UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – intermediate leasehold interest - power of competent landlord to bind immediate landlord notwithstanding separate representation of immediate landlord – section 40(2) Leasehold Reform Housing and Urban Development Act 1993

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) (LONDON VALUATION TRIBUNAL)

BETWEEN:

HOWARD DE WALDEN ESTATES LIMITED Appellant

and

(1) ACCORDWAY LIMITED
(2) STELLA KATEB Respondents

Re: Flat 12 and Garage 4,
123/125 Harley Street,
London
W1

Before: His Honour Judge Gerald

Sitting at: 43-45 Bedford Square, London WC1A 3AS
on
24 September 2014

Anthony Radevsky instructed by Speechly Bircham LLP for the Appellant
James Fieldsend instructed by Wallace LLP for the Respondents

The following cases are referred to in this decision:

Cadogan Viscount Chelsea v McGirk [1996] 29 HLR 294
Hosebay Limited v Day [2012] 1LR 2884
Earl Cadagon v Sportelli [2010] 1AC 278
James v United Kingdom [1986] 8EHRR 123

Arrow Game Limited v Vantage Volante Limited [LON-00AW-0LR-2007-721]
Weiss v Shawview International Limited [LON-NL-604-98].

DECISION

Introduction

1. The appellant appeals against the decision of the First-tier Tribunal Property Chamber (Residential Property) ("FtT") of 4 October 2013 following the grant of permission to appeal by the Deputy President of this Tribunal made on 23 January 2014 following the refusal of the FtT to grant permission to appeal on 19 November 2013.

2. The appellant owns the freehold to 123/125 Harley Street, London W1G 8AY. The first respondent held a long lease of Flat 12 at 123/125 Harley Street pursuant to a lease dated 7 March 1960. The second respondent is a mesne landlord holding a long lease of the immediate reversion pursuant to a lease dated 13 January 1960.

3. On 15 December 2012 the first respondent or, more properly, its immediate predecessor in title served a notice of claim pursuant to section 42 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act") claiming a new lease of Flat 12 as well as an associated garage in respect of which she also held a long lease. That notice was served on the appellant and also on the second respondent who for the purposes of the 1993 Act are "the competent landlord" and "the other landlord" respectively.

4. On 18 February 2013 the appellant served on the first respondent's immediate predecessor a counter-notice under section 45 of the Act admitting her right to a new lease of the flat and garage but not accepting any of the proposed terms of the notice of claim.

5. On 22 February 2013 the second respondent served a notice of her intention to be separately represented in any legal proceedings pursuant to paragraph 7(1) of Schedule 11 to the 1993 Act. That notice was served on both "the competent landlord" *i.e.* the appellant and also "the tenant" *i.e.* the first respondent or its predecessor.

6. On 19 April 2013 the appellant applied to the Leasehold Valuation Tribunal, as the FtT was then known, pursuant to section 48(1) of the 1993 Act to determine the premium payable for the grant of the new lease of the flat and garage to the first respondent who by then had acquired the leases of both the flat and the garage from its immediate predecessor in title.

7. On 18 July 2013 the appellant accepted the first respondent's offer of a total premium of £269,000 for the new leases of the flat and garage and apportioned that sum between the appellant and the second respondent as to £265,600 and £3,400. By this stage all other terms of the new leases had been agreed. Therefore on the same day, 18 July 2013, the appellant's solicitors wrote to the LVT to advise them that all of the

terms of the acquisition had been agreed and so requested that the hearing before the LVT be vacated. The following day, 19 July 2003, the first respondent's solicitors wrote to the LVT to the same effect.

8. On 25 July 2013 the second respondent's solicitors wrote to the LVT stating that she had not agreed the apportionment and accordingly could not consent to the hearing being vacated. The LVT thereafter made a paper determination on 14 August 2013 that the hearing should stand in order for it to be determined whether or not it had jurisdiction to determine the issue of apportionment given that "the competent landlord" and "the tenant" within the meaning of the 1993 Act had reached agreement.

9. The following day, 15 August 2013, the appellant granted new leases of the flat and garage to the first respondent who played no further part in the application before the LVT or indeed this appeal.

10. There was a full hearing before the FtT as it was by then known on 17 September 2013 which published its written decision on 4 October 2013. The FtT determined that the agreement between the appellant and the first respondent did not bind the second respondent so that it retained jurisdiction to determine the issue of the value of the intermediate lease of the second respondent. It is against that decision which the appellant appeals.

11. The appeal raises a very narrow question. Does the competent landlord have the authority or power to agree the terms of the grant of a new lease with the tenant so as to bind the intermediate landlord even though that intermediate landlord has served a notice of intention to be separately represented, that is represented separately from the competent landlord in any proceedings? Or, using the slightly more prosaic language of the second respondent's counsel, is the competent landlord able to "trump" the notice of intent to be separately represented served by the intermediate landlord?

12. Before referring to the specific provisions of the 1993 Act in question, it is convenient to set out the broad scheme of how this part of the 1993 Act operates. Upon service by the tenant of a notice under section 42 to exercise the right to acquire a new lease of the flat, the competent landlord must give a counter-notice by the date specified in the tenant's notice under section 45 of the 1993 Act. The tenant's notice must contain all of the proposed terms of acquisition including the proposed premium. The competent landlord's counter-notice must state whether the tenant's right is admitted and state what, if any, parts of the tenant's proposal contained in its notice are accepted. The competent landlord can also serve a counter-notice which does not admit the tenant's right to acquire, but that is not material for these purposes.

13. The competent landlord and tenant then have two months within which to agree terms. If they fail to agree terms the competent landlord or the tenant may apply to the FtT for determination of any matters which remain in dispute. That application must be made within six months of the date of service of the counter-notice. If terms are then agreed the competent landlord can simply grant a new lease. If terms are agreed or

determined by the FtT but for some reason the competent landlord or tenant does not complete the grant of the new lease, the competent landlord or the tenant may apply to the county court for in effect an order completing the grant of the new lease in accordance with the terms which have either been agreed between the competent landlord and the tenant or determined by the court. That is the effect of section 48 of the 1993 Act. Although different language is used, it is common ground that the agreement as to terms referred to in section 48 is agreement between the competent landlord and the tenant, there being no reference to the intermediate landlord's involvement in negotiation or agreement within section 48.

14. Once a new lease has been granted in pursuance of the section 42 notice, that notice ceases to be in force: section 42(8) of the 1993 Act. It therefore follows on a literal reading of those provisions that the competent landlord and tenant can reach agreement without involving the intermediate landlord in negotiations. Once a new lease has been granted in pursuance of the section 42 notice it is spent and the FtT no longer has any jurisdiction.

15. As I have said the question raised in this appeal is whether or not the competent landlord can reach agreement with the tenant so as to bind the intermediate landlord. The key provision is section 40(2) which grants the competent landlord what has been described in shorthand as a statutory power of attorney to act on its own behalf and on behalf of all other tenants. It provides as follows:

> "40(2)… the [competent] landlord … shall conduct on behalf of all the other landlords all proceedings arising out of any notice given by the tenant with respect to the flat under section 42 (whether the proceedings are for resisting or giving effect to the claim in question).
>
> "40(3) Subsection 2 has effect subject 2 to the provisions of Schedule 11 of this Act (which makes provision in relation to the operation of this Chapter in cases to which that subsection applies)."

16. What is to be noted about the wording of section 40(3) is that it is plain that Schedule 11 is intended to set out provisions relating to the operation (in other words the carrying into effect and working out) of the authority vested in the competent landlord.

17. The material provisions of Schedule 11 are to be found in paragraphs 6 and 7. The nature and extent of the competent landlord's ability to bind the intermediate landlord, described in these paragraphs as "the other landlords", depends upon an interplay of these two paragraphs and how they relate to the general scheme of the enfranchisement or lease extension process which I have already outlined.

> "*Acts of competent landlord binding on other landlords*
>
> "6(1). Without prejudice to the generality of section 40(2) –
>
> (a) any notice given under this Chapter by the competent landlord to the tenant

(b) any agreement for the purpose of this Chapter between that landlord and tenant, and

(c) any determination of the court or [the appropriate tribunal] under this Chapter in proceedings between that landlord and tenant,

"shall be binding on the other landlords and on their interests in the property demised by the tenants' lease or any other property; but in the event of dispute the competent landlord or any of the other landlords may apply to the [county court] for directions as to the manner in which the competent landlord should act in the dispute.

"(4) The competent landlord, if he acts in good faith and with reasonable care and diligence, shall not be liable to any of the other landlords for any loss or damage caused by any act or admission in the exercise of intended exercise of the authority given to him by section 40(2)."

18. It is common ground that this paragraph specifically makes binding upon an intermediate landlord any agreement which has been reached between the competent landlord and the tenant. If there is no intervention by the intermediate landlord he is bound by whatever the competent landlord has agreed with the tenant. It is also common ground that there is a statutory duty of care owed by the competent landlord for which he will be liable for breach unless he can avail himself of the statutory defence provided by paragraph 6(4), namely, that he acts in good faith and with reasonable care and diligence.

19. Thus, whilst it is theoretically open to the competent landlord to run a rough-shod over any known observations of the intermediate landlord and reach agreement with the tenant simply ignoring those observations of the intermediate landlord, in so doing he would run the risk of liability in damages. In those circumstances it would be very difficult for him to claim that he had acted in good faith or with reasonable care and diligence. However the fact that the competent landlord has reached agreement with the tenant knowing that the intermediate landlord has raised observations or objections to for example the premium or amount payable under Schedule 13 of the 1993 Act does not necessarily mean that he will not be able to demonstrate that he has been acting in good faith or with reasonable care and diligence. For example it may be that the competent landlord properly regards the observations or objections of the intermediate landlord as immaterial or of no substance or that he has been trying to get information out of the intermediate landlord to assist him in his negotiations which has not been forthcoming. In those circumstances it is possible, depending on the facts and circumstances of the case, that he could avail himself of the statute defence notwithstanding.

20. It is also common ground that the intermediate landlord could apply to the county court under paragraph 6(1) of Schedule 11 for directions as to the manner in which the competent landlord should act in relation to the dispute. Both counsel agreed that if the intermediate landlord did not for example like how the competent landlord was presenting the case or the terms which he was proposing or possibly intending to agree including the amount payable under Schedule 13, the intermediate landlord could intervene by applying to the county court. One aspect of that intervention could be a

request that the competent landlord be directed not to reach any agreement without the prior consent of the intermediate landlord or approval of the court. In both circumstances the reality would be that the competent landlord's authority would be curtailed by the effect of the court order. That power to intervene by application to the county court can be exercised at any time. Indeed the competent landlord himself might intervene if he had a recalcitrant intermediate landlord and wished to protect himself from any allegations and to assist availment of the paragraph 6(4) defence.

21. Paragraph 7 provides as follows.

> "*Other landlords acting independently*
>
> "7(1) Notwithstanding anything in section 40(2), any of the other landlords shall, at any time after the giving by the competent landlord of a counter-notice under section 45 and on giving notice to both the competent landlord and the tenant of his intention to be so represented, to be entitled to be separately represented –
>
> (a) in any legal proceedings in which his title to any property comes into question, or
>
> (b) in any legal proceedings relating to the determination of any amount payable to him by virtue of Schedule 13."

22. It is to be noted that this gives the intermediate landlord the right to serve a notice of intention to be separately represented "in any legal proceedings" relating to the title to property or any amount payable to him by virtue to Schedule 13. The service of the notice does not make him a party to any legal proceedings. It merely entitles him to be separately represented at both legal proceedings. If he did not participate or turn up in the legal proceedings that would be it. If he did then no doubt his views would be taken into account.

23. What is also significant is that paragraph 7(1) is very tightly worded. Putting to one side paragraph 7(1)(a), the intermediate landlord can only be separately represented in legal proceedings in relation to the determination of the amount payable to him by virtue of Schedule 13. He does not have any right to be separately represented in legal proceedings in relation to the other terms and issues or matters in dispute between the competent landlord and the tenant. It is therefore a very narrow right to be separately represented.

24. It is to be contrasted with paragraph 6 in a number of ways. Whereas the intermediate landlord's ability to intervene under paragraph 6(1) is predicated on an application to the county court rather than the FtT, the entitlement or right to be separately represented in relation to the amount payable by virtue of Schedule 13 is automatic upon service of the paragraph 7(1) notice. Whereas paragraph 6(1) expressly refers to any agreement reached between the competent landlord and the tenant, paragraph 7(1) is confined to the right to be represented separately in any legal proceedings. Had Parliament intended that the intermediate landlord would have the right upon service of a notice under paragraph 7(1) to participate in negotiations

between the competent landlord and the tenant and indeed to be a required party to any agreement between the competent landlord and the tenant one would have expected paragraph 7 to so provide. It does not.

25. That is to be contrasted with the parallel provisions set out in Schedule 1 to the 1993 Act relating to collective enfranchisement. By section 9(3) the competent landlord is vested with precisely the same statutory authority to bind all other landlords, albeit that slightly different wording is used to that under section 40(2). Section 9(3) is subjected to the provisions of Schedule 1, paragraph 7(1) of which has virtually the same language as paragraph 7(1) of Schedule 11 save for one addition, sub-paragraph 7(1)(a), which provides that upon service of a counter-notice by the intermediate landlord, which can be done "at any time after the giving" of the equivalent section 45 notice by the equivalent of the competent landlord their described as the reversioner, the intermediate landlord shall

> "be entitled (a) to deal directly with the nominee purchaser in connection with any of the matters mentioned in sub paragraph (i) to (iii) of paragraph 6(1)(b) so far as relating to the acquisition of any interest of his".

Paragraph 6(1)(b) of Schedule 1 is drawn in slightly wider language. Sub-paragraph 6(1)(b)(ii) referring to the reversioner's ability to deal on behalf of all landlords to "negotiate and agree with the nominee purchaser of the terms of acquisition".

26. Mr Radevsky submitted that as a matter of construction of paragraphs 6 and 7 of Schedule 11 to the 1993 Act it was plain that the authority to bind the intermediate landlord granted by section 40(2) was absolute and was not altered in any way by the mere service of a notice by the intermediate landlord under paragraph 7(1). There was no reason to seek to alter or qualify the otherwise express and absolute authority of the competent landlord. That authority was consistent with how the 1993 Act was in this Chapter intended to operate, namely, providing the tenant with a single point of contact, namely, the competent landlord with whom he or she had to deal and vesting in that competent landlord the exclusive right to negotiate terms. Upon agreement and grant of a new lease that was an end of the matter and the section 42 notice was then spent: section 42(8)(a). As a matter of statutory interpretation that conclusion was re-enforced by the absence of any provision in Schedule 11 equivalent to that contained in paragraph 7(1)(a) of Schedule 1.

27. The FtT, it was submitted, therefore erred in reaching its conclusion which is summarised in paragraph 36 of the decision.

> "In conclusion, the Tribunal determines that the agreement reached between the applicant and respondent does not bind with Miss Kateb as the value of her intermediate interest remains in issue and that the Tribunal has jurisdiction to determine this matter. For these reasons it is not necessary for the Tribunal to go on to deal with any Human Rights Act points raised on behalf of Miss Kateb."

28. The respondent's argument is simplicity itself. Counsel, Mr Fieldsend, submitted that if the appellant is right the ability of the intermediate landlord to serve a notice under paragraph 7(1) of Schedule 11 is meaningless or toothless because the competent landlord can simply ignore it and even part-way through the hearing can reach agreement with the tenant. The statutory authority is expressly "subject to" the provisions of Schedule 11. It is to be so construed that when a paragraph 7(1) notice of intention to be separately represented is served the competent landlord is no longer permitted to reach any agreement which would impinge on that right or entitlement to be represented at any proceedings. Recognising that the paragraph 7(1) notice could be served at any time, Mr Fieldsend said that the qualification on the competent landlord's authority would only bite when proceedings were in train, resulting in the somewhat asymmetrical situation that if full proceedings were not in train the competent landlord would be free to reach agreement with the tenant notwithstanding being aware of the intermediate landlord's intention to be legally represented.

29. I am unable to accept the arguments put forward by Mr Fieldsend. It is in my judgment inaccurate to describe the notice served under paragraph 7(1) as being meaningless or toothless if the appellant's contention is correct because it has a very real practical benefit to the intermediate landlord. Automatically, by mere service of the notice, he or she can have a right to be separately represented at any legal proceedings. That is to be contrasted with paragraph 6(1) which would require a separate application to be made to the county court which is quite distinct from mere service of a notice which is a simple piece of paper stating an intention to be represented. If there are no legal proceedings then the entitlement to be represented evaporates. It is unnecessarily complicated and would lay a trap for the unwary if it is right that the paragraph 7(1) notice would only qualify or defeat the competent landlord's authority once legal proceedings were in train. The language of paragraph 7(1) as I have already said is tightly drafted and to be contrasted with the wider drafting of paragraph 6(1) and gives no hint or indication that such a notice gives the intermediate landlord a right to be involved in negotiations or agreement or as suggested by Mr Fieldsend that such a notice lies in the undergrowth waiting to trip-up the competent landlord and divest him of authority to agree the amount payable under Schedule 13 the second legal proceedings are in train.

30. In my judgment this is consistent not only with the specific language of the material provisions of the 1993 Act but also with the scheme of how the tenant's right to extend the lease is to operate. As has already been held in *Cadogan Viscount Chelsea v McGirk* [1996] 29 HLR 294, the purpose of the 1993 Act was to be of benefit to tenants. As was said by Lord Justice Millett as he then was at page 298:

> "…It would in my opinion be wrong to disregard the fact that while the Act may to some extent be regarded as exploratory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the Act fairly and with a view if possible to making it effective to confer on tenants those advantages that Parliament might have intended them to enjoy."

31. In *Hosebay Limited v Day* [2012] 1LR 2884, commenting on that citation from Lord Justice Millett, Lord Carnwath JSC said:

> "By the same token the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended."

32. Bearing those observations in mind, the purpose of the 1993 Act is in my judgment to confer upon a tenant a right to acquire or extend a new lease of the flat on payment of a premium. In that vein it was intended so far as possible for the 1993 Act to operate simply, swiftly and efficiently with minimum intervention of other parties and the involvement of the court. In the same vein the express provisions of the sections and paragraphs to which I have referred make it quite clear that the points of contact for agreement and dispute resolution are the competent landlord and the tenant. It is they who are vested with the authority to make decisions and reach agreement. Upon agreement having been reached the lease is granted either without intervention of the county court or with intervention of the county court at which point in time the section 42 notice is spent. What is not intended is that the tenant be embroiled in multi-party negotiations. He is entitled to negotiate and reach agreement direct with the competent landlord. The competent landlord, as with any other agent, save that other agents would not usually act when there is potentially or arguably a conflict of interest between his own interest and that of in this case the intermediate landlord, is liable in the event of a failure to act in good faith or act with reasonable care and diligence.

33. There is not in my judgment anything particularly surprising about this. Viewed from a practical perspective the competent landlord will wish to engage with any intermediate landlord and indeed implicitly must do so in order to discharge his duty to act in good faith with reasonable care and diligence. The competent landlord is vested with a discretion in effect to decide whether or not to go ahead regardless of the position of the intermediate landlord and reach agreement with the tenant or not. If he decides to go ahead he knows that he will be at risk of a claim for damages from the intermediate landlord unless he can make out a paragraph 6 "defence".

34. This, viewed from a practical perspective and attempting to achieve the object of the 1993 Act which I have set out already, is desirable in the context of these sort of applications because it enables the competent landlord to take a view as to whether or not there is any real substance to the position adopted by the intermediate landlord and if for whatever reasons he does decide to reach agreement with the tenant it is only right that the tenant should be able to rely upon that agreement with impunity. It is then up to the intermediate landlord to claim any damages from the competent landlord if he so desires.

35. Whilst in my judgment that is the plain and natural reading of the provisions of paragraph 6 and paragraph 7 of Schedule 11, if there were any doubt about that conclusion one only needs to look at the parallel provisions of Schedule 1 where Parliament has expressly provided for the intermediate landlord to serve notice to have a right to negotiate in dealings under paragraph 7(1)(a) of Schedule 1 in relation to collective enfranchisement. The reason no doubt for that power or right is because collective enfranchisement is of a far more complex nature which results in numerous individuals and companies being involved and also the intermediate landlord's lease

being acquired by the collectivising tenants which is to be contrasted with the position of enfranchisement under Chapter 2 where the interest of the intermediate landlord continues.

36. I therefore allow this appeal. The service by an intermediate landlord of a notice of intention to be separately represented under paragraph 7(1) does not curtail or qualify the absolute authority of the competent landlord to reach agreement with the tenant and so bind all intermediate landlords pursuant to section 40(2) and paragraph 6. It therefore follows that the grant of the lease by the appellant to the first respondent on 15 August 2013 had the effect of completing or determining the force of the section 42 notice whereafter the FtT had no jurisdiction to determine any matter in relation to that notice.

37. I should say that in reaching this decision I have been referred to two decisions of the lower Tribunal which reach opposite conclusions. The first is *Arrow Game Limited v Vantage Volante Limited* LON-00AW-0LR-2007-721 and the second is *Weiss v Shawview International Limited* LON-NL-604-98. With no disrespect to either decision I have not referred to either of them because they are not binding upon this Tribunal.

38. As an alternative argument the respondent sought to persuade me that such a conclusion would be in breach of Article 6 of Schedule 1 to the Human Rights Act 1998 and Article 1 of the First Protocol to the Human Rights Act 1998. With regard to the right to a fair trial provided by Article 6, I have been unable to understand how the mere granting to the competent landlord of an authority to reach agreement on behalf of himself and others could properly be regarded as prohibiting or interfering with the right to a fair trial. If the intermediate landlord is so minded he can make an application to the county court under paragraph 6 of Schedule 13 to the 1993 Act which would have the effect, if successful, of having a trial of the assessment of the value of the amount to be paid to him under Schedule 13.

39. It seems to me however that this suggestion is rather more fundamental because it attacks the whole basis or right or scheme of the 1993 Act by which the competent landlord is vested with the statutory authority to act on his own and the other landlord's behalf. In order for the Article 6 challenge to succeed that whole statutory authority would have to be challenged, and Mr Fieldsend was not prepared to and did not go that far. Furthermore whilst the intermediate landlord who fails to make appropriate application to the county court is excluded – theoretically at any rate – from involvement in negotiations, he nevertheless may sue the a competent landlord for damages for breach of a statutory duty.

40. With regard to protection of property rights contained in Article 1, in my judgment this is also flawed because what has been substituted for those property rights is statutory compensation in effect for the grant of a new lease. In my judgment the impossibility of this line of argument is made clear by the decision of the House of Lords in *Earl Cadagon v Sportelli* [2010] 1AC 278 by Lord Walker of Gestingthorpe at paragraph 48 where he said as follows:

> "In relation to section 9 of the 1967 Act and Schedule 13 to the 1993 Act the landlord reliance on section 3 [Human Rights Act] in their oral submissions was less than wholehearted and for good reasons. The decision of the European Court of Human Rights in *James v United Kingdom* [1986] 8EHRR 123 presents them with an insuperable obstacle it is for Parliament or the National Legislator to decide on policies to remedy social injustice, with a wide margin of appreciation. Parliament's conclusions on social policy will be accepted by the Strasberg Court unless manifestly unreasonable. It is true that the scope of leasehold and enfranchisement and associated rights has increased greatly since the 1967 Act, especially with the removal of the requirement for occupation by a tenant. But Parliament concluded that that requirement creates difficulties in the enfranchisements in larger blocks of flats where there was a rapid turnover of some of the flats. Against that the landlord under section 9(1)(b) of the 1967 Act and the Schedule 13 to the 1993 Act receive half of the marriage value, a provision that cannot be attacked as lacking a reasonable relationship of proportionality: see paragraph 49 to 54 of the judgment in *James v United Kingdom*."

41. I should finally say that I was referred to a very large quantity of other authorities concerning the applicability of the Human Rights legislation. However in my judgment none of those authorities are of any assistance in this case.

42. I therefore allow the appeal.

Dated 28 October 2014

His Honour Judge Gerald