Landmark CHAMBERS

Recent Developments in Enfranchisement and New Lease Claims

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The topics

- Relativity
- Collective enfranchisement
  - premises qualifying
  - Rights in lieu of acquisition
- Lease extension qualification and notices
- Consents for conversion to residential
- Extent of demise
- Improvements
- Development value
- Costs

Mundy v Sloane Stanley [2018] EWCA Civ 35

- Methodology for assessing marriage value
- Parthenia model rejected
- Valuation assuming "Chapter 1 and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease"
- Held
  - Assumption limited to the premises being acquired
  - No reason not to value having regard to
    - Real world transactions and
    - Relativity graphs

Whitehall Court London Ltd v Crown Estate Commrs [2018] EWCA Civ 1704

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- Lease extension claim
- Issue is diminution in value of head lease
- Freeholder entitled to 85% of Net Receipts by head lessee
- Depends on prospects of statutory lease extensions of other flats
- Meaning of assumption that
- "Chapter 1 and this Chapter confer no right to acquire any interest in any premises containing the tenants flat or to acquire any new lease"
- Any new lease of premises or any new lease of flat?
- Held, no Act premises

Reiss v Ironhawk Ltd [2018] UKUT 311

- FHVP agreed
- Issue was relativity for 75 yrs unexpired
- Maunder Taylor at 93.5% based on Nesbitt graph
- Yasin (my leasehold) at 72%, based on
  - Sale of subject lease 2.8 yrs before, indexed and adjusted
  - Other comparable transactions
- Held
  - Sale of subject property too old to be reliable
  - Adjust from FHVP by reference to Savills enfranchisable 2015
  - Deduct 2.5% for rights. Result 86.9%

CQN RTM Co Ltd v Broad Quay North Block Freehold Ltd [2018] UKUT 183

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- Issue was whether premises were “structurally detached”.
- Expert evidence only from tenant’s expert.
- FTT decided the premises were not detached after site visit
- Appeal by review only
- Confusion as to state of evidence
- Appeal dismissed – expert evidence did not directly address construction of car park floor
- Principles summarised

CQN RTM Co Ltd v Broad Quay North Block Freehold Ltd

- (1) The expressions 'building' and 'structurally detached' are not defined in the 2002 Act and should be given their ordinary and natural meaning.
- (2) The statutory language speaks for itself and it is neither necessary nor helpful for a tribunal which is considering whether premises are 'structurally detached' to reframe the question in different terms. Thus, it is not helpful to substitute a test of 'structurally independent' or 'having no load-bearing connection' for that of 'structurally detached'.
- (3) Nevertheless, some explanation of when a building can properly be characterized as 'structurally detached' is clearly called for.
- (4) What is required is that there should be no 'structural' attachment (as opposed to non-structural attachment) between the building and some other structure. The word 'structurally' qualifies the word 'attached' in some significant manner.

- (5) Thus, a building may be 'structurally detached' even though it touches, or is attached to, another building, provided the attachment is not 'structural'.
- (6) 'Structural' in this context should be taken as meaning 'appertaining or relating to the essential or core fabric of the building'.
- (7) A building will not be 'structurally detached' from another building if the latter bears part of the load of the former building or there is some other structural inter- dependence between them.
- (8) So long as a building is 'structurally detached', it does not matter what shape it is or whether part of it overhangs an access road serving some other building.
- (9) A building can be 'structurally detached' even though it cannot function independently.

- (10) Adjoining buildings may be 'structurally detached' even though a decorative façade runs across the frontage of both buildings.
- (11) The question whether or not premises in respect of which a right to manage is claimed comprises a self-contained building is an issue of fact and degree which depends on the nature and degree of attachment between the subject building and any other adjoining structures.
- (12) In determining whether a building is 'structurally detached', it is first necessary (a) to identify the premises to which the claim relates, then (b) to identify which parts of those premises are attached to some other building, and finally (c) to decide whether, having regard to the nature and degree of that attachment, the premises are 'structurally detached'.
- (13) If a structural part of the premises is attached to a structural part of another building, the premises are unlikely to be 'structurally detached'.

Corp of Trinity House v 4-6 Trinity Church Sq Freehold Ltd [2018] EWCA Civ 764

Collective enfranchisement of 4-6 Trinity Church Square

- Clause 7 of each lease:
- "The Lessee shall be entitled as Licensee only to use in common with others the garden shown for the purposes of identification only coloured green on the said plan annexed hereto and marked "Plan A" upon the following conditions:
- (i) The garden shall be used for recreational purposes and then only provided that no nuisance or annoyance is thereby caused to the other lessees of the flats in the Building
- (ii) The Licence hereby granted may be revoked in writing by the Lessor at any time.“

The statutory provisions

- S1(2) and (3) the qualifying tenants are entitled to acquire the freehold of any property which is not comprised in the relevant premises if
- (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises
- S1(4)"The right of acquisition in respect of the freehold of any such property as is mentioned in subsection 3(b) shall, however, be taken to be satisfied with respect to that property if, …
  - (a) there are granted by the person who owns the freehold of that property –
    - (i) over that property, or
    - (ii) over any other property,
  - such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

Court of Appeal decision

- The requirement of permanence requires the revocable right to use the Garden to be converted into an irrevocable right on the completion of the transfer of the freehold of the Building. [24]
- a right under the lease to make regulations as long as it is not sufficiently wide to contravene the requirement of permanence, should be replicated in the transfer as a result of the equivalence provision in section 1(4)(a) , even if it has not been exercised on the relevant date [26]
- Had the licence to use the Garden not been revoked, therefore, the transfer of the freehold of the Building would have been deemed to pass with it all the rights enjoyed with the Building, including the rights over the Garden and had the effect of converting them into irrevocable rights [under s62] [27]

Villarosa v Ryan [2018] EWHC 1914

- s39(2) Those circumstances are that on the relevant date for the purposes of this Chapter—

  (a) the tenant has for the last two years been a qualifying tenant of the flat;
- S39(3)(A) On the death of a person who has for the two years before his death been a qualifying tenant of a flat, the right conferred by this Chapter is exercisable, subject to and in accordance with this Chapter, by his personal representatives; ..
- s42(4A) A notice under this section may not be given by the personal representatives of a tenant later than two years after the grant of probate or letters of administration."
- Held, s42(4A) only applies to PRs relying on s39(3)(A)

Villarosa

- (1) the executors of the deceased tenant executed a TR1 in relation to the lease in favour of Ms Villarosa on 6 April 2016;
- (2) legal title to the lease remained with the executors after 6 April 2016;
- (3) on 6 June 2016, the executors served the section 42 notice;
- (4) on 7 or 8 June 2016, the executors assigned to Ms Villarosa the benefit of the section 42 notice so that the benefit of the notice would pass when the legal title to the lease vested in Ms Villarosa;
- (5) on 27 June 2016, legal title to the lease vested in Ms Villarosa and at the same time the benefit of the notice passed to Ms Villarosa.
- Held, notice not deemed withdrawn.

Bluegate Housing Limited v LB Lambeth, CLCC, 20.4.2018

- Schedule 5 para 11: "any counter-notice given [under s45] to the tenant by the competent landlord must specify the other landlords on whose behalf he is acting."
- Counter-notice made proposals as to the premium payable to the intermediate landlord, but did not in terms state that the counter-notice was served on its behalf.
- Held (i) applying Mannai principles, the reasonable recipient would realise that the counter-notice was served on behalf of the intermediate landlord, and correct the mistake as a process of construction and
- in any event, applying the principles as to validity derived from Osman v Nott [2015] 1 W.L.R 1536 and Elim Court v Avon Freeholds [2017] EWCA Civ 189, the requirement in paragraph 5 was not integral to the working of the statutory scheme and did not invalidate the notice.

Hautford Ltd v Rotrust Nominees Ltd [2018] EWCA Civ 765

- 51 Brewer Street, London W1
- 100 year lease granted in 1985
- Lease terms
  - "Not to use the demised premises otherwise than for one or more of the following purposes (a) retail shop (b) offices (c) residential purposes (d) storage (e) studio ..
  - "To perform and observe all the provisions and requirements of all statutes and regulations relating to Town and Country Planning and not to apply for any planning permission without the prior written consent of the landlord such consent not to be unreasonably withheld …"

Rotrust

- Planning uses
  - B and G, retail
  - 1 and 2, office/ancillary
  - 3 and 4, residential
- Landlord refused consent for permission to apply for planning permission to convert 1 and 2 to flats
- Residential would increase from 25% to 52%

Rotrust, Court of Appeal decision

- Purpose of covenant not to prevent enfranchisement.
- Residential use authorised by user covenant
- Anyone could apply for planning permission
- *Kitway* and *Bickel* pre 1967 leases, so distinguishable
- So far as management of retained land is relevant, landlord can be protected by covenants imposed in a transfer under s10 LRA 1967
- Judge should have refused permission to refer to Mount Eden [2014]

Gorst v Knight [2018] EWHC 613 Ch

- 81 Tunis Road
- Flat 1 on floors 1 and 2
- Flat 2 on G, patio and cellar
- Does demise of Flat 2 include subsoil?
- Held,
  - No presumption as to whether lease demises sub-soil
  - Sub-soil not demised as matter of construction. Main indicators:-
    - Express inclusion of cellar in demise
    - Reservation of right to lessor to services under demised premises

Portman Estate Nominees v Jamieson [2018] UKUT 0027

- Mews at 7 Montagu Mews West attached to 7 Byranston Square house
- Former connections at G and 1 floor levels
- Underlease of mews 15 May 1957
- Demolished and replaced by mews house
- Claim under Leasehold Reform Act 1967
- Could construction of new house be disregarded as an improvement?
- the price payable is to "be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense" (section 9(1A)(d)).

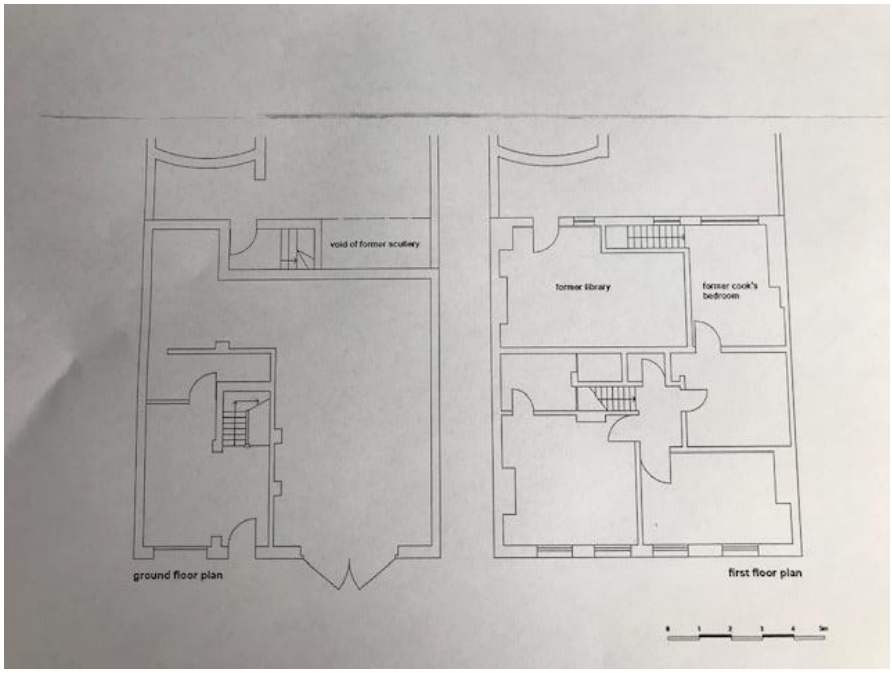
The improved house

Portman v Jamieson

1. Does the statutory disregard of improvements apply only if the improvements were carried out to a "house" at the time they were undertaken?
2. If so, was the building in its original form a "house", or was it prevented from being a house, as defined in section 2 of the Act, by the arrangement of its rooms and its relationship to the main house?
3. Was the work carried out in 1957/58 an "improvement" of the original building?
4. If so, was it carried out by a predecessor in title of the respondents at their own expense (as required by section 9(1A)(d))?
5. If the work was an improvement to be disregarded, what assumption ought to be made about the condition No.7 would have been in at the valuation date, if it had not been demolished and reconstructed?

(1) Does the statutory disregard of improvements apply only if the improvements were carried out to a "house" at the time they were undertaken

- Rosen v Trustees of Camden Charities [2002] Ch 69 held that the erection of a new house on a bare site was not an improvement to be disregarded
- Tandon v Trustees of Spurgeon Homes [1982] AC 755, tenant must
  - identify improvements which they or a predecessor in title had carried out at their own expense, and
  - satisfy the tribunal that but for those improvements the house and premises would have been worth less
- Purpose of disregard was to prevent unfairness
- Held by UT
  - No such requirement
  - Rosen limited to construction on a bare site



Was the building a house

- Inaccessible former library on 1st floor
- Void on G floor – former scullery
- Held
  - the presence of an inaccessible area within a building does not prevent it from being a house, at least where the whole structure is demised
  - Alternatively, not vertically divided as only on 1st floor
  - Inaccessible areas still part of house, so no material over/under hang
  - Alternatively inaccessible areas were appurtenances

Portman v Jamieson - Other issues

- Complete replacement of house could be improvement
- Tenant failed to prove that predecessor had carried out work at own expense
- Old mews must be taken to have been looked after as has the real house, and not allowed to fall into a notional state of dereliction. That means in this case that it would have been unmodernised and in need of complete refurbishment
- In any event, no increase in value
- Residual valuation method rejected

Francia Properties Ltd v St James House Freehold Ltd [2018] UKUT 79

- Collective claim for block of flats
- Potential for development on roof
- 2014 pre app advice that single additional floor might be acceptable
- May 2015 permission refused for 3 extra storeys
- S13 Notice 20 October 2015
- Three further applications also refused
- FTT determined development value of £295,000 after 65% discount for planning risk give history of refusals
- Held: FTT wrong to have regard to events after valuation date
- Value determined to be £100,000 base don 30% planning risk and 35% other risks

John Lyon v Terrace Freehold [2018] UKUT 0247

- 99 Hamilton Terrace. 5 flats, headlease with nominal value
- S33 costs claim for £11,000 legal costs and £15,495 valuation
- Held, following Drax and Sinclair Gardens,
  - Burden on reversioner
    - costs incurred
    - referable to s33 matters
    - Reasonable
  - Costs limited to what reversioner would have spent if no claim under s33
  - Reasonable to incur costs of specialist senior solicitor
  - Cost allowed: £4,712 legal, £7,620 valuation

Any questions?