Landmark Collective Enfranchisement Nuts and Bolts Seminar

Agreeing or Determining Terms of Acquisition

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Timetable

1. 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)**).

2. 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 (**section 24(2)).** 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).

3. Once terms of acquisition are either agreed or determined by the FTT the following timetable applies (**paragraph 6 Schedule 1**):

   3.1 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**));
   3.2 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**));
   3.3 If no statement is given by the Nominee Purchaser within this time he shall be deemed to have approved the draft (**paragraph 6(3**));
   3.4 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));**
   3.5 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)**)

4. 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).**

5. An application for a vesting order under section 24(4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period (**section 24(5)**).

6. 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 (**section 24(6)**).

7. 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**))

Terms of Acquisition

8. 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

9. Costs payable under section 33 are not a term of acquisition.

10. A broad interpretation was given to "terms of acquisition" in the recent decision of Timothy Fancourt QC in **Greenpine Investment Holding Limited v Howard de Walden Estates Limited** [2016] EWHC 1923, albeit in the context of lease extensions rather than collective claims.

11. The tenant had made an application under s.48(3) to the County Court to enforce the requirement to grant the new lease. Section 48(7) defines terms of acquisition, for the purposes of Chapter II of Part I of the 1993 Act, as:

    In this Chapter "the terms of acquisition", in relation to a claim by a tenant under this Chapter, means the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of the lease, or otherwise.

12. The question for the court was whether the application (made on 25 August 2015) was made in time, i.e. within 4 months of the parties agreeing the terms of acquisition (the appropriate period + 2 months).

13. Following the service of a counter-notice, on 18 November 2014 the landlord requested from the tenant a foreign legal opinion verifying that the tenant was incorporated in the BVI, has capacity to enter into new lease, has validly executed the new leases and is solvent. The tenant's solicitors replied on 2 December 2014 agreeing to provide the opinion. By 17 December 2014 the parties had agreed the form of the new lease. By 7 January 2015, the parties had agreed the premium to be paid by the tenant and the amount of costs payable to the landlord.

14. The Foreign Legal Opinion (FLO) was sent to the landlord on 12 January 2015. The opinion underwent further "minor" revision and was finally completed on 27 April 2015.

15. The tenant argued that the FLO was a term of acquisition and therefore the terms were only agreed on 27 April 2015 when the opinion was finalised. The landlord argued that the requirement for the FLO was not a term of acquisition. If it was a term of acquisition, all the terms were agreed by 7 January 2015 when the premium was agreed, the agreement to provide the FLO having occurred on 2 December 2014 and thus making the tenant's s.48(3) application out of time.

16. It was held that the landlord's request for a foreign legal opinion from the tenant was a term of acquisition and agreement had been reached on that requirement by 2 December 2014. It was not necessary for the content of the FLO to be agreed in detail for the terms of acquisition to be agreed. The key passages determining this point are found at [40] and [43]:

    40 Assuming, therefore, that a term of acquisition can be raised as such after the date of the counternotice but before all terms of acquisition have been agreed or determined, the first question is whether the requirement for the FLO falls within the definition of "terms of acquisition". In my judgment, the requirement did amount to a term of acquisition. In substance, Estates was making provision of an FLO confirming the four specified matters a condition of the grant of the new lease. As such, the terms of the transaction proposed were that Greenpine was to have a new lease of the Flat on terms of payment of the agreed premiums, on the terms contained in the new lease (as agreed), and upon provision of the FLO. The requirement for the FLO, as a condition of completion, is the type of additional

requirement that is capable of being caught by the words "or otherwise" in the definition in section 48(7)

…

43 Before Bilmes' letter to the Tribunal was written, CRS had returned the draft FLO with suggested amendments, to which Bilmes responded that they would communicate with the foreign lawyers regarding the amendments. Although at that time the exact wording of the FLO had not been finalised, there was no dispute about the principle that an FLO should be provided to confirm the four matters identified by CRS on 18 November 2014. The exact wording of such a document does not prevent agreement on its provision as a term of acquisition any more than the fact that the exact wording of the new lease is outstanding prevents agreement on the terms of acquisition: see the Bolton case, referred to above, and reg. 6 of the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 (S.I. 1993/2407)

17. The effect was that the tenant's notice was deemed to have been withdrawn.

18. The decision is also notable for expressing the obiter and unorthodox view that the terms of acquisition to be agreed or determined by the Tribunal are the proposals contained in the respective notices that remain in dispute at the relevant time – see [37]:

Reading section 48 as a whole, and in the context of the statutory scheme, my conclusion would be that the terms of acquisition to be agreed or determined by the Tribunal are the proposals contained in the respective notices that remain in dispute at the relevant time. That, of course, would not prevent the parties from agreeing additional or different terms if they are able to do so. Nor would it prevent either party from contesting the appropriate drafting of the new lease, in accordance with the provisions of section 57, at a later stage. But it would mean that the time limit for an application to the court to enforce or discharge the statutory contract runs from the time, as defined in section 48(6), when the terms of acquisition – not other terms or requirements – have been agreed or determined by the Tribunal.

Freehold Covenants

Overview of what can be imposed under the 1993 Act

19. In practice the most contentious terms of acquisition (other than the price) are the freehold covenants.

20. 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.

Definition of restrictive covenant

21. All negative covenants are included not just 'user covenants'**: Langevad v Chiswick Quay Freeholds Ltd** [1999] 1 E.G.L.R 61 where it was held that negative covenants as to alterations and outside painting are restrictive covenants for the purposes of the Act.

Relevance of an estate management scheme

22. If there is an estate management scheme already in existence, then regard can be had to its terms in so far as those terms are relevant to the covenant in question – **see Kutchukian v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon** [2012] UKUT 53, at [46]:

We accept Mr Johnson's argument that it is an important feature of the present case that there is in existence the scheme of management. We conclude that there is no significant prospect of this being amended adversely to the respondents, so as to allow through some objectionable use which at present is prohibited by the estate management scheme but which was not so prohibited after the amendment. We note Mr Hamilton's evidence that the estate management scheme is effectively as good as the restrictions in the restrictive covenant, save for the fact that the covenants in the scheme were qualified whereas those in the headlease were absolute. However we accept Mr Johnson's argument that this distinction (namely qualified as opposed to absolute) does not bring any significant benefit to the respondents such as to enable them to say that this feature satisfies the words "materially to enhance the value of the other property" in paragraph 5 of Schedule 7.

Material enhancement

23. 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)

24. The diminution in value may not need to be substantial: **Moreau v Howard de Walden Estates Ltd** 30 April 2003 LRA/2/2002).

25. 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, para 105:

We do not accept [Counsel's] argument that, having regard to the comparison of language between Schedule 7 paragraph 5 of the 1993 Act and section 84(1A) of the Law of Property Act 1925 as amended it is a prerequisite of a finding under subparagraph 5(1)(c)(ii) (ie a finding that a restriction will materially enhance the value of other property) that there must be valuation evidence which quantifies in money terms the effect on value of other property owned by the Freeholder. We conclude that it is not necessary for there to be quantified valuation evidence to show that the inclusion of a restriction will uplift the value of other relevant property by £x or will prevent the diminution in value of other relevant property by £y (where £x and £y are quantified sums). However there must be evidence to satisfy the Tribunal, albeit as a matter of general impression, that there will be some monetary uplift in value (albeit unquantified) or the prevention of some monetary diminution in value (albeit unquantified). If all that was proved was that a landlord merely lost some advantage, being an advantage which could have no effect one way or the other on monetary values of other relevant property, then this would not be sufficient.

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

Planning Control

27. 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** Unreported LRA/2/2002.

Other Property

28. 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

29. "Suitable adaptations" does not include modifications, which can only be made under other legislation, i.e. section 84 of the Law of Property Act 1925: **Le Mesurier v Pitt**. However, statutory modifications made to leasehold covenants, e.g by s.19 of the Landlord and Tenant Act 1927 ,must be reproduced in the conveyance: **Peck v Trustees of Hornsey Parochial Charities** (1971) 22 P &CR 789.

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

Agreement

What amounts to an agreement?

31. The Act does not define what is meant by 'agreement' although it is 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.

32. The concept of an agreement being at the same time 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 off 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.'

33. 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 confirmed in **Curzon v Wolstenholme** [2015] UKUT 0173 (LC).

34. The Court of Appeal in **Curzon v Wolstenholme** [2017] EWCA Civ 1098 has confirmed (in obiter dicta) that once a term of acquisition has been agreed, the dispute on that term cannot be re-opened, despite the fact that other terms of acquisition remain in dispute. This is of course subject to the parties' ability to specify in their negotiations that nothing is agreed until everything is agreed.

35. 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.

36. 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 .
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.
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.'

<u>When are the terms of acquisition agreed?</u>

37. The leading case on when the terms of acquisition are agreed for a new lease is the 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").

38. 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.

39. The landlord's counter notice stated, insofar as relevant:

    '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'.

40. In response to these Counter Notices, the tenants' solicitors wrote in each case to the freeholders' solicitors stating "Our client wishes to accept all counter-proposals contained in your client's counter-notice."

41. 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:

    '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".';

    '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';

42. 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.

43. 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...'

44. 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 and **Penman v Upavon Enterprises Ltd** [2002] L&TR 10 CA.

Deemed Withdrawal

45. 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

46. 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)(a))

-The date of deemed withdrawal is 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 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 section 25(5) (where there has is no counter notice) 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).

Independent Representation

47. 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

48. 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.

49. It has been held by the Upper Tribunal, and upheld by the Court of Appeal, 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 served a notice of intention to be separately represented (Howard de Walden Estates Limited v Accordway [2014] UKUT 0486(LC) and Kateb v Howard de Walden [2017] 1 WLR 1761.) The relevant provisions in that context are paragraph 6 and 7 of Schedule 11 to the Act.

50. See the Court of Appeal judgment in Accordway at [29] and [34]:

29 The provisions of paragraph 7 clearly do qualify the authority conferred on the competent landlord by section 40(2) as the opening words of paragraph 7(1) make clear. But the derogation is limited to separate representation (paragraph 7(1)) and the right to receive directly the Schedule 13 compensation: paragraph 7(2))(Paragraph 7(1) does not in terms limit the power of the competent landlord to reach enforceable agreements with the tenant which are binding on the other landlords and its sphere of operation is confined to legal proceedings rather than proceedings more generally arising out of the service of the section 42notice. Mr Fieldsend's argument therefore depends upon reading into paragraph 7 (and, in particular, its references to the other landlords being separately represented) a limitation on the power of the competent landlord to compromise the issues in the F-tT proceedings on behalf of the other landlords.

34 If, contrary to Mr Fieldsend's submissions, paragraph 7 gives the other landlord in question no more than a right to be heard he still retains the protection of paragraph 6(4) available to the other landlord but the tenant is not burdened with having to resolve disputes between the various landlords in order to avoid the expense and delay involved in contested proceedings. He retains the competent landlord as the sole party to any

negotiated settlement and disputes between the landlords as to the terms of the new lease or the amount of compensation which should be paid need not concern him. It therefore seems to me possible to identify in section 40(2) a policy objective in favour of facilitating the acquisition by the tenant of a new extended lease which is recognised by Schedule 11 . The scheme of paragraphs 6 and 7 is to preserve the measure of authority granted by section 40(2) (see paragraph 6(1)) but to build in protections designed to mitigate the possible adverse effects which this may have on other landlords. They can seek directions from the county court as to how the competent landlord conducts the proceedings and (if appropriate) recover compensation for negligence and bad faith. But the ability of the competent landlord to provide the tenant with an agreement binding on all other landlords remains unaffected.

51. 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).

52. The distinction between lease extension and collective claims in this context was drawn in the Court of Appeal, at [36] – [38]:

37 In this part of the legislation the reversioner's authority to act for and bind other relevant landlords in relation, for example, to the agreement of the terms of acquisition (paragraph 6(1)(b)(ii)) is also made subject to a right for the other landlords to seek directions from the court. But paragraph 7 is expressed to qualify not only section 9(3) but also paragraph 6 and, more important, includes an express right in paragraph 7(1)(a) to deal directly with the nominee purchaser in respect of the negotiation and agreement of the terms of acquisition or the other matters mentioned in sub-paragraphs (i) to (iii) of paragraph 6(1)(b). This is confirmed by section 24(3) (the equivalent of section 48(3) in Chapter II) which refers in sub-paragraph (b) to all the terms of acquisition having been agreed between the parties. "The parties" is defined by section 24(7) as meaning the nominee and the reversioner and any relevant landlord who has given a notice under paragraph 7(1)(a) of Schedule 1 .

38 It is clear that in a Schedule 1 case the intermediate landlords (relevant landlords) only acquire a right to be parties to an agreement about the terms if they serve a paragraph 7(1)(a) rather than a paragraph 7(1)(b) notice: see section 24(3) . The absence of any comparable provision in paragraph 7 of Schedule 11 and section 48(3) confirms, to my mind, that Parliament did not intend that a Schedule 11, paragraph 7 notice should remove the competent landlord's authority to agree terms binding on all the other landlords. In that way it is no different from a notice served under paragraph 7(1)(b) of Schedule 1 .

53. 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.

54. The key dates were as follows:

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

55. The FTT began by confirming that:

24 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'

56. 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.

57. 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'.

58. The Tribunal held that there was:

29 The Tribunal accepts [Counsel'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'

59. Two 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

60. 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.

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