Tenure confusion:
are shared ownership lessees assured tenants, long lessees or both?

TRISTAN SALTER
Five Paper
October 2018

This article seeks to re-examine the case of *Richardson v Midland Heart* [2008] L&TR 31 and discuss whether or not shared ownership leases should be classified as long leases.

Introduction

1. In *Richardson v Heart* Jonathan Gaunt QC held, famously, that a shared ownership lease is an assured tenancy pursuant to the Housing Act 1988. Less famously he also held that a shared ownership lease is not a long lease for the purposes of s.76 of the Commonhold and Leasehold Reform Act 2002, until the tenant has achieved 100% ownership; i.e. when the lease ceases to be a shared ownership one.

2. However, in an earlier case, *Brick Farm Management v Richmond Housing Partnership* [2005] EWHC 1650 (QB) and in a later case *Corscombe Close Block 8 RTM v Roseleb* [2013] UKUT 81 (LC) the High Court and the Upper Tribunal, respectively, held that shared ownership leases are long leases even when they are still shared ownership leases and that accordingly, the long lessees were 'qualifying tenants' for the purposes of collective enfranchisement and RTM, respectively.

3. In this Article we consider the reasoning in these cases and propose that that in *Brick Farm v RHP* and *Corscombe Close v Roseleb* should be preferred; i.e. shared ownership leases are both assured tenancies (where not otherwise excluded) and long leases attracting certain rights and protections under the statutory regimes that apply to each.

Shared ownership and "long lease"

4. *Richardson v Midland Heart Ltd* was a seminal case for those dealing with shared ownership leases. In that case the High Court rejected the notion that a shared

ownership created two concurrent tenancies and confirmed that Ms Richardson was an assured tenant of Midland Heart; it held that given the lease fulfilled the criteria of s.1 of the Housing Act 1988 it became "draped" in the protections of the statute.

5. In coming to that decision the High Court rejected the idea that a "long lease" had been created and Ms Richardson could avail herself of protections under ss.166 and 167 of the Common and Leasehold Reform Act 2002.

6. A "long lease" is defined by s.76(2) of the CLRA 02 which states that a lease is a "long lease" if:

> (a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise,
>
> …
>
> (e) it is a shared ownership lease, whether granted in pursuance of that Part of that Act or otherwise, where the tenant's total share is 100 per cent., …

7. The court was taken to the definition of long lease in s.76(2) but focused on s.76(2)(e) the judge stating that:

> "… [the tenant] had not acquired any additional shares and so her share remained fifty per cent and so her total share is not a hundred per cent but only fifty per cent and so she does not fulfil the condition in section 76(2)(e) and her lease is, therefore, not a long lease as defined."

8. It seemed as though the issue was settled and Housing Associations and tenants have been operating as though *Richardson v Midland Heart* was definitive on the issue.

9. However, almost identical provisions within the Leasehold Reform, Housing and Urban Development Act 1993 had been the subject of previous litigation. In *Brick Farm v RHP* the question arose as to the definition of a "long lease" under s.7(1) of the LRHUDA 93. This Act defines a "long lease" as:

> (a) a lease granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise;
>
> …
>
> (d) a shared ownership lease, whether granted in pursuance of that Part of that Act or otherwise, where the tenant's total share is 100 per cent ..

10. In *Brick Farm v RHP* Stanley Burton J was dealing with a tenant's right of collective enfranchisement and the exclusion for charitable housing trusts under s.5(2)(b) LRHUDA 93. In the course of judgment the judge touched on the curious features of the LRHUDA 93 and that there were multiple ways in which a lease could qualify as a "long lease", stating:

> "… [i]t follows that in practice all shared ownership leases are long leases within the meaning of section 7(1)(a) of the 1993 Act. On the face of it, therefore, para (d) of section 7(1) is otiose… Parliament cannot be taken to have intended to restrict the unqualified ambit of paragraph (a) of section 7(1) by adding a paragraph purporting to widen rather than narrow the definition of "long lease"."

11. HHJ Mole QC took on the logic underpinning that judgment in the case of *Corscombe Close v Roseleb*. In this case HHJ Mole QC was dealing with the CLRA 02 and whether tenants under a shared ownership scheme held "long leases" and therefore were qualifying tenants who needed to be served notice in relation to an application for Right To Manage. In deciding that shared ownership leases were indeed "long leases" the judge referred to *Brick Farm Management v RHP* and stated that the natural meaning of s.76(2) was to be read as a series of gateways. He held that if a lease fulfils s.76(2)(a), being granted for a term of years certain exceeding 21 years it comes within the definition of "long lease" and did not need to qualify through the gateway under s.76(2)(e) as well. At paragraph 15 he stated:

> "… The definitions of a long lease in s.76(2)(a) - (f) are additive: a lease qualifies as a "long lease" if it falls under any one of those definitions. Thus if a lease is a shared ownership lease is granted for a term of year certain exceeding 21 years and comes under (a), it is a "long lease"…."

12. Where does that leave us with shared ownership? The judge in *Corscombe Close v Roseleb* noted that the comments in the *Brick Farm v RHP* were from a different statute and technically obiter but that the "wording of the definition of "long lease" and "shared ownership" is almost identical." Moreover there exists the uncomfortable position for Housing Associations and tenants that there is a divergence between the case law on whether a shared ownership lease is a "long lease", even within the CLRA 02.

13. It is very hard to argue that *Richardson v Midland Heart* can stand as good law. Firstly the judge was not taken to, albeit obiter, comments on the definition of "long lease" in *Brick Farm Management*. Secondly the judge did not grapple with the apparent inconsistencies within s.76(2). The logical position, as highlighted in both *Brick Farm Management* and then in *Corscombe Close* is that s.76(2) is indeed a series of gateways. A shared ownership lease, granted for a term certain of above 21 years is therefore a "long lease" under CLRA 02.

Stare decisis

14. The difference between *Richardson v Midland Heart,* a decision of the High Court, and *Corscombe Close,* of the Upper Tribunal, highlights an interesting position for courts of first instance. Simply put which judgment would the County Court or First Tier Tribunal be bound to follow?

15. The rules on precedent of the courts were recently re-affirmed by the Supreme Court in *Willers v Joyce* [2016] UKSC 44. While the Supreme Court and the Court of Appeal obviously bind the High Court, it is not bound by other decisions of the High Court. Nevertheless it should generally follow decisions of the court unless there is a powerful reason for not doing so. If there is such a departing, and as such a court of first instance is faced with two conflicting decisions, the later decision is to be preferred, if it is reached after a full consideration of the earlier decision (see *Minister of Pensions v Higham* [1948] 2 KB 153).

16. The Upper Tribunal is a superior court of record, established by the Tribunals, Courts and Enforcement At 2007, and therefore equally not technically bound by

decisions of the High Court. In *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) Carnwath LJ confirmed that the Upper Tribunal is not formally bound by the High Court but should generally adopt the same general rule as the High Court when dealing with decisions of co-ordinate jurisdiction, save for one qualification. That qualification arose from comments by Lady Hale in *AH (Sudan) v Secretary of State* [2008] AC 678 in which she emphasised the specialist nature of some of legislation coming before tribunals. With that in mind Carnwath LJ stated, at paragraph 41, that:

> "… where such specialised issues arise before the Upper Tribunal, it [the Upper Tribunal] may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so."

17. Turning back to the issue whether a shared ownership lease is a "long lease" there is a total failure to consider earlier decisions: the 2013 decision of *Corscombe Close v Roseleb,* makes no reference to the 2008 case of *Richardson v Midland Heart* which in turn makes no reference to the 2005 case of *Brick Farm Management v RHP*.

18. Any first instance judge would likely follow the logic underpinning *Brick Farm Management v RHP* and *Corscombe Close v Roseleb.* While a single lease has been created it is draped in protection as an assured tenant as per *Richardson v Midland Heart* **and** the protection offered to tenants who hold a long lease.

Shared problems

19. Where does this leave the current state of shared ownership leases and do we need a re-think in our approach?

20. An initial concern for all landlords is the demands for rent must satisfy s.166 CLRA 02, which states that a tenant of a long lease is not liable for payment of rent unless the landlord has provided notice on the prescribed form: Landlord and Tenant (Notice of Rent) (England) Regulations 2004/(Wales) Regulations 2005. Rent based possession action might therefore be harder to pursue if demands have not be made correctly.

21. It also appears that treating any shared ownership lease solely as an assured tenancy runs into problems when possession is sought on non-rent arrears grounds. In a traditional long lease a landlord is not entitled to serve a s146 Notice until it has been admitted or determined as per s.168 CLRA 02. Shared ownership leases are also offered this protection, with s.169(5) highlighting that a shared ownership lease is a long lease for the purposes of s.168.

> **169 Section 168: supplementary**
>
> …
>
> (5)
>
> *"long lease"* has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

22. In non-rent cases it is therefore necessary to get an admission or determination before forfeiting the lease. It lends credence to the idea of dual protection from both the HA 99 and CLRA 02. Section 168 is specifically applied to shared ownership leases and the legislative intention must have been to protect such leases from forfeiture proceedings without a clear admission or determination.

23. The issue could also be turned on its head. If an assured tenancy can be protected by provisions designed for long leases surely long leases can be draped in the protections for assured tenants? There are restrictions on assured tenancy status but it does not cover all long leases. Leases entered into after 1 April 1990 that have an annual rental value exceeding £1,000 in London or £250 are explicitly excluded from assured tenancy status by para 3A of Schedule 1 of the HA 88. This might cover most traditional long leases but rents are increasing and many long leases will soon be caught by these rental values if they are not already. It is noteworthy that the simpler model within the secure tenancy regime that excludes all long leases under Schedule 1 of HA 85 was not replicated in the assured tenancy regime. This difference might be significant as ground rents increase.

24. This article does not seek to explore those questions in depth but highlights the potential pitfalls of overlapping regimes that come together most obviously in shared ownership leases.

Conclusion

25. This article has sought to show there are complexities in the legal position of shared ownership leases. Shared ownership could indeed benefit individuals who want the prospect of owning their own home who do not have the requisite capital for a deposit. However the status of shared ownership leases is not a settled proposition and the differences in the application of s.76(2) highlight that care should be taken, by both those offering shared ownership tenancies and those looking at it as a pathway towards home ownership.

TRISTAN SALTER