Landmark CHAMBERS

Agreeing or Determining the Terms of Acquisition

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Landmark Chambers
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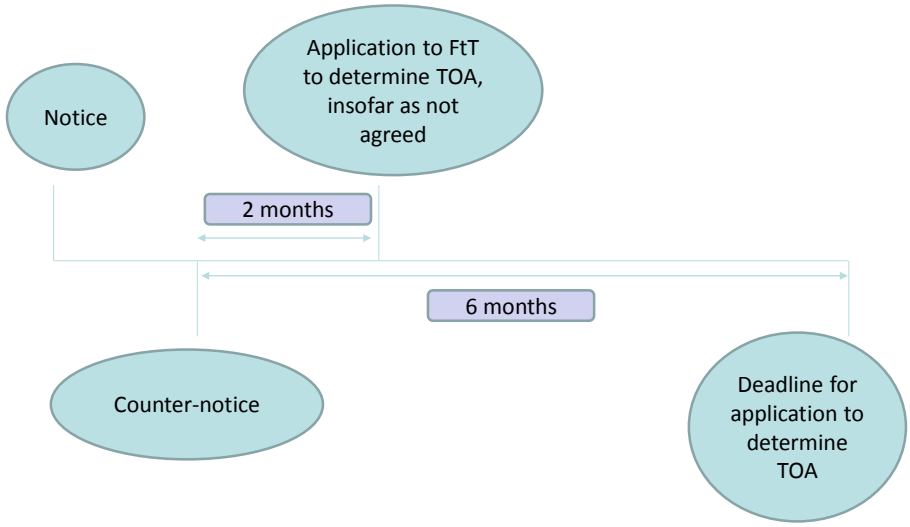
Timetable – terms in dispute

- 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)**).
- 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).

Timetable – terms in dispute



Timetable – once terms agreed or determined

Once terms of acquisition are either agreed of determined by the FTT the following timetable applies (**paragraph 6 Schedule 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**));
- 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**));
- If no statement is given by the Nominee Purchaser within this time he shall be deemed to have approved the draft (**paragraph 6(3**));
- 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));**
- 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)**)

Timetable – application for vesting order

- 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).

- 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)**).

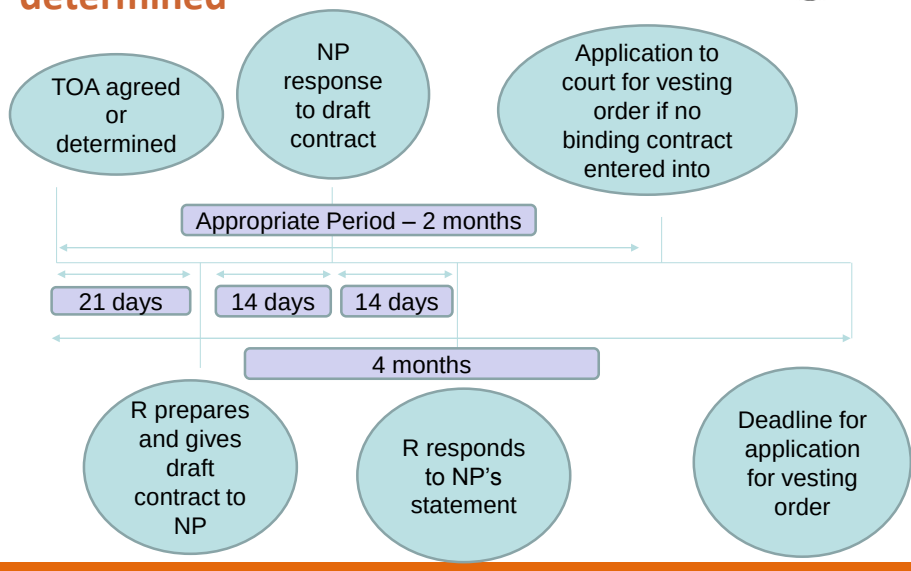
Timetable – appropriate period

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)**).

Timetable – once terms agreed or determined



Vesting Order

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

- 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

Terms of Acquisition

Greenpine Investment Holding Limited v Howard de Walden Estates Limited [2016] EWHC 1923:

- Broad interpretation given to "terms of acquisition"
- Albeit in the context of lease extensions rather than collective claims
- Section 48(7)

> *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.*

Terms of Acquisition - Greenpine

- Was the s.48(3) application made in time, i.e. within 4 months of the parties agreeing the terms of acquisition (the appropriate period + 2 months)?
  - Following service of 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 and, 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.
  - The Foreign Legal Opinion was sent to the landlord on 12 January 2015. The opinion underwent further "minor" revision and was finally completed on 27 April 2015.

Terms of Acquisition - Greenpine

- Application made on 25 August 2015
- 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 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.
- HELD: requirement for the foreign legal opinion was capable of being a term of acquisition. The requirement for the FLO was agreed on 2 December 2014.

Terms of Acquisition - Greenpine

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)

Terms of Acquisition - Greenpine

- 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

Paragraph 5 schedule 7

Broadly 3 types

• Restrictive covenants which affect the property otherwise than by virtue of the lease and are enforceable for the benefit of other property

• Suitably adapted existing restrictions within the lease

• Further restrictions which will not interfere with the reasonable enjoyment of the property and will materially enhance the value of other property in which the freeholder has an interest

Freehold Covenants: particular issues

- 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.

- 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 Kutchikian v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon [2012] UKUT 53, at [46].

Freehold Covenants: particular issues

- 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).

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

- 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.

Freehold Covenants: particular issues

- 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

- 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.

Freehold Covenants: particular issues

- 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.

- 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

- One that is subject to contract: Curzon v Wolstenholme [2015] UKUT 0173 (LC) and s.38(4)

- Does not have to be an agreement in writing

- Possible to have a binding agreement as to part of the price or as to particular terms: Lord Mayor of the City of Westminster v CH2006 Ltd [2009] UKUT 174 (LC), Curzon v Wolstenholme

- Must not be conditional upon agreement or determination of other terms: Ellis & Dines v Logothetis (LRA/3/200);

- Must be an actual agreement which is a question of fact: Pledream Properties Ltd v 5 Felix Avenue London Ltd [2011]

Agreement

•The Court of Appeal in Curzon v Wolstenholme [2017] EWCA Civ 1098 has confirmed (obiter) 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.

Agreement – when are the terms agreed?

- For new leases the leading case is Bolton v Godwin-Austen [2014] EWCA Civ 27

• Counter notice:

'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'

• Court of appeal held above formula was capable of acceptance

• Likely to cause fewer problems for a collective claim

Agreement – when are the terms of acquisition agreed?

- If NP accepts price in counter notice: (see 10 Egerton Place)
  - FTT has no jurisdiction in respect of price
  - NP unlikely to be able to argue the figure in the notice was too high
  - Any intermediate landlords would be bound

• If FTT has determined only the premium and the terms are expressed not to be agreed a second application may be made to the Tribunal in respect of the terms: Goldeagle Properties Limited v Thornbury Court Limited [2008] EWCA Civ 864 and Penman v Upavon Enterprises Ltd [2002] L&TR 10 CA.

Deemed Withdrawal

Important because

• No further notice may be given for 12 months; and

• It triggers a costs liability

10 situations:

i) Within 2 months of service of a negative counter notice NP fails to take or withdraws court proceedings to establish the right to collective enfranchisement (s.29(1))

ii) Within 6 months of service of a positive counter notice no application is made to the FTT to determine disputed terms (s.29(2))

Deemed Withdrawal

iii) All terms agreed or determined, no binding contract has been entered and no application for a vesting order (s.29(2)(b))

iv) On an application for a vesting order the court deems the initial notice withdrawn (s.29(5)(d))

v) No counter-notice, and no application by NP within 6 months of the date the counter-notice should have been served (s.29(3))

vi) No counter notice an application is made by the NP in time the terms have been determined by the court, no binding contract has been entered into within 2 months the court may deem the initial notice withdrawn (s.29(5)(e))

Deemed Withdrawal

vii) Where an order determining the terms of acquisition has been made under s.25(5) (no counter notice) but no application for a vesting order has been made within 2 months (s.29(4))

viii) Where the appointment of NP is terminated and no further notice is served on R within 28 days, with details of a replacement(s.29(5)(a))

ix) Where NP has retired or died, and no notice of replacement is given within 56 days by the participating tenants (s.29 (5)(b))

x) Where NP fails to comply with a notice requiring him to deduce title (s.29 (5)(b))

Independent Representation

- The issue is intermediate landlords

• No specific duty on R as regards other landlords although there is a statutory defence when R acted in good faith and with reasonable care and diligence: para 6(4) Sch 1

• 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.

• In a new lease claim the competent landlord has the power to agree terms with T so as to bind the IL even where they have serve a notice of intention to be separately represented: Howard de Walden Estates Limited v Accordway [2014] UKUT 0486(LC) as upheld in Court of Appeal [2017] 1 WLR 1761

Independent Representation

[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.

Independent Representation

- In a collective IL may after service of R counter notice serve notice to deal directly with NP: para 7(1)(a) Sch 1

- 10 Egerton Place [2014] FTT IL served notice of separate representation and terms were subsequently agreed between F and NP. FTT drew a distinction with Howard de Walden Estates Limited v Accordway

2 key points:

i) Once an IL has served notice of separate representation terms may not be agreed between NP and the FR without the IL; however

ii) Unless the IL varies or withdraws the counter proposals in the Counter Notice they may be accepted by the NP

• The more difficult question is whether there is anything an IL can do prior to the service of a counter notice

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