



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

Case Reference : LON/OOBK/OCE/2017/0267

Property : 110 Denbigh Street, London, WC1V 2EX

Applicants : (1) Fiona Violet Spencer Thomas; and
(2) Robert William Larard and Angela Moya Larard

Representative : Ms Nicola Muir (Counsel) instructed by
Thirsk Winton LLP

Respondent : St Georges Estate (London) Limited

Representative : Ms Julia Kent. Partner with Franklins
(Solicitors)

Tribunal Members: Judge Robert Latham
Ms Marina Krisko FRICS

**Date and venue of
Hearing** : 20 February 2018 at
10 Alfred Place, London WC1E 7LR

Date of Decision : 17 April 2018

DECISION

- (i) The Tribunal determines that the proposed Transfer should include the basement vaults as shaded blue in the title plan at p.150 of the Bundle.
- (ii) The Tribunal's findings on the other Clauses to be included in the proposed Transfer are at paragraphs 22, 23, 24, 26, 31 and 32.

The Application

1. On 8 November 2017, the Applicants issued the current application for the Tribunal to determine the premium to be paid and the terms of acquisition of their collective enfranchisement of 110 Denbigh Street, London SW1V 2EX pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). The terms in dispute were not identified. The parties have subsequently agreed the premium at £37,900.
2. On 24 November 2017, the Tribunal gave Directions. Pursuant to those Directions, the parties have served their draft Transfers (TP1). The draft proposed by the Respondent freeholder is at p.140-148; that proposed by the Applicant tenants at p.149-157. The Tribunal is asked to determine the following issues:
 - (i) The extent of the property to be included in the transfer. The Applicants contend that it should include the basement vaults which are included in their demises. The Respondent contends that this should be excluded as this land is not included in their freehold title. The freehold interest in the basement vaults is unregistered. The value of this freehold interest is modest, no more than some £100 to £500. The Applicants suggest that the owner may be Royal Liver Trustees Limited.
 - (ii) Whether various clauses should be added to the conveyance.

The Hearing

3. At the hearing on 20 February, the Applicant tenants were represented by Ms Nicola Muir (Counsel) instructed by Thirsk Winton LLP. She provided the Tribunal with a Skeleton Argument.
4. The Respondent freeholder was represented by Ms Julia Kent, a partner with Franklins (Solicitors). She stated that a number of the points had only been raised by the Applicant at a late stage. The Tribunal therefore permitted the Respondent to file further written submissions. These were filed on 5 March.
5. The relevant legislative provisions are set out in the Appendix to the decision.

The Relevant Legal Interests

6. The property at 110 Denbigh Street consists of three flats:
 - (i) Fiona Thomas is the tenant of Flat 1. Her interest was registered on 24 March 2006 (p.25). She derives her title from an under-lease dated 23 April 1990 which is for a term of 150 years (less 15 days) from 25 December 1951. Her title plan is at p.27. This includes part of the basement vaults.
 - (ii) Robert and Angela Lerard are the tenants of Flat 2. Their interest was registered on 2 August 1989 (p.30). They derive their title from an under-lease dated 3 July 1989 which is also for a term of 150 years (less 15 days) from 25 December 1951. Their under-lease is at p.38-70 of the Bundle. The First Schedule

defines the premises by reference to a plan on which the relevant part of the building is shown edged red. We have not been provided with a copy of that plan. Their Land Registry title plan is at p.32. This includes a separate part of the basement vaults.

(iii) Canal and Helen Gregory are the tenants of Flat 3. They are not participating tenants in the enfranchisement. Their interest was registered on 12 December 2016 (p.35). They derive their title from an under-lease dated 1 December 2016 which was granted by the Respondent. This is for a term from 1 December 2016 to 9 December 2191. Their title plan is at p.37. This also includes a separate part of the basement vaults.

7. The Respondent was registered as the freehold owner on 20 November 1986 under Title number title NGL403183 (see p.132). The freehold title includes a number of other properties in the area. It does not include the basement vaults in front of 110 Denbigh Street (see the title plan at p.139). It does include the neighbouring properties at 108 and 112 Denbigh Street and 4 Moreton Terrace Mews South a corner of which abuts the rear garden. The Properties at 108 and 112 Denbigh Street are subject to leases registered as Title numbers NGL181854 and NGL757464.
8. The freehold is subject to a head-lease which is registered under Title number NGL103096 (at p.89-128). The head-lease demises various properties on the St George's Estate and is dated 11 March 1952 which is for a term of 150 years from 25 December 1951. The title plan (at p.129) does not include the basement vaults in front of 110 Denbigh Street. Neither does it include either the neighbouring properties at 108 and 112 Denbigh Street or 4 Moreton Terrace Mews South. The head-lease is currently owned by Parkchoice Limited.
9. The head-lease is subject to an intermediate lease of 110 Denbigh Street which is registered under Title number NGL637299 (p.72-76). The intermediate lease is dated 18 April 1989 and is for a term of 150 years (less 10 days) from 25 December 1951. The title plan is at p.75. This includes the three basement vaults which are shown coloured blue. It is this title plan upon which the Applicants rely as the best evidence of the land which should be included in the enfranchisement. The intermediate lease is currently owned by Denbigh Street Management Ltd. Its title was registered on 8 June 2005.

The Enfranchisement

10. On 4 April 2017, the Applicants served their Initial Notice pursuant to section 13 of the Act (at p.15-18). The nominee purchaser is 110 Denbigh Street Freehold Limited. In Section 1, "the specified premises" are described as:

"the premises of which the freehold is proposed to be acquired by virtue of section 1(1) of the Act are shown SHADED RED" on the accompanying plan and known as 110 Denbigh Street London SW1V 2EX".

The accompanying plan is at p.18. This includes the basement vaults, albeit not with the precision with which they are marked in the title plan at p.75.

11. On 31 May 2017, the Respondent served its Counter-Notice pursuant to section 21 (at p.19-22). In paragraph 2, the Respondent states:

“The reversioner admits that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement under the 1993 Act in relation to the Specified Premises in so far as such premises ... fall within the reversioner’s freehold title NGL403183 but not further or otherwise”.

12. The Applicants proposed the following purchase price: (i) £21,736 for “the freehold interest in the specified premises”; (ii) £1,164 for the additional freeholds (namely the shared rear garden); (iii) £1,700 for the intermediate lease held by Denbigh Street Management Ltd and (iv) £200 for the head lease held by Parkchoice Limited. The Respondent proposed that the purchase price “for the freehold interest of the reversioner in the Specified Premises should be £42,837”. The Respondent accepted the proposals in respect of the three further interests. The total premium has subsequently been agreed at £37,900.

Issue 1: Does the Enfranchisement include the Basement Vaults?

13. Ms Muir argues that the Applicants served a valid Initial Notice to exercise their right to collective enfranchisement in respect of the “specified premises”. The Respondent had a right to either admit or deny their right to enfranchise. The Counter-notice should be read as admitting the right to enfranchise. The Applicants are therefore entitled to a transfer of the specified premises which included the basement vaults. Those vaults are best defined by title plan for the intermediate lease at p.75.

14. In support of her argument, Ms Muir makes the following points:

(i) This is a case where there is a split freehold, the Respondent freeholder not owning the basement vaults. Provision is made for split freeholds by section 9(2A) and Part 1A of Schedule 1 of the Act.

(ii) The Respondent is a person who owns a freehold interest in the premises and the initial Notice was therefore correctly served on the Respondent in accordance with section 13(2A).

(iii) By virtue of Paragraph 5A of Schedule 1, the Respondent is the relevant reversioner.

(iv) Whoever owns the freehold of the basement vaults is a relevant landlord by virtue of section 9(2A)

(v) Part II of Schedule 1 makes provision for the reversioner to conduct proceedings on behalf of any such relevant landlord. This includes (a) negotiating and agreeing with the nominee purchaser the terms of acquisition; (b) executing

any conveyance for the purpose of transferring any interest to the nominee purchaser; and (c) receiving the price payable for the acquisition of any interest (Paragraph 6). Paragraph 6(3) makes provision for the reversioner to apply to the County Court for directions where any relevant landlord cannot be found.

15. Ms Kent submits that in the light of paragraph 2 of the Respondent's Counter-Notice, the Applicants' right to collective enfranchisement has not been admitted in so far as the Specified Premises fall outside freehold title NGL403183. Therefore the Respondent is under no obligation to transfer to the nominee purchaser any interest in the basement vaults. Further, the Respondent was under no obligation to apply to apply to the County Court pursuant to Paragraph 6(3) of Schedule 1.
16. Without prejudice to this contention, the Respondent is willing to transfer the basement vaults to the nominee purchaser for "such right title and interest as it may have" in them. The Respondent also agrees to the new Clause 12.5.3 proposed by the Applicant.
17. The Tribunal prefers the submissions of the Applicant. Section 21 gives the reversioner a clear choice when serving its Counter-Notice either (i) to admit that the participating tenants are entitled to exercise the right to collective enfranchisement in relation to the specified premises; or (ii) to deny that right. Where the right is denied, the reversioner must specify reasons for not admitting that the participating tenants are not entitled to exercise the right to collective enfranchisement in relation to the specified premises. These two stark options are spelt out clearly in section 21(2), sub-paragraphs (a) and (b). On receipt of the Counter-Notice, the participating tenants should be in no doubt as to the steps that they need to take in order to protect their position. If the right is denied, they must apply to the County Court for a declaration as to the validity of their Initial Notice under section 22 of the Act.
18. The Tribunal is unable to construe the Counter-Notice as denying the Applicant's right to exercise the right to collective enfranchisement of the specified premises. No reasons for not admitting the right are provided. The issue is rather whether the Counter-Notice should be construed as either (i) an admission of the right to collective enfranchisement of the premises specified in the Initial Notice; or (ii) an invalid Counter-Notice in that it fails to specify clearly whether that right is admitted or denied. The consequences of any finding that the Counter-Notice is invalid would be extremely grave for the Respondent. We therefore find that the Respondent has admitted the Applicant's right to collective enfranchisement the premises specified in the Initial Notice. This includes the basement vaults. The proposed Transfer should include the basement vaults as shaded blue in the title plan at p.150 of the Bundle.

Issue 2: The Other Terms in Clause 12 of the Transfer

19. The Tribunal is asked to determine whether a number clauses should be included in the proposed transfer. The Respondent's proposed draft transfer is at p.140-148 and the Applicants' at p.140-148. The Applicants submit that a number of the Clauses proposed by the Respondent should be deleted. Section 34(9)(a) of the

Act provides that, except to any extent that any departure is agreed by the parties, the conveyance of the leasehold interest shall conform with the provisions of Schedule 7.

Definitions

20. The Respondent seek to include two definitions to which the Applicants object:

(i) "Adjoining Property" which "means any part or parts of the adjoining or neighbouring property belonging to the Transferor comprised in title number NGL403183".

(ii) "the Restriction" to enable the Respondent to include a number of restrictive covenants (see below).

21. The Applicants suggest that the Respondent has no property adjoining 110 Denbigh Street. This is not correct. The Respondent point out that title number NGL403183 includes 15 other properties which are neighbouring or adjoining. A number of these are included in the title plan at p.139. These include the neighbouring properties at 108 and 112 Denbigh Street and 4 Moreton Terrace Mews South which abuts the rear garden.

22. The Tribunal determines:

(i) The definition of "adjoining property" should be included. This phrase is included in Clauses 12.3.1, 12.3.2 and 12.3.3 to which the Applicant makes no objection.

(ii) The definition of "The Restriction" should be deleted in view of our findings below in respect of the proposed restrictive covenants.

23. The Respondent agrees to addition of a definition of "the Act" as proposed by the Applicants.

Rights reserved for the Benefit of Other Land

24. There is some confusion as to whether the Applicants are proposing the deletion of Clause 12.3.3. The Tribunal does not believe that they are. In any event, it is reciprocal to the right granted to the Applicant in clause 12.2.3 and is a clause which we approve.

25. The Respondent seeks to include Clauses 12.3.4 and 12.3.5 which reserve (i) a right of access (ii) a right to alter or redevelop adjoining property. We were told that the only relevant adjoining property is 4 Moreton Terrace Mews South. Only a small corner of this abuts the rear garden of 110 Denbigh Street. Ms Muir argues that Schedule 7, paragraph 3(2)(b) only allows for the reservation of easements and rights as are necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date.

26. The Tribunal determines that clause 12.3.4 should be included, but not 12.3.5. We are satisfied that the reserved right of access is important for the Respondent's reasonable enjoyment of their neighbouring property at 4 Moreton Terrace Mews South. However, Clause 12.3.5 seeks to reserve a right to interfere with the light or air to the Applicant's property without any liability to compensate. We do not consider that this is necessary for the Respondent's reasonable enjoyment of their neighbouring property.

Restrictive Covenants by the Transferee and "The Restriction" in the Schedule

27. The Respondent seeks to include a number of restrictive covenants at Clauses 12.4.1 to 12.4.9. In its written submissions, the Respondent argues that its practice has been, in transfers following claims for enfranchisement (and in sales by private treaty), to incorporate provisions which will be for the mutual benefit of the property being transferred and the freehold reversions being retained. In addition to the 15 other properties in title NGL403183, the Respondent owns more than 200 neighbouring properties in other freehold titles. These covenants maintain and enhance the value of the other properties in which the Respondent has a freehold interest. These covenants will not interfere with the reasonable enjoyment of the property as it has been enjoyed during the currency of the Applicants' leases because the property already benefits from the fact that equivalent covenants have been included in transfers by the Respondent of many neighbouring properties in the past. The Respondent will continue to include these restrictive covenants in such transfers in the future.

28. Ms Muir objects to these restrictive covenants on two grounds. First, she notes that Paragraph 5(1)(c) of Schedule 7 only permits the Tribunal to include such covenants which restrict the Applicants' use of the premises in so far as they:

(i) "will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired"; but

(ii) "will materially enhance the value of other property in which the freeholder has an interest at the relevant date".

Ms Muir argues that the only adjoining property is Moreton Terrace Mews South and that these restrictions have no relevance to this land.

29. Secondly, Ms Muir argues that Clauses 12.4.7, 12.4.8 and 12.4.9 are positive restrictions for which no provision is made in the Act. Ms Muir makes a similar objection to the "The Restriction" in the proposed Schedule.

30. The Respondent responds that the fact that the Act does not specifically refer to the inclusion of positive covenants in the Transfer does not mean that they should not be included, where appropriate, in accordance with normal conveyancing practice. Because positive covenants, unlike restrictive covenants, do not run with the land it is necessary for the Transfer to contain Clause 12.4.9 and the Restriction so that the covenant to contribute is capable of being enforced against the transferee's successors in title.

31. The Tribunal determines that these clauses should not be included:

(i) Whilst we accept that the Respondent has an interest in a number of properties in the area, we do not consider that these restrictive covenants will materially enhance the value of those properties.

(ii) Some clauses seek to impose positive covenants which are not permitted by the Act. Any conveyance must conform with the provisions of Schedule 7.

Declarations

32. The parties are agreed that a new clause 12.5.3 should be added:

“As to the part tinted blue the Transferor transfers to the Transferee such right, title and interest as they may have and/or as they may lawfully transfer by virtue of the Act”.

33. The purpose of this provision is to ensure that if either the Respondent or the head-lessor has adverse possession rights over the basement vaults, those rights will be transferred to the nominee purchaser.

Judge Robert Latham
17 April 2018

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of Relevant Legislation

Leasehold Reform, Housing and Urban Development Act 1993

Section 9. The reversioner and other relevant landlords for the purposes of this Chapter

(2A) In the case of any claim to exercise the right to collective enfranchisement in relation to any premises the freehold of the whole of which is not owned by the same person—

(a) the reversioner in respect of the premises shall for the purposes of this Chapter be the person identified as such by Part IA of Schedule 1 to this Act, and

(b) every person who owns a freehold interest in the premises, every person who owns any freehold interest which it is proposed to acquire by virtue of section 1(2)(a), and every person who owns any leasehold interest which it is proposed to acquire under or by virtue of section 2(1)(a) or (b), shall be a relevant landlord for those purposes.

Section 13. Notice by qualifying tenants of claim to exercise right.

(1) A claim to exercise the right to collective enfranchisement with respect to any premises is made by the giving of notice of the claim under this section.

.....

(2A) In a case to which section 9(2A) applies, the initial notice must specify—

(a) a person who owns a freehold interest in the premises, or

(b) if every person falling within paragraph (a) is a person who cannot be found or whose identity cannot be ascertained, a relevant landlord, as the recipient of the notice.

Section 21. Reversioner's counter-notice.

(1) The reversioner in respect of the specified premises shall give a counter-notice under this section to the nominee purchaser by the date specified in the initial notice in pursuance of section 13(3)(g).

(2) The counter-notice must comply with one of the following requirements, namely—

(a) state that the reversioner admits that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises;

(b) state that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were so entitled;

(c) contain such a statement as is mentioned in paragraph (a) or (b) above but state that an application for an order under subsection (1) of section 23 is to be made by such appropriate landlord (within the meaning of that section) as is specified in the counter-notice, on the grounds that he intends to redevelop the whole or a substantial part of the specified premises.

(3) If the counter-notice complies with the requirement set out in subsection (2)(a), it must in addition—

(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;

(b) if (in a case where any property specified in the initial notice under section 13(3)(a)(ii) is property falling within section 1(3)(b)) any such counter-proposal relates to the grant of rights or the disposal of any freehold interest in pursuance of section 1(4), specify—

(i) the nature of those rights and the property over which it is proposed to grant them, or

(ii) the property in respect of which it is proposed to dispose of any such interest, as the case may be;

(c) state which interests (if any) the nominee purchaser is to be required to acquire in accordance with subsection (4) below;

(d) state which rights (if any) any relevant landlord, desires to retain—

(i) over any property in which he has any interest which is included in the proposed acquisition by the nominee purchaser, or

(ii) over any property in which he has any interest which the nominee purchaser is to be required to acquire in accordance with subsection (4) below,

on the grounds that the rights are necessary for the proper management or maintenance of property in which he is to retain a freehold or leasehold interest; and

(e) include a description of any provisions which the reversioner or any other relevant landlord considers should be included in any conveyance to the nominee purchaser in accordance with section 34 and Schedule 7.

Section 34. Conveyance to nominee purchaser.

(1) Any conveyance executed for the purposes of this Chapter, being a conveyance to the nominee purchaser of the freehold of the specified premises of a part of those premises or of any other property, shall grant to the nominee purchaser an estate in fee simple absolute in those premises, that part of those premises or that property, subject only to such incumbrances as may have been agreed or determined under this Chapter to be incumbrances subject to which that estate should be granted, having regard to the following provisions of this Chapter.

....

(9) Except to the extent that any departure is agreed to by the nominee purchaser and the person whose interest is to be conveyed, any conveyance executed for the purposes of this Chapter shall—

(a) as respects the conveyance of any freehold interest, conform with the provisions of Schedule 7

Schedule 1: Conduct of Proceedings by Reversioner on behalf of Other Landlords

Part 1A: The Reversioner: Premises with Multiple Freeholders

Paragraph 5A: Initial Reversioner

Subject to paragraphs 5B to 5D, in a case to which section 9(2A) applies, the reversioner in respect of any premises is the person specified in the initial notice in accordance with section 13(2A) as the recipient.

Part 2: Conduct of Proceedings on behalf of Other Landlords

Paragraph 6: Acts of Reversioner Binding on Other Landlords

(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 of acquisition;
- (iii) execute any conveyance for the purpose of transferring any 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.

(3) If any of the other relevant landlords cannot be found, or his identity cannot be ascertained, the reversioner shall apply to the court for directions and the court may make such order as it thinks proper with a view to giving effect to the rights of the participating tenants and protecting the interests of other persons, but subject to any such directions—

(a) the reversioner shall proceed as in other cases;

(b) any conveyance executed by the reversioner on behalf of that relevant landlord which identifies the interest to be conveyed shall have the same effect as if executed in his name; and

(c) any sum paid as the price for the acquisition of that relevant landlord's interest, and any other sum payable to him by virtue of Schedule 6, shall be paid into court.

(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).

Schedule 7: Conveyance to Nominee Purchaser on Enfranchisement

Paragraph 3: Rights of Support, Passage of Water etc

(2) The conveyance shall include provisions having the effect of—

(b) making the relevant premises subject to the following easements and rights (so far as they are capable of existing in law), namely—

(i) all easements and rights for the benefit of other property to which the relevant premises are subject immediately before the appropriate time, and

(ii) such further easements and rights (if any) as are necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date.

Paragraph 5: Restrictive Covenants

(1) As regards restrictive covenants, the conveyance shall include—

(a) such provisions (if any) as the freeholder may require to secure that the nominee purchaser is bound by, or to indemnify the freeholder against breaches of, restrictive covenants which—

- (i) affect the relevant premises otherwise than by virtue of any lease subject to which the relevant premises are to be acquired or any agreement collateral to any such lease, and
- (ii) are immediately before the appropriate time enforceable for the benefit of other property; and

(b) such provisions (if any) as the freeholder or the nominee purchaser may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of any such lease or collateral agreement as is mentioned in paragraph (a)(i), being either—

- (i) restrictions affecting the relevant premises which are capable of benefiting other property and (if enforceable only by the freeholder) are such as materially to enhance the value of the other property, or
- (ii) restrictions affecting other property which are such as materially to enhance the value of the relevant premises; and

(c) such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which—

- (i) will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired, but
- (ii) will materially enhance the value of other property in which the freeholder has an interest at the relevant date.

(2) In this paragraph “restrictive covenant” means a covenant or agreement restrictive of the user of any land or building.