

**Collective Enfranchisement Nuts & Bolts**

**Agreeing or determining terms of acquisition**

**Katie Helmore**

**What are terms of acquisition**

1. Terms of acquisition are defined at section 24(8) as the terms of the proposed acquisition by the nominee purchaser whether relating to:
  - a) The interests to be acquired
  - b) The extent of the property to which those interests relate or the rights to be granted over any property
  - c) The amounts payable as the purchase price for such interests
  - d) The apportionment of conditions or other matters in connection with the severance of any reversionary interest; or
  - e) The provisions to be contained in any conveyance
  
2. Costs payable under section 33 are not a term of acquisition.
  
3. In practice the most contentious terms of acquisition (other than the price) are the freehold covenants.

**Freehold Covenants**

**Overview of what can be imposed under the 1993 Act**

4. The following restrictive covenants may be included pursuant to paragraph 5 of Schedule 7:
  - i) Such provisions 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—
    - a) Affect the relevant premises otherwise than by virtue of any lease or collateral agreement, and
    - b) Are enforceable for the benefit of other property;

- ii) Such provisions as the freeholder or the nominee purchaser may require to secure the continuance with suitable adaptations of restrictions arising by virtue of the leases which either-
  - a) Affect the relevant premises, are capable of benefiting other property and are enforceable by persons other than the freeholder;
  - b) Affect the relevant premises, are capable of benefiting other property, are enforceable by the freeholder only and materially enhance the value of the other property; or
  - c) Affect other property and materially enhance the value of the relevant premises;
  
- iii) Such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which—
  - a) Will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases; but
  - b) Will materially enhance the value of other property in which the freeholder has an interest at the relevant date.

#### **A few issues which have arisen**

##### *Definition of restrictive covenant*

- 5. All negative covenants are included not just 'user covenants': (***Langevad v Chiswick Quay Freeholds Ltd*** [1999] 1 E.G.L.R 61.

##### *Material enhancement*

- 6. Includes maintaining a value which would otherwise deteriorate: ***Ackerman v Mooney*** [2009] PLSCS 266 (see also ***Peck v Trustees of Hornsey Parochial Charities*** (1971) 22 P & CR 789 and ***Le Mesurier v Pitt*** (1972) 23 P & CR 389)
- 7. The diminution in value may not need to be substantial: ***Moreau v Howard de Walden Estates Ltd*** 30 April 2003 LRA/2/2002)
- 8. Although valuation evidence is not required to quantify the benefit there must be some evidence of uplift in value or prevention of diminution in value: ***Earl Cadogan v Betul Erkman*** [2011] UKUT

90, mere assertions by counsel are not sufficient: **Trustees of the Sloane- Stanley Estate v Carey-Morgan** [2011] UKUT 415.

#### *Planning Control*

9. Planning control does not achieve the same result as restrictive covenants against alterations and user and does not therefore make such covenants unnecessary: **Moreau v Howard de Walden Estates Ltd**

#### *Other Property*

10. It was held in **Ackerman v Mooney** [2009] PLSCS 266 that:

- i) The covenant must materially enhance the value of properties owned by the particular landlord and not by reference to some wider family estate;
- ii) As a matter of good conveyancing practice the land to be benefited by the covenant should be clearly identified and set out in the transfer;
- iii) The “other property” must be sufficiently close to the tenant’s property to be affected by the covenant.

#### *Suitable Adaptations*

11. Suitable adaptations does not include modifications: **Le Mesurier v Pitt** other than statutory modifications: **Peck v Trustees of Hornsey Parochial Charities** (1971) 22 P &CR 789.

12. Modification does not extend to imposing an entirely new covenant against other property belonging to the landlord: **Loder Dyer v Cadogan** [2001] EGLR 3

#### *Covenants imposed on other property on the estate*

13. A failure by the freeholder to provide evidence as to the form of covenants imposed on collective enfranchisement of on the other tenants of the estate was a 'serious weakness in the Freeholder's case': ***Earl Cadogan v Betul Erkman***.

### 3 key questions

- What in monetary terms the covenant is actually worth, particularly given that the FTT is essentially a no costs jurisdiction: is it worth it?
- Whether the covenant will affect the premium (an extreme example of this can be seen in ***Kutchukian v Trustee of John Lyon's Charity*** [2012] UKUT 53(LC)): can the tenant afford it?
- Whether the rest of the agreement will fall apart if the covenant is litigated and whether the landlord/tenant has more to gain by keeping the rest of the agreement: is it a deal breaker?

### The Timetable

- 19 Where any of the terms of acquisition remain in dispute at the end of the period of 2 months after the counter notice either the Nominee Purchaser or the Reversioner may apply to the FTT to determine the matters in dispute (section 24(1)).
- 20 The application must be made not later than the period of 6 months from the date of service of the counter notice admitting the right, there is no jurisdiction to extend this time limit. The application is made when it is received by the FTT and not when it is put in the post (***Davis v The Wellcome Trust Ltd*** Unreported 2002 LVT)

- 21 Once terms of acquisition are either agreed or determined by the FTT the following timetable applies (paragraph 6 Schedule 1):
- 24.1 The reversioner shall prepare the draft contract and give it to the nominee purchaser within 21 days of the date terms of acquisition are agreed or determined by the Tribunal (paragraph 6(1));
- 24.2 The nominee purchaser shall give to the reversioner a statement of any proposals for amending the draft contract within 14 days of the date the draft contract is given (paragraph 6(2));
- 24.3 If no statement is given by the nominee purchaser within this time **he shall be deemed to have approved the draft** (paragraph 6(3));
- 24.4 The reversioner shall give to the nominee purchaser an answer with any objections or comments to the proposals in the statement within 14 days of the date the statement is given (paragraph 6(4));
- 22.5 If no answer is given by the reversioner within this time **he shall be deemed to have agreed the nominee purchaser's proposals for amendment to the draft contract** (paragraph 6(5))

### **When is Agreement Reached**

#### **What amounts to an agreement?**

23. The Act does not define what is meant by 'agreement' although it clearly means one falling short of a binding contract and there is reference to an agreement being subject to contract (section 38(4)). There is nothing which requires an agreement to be in writing although in practical terms it is safer and clearer to do so.
24. The concept of an agreement being at the same time being both binding and subject to contract was explained in *Curzon v Wolstenholme* [2015] UKUT 0173 (LC) as follows:

*'52. On any contractual analysis, terms which are capable of being the subject of an application for a vesting order will nonetheless remain subject to contract. No application could be made for specific performance of those terms, and no agreement compliant with s.2 of the 1989 Act would exist. Thus, although the concept of a binding agreement subject to contract is a curious one, it is a concept which the Act requires to be acknowledged. The purposes of s.38(4) is not, as Mr Letman submitted, to confirm that agreed terms are not binding, but rather it is to make it clear that even though terms may have been agreed subject to contract, they are nonetheless to be treated as having been agreed for the purpose of the statutory scheme. Terms which have been agreed are not binding or irrevocable in a contractual sense; thus a nominee purchaser may decline to proceed with the proposed acquisition if it is dissatisfied with the best terms it has been able to agree; either party may seek their modification under s.24(b); either party may seek an order under s.24(4)(c) that despite all of the terms being agreed or determined the initial notice should be deemed to have been withdrawn. In my judgment agreed terms are only ever binding in the sense that they may be the subject of an application for a vesting order, which may or may not result in them being enforced.'*

25. It is possible to have a binding agreement as to part of the price or as to particular terms: **Lord Mayor and Citizens of the City of Westminster v CH2006 Ltd** [2009] UKUT 174 (LC) as recently confirmed in **Curzon v Wolstenholme** [2015] UKUT 0173 (LC).
26. Agreement must however not be conditional upon agreement or determination of other terms: **Ellis & Dines v Logothetis** (LRA/3/200). In other words it is not possible to have an agreement where the premium is conditional upon the exclusion/modification of certain terms or covenants.
27. There must be actual agreement which is a question of fact. As set out in the following paragraphs from the judgment of Mr Justice Lewison in **Pledream Properties Ltd v 5 Felix Avenue London Ltd** [2008] EWHC 3048:

*'18 First, whether a term has been agreed is, in my judgment, a question of fact. The Act does not deem a term to have been agreed when in fact it has not. Second, a dispute may arise in fact even if the outcome of a dispute is a foregone conclusion. We all have experience of litigants advancing hopeless cases with no prospects of success. It would be a misuse of language to say that there was no dispute simply because the outcome was inevitable. This is consistent with the view of the ordinary meaning of the word 'dispute' addressed by Mr Justice Savile in **Hayter v Nelson** [1990] 2 Ll.Rep 265 and confirmed by the Court of Appeal in **Halkin Shipping Corporation v Soapex Oils Ltd** [1998] 2 All.E.R 23 .*

*19 Third, in a case such as the present, where it was open to the parties to agree a departure from the default provisions of Schedule 7 , I see no reason why the proponent of a change must*

*take an initial refusal at face value and cannot make another attempt to secure agreement. It is plain on the facts of this case that the nominee purchaser's solicitors persisted in their attempt to secure a full title guarantee by submitting a second version of the transfer containing that covenant on 1st September and moreover asking for it to be approved on 8th September. To put it at its lowest, they had not then given up hope of securing the reversioner's agreement to the full title guarantee. In addition, until 11th September the only draft transfer actually in existence was that which contained the full title guarantee.*

*20 Fourth, such indications as there are in case law suggest that what one is looking for is positive agreement rather than silence. In Gold Eagle Properties Ltd v Thornbury Court Ltd [2008] 3 EGLR 69 Judge Collins held that there was no agreement on the terms of a transfer until there had been an express indication that the terms of a transfer had been agreed. His decision was upheld by the Court of Appeal.'*

#### **When are the terms of acquisition agreed?**

28. The leading case on when the terms of acquisition are agreed for a new lease is the recent Court of Appeal decision of ***Bolton v Godwin-Austen*** [2014] EWCA Civ 27. The particular term in issue was a 'rent as service charge' provision relating to the rent reserved by the head lease (the "RASC provision").
  
29. The tenant's section 42 notice proposed new leases of a further 90 years at a peppercorn rent and otherwise on the same terms as the existing leases subject to '*...an amendment to paragraphs, 1(a)(i) of the Third Schedule so as to delete the words 'first four thousand pounds of the...' . The amendment would have the effect of removing the RASC provision.*
  
30. The landlord's counter notice stated, insofar as relevant:
 

*'Landlord's counter proposal The new lease terms should contain such modifications and amendments as the Landlord is entitled to under an/or as may be necessary to give effect to the requirements of Chapter II of Part II of the Act and without prejudice to the generality of the above such further reasonable modifications to be agreed'*

31. The Court of Appeal unanimously held that the counter notice was valid. The following are the key paragraphs of the leading judgment of Lord Justice McCombe:

i) *'36 It seems to me that this is a perfectly workable proposal by the freeholders, capable of acceptance by the tenant, and leaving it to the court to determine what the landlord was entitled to or the Act required in respect of the RASC provision. The "sweeper provision" in the last part of the freeholders' counter proposal on this matter was, to my mind, no less certain or capable of operation than the common provision in a court's costs order that costs shall be "assessed, if not agreed" .';*

ii) *'44...It seems to me that if the Counter Notices truly contained a clear counter proposal, then it must have been capable of acceptance in the terms of the tenants' letter of 13 April 2011. If it was so accepted, then there was agreement as to the terms of acquisition, within the meaning of the Act. What followed then was the procedure for agreeing the form of lease under the Regulations. In implementing that procedure, the freeholders failed to comply with the prescribed time limit for responding to the tenants' amendments and would be deemed to have agreed them, with the necessary consequence that the tenants would be entitled to orders under [section 48\(3\)](#) .*

*45 For these purposes, it matters not at all what the true construction and effect of the counter proposals and of the tenants' acceptance of them were. The problem that has presented itself in these proceedings is that the freeholders and St Anselms are endeavouring to get round the undeniable fact that they failed to meet the time limits set out in the Regulations, by unscrambling the obvious and clear acceptance by the tenants of the freeholders' own counter proposals, whatever those proposals on their true construction might have meant';*

iii) *'52. In my judgment, however, if the counter proposals could not be converted into agreement of "terms of acquisition" by acceptance, then difficulties arise in saying that the Counter Notices complied with the requirements of Section 45.');*

- iv) '54. I do not see how a Counter Notice whose proposals cannot in the terms expressed in it can be valid notice within the criteria laid by Chadwick LJ in the *Burman* case in the passages which I have just quoted'.
32. This is likely to cause far fewer problems in a collective enfranchisement claim as the counter notice is unlikely to use such a formula. However, if acceptance of the terms in the notice or counter notice is an agreement (see for example **10 Egerton Place**) the following occurs where, for example, the Nominee Purchaser accepts the price in the initial notice:
- i) The FTT would not have jurisdiction in respect of the price;
  - ii) The nominee purchaser is unlikely to be able to claim the figure in the notice was too high such that the only solution would be to withdraw the claim;
  - iii) Any intermediate landlords would be bound as the right to separate representation arises only after the reversioner has given the counter notice.
33. It is worth considering how the test in ***Bolton v Godwin Austin*** fits with that proposed by Her Honour Judge Alice Robinson in ***The Lord Mayor and Citizens of the City of Westminster v CH2006 Ltd*** [2009] UKUT 174(LC) and approved by Mr Justice Lewison in ***Pledream Properties Ltd v 5 Felix Avenue London Ltd*** [2008] as 'a workable test':

*'How is one to determine if such an agreement has been reached for the purposes of section 24? It would not be appropriate to require the formalities necessary to give rise to a binding contract at common law, even one made orally. There is unlikely to be any consideration flowing from one party to the other because the agreement relates to only some term of a larger whole. On the other hand 'the elephant in the room' test is inadequate as being insufficiently certain. In my judgement it must be clear that negotiations have been completed and final agreement has been reached, either orally or in writing, on a specific term or terms and that is not in any way contingent on agreement or determination of some other term or terms. It would thus be open to the parties to express any agreement as to e.g the price as conditional on the acceptance of other terms...' (emphasis added)*

34. It is also worth bearing in mind that if the FTT has determined only the premium and the terms are expressed not to be agreed it seems a second application may be made to the Tribunal to determine any terms not agreed: ***Goldeagle Properties Limited v Thornbury Court Limited*** [2008] EWCA Civ 864.

### **Independent Representation**

35. The issue here relates to intermediate landlords. There is no specific obligation or statutory duty on the reversioner towards other landlords although there is a statutory defence at paragraph 6(4) of Schedule 1 to the Act whereby:
- ‘ 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’.*
36. An intermediate landlord may give notice of separate representation pursuant to paragraph 7 of schedule 1 to the Act but only after the service of the relevant counter notice.
37. It has recently been held by the Upper Tribunal that in a claim for a new lease the competent landlord has the authority or power to agree the terms of the new lease with the tenant so as to bind the intermediate landlord even where they have serve a notice of intention to be separately represented (***Howard de Walden Estates Limited v Accordway*** [2014] UKUT 0486(LC)).
38. There is however a difference between collective and new lease claims. In a collective claim the intermediate landlord is entitled, after the service of the reversioner’s counter notice, to serve notice to deal directly with the nominee purchaser (paragraph 7(1)(a) Schedule 1 1993 Act).
39. In ***10 Egerton Place*** (LON/ooAW/OCE/2014/0209) the FTT considered the position where an intermediate landlord had served notice of separate representation and the terms were subsequently agreed between the freeholder and nominee purchaser.

40. The key dates were as follows:

- i) 19 March 2014 an Initial Notice was served;
- ii) 23 May 2014 a Counter Notice was served by the Freeholder;
- iii) 15 October 2014 the intermediate landlord served notice of separate representation;
- iv) 11 December 2014 the nominee purchaser wrote to the intermediate landlord purporting to accept the terms of the counter notice

41. The FTT began by confirming that:

*'The Tribunal does not consider that the Freehold Reversioner has the power to agree a term with the Nominee Purchaser after notice of separate representation had been served by the Intermediate Landlord. Such a notice was served on 15 October 2014, giving an entitlement pursuant to Paragraph 6(1)(b)(ii) of Part II of Schedule 1 to the Act to "deal" with the Nominee Purchaser "in connection with" negotiating and agreeing the terms of acquisition'*

42. The Tribunal referred to **Howard de Walden v Accordway** and noted the distinction drawn in that case between lease extensions and collective enfranchisement claims as well as the right for any other relevant landlord to give notice pursuant to paragraph 7(3) of Schedule 1 to the reversioner requiring him to apply to the Tribunal for the determination of any of the terms of acquisition so far as relating to the acquisition of any interest of that landlord.

43. The Tribunal then framed the issue for determination as follows:

*'whether there was an offer by the Intermediate Landlord which was capable of acceptance by the Nominee Purchaser on 11 December 2014'.*

44. The Tribunal held that there was:

*'The Tribunal accepts Mr Jourdan's submission that the Counter Notice, as a matter of law, must constitute an offer capable of acceptance and that the Intermediate Landlord at no time made new counter proposals to those made in the Counter Notice. Since those counter proposals were made at a time when Wellcome was authorised by Section 9 and Schedule 1 of the Act to make them on behalf of the Intermediate Landlord, it was open to the Nominee Purchaser to accept them when they were made. They could clearly have been accepted immediately after service of the Counter Notice and, but for their variation or withdrawal by the Intermediate Landlord, they continued to be available for acceptance'*

50. 2 key points emerge:

- i) Once an Intermediate Landlord has served notice of separate representation terms may not be agreed between the Nominee Purchaser and the Freehold Reversioner without the Intermediate Landlord; **however**
- ii) Unless the Intermediate Landlord varies or withdraws the counter proposals in the Counter Notice they may be accepted by the Nominee Purchaser

45. The more difficult question is whether there is anything an intermediate landlord can do prior to the service of a counter notice if, for example, they become aware that the premium proposed for their interest will be too low? It may be possible for a well informed and well resourced intermediate landlord to apply to court for an injunction preventing the service of a counter notice. In reality this is however likely to be rare.

### **Vesting Orders**

46. If, once the terms of acquisition are either agreed or determined by the FTT, no binding contract is entered into by the end of the appropriate period either the nominee purchaser or the reversioner may apply to the court for a vesting order pursuant to section 24(4).

47. On an application for a vesting order the court may make one of 3 orders:

- i) Vesting the interests in the nominee purchaser on the agreed or determined terms of acquisition (section 24(4)(a));
- ii) As above but with such modifications as—
  - a) may have been determined by the FTT, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and

- b) are specified in the order (section 24(4)(b)); or
  - (iii) Deeming the initial notice to be withdrawn at the end of the appropriate period (section 24(4)(c))
48. The appropriate period is:
- i) Where all of the terms of acquisition have been agreed between the parties 2 months beginning with the date of agreement; or
  - ii) Where any or all of the terms of acquisition were determined by the FTT 2 months from the date the decision becomes final or such other period fixed by the FTT in its decision.

**Deemed Withdrawal**

49. The importance of an initial notice being deemed withdrawn is:
- i) That no further notice may be given for a period of 12 months following the deemed withdrawal (section 13(9)). In a rising market or when the delay triggers the payment of marriage value this can have significant valuation consequences; and
  - ii) It triggers a costs liability
50. The initial notice will be deemed withdrawn in the following circumstances:
- i) Within 2 months of service of a negative counter notice the nominee purchaser fails to take court proceedings to establish the right to collective enfranchisement or withdraws such proceedings(section 29(1))
    - The date of deemed withdrawal is either the end of the 2 month period for issuing proceedings or the date the application is withdrawn;
  - ii) Within 6 months of service of a counter notice admitting the right no application is made to the FTT to determine the terms remaining in dispute (section 29(2))
    - The date of deemed withdrawal id the end of the 6 month period;

- iii) Where all the terms of acquisition have been agreed or determined by the FTT, but no binding contract has been entered into and no application has been made to court for a vesting order (section 29(2)(b))
  - The date of deemed withdrawal in that case is the end of the two-month period for making the application
  
- iv) Where an application for a vesting order is made in time the court nevertheless has a discretion to provide for the notice to be deemed withdrawn as from the end of the 2 month period referred to above (section 29(5)(d))
  
- v) Where no counter-notice (or further counter-notice) has been served, but no application has been made by the nominee purchaser within 6 months of the date when the counter-notice should have been served (section 29(3))
  - The date of deemed withdrawal is the expiry of the 6 month period.
  
- vi) Where there is no counter notice an application is made by the Nominee Purchaser in time the terms have been determined by the court, but no binding contract has been entered into within the 2 month period laid down,<sup>26</sup> the Court has a discretion to provide for a deemed withdrawal of the notice. Section 29(5)(e))
  
- vii) Where an order determining the terms of acquisition has been made under but no application for a vesting order has been made within 2 months (section 29(4))
  - The date of deemed withdrawal is the end of that 2 month period.
  
- viii) Where the appointment of the nominee purchaser is terminated and there is no replacement for the time being, and no further notice is served on the reversioner within 28 days, with details of a replacement(section 29(5)(a))
  - The date of deemed withdrawal is the end of the 28 day period
  
- ix) Where the nominee purchaser has retired or died, and no notice of replacement is given within 56 days by the participating tenants (section 29 (5)(b))

- The date of deemed withdrawal is the end of the 56-day period.
  
- x) Where the nominee purchaser fails to comply with a notice requiring him to deduce title under s.20 (section 29 (5)(b))
  - The date of deemed withdrawal is the expiry of the 21 days given for compliance under s.20(2).

KATIE HELMORE

5 November 2015

*This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the continuing accuracy of the contents.*