[2015 Gib LR 243]

FACIO-BEANLAND v. MURPHY

SUPREME COURT (Jack, J.): July 2nd, 2015

Land Law—partition of freehold estate—flying freeholds—court may order horizontal partition of freehold estate creating flying freeholds with management scheme for maintenance and improvement works, e.g. 999-year lease of freehold to management company, leaseback of each part to each freeholder with leasehold covenants to pay service charges to management company, then partition of freehold with common parts owned by all freeholders as tenants in common—may impose obligations between parties to implement management scheme

The claimant applied for an order for partition of a freehold estate.

A freehold estate comprising a block of eight flats was held by the claimant, the defendant and the estate of Mrs. Esteve as tenants in common. The claimant held a five-eighths share, the defendant held a one-quarter share, and the Esteve estate held a one-eighth share of the estate.

The claimant and the defendant sought horizontal partition of the property between themselves and the Esteve estate but Mrs. Esteve's heirs preferred that the property should be sold. The claimant and defendant proposed that, on partition, the property should be divided in such a way that five flats would be owned by the claimant, two flats would be owned by the defendant, and one flat would be owned by the Esteve estate.

Horizontal partition would involve the creation of flying freeholds (*i.e.* freeholds which would overhang other freeholds), which was problematic because it was often difficult for flying freeholders to make agreements between themselves concerning maintenance and improvement works which would benefit the whole property. To resolve this, at an earlier stage in the proceedings the court suggested that, prior to partition, the whole property could be leased to a management company for 999 years with leasebacks of the individual flats to each of the parties. The freehold could then be partitioned between the parties but maintenance and improvement of the property would be dealt with by the management company and funded by a service charge imposed on each of the parties under the terms of the leasebacks of the flats.

For the court's proposed solution to be adopted, three issues had to be resolved: (a) did the court have the power to order the horizontal partition of a freehold which would create flying freeholds? (b) did it have the power to direct the execution of a long lease to a management company

and leasebacks of individual flats? and (c) should it order partition or a sale in lieu of partition?

The claimant ignored the court's proposed long lease and leaseback arrangement and instead prepared a draft deed which provided for the horizontal partition of the freehold between the three tenants in common, the transfer of the common parts of the property to a management company, and the imposition on each tenant in common of a personal obligation to pay a service charge to the management company and an obligation to ensure that, on a transfer of a flat, the transferee would give a personal covenant to pay the service charge.

Held, ordering the partition of the freehold:

(1) The court would order partition under s.5 of the Partition Act 1868 despite the Esteve heirs' preference for a sale, provided that the claimant and/or the defendant was prepared to give an undertaking to purchase the one-eighth share held by the Esteve estate. Under s.5, the court could order a partition even if one tenant in common preferred a sale as long as another tenant in common undertook to purchase the share of the tenant in common who sought a sale (para. 58).

(2) The court had a discretionary power to order the horizontal partition of a freehold estate creating flying freeholds, but it would only exercise that power if the partition would not damage historic buildings and it could implement a viable scheme of management to secure proper maintenance and improvement works. It also had the power to impose obligations between the parties that would help to achieve a fair and workable partition. It would use these powers to impose a scheme of management whereby it would order the grant of a 999-year lease to a management company and leasebacks of each individual flat to the tenant in common to whom that flat had been allocated. The leasebacks would impose obligations on the tenants in common to pay a service charge to fund maintenance and improvement works. The freehold would then be partitioned in such a way that each tenant in common would acquire the freehold of his allocated flats and the common parts would be held by all three tenants in common in undivided shares. This scheme would be adopted for three reasons: (a) there was a great demand for horizontal division of freeholds in Gibraltar; (b) the creation of flying freeholds without the oversight of a management company was problematic because it was often difficult for flying freeholders to make agreements by themselves concerning maintenance and improvement works which would benefit the whole property; and (c) the tenants in common could themselves agree on a partition and it was undesirable for the court to lack jurisdiction to do something which the parties could do themselves (paras. 37–38; para. 47; paras. 50–53).

(3) By contrast, there were several problems with the draft deeds of partition prepared by the claimant: (a) the court would not be able to transfer the common parts of the property to a management company

because it was not one of the existing tenants in common; (b) the obligation to pay a service charge was purely personal and the management company would therefore have only a personal claim against any party who refused to pay; and (c) the parties' covenants to pay the service charge would not bind future transferees of the flats because a positive covenant could not run with the land. The claimant's proposal that each tenant in common should be obliged to ensure that, on a transfer of a flat, the transferee would give a personal covenant to pay the service charge, creating a chain of covenants, would be ineffective if a flat were mortgaged, as mortgagees generally refused to enter into personal covenants to pay service charges, and if the mortgagor fell into arrears and the mortgagee sold, the chain of covenants would be broken (paras. 39–43).

(4) The court had a limited common law power to order one flying freeholder to give another flying freeholder a contribution to works which were of mutual benefit, but this power could not be used to arrange the maintenance of a block of eight flats because (a) the freeholders and the management company would have to consider the extent to which every piece of repair work benefited each flat, and this was likely to give rise to constant disputes as to what work needed to be done; (b) this common law power could only be exercised to resolve a nuisance and issues such as failure to decorate and clean the common areas of the block of flats were not actionable nuisances; and (c) the case law on which the common law power was based was still in a state of development and had been doubted, and was therefore an unsafe basis on which to order a partition creating flying freeholds (paras. 44–46).

Cases cited:

(1) *Abbahall Ltd.* v. *Smee*, [2003] 1 W.L.R. 1472; [2003] 1 All E.R. 465; [2003] H.L.R. 40; [2002] EWCA Civ 1831, not followed.
(2) *Coope* v. *Ward*, [2015] 1 W.L.R. 4081; [2015] EWCA Civ 30, referred to.
(3) *Delaware Mansions Ltd.* v. *Westminster City Council*, [2002] 1 A.C. 321; [2001] 3 W.L.R. 1007; [2001] 4 All E.R. 737; [2001] UKHL 55, referred to.
(4) *Drinkwater* v. *Ratcliffe* (1875), L.R. 20 Eq. 528, referred to.
(5) *First National Bldg. Soc.* v. *Ring*, [1992] 1 I.R. 375; [1991] IEHC 2, referred to.
(6) *Francisco Mena Guillen Ltd.* v. *Ullger*, Supreme Ct., Action No. Misc. No. 59 of 1993, unreported, applied.
(7) *Holbeck Hall Hotel Ltd.* v. *Scarborough B.C.*, [2000] Q.B. 836; [2000] 2 W.L.R. 1396; [2000] 2 All E.R. 705, referred to.
(8) *Leakey* v. *National Trust*, [1980] Q.B. 485; [1980] 2 W.L.R. 65; [1980] 1 All E.R. 17, considered.
(9) *Lister* v. *Lister* (1839), 3 Y. & C. Ex. 540; 160 E.R. 816, referred to.
(10) *Mattana* v. *Ullger*, Supreme Ct., Action No. Misc. No. 46 of 1996, unreported, referred to.

(11) *Official Receiver for Northern Ireland* v. *O'Brien*, [2012] BPIR 826; [2012] NICh 12, referred to.
(12) *Pitt* v. *Jones* (1880), 5 App. Cas. 651, referred to.
(13) *Rhone* v. *Stephens*, [1994] 2 A.C. 310; [1994] 2 W.L.R. 429; [1994] 2 All E.R. 65, referred to.
(14) *Tulk* v. *Moxhay* (1848), 1 H. & Tw. 105; 47 E.R. 1345, referred to.
(15) *Turner* v. *Morgan* (1803), 8 Ves. Jr. 143; 32 E.R. 307, referred to.
(16) *Warner* v. *Baynes* (1750), Amb. 589; 27 E.R. 384, followed.
(17) *Woodhouse* v. *Consolidated Property Corp. Ltd.* (1993), 66 P. & C.R. 234, referred to.

Legislation construed:
Partition Act 1868 (31 & 32 Vict., c.40), s.5: The relevant terms of this section are set out at para. 56.

S.J. De Lara for the claimant;
C. Pitto and *G.M. Lima* for the defendant.

1 **JACK, J.:** "Buy land, they're not making it anymore" was Mark Twain's advice. Any resident of Gibraltar knows, however, that land can indeed be made, because much of the population now lives on land which was under water until reclamation works in this and the last century. In a more restricted sense, however, Twain's adage does apply in Gibraltar because, for many years, it has been the policy of the Government of Gibraltar to grant only long leases of land. Freehold land is comparatively rare and is confined largely to the Old Town.

2 Because of its rarity, Gibraltarians attach particular value to freeholds and are reluctant to part with freehold land. This leads to difficulties where the fee simple is divided among many joint tenants or tenants in common. 10 Demaya's Ramp is such a freehold. The last sole owner of the freehold was Antonio Facio, who died in Gibraltar on May 11th, 1910. In his last will, made on September 11th, 1909, he expressed the wish that the property be kept within the family. As a result of various transfers on death and inter-family sales which it is not necessary to recount, the property is now held by three tenants in common sharing in undivided shares as follows: the claimant ("Mr. Facio-Beanland"), 62.5% or five-eighths; the defendant ("Mr. Murphy"), 25% or a quarter; and the estate of the late Lisette Esteve Facio ("Mrs. Esteve"), 12.5% or one-eighth.

3 Mrs. Esteve died intestate living in Spain. She left three daughters, Lydia Esteve Facio, who lives in Germany, and Cristina Esteve Facio and Irene Esteve Facio, both of whom live in San Roque. They are the sole inheritors of her estate. They refuse to take any steps to administer their late mother's estate.

Procedural history

4 By a Civil Procedure Rules, Part 8 claim form issued on December 15th, 2014, Mr. Facio-Beanland sought partition of the property, or, in the alternative, an order for sale under the Partition Act 1868. Mrs. Esteve's estate was not a party. The matter first came before me on February 19th, 2015 and I raised the need to have her estate represented. I directed that Mr. De Lara, who has represented Mr. Facio-Beanland throughout, should contact the three daughters and see whether they wished to appear in the action or wished to sell their share to one or other of the other parties. At that hearing, I pointed out to him and to Mr. Pitto, who represents Mr. Murphy, various difficulties with dividing a freehold horizontally, because of the notorious problems associated with flying freeholds, and suggested that (subject to the court having the power to do so) the grant of a long lease to a management company with leasebacks of the individual flats would be a practical solution.

5 Mr. Murphy's position at that hearing was that he wanted a sale of the property, but with sealed bids being made solely by members of the family, rather than by a public sale process. I pointed out that that would prejudice the Esteve estate. One matter which was apparent at this hearing was that Mr. Facio-Beanland and Mr. Murphy and the respective sides of their families did not get on well together. This impression was confirmed on the site inspection and at subsequent hearings. The advocates at the hearing on June 24th, 2015 accepted that this was the position.

6 On February 23rd, 2015, I had an email sent to the parties drawing attention to various matters. If the solution was to be adopted of lease-backs of individual flats, the email said:

> "The judge is happy to hear submissions as to what the terms of such a lease should be, but his preliminary thoughts are these.
>
> (a) There will need to be a managing agent, who will receive all ground rents and service charges.
>
> (b) There will need to be provision for the appointment of a managing agent, either by a super-majority of the leaseholders (say by 8 flats) or by a third party, say the Chairman for the time being of the Bar.
>
> (c) The freeholders will need to give the managing agent an irrevocable power of attorney to act in their names in the collection of rents and service charges. (An alternative might be to have a management company, owned by the freeholders, to whom separate covenants are given by the lessors and lessees, but this might lead to duplication of costs.)

(d) The managing agent should be given a wide discretion as to what works of repair and improvement should be done.

(e) However, the managing agent should be directed to consult with the leaseholders as to what works should be done, and in particular should have regard to the leaseholders' means in proposing (and staggering) major works.

(f) There should be provision for a sinking fund.

(g) There should be provision for a ground rent to be paid, but with the power for the managing agent to waive collection of the ground rent. The need for a ground rent is that, if the managing agent incurs costs (say legal fees) which (for whatever reason) he cannot recover through the service charge, he will need an independent source of finance, otherwise the building will be insolvent."

I gave directions for travelling documents to be agreed, with copies to be sent to Mrs. Esteve's daughters.

7 The need for a strong managing agent to be in charge was due to the problems in management which would otherwise arise resulting from Mr. Facio-Beanland having a majority share of the freehold or of any management company. It would have been in no one's interest for Mr. Murphy to have to bring proceedings, for example an unfair prejudice petition, in order to have his interests considered. It was also apparent that there might be a discrepancy as regards the parties' means.

8 When the matter came back before me on May 29th, 2015, none of the daughters had taken out letters of administration or the Spanish equivalent. Terms for the sale of their share to Mr. Facio-Beanland or Mr. Murphy could not be agreed. The daughters did not appear, nor did they make any offer to take out letters of administration so that the estate of their mother could be administered. The daughters' preference, as relayed by Mr. De Lara, was for 10 Demaya's Ramp to be sold, but they refused to take any step in the action to achieve this aim. In consequence, Mr. Facio-Beanland has applied to be appointed as administrator of Mrs. Esteve's estate either *ad collegenda bona* or *ad litem.*

9 At the hearing on May 29th, 2015, Mr. De Lara had not complied with my directions for the preparation of a lease and leaseback. Instead, he had prepared a detailed draft deed which provided for partition of the freehold between the three tenants in common and a management company (the articles of which he had settled), which would hold the common parts. The draft provided for payment of service charges and the other incidents normally associated with long leases. I shall return to discuss the legal problems associated with this scheme below.

10 At this hearing, however, Mr. Pitto indicated that his client had ceased to insist on an order for sale and instead was supportive of the lease to a management company with leasebacks of the individual flats. I set down July 2nd and 3rd, 2015 for a final hearing of the matter, expecting the parties to be able to produce documentation and agree a proposed managing agent in time for that hearing. I indicated that I would grant limited letters of administration to Mr. Facio-Beanland but that this would be limited to the execution of the documents necessary to effect a partition or a sale, depending on what was ordered, so that I could not make the grant immediately.

11 Matters did not thereafter go smoothly. The parties were unable to agree a managing agent. Although each proposed an agent, remarkably neither had obtained details of what the agent proposed to charge for its services. The court was thus unable to give directions for determination as to which agent should be instructed. Nor had the parties been able to agree a lease of the freehold, the articles of the proposed management company which was to hold the 999-year lease of the freehold, or the terms of any leasebacks. At a hearing on June 24th, 2015, I limited argument at the hearing on July 2nd and 3rd, 2015 to the three issues I set out below.

12 When I circulated a draft copy of this judgment, I had proceeded on the basis that, on a partition, it was proposed that Mrs. Esteve's estate receive Flat 7A. However, I was then told that what was proposed was that the estate be given Flat 4. I shall return to the problems which this creates below.

Site visit

13 I carried out a site visit on the afternoon of May 28th, 2015 in the presence of the parties' counsel. Various members of the family attended, but none of the Esteve daughters. The weather was fine.

14 10 Demaya's Ramp is situated on an irregular shaped site a short distance from Casemates. It is reached from Casemates by going up Cratchett's Ramp, which rises steeply from south to north. Before a long row of steps is reached, there is a dog-leg back in a south-south-easterly direction. The dog-leg is Demaya's Ramp. It too rises steeply. About half way up Demaya's Ramp is the main entrance to the property at ground floor level.

15 Above the door is the date 1891, but it is unclear whether all of the property was built at that time. The general appearance of premises suggests that there were at least three different stages of building: a north section, a middle section and a south section, although in what order the various parts were built is impossible to say on a brief site inspection. There were no obvious structural problems apparent on inspection,

although I was told some of the roofs leaked. I did not carry out any form of structural inspection.

16 The building is constructed from brick with a stucco facing. The south section was in reasonably good condition and appeared to have been painted fairly recently. The middle and north sections were in poor condition, with stucco coming loose in various places.

17 The north section is rhomboid in shape, narrowing to the north where the front door is. The middle and southern sections are rectangular. Inside the ground floor there is a wide corridor going through to the flat at the south end. (The wideness of the corridors is also a feature of the first and second floors.) The common parts on the ground floor are in extremely poor condition. On the left as one enters there is a store room, irregular in shape. On the right there is Flat 1. At the time of the visit, it was empty, with many fittings stripped out. Underneath the floor there was a cistern which I was told could contain 10,000 gallons of fresh water. It was, I was told, empty at the time of my inspection. Flat 1 consists of an entrance hall, a bathroom with a small bath/shower and WC, a kitchen, two living rooms, and two bedrooms. The two bedrooms had been built by dividing one room. Only the westerly bedroom had a window. This window looked west; however, there was no view to be had due to the facing building.

18 In the middle section of the ground floor, there are store rooms on the right and left. At the end of the corridor is Flat 4, which I did not inspect internally, since at that time no intimation had been given that the flat might be the one proposed for the Esteve estate. It is occupied by a protected tenant. From the ground floor, there are stone steps to the first floor. The common parts on the first floor are in better condition than the ground floor, but are nonetheless in generally poor condition. Flats 5, 6 and 7 are on this floor. Opposite Flat 6 is a store room, which was formerly a WC. I was unable to inspect any of these flats internally.

19 There are wooden steps leading up to a mezzanine landing. From the mezzanine was a door giving access at the east to a medium sized concreted patio area which appeared to be used for children to play. An external door in the north wall of the patio gave access to Demaya's Ramp. At this point, Demaya's Ramp makes a bend to the left. On the south side of this patio, there were steps leading up about 3 ft. to a high slatted gate which gave access to a further, larger patio. This was used with Flat 9. A lean-to had been erected in the patio area next to the east side of the building. Access to the lean-to was gained from the kitchen of Flat 9. Neither of these patio areas was part of the freehold of 10 Demaya's Ramp. Instead, it was common ground that there were two separate leases of these patio areas granted by the Governor of Gibraltar a great many years before. The leases were not in evidence before me.

20 Returning to the inside, the staircase from the mezzanine landing went up to the second floor, where the common parts were in fairly good condition. On this floor, I was shown Flat 7A, which was at the north end and was also stripped out. This had a hallway leading to a kitchen at the back. Off the hallway on the west side was the main living room. Leading off this to the left were two small bedrooms, which, as with Flat 1, had been converted from one room. The easterly bedroom, however, had a window opening onto the westerly bedroom. Leading off from the north of the living room were two more bedrooms. There was a bathroom with a small bath and shower and a separate WC. This flat had a view over Casemates, but the apartment blocks on the reclaimed land in the Europort and Ocean Village areas meant that very little of Algeciras could be seen over the Bay. I was told that there was a problem of water ingress from the roof.

21 The corridor on the second floor has been blocked with a door so that the southerly part of the corridor had become a vestibule for Flats 8 and 9, which are occupied respectively by Mr. Murphy and his parents. There is a store room on the east side of the vestibule. I was shown Flat 9 internally. It has its own hallway. On the left there is a utility room and then the kitchen, which, as noted above, leads through to the lean-to. At the end of the hallway were two living rooms. I was shown the entrance to the loft (which I did not inspect) and was told that there was also a problem of water ingress from the roof.

22 Going back into the main corridor, the wooden steps from the mezzanine continue to the roof, where there is a medium sized open roof-top patio and a further store room. The roof-top patio may have development potential. Indeed, it may be possible to add a whole floor over the whole of the roof. There is a reasonable view from the patio over the top of the Europort buildings to Algeciras. It was also possible from this vantage point to see most of the various forms of roofing used on the building. The south section has Spanish-style orange tiles. The middle section has corrugated asbestos boards painted red. This part of the roofing appeared to have reached the end of its useful life. The north section had various forms of roofing, with some modern and apparently recently installed tiles, some corrugated boards and a mixture of flat and pitched roofs. Save for the new tiled areas, most of the roofing on the building appeared to need replacement or repair.

The square footage

23 Mr. Facio-Beanland and Mr. Murphy were in agreement on the areas in the flats and the main storage rooms. The total area (excluding the common parts and the vestibule on the second floor) comprised 4,998 sq. ft., divided as follows:

	Sq. ft.	Percentage
Ground floor		
Flat 1	639	12.79
Store 2	88	1.76
Store 3	319	6.38
Flat 4	551	11.02
First floor		
Flat 5	647	12.95
Flat 6	544	10.88
Flat 7	647	12.95
Second floor		
Flat 7A	647	12.95
Flat 8	458	9.16
Flat 9	593	11.86
Rooftop		
Store 10	88	1.76

24 There had initially been a dispute as to the division of the flats between the parties, especially in relation to the second floor flats. As noted above, Mr. Murphy and his parents lived in Flats 8 and 9. The fact that the flats are their homes would have been a material consideration in deciding how partition should be effected or whether a sale should be ordered: *First National Bldg. Soc.* v. *Ring* (5) and *Official Receiver for Northern Ireland* v. *O'Brien* (11) ([2012] BPIR 826, at para. 17). In the event, however, Mr. Facio-Beanland and Mr. Murphy came into agreement which was originally that, on a partition, the property should be divided as follows:

(a) Mr. Facio-Beanland: Flat 1, Store 3, Flat 4, Flat 5, Flat 6 and Flat 7;

(b) Mrs. Esteve's estate: Flat 7A; and

(c) Mr. Murphy: Store 2, Flat 8, Flat 9 and Store 10.

25 As noted above, the most recent proposal (only communicated to the court yesterday) is that Mrs. Esteve's estate should have Flat 4 and Mr. Facio-Beanland Flat 7A. When I carried out the site inspection, I was originally concerned as to whether giving Mrs. Esteve's estate Flat 7A was appropriate. Having viewed the flat, I was satisfied that it was a fair allocation. Indeed, it was probably slightly more generous to her estate than a different allocation would be. The floor area is slightly more than the estate's 12.5% share and the top flats, such as 7A, have better views than the lower flats. The flat is stripped out and is currently uninhabitable, but since any new owner would probably wish completely to renovate most of the flats in the building, I do not consider that this is material.

26 Flat 4 is occupied by a protected tenant. I have no details of the rent paid by the tenant. I assume it is very low. Flat 4 is also smaller than Flat 7A. With only 11.02% of the overall square footage, it is also smaller than the 12.5% share which the estate has in the property. As a ground floor flat, it will lack a view and is almost certainly worth substantially less than Flat 7A. Mr. De Lara tells me that Mrs. Esteve's daughters were notified of the proposed changes and raised no objections. However, he also suggested to them that Flat 4 is bigger than Flat 7A, which does not appear to be the case. Whether any approval given by the daughters was based on this important misunderstanding is unclear. I shall therefore give directions to clarify this matter. It may also be necessary to consider whether some form of payment (technically known as an owelty) should be made to the Esteve estate.

Issues

27 Three issues arise:

(a) Does the court have the power to order the horizontal partition of a freehold, so as to create flying freeholds?

(b) If it does, does it have the power to direct that various ancillary documents be executed, such as the lease to a management company and the leasebacks of individual flats?

(c) In the court's discretion, should it order partition or a sale in lieu?

(a) *Flying freeholds*

28 The main treatises on partition are *Littleton's Tenures* (c.1480); Sir Edward Coke's *Co. Litt.*, 19th ed., with notes by Hargrave and Butler (1832); Allnatt, *A Practical Treatise on the Law of Partition* (1820); Walker, *The Partition Acts, 1868 & 1876*, 1st ed. (1876, reprinted 2013); Foster, *The Law of Joint Ownership and Partition of Real Estate* (1878); and Conway, *Co-Ownership of Land: Partition Actions and Remedies*, 2nd ed. (2012). Neither the court nor counsel had access to *Allnatt* or *Foster*, nor to a hard copy of *Conway*, but Dr. Conway very kindly made available an electronic copy of the second chapter of her work.

29 Partition was originally a common law remedy, but it was only available in two limited classes of case. The most common was where a freeholder died leaving only daughters. The daughters held as coparceners, which is a special form of joint tenancy. The other case was where land descended in accordance with the custom of gavelkind, whereby the sons shared jointly. Gavelkind applied in Kent, but also by the custom of some boroughs outside Kent. The remedy at common law was to seek a writ of *de partitione facienda*. By two statutes of Henry VIII, the remedy was extended to all joint tenants and tenants in common: Joint Tenants and

Tenants in Common Act 1539, and Joint Tenants for Life or Years Act 1540. Both of these Acts are still in force in Gibraltar: English Law (Application) Act 1961, s.3(1)(a) and the Schedule, Part I, Items 11 and 12.

30 In fact, the common law remedy proved difficult to operate. (The plaintiff had to prove the title of all relevant defendants and there was a need to summon a sheriff's jury.) As a result, by the 18th century, partitions were dealt with in equity by the Court of Chancery (or the English side of the Exchequer). In England, the writ of *de partitione facienda* was abolished (except as to dower) by s.36 of the Real Property Limitation Act 1833, but it is unclear whether that Act was extended to Gibraltar. None of the parties in the current case sought to rely on the common law procedure.

31 The only author to deal with flying freehold is Coke, who mentions the point in his discussion of castles in *Co. Litt*., at 165a, citing Bracton, Fleta and Britton:

> "If a castle that is used for the necessary defence of the realme, descend to two or more coparceners, this castle might be divided by chambers and roomes, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided: for as one saith, *propter jus gladii dividi non potest*; and another saith, *pur le droit del espèe que ne soeffre division en aventure que la force del realme ne defaille pax taunt.* But castles of habitation for private use, that are not for the necessary defence of the realme, ought to be parted betweene coparceners as well as other houses . . ."

32 This implies that flying freeholds are acceptable when a house is divided. Indeed, it suggests that that was the normal course.

33 There is a dearth of case law on whether flying freeholds can be created on a partition. The only case which counsel have identified is, ironically, a decision of this court. On June 17th, 1994, Kneller, C.J. ordered partition of the property known as 28/34 Governor's Street and 55/57 City Mill Lane, giving the plaintiff most of the ground floor with the remainder of the ground floor and the upper three storeys to be held by various parties: see *Francisco Mena Guillen Ltd.* v. *Ullger* (6). Unfortunately, the court file has gone missing and no record of the Chief Justice's reasoning survives.

34 Mr. Keith Azopardi, now Q.C., who appeared for the plaintiff in the matter, said that the Chief Justice dealt with the matter in his chambers and did give a brief judgment. He could not recall, however, to what extent there was any dispute between the parties or what (if any) legal points Kneller, C.J. determined. Mr. Azopardi, when he appeared in the matter, was with Attias & Levy, which is now Mr. Pitto's firm. Mr. Pitto said that

he had been able find the file for the matter, but that it did not contain any notes of the judgment. A search by the Court Service for the judge's notebook for 1994 was unsuccessful. Sir Alister Kneller died in 2005. Mr. Ross, who was the other advocate before Kneller, C.J., is no longer at the Bar and does not appear to reside in Gibraltar. His firm, Finch & Co., no longer exists.

35 There was a subsequent action in relation to the property: *Mattana* v. *Ullger* (10). On November 21st, 1997, Pizzarello, J. gave an unreported judgment in relation to the beneficial ownership of the upstairs part of the property, but it does not assist on the present issue.

36 The only conclusion I can draw is that Kneller, C.J. must have been satisfied that he had jurisdiction to partition a building by creating a flying freehold, because jurisdiction is a matter for the court to consider of its own motion. However, the judge's reasoning can no longer be ascertained.

37 Although the legal authority on whether flying freeholds can be created on a partition is sparse, there is no authority identified saying that it cannot be done. In these circumstances, in my judgment, I should follow Sir Edward Coke and Sir Alister Kneller and hold that there is a power in the court to create a flying freehold on partition.

38 Even though the court has the power to order partition so as to create a flying freehold, that does not mean that it should do so. The court, in the exercise of its discretion as to whether to order sale instead of partition, must, in my judgment, have regard to the practicalities of such a form of partition. It does no one any good if a property is divided but no adequate provision is made for repair and maintenance. This is particularly so in relation to a property such as 10 Demaya's Ramp, which is part of Gibraltar's architectural heritage. There are strong grounds of public policy (which are not just limited to the kind of public policy concerns mentioned in *Co. Litt.* in relation to castles and the defence of the realm) for not ordering partition if the effect would be to damage historic buildings.

39 The problems of flying freeholds are well recognized, but it is convenient to examine the draft deed of partition which Mr. De Lara prepared, since this illustrates the hazards. First, the deed purports to partition the property so that the common parts are held by the management company which he proposed should be formed. Yet there is no jurisdiction to give parts of a property to a third party who is not one of the tenants in common.

40 Secondly, the obligation to pay service charges is a personal one not charged on the land. Where rent and service charges are payable under a lease, the provision for forfeiture for non-payment has the effect of giving the landlord a form of super-security for the money, which takes priority

over any mortgage granted by the lessee. Where no forfeiture is possible, the landlord, or (on Mr. De Lara's draft) the management company, is left to try and enforce a personal claim against the flat-owner. If there is no equity in the flat, it is not possible to enforce by selling the flat. This defect is one of the reasons commonhold tenure has been unsuccessful in England and Wales: see Commonhold and Leasehold Reform Act 2002 (UK) and Jack, *Commonhold: The Fatal Flaw*, 153 *New Law Journal*, at 1907 (2003).

41 Thirdly, the covenant to pay service charges is not attached to the land. Whereas with leases, such covenants are enforceable against subsequent owners by the doctrine of privity of estate, positive covenants do not run with freeholds: *Rhone* v. *Stephens* (13). Mr. De Lara sought to overcome this difficulty by providing that, on a transfer of a freehold, the transferor would ensure that the transferee entered a like personal covenant with his fellow freeholders and the management company. Now it is true that such a system of transferees giving a chain of covenants has worked in the Albany, just off Piccadilly in London. The property was divided into 69 sets in 1802, which were sold freehold. However, there are special circumstances in that the apartments are held by a few very wealthy families and institutions and are rarely sold. Mortgages, I suspect, are rare.

42 More typical is what occurred when New Square, Lincoln's Inn, was built around 1700. The grant of flats on flying freeholds resulted in a "free-rider" problem, with some flat owners refusing to contribute to maintenance. The Inn was, in practice, obliged to repair, lest the whole of the square become derelict. The matter was only resolved by the Inn obtaining a private Act of Parliament, the Lincoln's Inn Act 1860 (23 & 24 Vict., c.184).

43 Even if a chain of covenants could be maintained as between vendors and purchasers of the freehold flats, there would still be a grave difficulty if a flat were mortgaged. Mortgagees typically refuse to enter personal covenants to pay service charges. If the mortgagor fell into arrears and the mortgagee sold, the chain of covenants would be broken. Likewise, the holder of a lease granted by the freehold flat-owner might well be able to escape giving a direct covenant to the other freeholders and the management company.

44 It is true that there is a limited common law power for the court to order that one flying freeholder make to another flying freeholder a contribution to works which benefit both: *Abbahall Ltd.* v. *Smee* (1); however, this is not a satisfactory basis for arranging the maintenance of a block of 10 units. The extent to which every single individual work of repair benefited a particular unit would need to be considered. Moreover, although there might be a duty on a lower flat-owner to support the

upstairs flats, and a duty on a top-floor flat-owner to maintain the roof (see *Holbeck Hall Hotel Ltd.* v. *Scarborough B.C.* (7)), in practice there would be constant disputes as to what works needed to be done.

45 Further, it is difficult to see that the *Abbahall* reasoning could be extended to ensure decorative repair, cleaning and lighting of the common parts, because the *Abbahall* reasoning depends on there being a nuisance. Failure to decorate, clean and pay the electricity bills are not actionable nuisances. Further, if (as would usually be the case) the common parts are kept in common ownership, it is very doubtful that one holder of one undivided share could sue another holder of an undivided share of the same freehold in nuisance.

46 Lastly, *Abbahall* (1) and *Holbeck Hall Hotel* depend in their reasoning on *Leakey* v. *National Trust* (8), the correctness of which may still stand to be considered at Privy Council or UK Supreme Court level. (It was cited without comment by the House of Lords in *Delaware Mansions Ltd.* v. *Westminster City Council* (3), but Glidewell, L.J.—subsequently the President of the Court of Appeal of Gibraltar—during argument in *Woodhouse* v. *Consolidated Property Corp. Ltd.* (17) said that he considered *Leakey* wrongly decided.) This whole area of law is still in a state of development: see most recently *Coope* v. *Ward* (2). The fact that the law is uncertain makes *Abbahall* an unsafe basis on which to order a partition into flying freeholds.

47 It follows that, in my judgment, it is only if the court can ensure that a viable scheme of management is in place that it should contemplate making an order of partition. A well-established scheme is the grant of a long lease, say 999 years, to a tenant-owned management company and then a leaseback of each individual flat. Once the lease and leasebacks were in place, a formal partition of the freehold could be made, so that each flat-owner acquired the freehold of his flat (the common parts could remain held in undivided shares).

(b) ***Power to order a lease and leaseback***

48 There is limited authority on the extent to which the court can direct the parties to have obligations as between each other as part of the process of partitioning. Some covenants can certainly be ordered, most obviously that the transferors give a covenant as to title (although usually only a limited covenant) and the court can make provision for easements: see the footnotes at 29 *Encyclopaedia of Forms & Precedents*, (C) Forms and Precedents: A. Partition Agreements and Scheme (2012). In addition, a covenant to pay mortgagees can be ordered: see the precedent for a physical partition of partnership real estate in 30(2) *Encyclopaedia of*

Forms & Precedents, (B) Forms and Precedents: B. Partnership Administration and Dealings 3. Dealings with Partnership Property (2010 reissue, amended 2014).

49 Whether wider provisions can be ordered is less clear. Indeed, the only case cited to me by counsel in which a wider scheme of arrangement has been made is *Warner* v. *Baynes* (16). This concerned the Cold-bath Fields in Clerkenwell in London. Baynes's father, a well-known medical man, and Warner had, at considerable expense, lain pipes, so as to supply water to (as the name implies) a cold-water bath. Apparently, cold-water bathing was a fashionable activity, which was thought to be a cure for various maladies and for which people were prepared to pay 2s. a time: see Thornbury, 2 *Old and New London*, ch. XXXVIII (1878), and for a fuller account, Temple ed., 47 *Survey of London*, ch. 1 (2008). (The bath continued in use until 1865 and was only demolished in 1887.) There was a conduit to take away the waste water, but this conduit was capable of being converted into another cold-water bath.

50 Lord Hardwicke, L.C. ordered that Baynes should have the land with the cold-water bath and Warner the land with the waste water conduit. However, because the creation of another cold-water bath would very substantially diminish the value of the existing bath, he ordered that Warner give security to Baynes not to convert the waste water conduit into a cold-water bath. This decision pre-dated by nearly a century *Tulk* v. *Moxhay* (14), which would have allowed the same solution to be reached by a restrictive covenant. However, the underlying principle, in my judgment, is that the court can impose obligations between the parties to a partition where that helps achieve the objective of a fair and workable partition.

51 This view is given support by the decision of the Court of Exchequer (sitting in its equity jurisdiction) in *Lister* v. *Lister* (9), where fences were ordered to be erected as part of a partition with cross-covenants for the keeping of them in repair. Alderson, B. said (3 Y. & C. Ex. at 546; 160 E.R. at 818) that the court had "the power of doing what is reasonable to be done in these cases . . ."

52 I accept that ordering that a 999-year lease be granted to a management company with provision for leasebacks of individual flats, prior to the freehold being partitioned, is an extreme use of the court's power to impose obligations, but, in my judgment, the court should have such a power.

53 I say this for three reasons. First, there is in Gibraltar a demand for the horizontal division of freeholds, because families are loath to part with freeholds. The court should lean in favour of a solution which supports the wishes of freeholders. Secondly, for the reasons outlined in the previous section, partitioning so as to create flying freeholds without some such

apparatus of lease and leaseback is likely to prove disastrous. It is wrong that the court should have to order a sale simply because the technical machinery at the court's disposal is subject to artificial limitations on its powers, in circumstances where a partition is desired by the tenants in common holding all but one-eighth of the property. It should be remembered that, until the 1868 Act, the court was *obliged* to partition, which suggests that the court had wide common law powers to determine the terms of a partition so as to ensure an effective partition. Thirdly, if the parties themselves could agree on a partition (instead of the court having to decree the terms of a partition), this is the solution which the parties (if properly advised) would adopt. It is undesirable that the court should lack jurisdiction on a partition to do something which the parties themselves could do. The absence of such a jurisdiction is likely to put arbitrary power in the hands of one of the parties, which is an obvious recipe for abuse.

54 Accordingly, I hold that the court does have such a power, which (if partition be ordered) it should be able to exercise in a case such as the present.

(c) ***Discretion as to sale or partition***

55 At common law, the court had (save on public policy grounds: see above in relation to castles) no discretion whether to order partition. It had no power to order a sale, although it could apply pressure on a party resisting a sale by making the terms of partition extremely unattractive to such a party. This is the background to the controversial case of *Turner* v. *Morgan* (15), where Lord Eldon, L.C. approved a partition whereby the house was divided with the plaintiff receiving the chimney stack, all the fireplaces and the only staircase, so that the defendant (who resisted a sale) had only parts of rooms which he could not access. Lord Eldon said expressly (8 Ves. Jr. at 145, fn. 1; 32 E.R. at 308, fn. 1) that "the parties ought to agree to buy and sell" but said that he had no jurisdiction to order a sale.

56 The Partition Act 1868 was passed to give the court a power of sale in various circumstances set out in the Act and granted the jurisdiction held not to exist in *Turner* v. *Morgan*. Section 3 gives a general power to order a sale. Section 4 directs that a sale should be ordered where holders of a moiety or more of the shares in the land seek partition, unless the court "sees good reason to the contrary." Section 5 provides:

> "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties

> interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

57 The House of Lords in *Pitt* v. *Jones* (12) held that this was a freestanding power. The power to order a sale under s.3 of the Act, it held, was different. Under s.5, the other freeholders (or one or some of them) had to undertake to purchase the share of the party requesting a sale, but if that were done, then partition might be ordered instead of a sale. The s.5 power is discretionary: *Drinkwater* v. *Ratcliffe* (4).

58 In the current case, Mrs. Esteve's daughters, holding a one-eighth undivided share, want a sale, but the holders of the remaining seven-eighths prefer a partition. Moreover, both Mr. Facio-Beanland and Mr. Murphy wish to buy the daughters' one-eighth share. Given that the lease and leaseback proposal makes partition viable and that no prejudice will be suffered by the daughters in my making an order under s.5, in my judgment, this is a strong case for exercising my discretion in favour of making such an order if Mr. Facio-Beanland or Mr. Murphy or both are prepared to give an undertaking.

Further directions

59 I shall hear counsel on how the price to be paid should be ascertained. My preliminary view was that there should be a court-appointed expert to value the combined worth of (a) the 999-year lease of Flat 7A and Flat 4 (subject to the sitting tenant), (b) the one-eighth of the shares in the management company, (c) the freehold of Flat 7A or Flat 4 after the lease and leaseback, and (d) the undivided share of the freehold of the common parts. In practice, the valuer will probably ignore (c) and (d), because the value of the freehold reversion will be entirely subsumed in (b). The court-appointed expert should also advise on which of Flat 7A and Flat 4 better represents the Esteve estate's one-eighth interest. The valuer should also value the total combined value of the building, assuming all units were the subject of the lease and leaseback arrangement, but also subject to any sitting tenancies. The value of the one-eighth share can then be readily calculated.

60 Some at least of the costs of the valuation are likely ultimately to be ordered to fall on Mrs. Esteve's estate and to be a charge on the estate's share of the property. In the meantime, however, the cost should be borne five-sevenths by Mr. Facio-Beanland and two-sevenths by Mr. Murphy

(but without prejudice to the court's determination of the ultimate incidence of such costs). Once the expert's opinion has been obtained, I shall have to consider whether Flat 7A or Flat 4 should be allocated to Mrs. Esteve's estate, or to follow the straightforward route of valuing the whole building so as to calculate the value of the one-eighth interest. Once I have done that, Mr. Facio-Beanland and Mr. Murphy (unless they agree to purchase jointly at that price) should make sealed bids of at least as much as the expert's valuation and the higher bid will win. If both bids are the same, then I shall hear submissions as to how the purchaser should be chosen. The traditional method was to draw lots: *Littleton's Tenures* (*op. cit.*), §246, at 114.

Orders accordingly.