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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/OCE/2013/0014**
Property	:	Flats 1–26, St Michael-at-Pleas, Norwich NR3 1EP
Applicant	:	SM at Pleas Properties Limited(Nominee Purchaser)
Respondents	**1**	Norwich City Council (Freeholder)
	2	Steeple Court Ltd (Freeholder of Additional Land)
	3	Bullen Developments Ltd(Intermediate landlord)
	4	The Saint Michael at Pleas Residents Company Ltd (Intermediate landlord)
Representatives	*App*	Nathaniel Duckworth, counsel, instructed by Cozens-Hardy LLP, Norwich (Ref WSW) [days one & two] Simon Whipp, solicitor [day three]
	R1	Martin Dray, counsel, instructed by Hugh Ferguson, solicitor, Nplaw [days one & two] Hugh Ferguson, solicitor [day three]
	R3	Mark Loveday, counsel, instructed by Greenwoods, Peterborough (Ref GMC) [day one]
Type of Application	:	For determination of the terms of acquisition remaining in dispute (flats and premises – collective enfranchisement) [LRHUDA '93, s.24(1)]
Tribunal Members	:	G K Sinclair, D S Brown FRICS & G F Smith MRICS FAAV REV
Date and place of hearing	:	27th & 28th January, 18th & 19th February 2014 at Norwich Magistrates Court
Date of Decision	:	11th March 2014

DECISION

Cases referred to

- *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324; [2006] 1 WLR 1186
- *Broomfield Freehold Management v Meadow Holdings* LRA/148/2006
- *Cadogan v Morris* (1999) 31 HLR 732 (CA)
- *City of Westminster v CH2006 Ltd* [2009] UKUT 174 (LC)
- *Daejan Investments Ltd v The Holt (Freehold) Ltd* LRA/133/2006
- *Denison Close Ltd v The New Hampstead Garden Trust* (2002, unreported)
- *Ellis & Dines v Logothetis* (Lands Trib – LRA/3/2000)
- *Nailrile Ltd v Earl Cadogan* [2009] 2 EGLR 151 (Lands Trib)
- *Pleadream Properties v 5 Felix Avenue London Ltd* [2010] EWHC 3048 (Ch); [2011] 1 EGLR 42

Legislation referred to

- Leasehold Reform, Housing & Urban Development Act 1993, ss 9, 13, 21, 24 & 33, and Sch 1, Part II

Statutory instruments referred to

- Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, rules 8, 9 and 13

Contents

Introduction

1. This application concerns a development of 26 residential flats and maisonettes near the commercial centre of Norwich. The tribunal (then as a leasehold valuation tribunal) has been involved before, when the lessees of two of the maisonettes applied to extend their leases. On this occasion there are five parties concerned, of which only three participated in the proceedings and were legally represented. Steeple Court Ltd, the freehold owner of land over which vehicular and pedestrian access is required, is believed to have done a deal with the Applicant concerning its interest and was not represented. Neither was the Saint Michael at Pleas Residents Company Ltd (an intermediate landlord controlled by the lessees and of which each unit– including Bullen Developments as occupier

of unit 11 – provides a single member).

2. This application was brought in September 2013 by the nominee purchaser after the freeholder, on whom it had served its initial notices, had served counter-notices disputing the amount payable to the freeholder as consideration for a transfer of its reversionary interest. Crucially, both applicant and freeholder agreed that the price payable for each of the two intermediate interests was nil. After directions had been issued by the tribunal, in which points of agreement were recorded, and the application set down for hearing over two days starting on Monday 27th January 2014, Bullen Developments Ltd ("Bullen") as holder of an intermediate leasehold interest gave notice on 18th December 2013 of its intention to be separately represented. In January 2014 it filed and served its own Statement of Case and, two weeks before the hearing, a valuer's report arguing that the value of its interest – for which the applicant must pay – was substantial.

3. The applicant challenged Bullen's right to participate, arguing that the price payable to it had already been agreed by the effective landlord, Norwich City Council, and it could not resile from that. The price having been agreed, the tribunal had no jurisdiction to determine that a sum greater than nil was payable. Alternatively, as Bullen's notice, Statement of Case and valuation report were so late, and not in accordance with the tribunal's own directions, the tribunal should in the exercise of its discretion ignore them. The ability of Bullen to participate in the proceedings and argue for something contrary to that agreed between the relevant parties at the time was therefore taken as a preliminary issue on day one.

4. Having determined that, the tribunal then went on to hear valuation evidence on day two and adjourned for further argument, including on costs, to 18th February.

Determination

5. For the reasons set out later in this document the tribunal makes the following determinations.

6. *Preliminary issue – jurisdiction :* The tribunal finds that the price payable to Bullen Developments Ltd for its intermediate leasehold interest was agreed at nil by the freeholder Norwich City Council on its behalf, and after seeking its consent to the terms of a draft counter-notice sent to its solicitors for approval. It is not open to Bullen to go back on or re-open the agreement reached. As there is no issue to be determined on this point the tribunal therefore lacks jurisdiction to determine that the price payable to Bullen is anything other than nil.

7. *Preliminary issue – non-compliance with directions :* If the tribunal were later to be held to be wrong on the question of jurisdiction then it determines, in the alternative and after considering rule 8 and the evidence and arguments before it, that Bullen – having been sent a copy of the tribunal's directions dated 4th October 2013, is guilty of excessive delay and its Statement of Case and expert report on valuation (both of which are dated 14th January 2014) be struck out and not admitted in evidence respectively.

8. *Price :* After hearing evidence from the applicant's and freeholder's respective valuers on day two and adjourning the case to a third day to hear argument, the

tribunal was notified in writing that the two parties had reached agreement on the price payable by the applicant to the freeholder. The price, which was not disclosed to the tribunal, was however conditional on Bullen not appealing the tribunal's decision to exclude its evidence and case or the Upper Tribunal (Lands Chamber) refusing permission to appeal or any appeal being dismissed. For that reason the tribunal simply adjourned generally the question of the price to be paid by the applicant.

9. *Other terms of transfer :* At tab 23 in the hearing bundle the parties provided a draft form TP1. On day three the applicant and freeholder invited the tribunal to approve that form of transfer, save that in box 3 (Property) there be added the words highlighted in pink on an amended draft [shown in bold below] at the end of the second bullet point. The tribunal agrees, and the text now reads :

> ...edged red on Plan 2 in respect of that part of the leasehold land comprised in title number NK23748 **but excluding (so that it is retained by the relevant transferee) the interior of Unit 11 and...**

10. *Section 33 costs of enfranchisement :* As between applicant and freeholder both solicitors had engaged in the process required by the directions, and four points of objection were raised by the applicant and replied to by the freeholder. Of these four points :
    a. On valuation costs the tribunal allows 24 hours at £75/hr as sought
    b. The second point, concerning whether the work was within the scope of section 33(1), was conceded by the freeholder, and the time allowed is reduced by 17 hours and 12 minutes
    c. On the third point, 61 hours are allowed as claimed
    d. Finally, counsel's fees are allowed in full.

11. As between applicant and Bullen, the tribunal was informed that there had been no response from Bullen's solicitors and therefore the transfer had been prepared without any such input. The amounts claimed on Bullen's behalf in a schedule stamped as received by the applicant's solicitors on 24th January 2014 include both conveyancing and valuation costs and total £10 232.50. The applicant raised points of objection but these were not replied to. The tribunal allows only £650 legal costs and nothing for valuation.

12. *Rule 13 costs payable by Bullen :* Applications having been made by both the applicant and Norwich City Council for costs to be awarded against Bullen under rule 13, and Bullen having failed to comply with directions for the filing and service of written submissions, the tribunal determines that Bullen has acted unreasonably in its conduct of the proceedings, as a result of which the hearing was extended and the costs incurred by the parties having legal representatives and valuers present on day one were rendered unnecessary. However, after the applicant and Norwich City Council submitted their claims for costs they reached conditional agreement on the price payable and so counsel were not required on day three, which was reduced to a hearing of just over one hour.

13. The tribunal, taking into account the submissions filed and the facts as known when making its decision on 19th February 2014, therefore orders Bullen to pay costs in the sum of £7 202.00 to the applicant (and not the £11 010.21 claimed).

14. The tribunal also orders Bullen to pay costs in the sum of £1 959.48 to Norwich City Council (instead of the £6 357.80 claimed).

Factual background

15. The applicant is the nominee purchaser appointed to act on behalf of the lessees of what was built as part of a part residential, part commercial development in about 1970 in the historic heart of Norwich. Access by vehicle is obtained from Princes Street, with pedestrian access from various directions. Some of the flats and "townhouses" are constructed above an underground car park serving the development, so acquisition of the freehold by individual enfranchisement is not possible. Instead, the lessees have gone for collective enfranchisement under Part I of the Leasehold Reform, Housing & Urban Development Act 1993 ("the Act").

16. The legal tenure of this development is quite complex. The freeholder is Norwich City Council. It granted a long lease to R G Carter (Developments) Limited, which developed the site. It in turn sold the dwellings on to individual lessees. The sample underlease at tab 7 is dated 27th March 1975 and grants a term of 125 years less 20 days from 1st April 1971. At a later date R G Carter (Developments) Ltd [now Bullen Developments Ltd] granted an intermediate lease of all the flats and maisonettes on the estate to St Michael at Pleas Residents Company Ltd, which was also charged with managing the site.

17. In 2009 the lessees of two of the townhouses or maisonettes applied to extend their leases. In determining the price payable the tribunal then[1] noted the high negative value of the intermediate interest of the applicants' immediate landlord, the St Michael at Pleas Residents Company Ltd (referred to in these proceedings as "the ResCo").

18. The party on whom the applicant nominee purchaser must serve his initial notice under section 13 is the freeholder, Norwich City Council. In this case the Applicant's solicitor served a number of section 13 notices on 27th February 2013. As freeholder Norwich City Council responded on behalf of itself and all those with intermediate leasehold interests by serving counter-notices admitting the right to enfranchise on 9th May 2013. Before doing so it consulted Bullen as the head lessee about the amount payable in respect of its intermediate interest, taking into account the likely negative value of the ResCo's interest. The figure proposed by the applicant as payable for the interests of both ResCo and Bullen was nil, which the freeholder was minded to accept. Bullen did not object.

19. Norwich did object, however, to the amount which the applicant proposed to pay it. There were also issues concerning the detail of the transfer which needed to be worked out, so in September 2013 (Norwich's solicitors having agreed that a single application and transfer was easier to deal with and more sensible than multiple ones) this application was filed with the tribunal. Directions were issued on 4th October.

20. The directions noted in particular what was agreed, what was expressed to be in dispute and requiring resolution, and the matter of costs, that had not yet been raised but should. Paragraphs 3 to 5 read as follows :

[1] CAM/33UG/OLR/2009/0037 & 0044

3. The tribunal wishes to record that the applicant nominee purchaser and Norwich City Council as freeholder have agreed :
   a. That it is sensible to deal with all the notices and counter-notices by way of a single application dealing with the whole development
   b. The extent of the Premises
   c. The Additional Freehold Property to be acquired from Norwich City Council, and
   d. The intermediate leasehold interests to be acquired and the price to be paid for such interests, namely NIL.

4. The issues that remain to be resolved are :
   a. The price to be paid to Norwich City Council for the Premises and those parts of the Additional Freehold Property that it owns
   b. The price to be paid to Steeple Court Ltd for those parts of the Additional Freehold Property that it owns, and the extent of that property; or alternatively the rights to be granted to the nominee purchaser over those parts of the Additional Freehold Property owned by Steeple Court Ltd
   c. The terms of a leaseback of Unit 11 (a commercial unit); and
   d. The terms of a leaseback of land comprised in leasehold title NK47832.

5. The question of costs has not been mentioned but, if a matter outstanding, it is better dealt with at the same time.

21. In the directions Steeple Court Ltd (owner of the freehold of the vehicular access) and the two parties with intermediate leasehold interests were named, and copies were served upon them. In particular, statements of case concerning the price payable and valuation evidence in the form of expert reports were to be filed and served by 25th October 2013 (paragraph 6). The preamble to the directions also contains the following points which are pertinent :
   - *Failure to comply with Directions could result in serious detriment to the defaulting party e.g. the tribunal may refuse to hear all or part of that party's case and orders may be made for them to reimburse costs or fees thrown away as a result of the default*
   - *A party wishing to alter any of these directions must immediately apply in writing to the tribunal office giving full reasons*

22. Both the applicant and freeholder complied with the directions. However, by application by letter dated 21st November 2013, received in the tribunal office on 25th November, the solicitor for the freeholder requested that this case be transferred to the Upper Tribunal (Lands Chamber), to be heard with the appeal of a similar Bournemouth case (Case Ref CHI/00HN/OCE/2013/0013), pursuant to rule 25 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

23. The grounds for seeking such relief were stated to be that both cases involve complex and important issues and principles, and large sums of money. The other "Greensleeves" case was said to involve similar issues, including whether the Act should be read purposively so as to comply with the parties' rights under the European Convention on Human Rights, and in particular Article 1 of the

First Protocol. Having asked for other parties' comments, on 2nd December 2013 the tribunal dismissed Norwich's application and directed that the case proceed on the dates already notified in late January 2014.

24. On 18th December 2013, and without any prior warning, Bullen's solicitors served notice that it intended to be separately represented. On 14th January 2014, just two weeks before the hearing, Bullen' solicitors sought the tribunal's permission to file a Statement of Case and expert valuation evidence – each document being dated 14th January 2014. The applicant objected, arguing that as the price for the two intermediate leasehold interests had been agreed in the counter-notices the tribunal had no jurisdiction to determine the issue. The tribunal agreed on day one of the hearing, immediately after the inspection, to deal with this problem as a preliminary issue (although that was not the course argued for by Bullen's representatives).

Relevant statutory provisions

25. Section 13 requires that the initial notice which starts the process of collective enfranchisement must be served on the reversioner. Of importance to this case is section 9(3), which provides that :

> Subject to the provisions of Part II of Schedule 1, the reversioner in respect of any premises shall, in a case to which subsection (2) or (2A) applies, conduct on behalf of all the relevant landlords all proceedings arising out of any notice given with respect to the premises under section 13 (whether the proceedings are for resisting or giving effect to the claim in question).

26. In particular, it is for the reversioner (in this case Norwich City Council) to deal with the preparation and service of the counter-notice under section 21. Where, as here, the counter-notice states that participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises[2] then by section 21(3) it must go on, inter alia, to :

(a) state which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which (if any) of those proposals are not so accepted, and specify –
  (i) in relation to any proposal which is not so accepted, the reversioner's counter-proposal, and
  (ii) any additional leaseback proposals by the reversioner...

27. One must then turn to Schedule 1, Part II, at paragraphs 6 and 7. Part II is headed "Conduct of Proceedings on Behalf of other Landlords", and carries the subsidiary strap line "Acts of reversioner binding on other landlords". Paragraph 6 provides :

(1) Without prejudice to the generality of section 9(3) –
  (a) any notice given by or to the reversioner under this Chapter or section 74(3) following the giving of the initial notice shall be given or received by him on behalf of all the relevant landlords; and
  (b) the reversioner may on behalf and in the name of all or (as the case may be) any of those landlords –
    (i) deduce, evidence or verify the title to any property;
    (ii) negotiate and agree with the nominee purchaser the terms

[2] See s.21(2)(a)

of acquisition;

(iii) execute any conveyance for the purpose of transferring an interest to the nominee purchaser;

(iv) receive the price payable for the acquisition of any interest;

(v) take or defend any legal proceedings under this Chapter in respect of matters arising out of the initial notice.

(2) Subject to paragraph 7 –

(a) the reversioner's acts in relation to matters within the authority conferred on him by section 9(3), and

(b) any determination of the court or [the appropriate tribunal] under this Chapter in proceedings between the reversioner and the nominee purchaser,

shall be binding on the other relevant landlords and on their interests in the specified premises or any other property; but in the event of dispute the reversioner or any of the other relevant landlords may apply to the court for directions as to the manner in which the reversioner should act in the dispute.

28. Sub-paragraphs 7(1) and (3) are material :

(1) Notwithstanding anything in section 9(3) or paragraph 6, any of the other relevant landlords shall, at any time after the giving by the reversioner of a counter-notice under section 21 and on giving notice of his intention to do so to both the reversioner and the nominee purchaser, be entitled –

(a) to deal directly with the nominee purchaser in connection with any of the matters mentioned in sub-paragraphs (i) to (iii) of paragraph 6(1)(b) so far as relating to the acquisition of any interest of his;

(b) to be separately represented in any legal proceedings in which his title to any property comes in question, or in any legal proceedings relating to the terms of acquisition so far as relating to the acquisition of any interest of his.

...

(3) Any of the other relevant landlords may by notice given to the reversioner require him to apply to the appropriate tribunal for the determination by the tribunal of any of the terms of acquisition so far as relating to the acquisition of any interest of the landlord.

29. Finally, section 33 deals with the issue of costs payable by the applicant to the other involved parties. Provisions material to this discussion are :

(1) Where a notice is given under section 13, then (subject to the provisions of this section and sections 28(6), 29(7) and 31(5)) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or by any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely

(a) any investigation reasonably undertaken –

(i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or

(ii) of any other question arising out of that notice;

(b) deducing, evidencing and verifying the title to any such interest;

(c) making out and furnishing such abstracts and copies as the nominee purchaser may require;

(d) any valuation of any interest in the specified premises or other property;
(e) any conveyance of any such interest;...

(2) For the purposes of subsection (1) any costs incurred by the reversioner or any other relevant landlord in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

...

(5) The nominee purchaser shall not be liable under this section for any costs which a party to any proceedings under this Chapter before the appropriate tribunal incurs in connection with the proceedings.

Preliminary issue – submissions on law

30. Both the applicant and third respondent (Bullen) submitted skeleton arguments which dealt with the preliminary issue whether Bullen should be allowed to participate in the argument about the price payable for its interest. Norwich City Council chose not to get involved and sat quietly on the sidelines during argument which occupied a substantial part of day one, from 11:43 until 16:00.

31. For the applicant Mr Duckworth opened by submitting that on jurisdiction two points required determination :
a. Has an agreement been reached about the premium payable?
b. If so, is the agreement something from which Bullen may later resile?

32. He referred first to what *Hague*[3] says on the subject of agreement, at 26–11 :

> The 1993 Act does not define what is meant by such an agreement. Plainly, it must mean an agreement falling short of a binding contract (i.e. one complying with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989) with which it is contrasted in the same subsection. The Act refers to an agreement as to terms of acquisition being subject to contract. There is no provision requiring the agreement to be written, though it will normally be contained in correspondence; if there is sufficient evidence, it is considered that there could be an oral agreement. If an offer made "without prejudice" is accepted by the other side, it is considered that this will constitute an agreement within the Act. It is probably open to either side to accept the terms specified in the initial notice or counter-notice and for such acceptance to amount to an agreement within the Act. If a party wishes to resile from, for example, the price specified in its notice or counter-notice, it should make that clear so that it is not faced with an acceptance.

33. He argued that there could also be agreement by conduct afterwards, where the applicant applied to the tribunal stating that there had been agreement on the premium payable for the intermediate leasehold interests, and the directions had recorded that. The freeholder, authorised by the Act to represent the interests of all other landlords, did not make an application to vary but instead only filed a Statement of Case and evidence about the issues recorded in paragraph 4 of the

3 *Hague : Leasehold Enfranchisement* (5th ed – Sweet & Maxwell 2009)

directions.

34. Where he locked horns with Mr Loveday, for Bullen, was on his interpretation of the case of *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council.*[4] Nowhere, he argued, does it say that where there has been an agreement a landlord can backtrack from it. That was not surprising because that case was not one where there ever was an agreement. There had not been an agreement; and the parties' respective notices had disclosed a dispute.

35. The case of *City of Westminster v CH2006 Ltd*[5] was, he said, on the point and clearly in the applicant's favour on the question whether the tribunal has jurisdiction to reopen the case.

36. As a secondary argument Mr Duckworth argued that, if the tribunal could let Bullen back in, it should exercise its powers under the rules and refuse to allow it to do so because :
    a. Time for seeking to participate passed in October last year.
    b. The recitals to the directions provided that a party in breach may not be allowed to advance their case. This must mean something.
    c. By analogy with the CPR, a party in default should only be granted an indulgence if there is some good reason for that default. Bullen rather conspicuously had not proffered any reason for its actions. That was unsurprising because it was the author of its own misfortune.
    d. The applicant would suffer prejudice if Bullen were allowed back in. All the applicant's documents are directed to the freeholder's case and do not address those points raised by Bullen. There was also additional expense which the applicant would have to shoulder.

37. He went further, arguing that Bullen was estopped as it had represented that it approved the nil premium by saying it was happy with the counter-notice and by not objecting to the directions. The other parties relied on that by preparing for trial on that basis, ready to argue the case on that basis. It would be inequitable to allow Bullen to conduct a volte face, and Bullen would not necessarily lose out, as it can look to its professional advisors about the earlier agreement.

38. For Bullen, Mr Loveday said that the first issue must be jurisdiction, and the notice and counter-notice procedure, and the form of the notice and counter-notice. Then he proposed to address the tribunal on the question whether there was "a matter in dispute", and thirdly on the question whether an intermediate landlord exercising its rights to be separately represented could advance its case differently or resile from the case as agreed by the reversioner. Finally, he would deal with the tribunal's Procedure Rules and the decision whether to allow in evidence.

39. Mr Loveday took the tribunal to the counter-notice at tab 15, page 197 and to the heading of that document. All of the sub-paragraphs refer to the reversioner. On the legislative scheme there is no acceptance or admission by the holder of an intermediate leasehold interest of anything at all. He then took the tribunal

4 [2005] EWCA Civ 324; [2006] 1 WLR 1186

5 [2009] UKUT 174 (LC)

through the legislation already quoted in paragraphs 25 to 28 above.

40. As to the propositions advanced by Mr Duckworth on jurisdiction, his first point had been that the counter-notice is an agreement that makes the premium to be paid to Bullen an issue no longer in dispute. Mr Loveday referred to the case of *Pleadream Properties v 5 Felix Avenue London Ltd*[6] on what is required for an agreement. In *9 Cornwall Crescent* at page 1197A, paragraph [31], there is a clear indication that the function of the counter-notice is far short of one indicating whether there is an agreement or not. While the applicant suggests that there is clear authority to the contrary in the *Westminster* case, at [19]–[20], paragraph [20] is not saying that an "agreement" is automatically binding. At [23] it is not supporting the proposition that the counter-notice is capable of amounting to an agreement.

41. Asked by the tribunal whether Bullen was consulted, and did it agree to the terms set out in the counter-notice, Mr Loveday answered that it is not part of the function of the Act for Bullen to agree to the freeholder's counter-notice. It was then put to him that the reversioner is acting on behalf of all unless one opts out, to which Mr Loveday responded that there is nothing in the Act enabling the holder of an intermediate leasehold interest to agree. He is taken to be bound by the counter-notice. That does not mean to say that the counter-notice amounts to an agreement by the holder of an intermediate leasehold interest. He argued that a notice of separate representation cannot be served until after the counter-notice has been served, and so it cannot be binding on those with intermediate interests. It was not in every situation where the reversioner does consult those holding under him.

42. If, as the tribunal observed, as soon as the counter-notice is served another party can serve notice of separate representation, was not the longstop the date in section 24 by when application must be made to the tribunal? No, he said, the longstop was as set out in Schedule 1 at paragraph 6. Paragraph 7 is without any qualification in time.

43. Mr Loveday argued that a party with an intermediate interest could resile from what was said in the counter-notice, that Bullen was entitled to by paragraph 7, and was not bound by what was said by the reversioner.

44. On the argument of estoppel, he said first that generally estoppel is not an answer to a statutory right. Secondly, was there a clear representation here? Norwich were prepared to agree a price of nil for Bullen's interest and those would be statements that bind the intermediate interest. He submitted that they don't. Was there a change of position? To what extent had the other parties changed position to their detriment. Arguments on the Human Rights Act had been raised by Norwich in its skeleton argument in any event. Further, any detriment is a relatively insubstantial one. On the question of equity, that would favour Bullen where the alternative would be to deprive of it of anything up to £¼ million.

45. On the alternative argument that the tribunal should exercise its discretion to exclude Bullen's case and evidence, he said ths should be considered under the

[6] [2010] EWHC 3048 (Ch); [2011] 1 EGLR 42, at [20]–[21]

tribunal's procedure rules and not the CPR. The overriding objective is not framed in the same way as under the 2013 procedure rules.

46. Although the matters described by Mr Loveday were not supported by witness evidence he nonetheless provided the tribunal with a chronology of events that were relevant to the issue of discretion. Bullen's position as of the dates of the section 13 notice and counter-notice was that all parties were aware of *Nailrile*[7] and the decision in that case and observations made there on the valuation of intermediate leasehold interests, and Human Rights Act arguments. It later learnt of the *Greensleeves* case, and the potential Human Rights Act arguments deployed in it (but unsuccessfully in the LVT). This was not heard until after the notice and counter-notice in this case had been given. Its potential consequences were not drawn to Bullen's attention until October.

47. Statements of case went in before any notice of separate representation, and almost simultaneously with the expert evidence.

48. The question of a "leapfrog appeal" by Norwich was disposed of by the tribunal's decision dated 2nd December 2013. Bullen's solicitors then obtained further instructions and served notice of separate representation on 18th December 2013. That was the explanation for the delay until then. Bullen instructed its expert over Christmas and he produced his report quickly. Without that Bullen could not prepare its statement of case, which was served on 14th January.

49. Asked by the tribunal what was it in the *Greensleeves* decision that influenced R3's decision, Mr Loveday stated that the argument in *Greensleeves* was subtly different from that in *Nailrile*. Until that point it was thought unlikely that Bullen would get any compensation. What was new was that an argument was being raised which, if successful before the Upper Tribunal, would have made the netting off provision in the Act between the different intermediate interests more difficult to enforce.

50. Replying, Mr Duckworth said that on the procedural question Mr Loveday had now been asked by the tribunal three times whether his client did or did not agree and on each occasion he had given "a Tony Blair answer" – to which comment Mr Loveday strongly objected.[8] Bullen was given the opportunity to agree, and to approve the notice, and it did so.

51. On discretion, it was difficult to understand the logical thrust of what Bullen was saying. It was not saying that the tribunal's decision should await the decision on the *Greensleeves* appeal. That case was unlikely to be seen or understood as a game changer. It is one in which, not for the first time, "a tedious Human Rights Act argument" was run and – like in all of the other cases - had failed. He said one could understand the argument that it was a game changer if it had only succeeded, but it did not. It was not a "new dawn".

7 *Nailrile Ltd v Earl Cadogan* [2009] 2 EGLR 151 (Lands Tribunal)

8 Although not known by the tribunal until a month later, when dealing with rule 13 costs, an e-mail dated 8th May 2013 from Mr Loveday and for some reason forwarded by Bullen's solicitors to those acting for the freeholder did contain the comment "I think we should admit that the client will get nothing for his interest in the headlease – and I have amended all 3 notices accordingly."

52. In October Bullen had seen the Greensleeves case and could then have sought to change its position by serving notice of separate representation and its own statement of case, as directed. It could have given the other parties an indication of what it was thinking.

53. On jurisdiction, Mr Duckworth said that Bullen makes 4 points :
   a. A counter-notice is never binding
   b. If wrong, an agreement made on notices by the reversioner does not bind other leasehold interests
   c. If wrong about that, the notice and counter-notice don't disclose a clear agreement on their face anyway
   d. The argument that there was an agreement evinced by the parties' conduct does not work because it is one implied by silence rather than the positive assent of the parties.

54. As to the first point, the basis is *9 Cornwall Crescent* and a misreading of the *Westminster* case. *9 Cornwall Crescent* does not say that, because on its facts it was not a case about an agreement on the notices.

55. As for the *Westminster* case, he relies on para [21] and says the test is whether an agreement would enable the applicant to apply for a vesting order, and – in the last sentence – "after". Both are palpably wrong. Bullen says what the Upper Tribunal said is that you must be able to apply for a vesting order, so must have agreed on everything. That is not what the logic of the decision says. Turn back to paragraph [7] to see what was before the LVT. This was not a case where there was an agreement on everything. The agreement was said to be of the price payable for appurtenant land. The reason why the word "after" is there in [21] is because of the facts of that case. No such analysis appears elsewhere in the decision. The language of the statute lends no support to the argument that one can't have an agreement by notice and counter-notice.

56. Mr Duckworth invited the tribunal to look at Schedule 1, paragraph 6(4) :

> The reversioner, if he acts in good faith and with reasonable care and diligence, shall not be liable to any of the other relevant landlords for any loss or damage caused by any act or omission in the exercise or intended exercise of the authority conferred on him by section 9(3).

The reversioner can't rely on that if he has not even considered consulting. The only way by which the reversioner can comply with that duty is by consulting. The mischief on which Bullen constructs his argument does not exist.

57. As for Mr Loveday's third point, his argument was unsustainable. It could not be clearer that there is an agreement on the face of the notices.

58. His fourth point was that there could be no agreement by subsequent conduct, ie by silence. The problem here, said Mr Duckworth, is that we do have positive assent. The reversioner is clothed by the Act with representation of everyone else. The reversioner served the counter-notice, then we have the application made by the applicant positively asserting a nil headlease premium, then directions recording that fact as agreed, and directing the filing of statements of case about the issues identified as live.

Discussion

59. The tribunal agrees with Mr Duckworth's interpretation of *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough*, as the issue in that case was whether the rule in *Cadogan v Morris*[9] that a tenant's proposal on the price had to be "realistic" also applied to a landlord's counter-notice. It was not a case where either party was seeking to construe an agreement from the content of the notices.

60. In *City of Westminster v CH2006 Ltd*[10] Her Honour Judge Alice Robinson held, in a case concerning enfranchisement under the Act :

> 20. ...There may be valid reasons why a term agreed at an early stage in the negotiations does not appear to be such a good idea later in the negotiations when other issues have been raised and perhaps resolved. Preventing a party from revisiting an issue previously agreed may give rise to unfairness. On the other hand, allowing a party to resile from agreement reached much earlier may also give rise to unfairness, it could simply be a delaying tactic or result in the need for a further LVT hearing after one has already been held. Such unfairness may arise in circumstances falling short of an estoppel which could prevent one party from resiling from an earlier agreement.
>
> 21. In my judgment the scheme of section 24 is such that an agreement as to terms of acquisition must be binding in the sense that it can be enforced by application for a vesting order. To hold that a party could resile from an earlier agreement would result in uncertainty and potentially render the enforcement mechanism ineffective which cannot have been intended. Further, there is no basis in section 24 for distinguishing between the status of an agreement reached at different times in the process of negotiation, application to the LVT, determination by the LVT of matters in issue and application for vesting order. Therefore an agreement reached at any time after the statutory formalities of initial notice and counter notice have been completed for the purposes of section 24 is binding.

61. In support of these propositions Her Honour referred with approval to an earlier decision of the Lands Tribunal, *Ellis & Dines v Logothetis*[11] which considered section 48 of the 1993 Act. At paragraph 10 the President said :

> The terms are determined either by agreement between the parties or by the LVT. So long as any of the terms of acquisition are not agreed those terms remain in dispute and it is for the LVT to determine them. Terms which are agreed cease to be in dispute. The LVT only has jurisdiction where there are terms that are not agreed, and the county court only has jurisdiction where all the terms have been agreed or determined by the LVT. Any agreement reached is necessarily reached in the context of the provisions of section 48. Any terms agreed are "terms of acquisition" of the new lease to which the tenant is entitled under the Section. Any agreement reached which is not intended to create rights independent of the statutory provisions is thus an agreement made for the purpose of

9 (1999) 31 HLR 732 (CA)

10 [2009] UKUT 174 (LC)

11 (LRA/3/2000)

those provisions. It has to be a complete agreement in the sense that each party commits itself unconditionally to such terms as are agreed.

62. In this case the one issue on which the counter-notice bound the holders of the two intermediate leasehold interests (Bullen and the ResCo) was the premium payable to buy out those interests. At all material times up to 18th December 2013 the freeholder had full statutory authority to act on behalf of all other interests, but as Mr Duckworth submitted to the tribunal – and Mr Loveday was at pains to avoid admitting – Norwich City Council took its responsibilities seriously and approached Bullen for its approval of the draft counter-notice. The fact that the premium payable to Bullen was stated to be nil was not something that its advisers overlooked. They were fully aware of it, and had expressly agreed to the wording of the counter-notice.

63. The tribunal rejects the suggestion that at any stage – presumably up to the tribunal delivering its decision – the holder of an intermediate leasehold interest can spring a notice of separate representation on the reversioner and the tribunal and claim not to be bound by what had previously everyone had assumed was its position.

64. It may be, and no authority was referred to by either party which was specifically on the point, that where a reversioner has negligently served a counter-notice without first enquiring of those holding under it then that other party might swiftly give notice of separate representation and resile from something said in that notice. The more usual case where separate representation is likely to be sought is where there is a conflict of interest as between reversioner and that other, where perhaps it has required the reversioner to state a price for its intermediate interest with which the reversioner profoundly disagrees, and each wants to mount a different argument before the tribunal.

65. Where there has been actual agreement, however, there is no issue requiring determination and the tribunal lacks jurisdiction if it attempts to do so. Here Bullen agreed the terms of the counter-notice, then said nothing when the directions were issued in early October 2013. The final date for submitting a statement of case was 25th October, by when Bullen and its advisers were aware of the *Greensleeves* case. No attempt was made to write to Norwich City Council or the applicant, mentioning the *Greensleeves* case and serving notice of separate representation plus a request for further directions. Instead, all was quiet until 18th December, when notice of separate representation was served. That did not reveal much, as it would have been perfectly proper for Bullen to want its own conveyancing solicitors involved in negotiating the form of transfer and lease back of the interior of unit 11 plus various car parking spaces.

66. The tribunal determines that the premium payable for Bullen's interest had been agreed in the counter-notice and it is bound by that. The issue having been agreed, this tribunal has no jurisdiction to hear argument from Mr Loveday or evidence from Mr Shapiro on the point.

67. If the tribunal is wrong then, taking into account the matters discussed above and in the exercise of its discretion under rules 8 and 9, it determines alternatively that the breaches of the directions order and the delay are so serious that the

other parties and the hearing would be prejudiced. None of the other parties or their witnesses addressed the question how a claim by Bullen would affect the amount payable ultimately to the reversioner. The hearing would have to be adjourned, or additional time taken up in dealing with this late change of position.

Conditional agreement on price

68. After hearing evidence from the applicant's and freeholder's respective valuers on day two and adjourning the case to a third day to hear argument, the tribunal was notified in writing by both parties' solicitors that they had reached agreement on the price payable by the applicant to the freeholder. The price, which was not disclosed to the tribunal, was however conditional on :
    a. Bullen not appealing the tribunal's decision to exclude its evidence and case, or
    b. The Upper Tribunal (Lands Chamber) refusing permission to appeal, or
    c. Any appeal being dismissed.

    The tribunal was invited to confirm whether it was willing simply to adjourn generally the question of the price to be paid by the applicant so that counsel's attendance on the third day could be dispensed with and the applicant's and reversioner's solicitors deal with some minor issues concerning the form of the required transfer and the section 33 costs payable by the applicant.

69. The tribunal notified the parties of its agreement to proceed on this basis, and the question of price is therefore adjourned on the basis that it will be resurrected only if Bullen obtains the right to participate in these proceedings on that subject.

Other terms of transfer

70. On day three the applicant's and reversioner's solicitors put before the tribunal a revised form of the transfer at tab 23 in the hearing bundle. It was designed to be a composite transfer of the interests of all involved save for the ResCo. The transfer also includes a transfer of the freehold areas held by Steeple Court. In practice, the tribunal was told this may not be necessary. In principle the applicant had agreed to take a 999 lease of those parts, to avoid creating flying freeholds, but it was proving painfully slow trying to get that done. Mr Whipp still didn't have a draft lease from Steeple Court, whose solicitors are Hansells (although no notice of separate representation had been served as yet). He said that if they won't co-operate the applicant will take a transfer of the freeholds, and seek approval for that, but in practice he would remove all reference to Steeple Court from the transfer if co-operation were shown.

71. A further problem was that the applicant had agreed with Norwich the terms of the transfer but only after Bullen's service of its notice of separate representation, so the transfer terms are not binding on it. Mr Whipp therefore sought a transfer of all save the interior of unit 11 and four of the car ports by Paston House.

72. Both solicitors agreed that the required solution was a conveyancing mess, with no terms being designed for a small leasehold area. Both solicitors considered that the way they had to proceed is to carve out the interior of unit 11 from the freehold transfer. If accepted in this form the leaseback to NCC is subject to that leasehold interest. The provisions of the existing Bullen head lease will continue, but someone will need to work out the appropriate rent, etc.

73. Asked by the tribunal what contact there had been with Bullen's solicitors, Mr Ferguson said that there had been nothing but a holding response to an e-mail request by Norwich City Council during the previous week, to the effect that they were awaiting instructions.

74. The tribunal approves the slightly amended form of the transfer at tab 232 which had been handed in that morning. The additional wording is set out at paragraph 9 above.

Section 33 costs payable by the applicant

75. The applicant and reversioner had each complied with the tribunal's directions to do with costs. The reversioner's schedule was answered by the applicant's points of objection, to which Norwich had then replied. Coming to the case late, Bullen had not given the applicant much opportunity to respond to its two schedules (the larger for some reason including the costs of the hearing) with objections, but it had managed to do so. There was no reply.

76. Dealing with the section 33 costs payable to the freehold reversioner, four points of objection were raised; the second of which was then conceded as being outwith the parameters of the section. The first point taken was the cost for valuation (effectively the hours spent, rather than the in-house hourly rate of £75). For the applicant Mr Whipp proposed a 25% reduction in hours to 18. The third point involved solicitor's costs, which he proposed should be reduced by one third to 40 hours. When the tribunal pointed out that the reversioner's solicitor had to deal with no fewer than five separate section 13 notices Mr Whipp agreed that this was so. His final point of objection was the cost of counsel's fee of £4 000.

77. The tribunal determines each of the disputed points in favour of the reversioner. The valuer was new, not having been involved with the previous lease extension applications. The estate was complex, both in layout and leasehold structure. The same applied to the solicitor, who had five separate notices to consider. In the circumstances, with a lot at stake due to the complexities of the intermediate interests – especially that of the ResCo – Norwich was fully justified in engaging counsel with particular experience of this line of work.

78. As for the costs payable to Bullen, the tribunal was not impressed by the schedule prepared on its behalf. Had there been full co-operation in the negotiation of the transfer then some might have been justified, but to the tribunal it seemed more of a wish list than a record of work actually undertaken – or undertaken in time. Nor could the tribunal see how much of these costs could possibly be incurred within the strict limits of section 33. Instructions for the preparation of a valuation report were not given until just before Christmas 2013 – long after service of the counter-notice specifying a nil valuation. It is fair to point out that Bullen was not represented on day three, but nor had it responded to Mr Whipp's points of objection.

79. The tribunal allows half an hour for SOE reading instructions, one hour for searches and title review, and a further hour for SDLT and Land Registry management, making a total of £650. No other costs are allowed.

Rule 13 costs payable by Bullen

80. At the conclusion of the parties' submissions on day one the tribunal retired to consider its decision and delivered an oral ruling, confirmed in writing by this decision. Thereupon, both the applicant and Norwich City Council applied for costs under rule 13, on the ground that in seeking to overturn its earlier agreement to accept a nil premium and appear separately, thus taking up the whole of the first of a two day hearing with the preliminary issue that it had lost, Bullen had acted unreasonably in its conduct of the proceedings and the other parties had thereby incurred unnecessary costs.

81. It was agreed that this issue of costs would be dealt with by written submissions and written directions dated 29th January 2014 were later sent to all three parties. The applicant and reversioner were required to file and serve schedules and submissions by 12:00 noon on Friday 7th February, to which – giving Bullen as much time as possible – it had until 12:00 noon on Wednesday 19th February to file and serve its written submissions as to why the tribunal should not make the requested costs orders. The question of costs would be considered on or after that afternoon, after the tribunal's consideration of its decision on the substantive case.

82. The applicant and reversioner filed their respective schedules and submissions by the appointed time, but on the morning of 19th February the tribunal enquired of the office staff whether anything had been received on behalf of Bullen. Much to the tribunal's surprise the answer was in the negative, so at around 13:00 a call was placed to Bullen's solicitors and a promise was given that submissions would be delivered by 15:00. In fact they were delivered shortly after 13:15.

83. Having considered the various points made, some at length, in the respective submissions, the tribunal determines as follows :

a. The tribunal is satisfied that Bullen has acted unreasonably in its conduct of the proceedings because if by 23rd October 2013 it had formed the intention of submitting a claim for payment to it of a substantial premium then, in the knowledge of the tribunal's directions, it should at that stage have served notice of separate representation and asked for variations to directions. Instead, the applicant and reversioner were left to proceed on the assumption that none of those with intermediate interests would be involved, that the evidence and argument would be limited, and that only a two-day hearing would be required. Bullen is not being penalised just because it ran a legal argument which was unsuccessful.

b. Since the potential receiving parties' schedules had been prepared the shape of the proceedings had changed radically. Instead of day three being taken up with a promised three hours of closing submissions, mainly on the subject of price, by the reversioner followed by two hours from the applicant the question concerning the price had been parked. Counsel were therefore not required following the solicitors' requests on 13th February that the tribunal accede to their request to proceed on that basis.

c. The cost of incurring counsel's fees having been avoided, it would breach the indemnity principle if such fees were nevertheless to be recovered from the paying party. It would also be unreasonable.

d. Insofar as concerns the applicant's costs schedule (with supporting notes) the tribunal :

i. Reduces the time allowed for letters out/emails from what appears to be an excessive 3:12 hours to 1 hour [a reduction from £640 claimed to £200]
ii. Reduces the time allowed for the hearing from 4 hours to 3 [a reduction from £800 to £600]
iii. Reduces counsel's fee of the hearing from £3 834 to £1 100, as no second refresher fee was required, but counsel had spent some of his preparation time on dealing with the jurisdiction/delay issues. The proportion of his preparation time claimed was one third, but these issues occupied only four pages out of an 18 page skeleton argument. 20% is consider a fair proportion
iv. All other fees, including for the attendance of the valuer on day one, are allowed as claimed
v. There are consequential reductions in the VAT recoverable.

e. Insofar as the reversioner's costs schedule is concerned :
i. The time allowed for attendance at the hearing is reduced from six hours to three, as had day one not been spent dealing with Bullen then evidence would have been taken on day one and the whole of day two would have been spent on legal argument. Instead, due to the delay between day two and day three, the parties were able to agreed terms and shorten the hearing on day three. The additional time incurred was therefore only the short hearing on day three [a reduction from £505.80 to £252.90]
ii. Counsel's refresher fee of £3 500 is deleted
iii. All other fees, including for the attendance of the valuer on day one and counsel's fee for the costs submissions, are allowed as claimed
iv. There are consequential reductions in the VAT recoverable, but as a VAT-registered entity Norwich almost certainly reclaims its VAT as input tax rather than from the paying party.

Dated 11th March 2014

Graham Sinclair
Tribunal Judge