtue of section 1(3)(a) of the Act. If the Applicant wishes to argue that the property claimed qualifies by virtue of section 1(3)(b) of the Act it should do so by a request to the Tribunal, to be received not later than 14 days after the date of this decision. Following receipt of any such request the Tribunal will issue Directions as necessary.
135. In the meantime the Tribunal directs, under Rule 6 of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013, that in the case of the present decision the period within which an application for permission to appeal may be made under Rule 52 of the said Rules shall not start to run until such date as the Tribunal shall specify.

