UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – COLLECTIVE ENFRANCHISEMENT – INTERMEDIATE LEASEHOLD INTEREST – CONSTRUCTION OF LEASE AND OF LICENCE TO UNDERLET

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) REGENT WEALTH LIMITED **Appellants**

(2) SILVER GARDEN INVESTMENTS LIMITED

(3) GARDEN BAY HOLDINGS LIMITED

and

(1) NIGEL CHARLES WIGGINS, **Respondent**

(2) LANGBOURN

PROPERTIES (FH4547SS) LIMITED

Re: 45-47 South Street,
London,
W1K 2XQ

Elizabeth Cooke, Upper Tribunal Judge

Sitting at: The Royal Courts of Justice

on

2 October 2019

Jonathan Gaunt QC and Anthony Radevsky for the appellant, instructed by Cripps Pemberton Greenish
Stephen Jourdan QC and Thomas Jefferies for the respondents, instructed by Withers LLP

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The following cases are referred to in this decision:

Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56

Arnold v Britton [2015] UKSC 36

Benjamin Developments Ltd v Robt Jones (Pacific) Ltd [1994] 3 NZLR 189 CA

Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101

Durham v BAI (Run Off) Ltd [2012] UKSC 14

East v Pantiles (Plant Hire) Ltd [1982] 2 EGLR 111

Homburg Houtimport BV v Agrosin Ltd (The Starsin) [2004] 1 AC 715

KPMG LLP v Network Rail Infrastructure Ltd [2007] EWCA Civ 363

Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742

Prudential Assurance Co Ltd v Ayres [2008] 1 EGLR 5

Regent Wealth Ltd, Sliver Gardens Investment Ltd and Garden Bay Holdings Ltd v Wiggins [2014] EWCA Civ 1078

Wiggins v Grosvenor (Mayfair) Estate, Regent Wealth Ltd, Silver Garden Investments Ltd and Garden Bay Holdings Ltd London Leasehold Valuation Tribunal Decision of 9 July 2012

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the value of leases held by the appellants and to be acquired by the respondents as part of the collective enfranchisement of 45-47 South Street, London W1K 2XQ. That valuation turns upon a question of construction of intermediate leases of flats 3, 4 and 5 in the building, together with the licences that permitted the grant of those leases. The appellant companies have appealed the FTT's decision, with permission from the FTT, and this appeal is a review of the FTT's decision.

2. I heard the appeal at the Royal Courts of Justice on 2 October 2019. The appellants were represented by Mr Jonathan Gaunt QC and Mr Anthony Radevsky, and the respondents by Mr Stephen Jourdan QC and Mr Thomas Jefferies; I am grateful to them all for their helpful arguments.

3. In the paragraphs that follow I begin by setting out the legal and then the factual background; I then consider the issue between the parties and explain the FTT's decision before turning to the submissions made on appeal and my decision.

The legal background

4. The legal background to this appeal is to be found in the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). The detail and effect of the legislation is not in issue in the appeal and so, rather than setting out long extracts from the statute, I can summarise the relevant provisions as follows.

5. Part I of the 1993 Act confers rights on "qualifying tenants", namely tenants under a residential lease for a term exceeding 21 years (sections 5 and 7).

6. Chapter 1 of Part I creates the right to collective enfranchisement. Section 1 states that the qualifying tenants in a building are entitled to have the freehold of the building purchased on their behalf. The building must be a self-contained building or part of one, containing two or more flats held by qualifying tenants, where at least two-thirds of all the flats are held by qualifying tenants (section 3). Where the freehold is purchased in this way, leases superior to those of the flats are also purchased (section 2).

7. A person who holds the long lease of three or more flats is not a qualifying tenant for the purposes of Chapter 1 (section 5(5)).

8. A claim to exercise the right to collective enfranchisement is made by giving notice under section 13, and notice may be given by the lessees of not less than half the flats in the building.

9. Chapter II of Part I gives to individual qualifying tenants the right to a new lease of their flat, for a term expiring 90 years after the end date of the existing lease; the new lease is to be for a peppercorn rent, after payment of a premium calculated in accordance with the terms of the 1993 Act, but otherwise essentially on the same terms as the existing lease with some adaptations (sections 56 and 57).

10. The right is exercised by notice (section 42).

11. This appeal arises from claims made under the 1993 Act both to collective enfranchisement and to extended leases, and from the interaction between the two types of claim. If a tenant serves notice claiming an extended lease at a time when a collective enfranchisement claim has already been commenced, the section 42 notice is suspended during the currency of that claim (section 54).

The factual background

12. This appeal is the latest chapter in a long and litigious story. Not all of it need to be told here, but the following is essential background to the question of construction on which the appeal turns.

The interests in the property as they stood before the first collective enfranchisement claim

13. 45-47 South Street was until recently part of the Grosvenor estate. Initially the structure of titles in the buildings was as follows; the estate held the freehold, there was a lease of the whole building to a management company expiring on 24 September 2023, and there were sub-leases of seven flats (in the basement, ground floor, and first to fifth floors; I refer to the latter as flats 1 to 5) granted in the 1960s and expiring in September 2023. I refer to those sub-leases as the "occupational leases", and to the occupational lessees where appropriate.

14. That simple initial structure became complicated as a result of the creation of a number of interests in the last twenty years.

15. First, in 1999 the freeholder granted to Grosvenor West End Properties Ltd ("GWEP") a lease of the whole building for a term expiring on 24 March 2184 ("the GWEP lease"). That was the longest lease in the structure.

16. The Grosvenor estate, knowing that its occupational lessees would be able to claim an extended lease under the 1993 Act, enabled them (in this and, I understand, other buildings) instead to acquire an overriding lease, for a term expiring (in this building) in September 2122. That meant that there was no need for the lessees to use the 1993 Act and the Grosvenor estate was able to control the resulting arrangements.

17. In 2001-2005 GWEP granted to each of the occupational lessees of the basement and flats 1, 2, 3, 4 and 5, or their nominees, an overriding lease of their flat expiring on 25 September 2122. Those leases are therefore also superior to the management company. I refer to those leases as "the OL1 leases."

18. The lessee of the ground floor flat did not take up the offer of an overriding lease, claiming instead an extended lease under the 1993 Act; an extended lease was granted, expiring on 19 September 2113.

19. The grant of the OL1 leases by themselves would have left GWEP at one step removed from the management lease, and GWEP wanted to be able to enforce the covenants of the management company. So the day before it granted the OL1 leases it granted a further lease of the whole building, in reversion to the management company lease, to a Grosvenor company Mayfair Leasehold Properties Ltd, expiring on 30 September 2023. That meant that a Grosvenor company could enforce the management company's obligations, and I refer to its lease as the "enforcer lease".

20. Accordingly, before the story of this litigation begins, the title structure of each of the flats (except the ground floor) was as follows (the blank row is deliberate and its purpose will become clear later; it can be ignored for now):

	Held by	Expiry date
Freehold	Grosvenor (Mayfair) Estate	
Head lease	GWEP	24.3.2184
OL1	The occupational lessee or a company controlled by that lessee	25.9.2122
Enforcer lease	Mayfair Leasehold Properties Ltd	30.9.2023
Management company lease	South Street Management Ltd	24.9.2023
Occupational lease	Occupational lessee	19.9.2023

21. The occupational leases in all three of the flats with which we are concerned were held by members of the Van Praag family – flats 3 and 4 by Dr and Mrs Van Praag, flat 5 by their

son Alexander Van Praag. The three appellants are companies controlled by the Van Praag family and took the OL1 leases for them.

The collective enfranchisement claims

22. As to the flats other than those owned by the Van Praag family, a number of them changed hands and by the end of November 2010 the occupational leases of the basement, ground floor, and first and second floor flats were held by the first respondent or by companies under his control. They therefore held more than half the occupational leases and so were qualified to serve notice under section 13 of the 1993 Act claiming collective enfranchisement. On 22 December 2010 they did so. That notice ("the 2010 notice") entitled the first respondent as nominee purchaser to acquire the freehold of the building and all the interests in the table above save for the occupational leases.

23. This came as an unpleasant surprise to the Van Praag family, as we know from Dr Van Praag's witness statement in the FTT (which was not challenged). There was no escape from the effect of the notice so far as the interests in the table above were concerned, and the OL1 leases of flats 3, 4 and 5 were inevitably going to be bought by the first respondent.

24. The story now has a twist. The section 13 notice could have been protected by the entry of a notice at HM Land Registry on the registers of title to the interests to be acquired. Had it been registered then any purchaser of any interest to which the notice applied would have been bound by it (and therefore liable to have their interest purchased); moreover, section 19 of the 1993 Act would have prevented the severance of any of those interests (for example by a sale of part) or the grant of a lease out of any of them. But the notice was not registered.

25. Those advising the Van Praag family took advantage of this to devise an ingenious scheme. On 7 April 2011 each of the lessees under the OL1 leases of flats 3, 4 and 5 (being the first, second and third appellants respectively) granted a further overriding lease, expiring a few days before the OL1 leases on 15 September 2122. I refer to these as the OL2 leases. The lessee was another of the three companies; so the lessees under the OL2 leases of flats 3, 4 and 5 were the second, third and first appellants respectively.

26. The blank row in the table above is relevant only to flats 3, 4 and 5, and it looks like this:

OL2	One of the appellant companies, controlled by the occupational lessee	15 September 2122

27. The first respondent sought to amend the 2010 notice so as to take in the OL2 leases, but this proved impossible (see *Regent Wealth Ltd, Sliver Gardens Investment Ltd and Garden Bay Holdings Ltd v Wiggins* [2014] EWCA Civ 1078).

28. The Van Praag family sought to require the first respondents to purchase the OL1 leases valued as if they were not subject to the OL2 leases; this failed at first instance (*Wiggins v Grosvenor (Mayfair) Estate, Regent Wealth Ltd, Silver Garden Investments Ltd and Garden Bay Holdings Ltd* London Leasehold Valuation Tribunal Decision of 9 July 2012. Permission to appeal was granted but the appeal went no further.

29. In 2012 the Grosvenor interests – the freehold, the GWEP lease, the enforcer lease and the management company lease – were all acquired by the first and second respondents.

30. On 20 February 2015 the Van Praag family served on the landlords under the OL2 leases notices under section 42 of the 1993 Act claiming extended leases of flats 3, 4 and 5. Those claims were suspended during the currency of the first respondent's collective enfranchisement claim, and remain suspended, pursuant to section 54 of the 1993 Act.

31. On 5 March 2015 the Van Praag family entered into three agreements with the appellants, one relating to each flat, each agreement being between the occupational tenant and the company tenant of the relevant OL2 lease. The effect of the agreements was that once the section 42 notice ceased to be suspended by the currency of the enfranchisement claim, each OL2 tenant would admit the section 42 claim by the occupational tenant.[1]

32. Shortly after that Alexander Van Praag transferred Flat 5 to his parents. That meant that Dr and Mrs Van Praag owned three of the occupational underleases, and none of flats 3, 4 and 5 were held by qualifying tenants for the purposes of collective enfranchisement. Dr Van Praag explained in his witness statement that the purpose of this was to make it impossible for the first respondent to make a further enfranchisement claim and purchase the OL2 leases, because now fewer than two thirds of the flats were held by qualifying tenants.

33. Nevertheless by dint of various re-arrangements the respondents were able to re-create a situation where collective enfranchisement was possible. On 12 February 2018 a fresh section 13 notice was served by the first respondent, this time catching the OL2 leases as well as the OL1s.

34. On 6 February 2018 the first respondent concluded a contract ("the 2018 contract") for the acquisition of the OL1 leases; that contract was suspended because of the second section 13 notice served in February 2018 (section 19(4) of the 1993 Act) and will be discharged

[1] Those agreements were revoked by agreements dated 7 June 2018 when the respondent's argument about valuation was made known to the appellants.

when the enfranchisement claim made in February 2018 results in a binding contract. All that stands in the way of that acquisition is the determination of the price of the OL2s, which is the question to be answered in this appeal.

The valuation of the OL2 leases

35. Central to the valuation dispute are the alienation provisions in a number of the leases. By "alienation" I mean assigning, sub-letting, parting with possession and so on. A tenant can do all these things without permission from its landlord unless the lease says otherwise. A lease that says otherwise may impose an absolute prohibition (no alienation at all), a qualified covenant (no alienation without the landlord's consent), or a fully qualified covenant (no alienation without the landlord's consent, such consent not to be unreasonably withheld).

36. The occupational leases, granted in the 1960s, restricted alienation only in the last seven years of the term, by a covenant not to assign the demised premises or any part thereof without the consent of the lessor and all the superior lessors.

37. In recent years the Grosvenor estate's policy has become much more restrictive. A 2008 document setting out its policy on residential sublettings says this:

> "The majority of the more modern leases state that you may sublet the flat for a term of not less than one year and not more than twenty years. This subletting must be at a full market rental value and the terms must be no less onerous than those of the lease. There is to be no further assignment or subletting and the subletting must be of the whole of the premises and not part."

38. The effect of that stricter policy is of course to protect the Grosvenor estate from claims under the 1993 Act, which can only be made in respect of leases for more than 21 years. Consistent with that policy the OL1 leases contained the following provisions about alienation:

> "12. The Tenant will not charge any part (as opposed to the whole) of the Premises and will not assign underlet hold on trust for another or otherwise part with or share possession or occupation of or suffer any other person to occupy the whole or any part of the Premises <u>SAVE</u> for a transaction complying with paragraphs 13 to 16 or in relation to an underlease subsisting at the date hereof <u>PROVIDED THAT</u> if the Tenant is a body corporate occupation of the Premises by its directors or shareholders or (if the shareholders are trustees) beneficiaries under the trust on which its shares are held and their respective families shall not be of this paragraph (sic) <u>SUBJECT TO</u>:
>
> 12.1 the Tenant notifying the Landlord of the occupiers from time to time of the Premises occupied under this proviso and
>
> 12.2 such occupation being as licensee without any legal equitable or other interest in the Premises being thereby created

13. (Subject to paragraphs 14 to 16) the Tenant will not without the approval of the Landlord (such approval not to be unreasonably withheld) assign or underlet the whole of the Premises.

14. The Tenant will procure that upon the first assignment of this Lease the Existing Lease and this Lease are vested in the same person and thereafter during the term of the Existing Lease that both it and this Lease are vested in the same person

15. On any assignment of the Premises to a person who is not resident in the United Kingdom and in any other case if reasonably requested by the Landlord the Tenant will procure that either:

15.1 a person who is resident in the United Kingdom approved by the Landlord (such approval not to be unreasonably withheld) gives a Guarantee to the Landlord or

15.2 the assignee (as security for its performance of the Tenant's obligations in this Lease and on such terms as the Landlord reasonably requires) deposits with the Landlord a sum equal to three times the aggregate of the sums payable under paragraph 11 and the Service Charge in the year before the assignment

16. The Tenant will not grant any underlease of the Premises

16.1 for a term less than six months or exceeding 20 years

16.2 on terms less onerous than those in this Lease nor

16.3 unless its terms prohibit absolutely any further assignment underletting charging or parting with or sharing possession or occupation of the whole or any part of the Premises"

39. The effect of these provisions is that there is a fully qualified covenant restricting assignment; and that sub-letting is permissible but only where the sub-lease conforms to the modern policy and forbids any alienation by the sub-tenant.

40. The OL2s contain exactly the same provisions – and indeed are identical in all respects to the OL1s save for the parties and dates.

41. That means that the OL2s are obviously not in accordance with the alienation provisions in the OL1s, being for a term of more than 20 years. Permission was needed, and obtained, from GWEP (being the lessor to the OL1 leases). Licences to sub-let were granted on 11 April 2011, the same date as the OL2s themselves.

42. Each licence is expressed to be supplemental to and collateral to the relevant OL1 lease. The draft of the relevant OL2 lease is annexed to it. Each licence is made between GWEP, the tenant under the OL1, and the prospective tenant under the OL2. At paragraph 3.2 the

prospective undertenant covenanted not to do anything that would cause the tenant of the OL1 lease to be in breach of covenant under that lease, and at 4.3 the tenant under the OL1 lease covenanted with GWEP to enforce against the undertenant the covenants in the OL2. At paragraph 3.3 of each licence the prospective undertenant covenants with GWEP

> "Not to assign charge underlet or part with or share possession or occupation of the whole or any part of the Premises."

43. Thus the alienation provisions in the OL2 leases, and made between the landlord and tenant of the OL2 lease, themselves are very different from the covenant given to GWEP in the licence that enabled the grant of the OL2. The appellants say that the two documents are inconsistent and that therefore there is a mistake in the licence; their argument before the FTT was that the words "without the landlord's consent, not to be unreasonably withheld" have been omitted. The Tribunal should add those words as a matter of construction because there is an obvious mistake, on the principle set out in *East v Pantiles (Plant Hire)* Ltd [1982] 2 EGLR 111. Alternatively the tribunal should imply a term to the effect of those words, on familiar principles most recently set in *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742.

44. If the appellants succeed then the value of the OL2 leases will be higher than it is if subject to the absolute prohibition on alienation contained in the licences. The parties have agreed that the three OL1 leases to be purchased by the respondents are to be valued at £2 each. They have also agreed that the value of the three OL2 leases if they are subject to the absolute covenant in the licence is:

Flat 3 £3, 035,000

Flat 4 £1,085,000

Flat 5 £1,025,000

45. If the appellants' argument prevails, so that additional words are read into the licence to make it a fully qualified covenant, it is agreed that the values are as follows:

Flat 3 £4,295,200

Flat 4 £1,539,000

Flat 5 £1, 447,300

46. Accordingly if the lessees of OL2 are bound by the absolute covenant the first respondent will pay £2,136,500 less than if the appellants' argument about mistake prevails. The first respondent was successful in the FTT, but for a reason that had not been argued: the FTT found that there was a mistake but that it lay in the OL2s which should all have contained an absolute covenant against assignment.

47. In the paragraphs that follow I look first at the arguments based on the correction of a mistake and then at the arguments for and against the implication of terms.

The correction of an obvious mistake

The appellants' submissions

48. Mr Gaunt starts from the provisions of the licence, which is closely tied to both the OL1 and OL2 leases. It demonstrates, he says, that GWEP was happy to put on one side the provisions of the OL1 lease and its 2008 letting policy, and to allow the grant of a much longer underlease than is contemplated in OL1. GWEP was endeavouring to help the Van Praag family to keep the benefit of the rights they bought from the Grosvenor estate. In that context, the alienation covenant at 3.3 was draconian. It meant that the tenant under a 111 year lease could do almost nothing with it, save by paying whatever GWEP chose to demand. There is no reason, he argues, why a tenant would take – or why the landlord would grant – a lease of that length on those terms. It is a commercial and practical absurdity.

49. Moreover, as a result of the section 13 notice the respondents will acquire the GWEP lease and the OL1 leases. The same landlord will have therefore benefit of two inconsistent alienation covenants. Again, Mr Gaunt argues that this is absurd and that something must have gone wrong.

50. Mr Gaunt took me to the authorities on the construction of contracts. The starting point is *Arnold v Britton* [2015] UKSC 36, in which the Supreme Court considered the provisions of leases of chalets in which the service charge was a fixed sum, rising by 10% (compounded) each year, so that the tenant who paid £90 in 1974 would pay £1,073 in 200 and £1,025,004 in 2072. At paragraph 15 Lord Neuberger said:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context."

51. It is well-established that evidence of the subjective intentions of the parties is irrelevant, and for that reason the correspondence in 2011 between GWEP and the appellants' representatives is not before the Tribunal. Mr Gaunt observes that the words of paragraph 3.3 of the licence are very clear, but argues that they must be read in the context of their factual background – as set out above – and their documentary context, alongside the OL1 leases, and in particular the OL2 leases whose creation forms part of the same transaction. He points to paragraph 3.03 in Lewison, *The Interpretation of Contracts* 6th edition, where it is said that "where the transaction is in truth one transaction, all the contracts may be read together for the

purpose of determining their legal effect." The author quotes Lord Mance in *Durham v BAI (Run Off) Ltd* [2012] UKSC 14 at paragraph 69:

> "Where two contracts are linked, the law will try to read them consistently with each other."

52. It is well-established that obvious drafting mistakes can be corrected as a matter of construction. In *East v Pantiles (Plant Hire) Ltd* [1982] EGLR 111 Brightman LJ said:

> "Two conditions must be satisfied: first there must be a clear mistake on the face of the instrument; secondly it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

53. Mr Gaunt QC drew my attention to *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, where the terms of a break clause in a lease were obviously problematic, and the court corrected them by adding words from a previous draft; similarly, the Tribunal is asked to supply in paragraph 3.3 of the licence the missing words that would turn it into a fully qualified covenant. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 the House of Lords had to consider an overage provision which, when read "in accordance with the ordinary rules of syntax makes no commercial sense" (Lord Hoffmann at paragraph 16). At paragraph 14 Lord Hoffmann said "… the law [does] not require a court to attribute to the parties an intention which a reasonable person would not have had". Here it is argued that no reasonable person would have taken the OL2 lease with an absolute prohibition on alienation.

54. In this case of course there is nothing wrong with the grammar or syntax of the alienation provision in the licence. Most of the instances of the correction of a mistake, on the principle set out in *East v Pantiles*, are cases where there is an obvious error of that nature – *Homburg Houtimport BV v Agrosin Ltd (The Starsin)* [2004] 1 AC 715 is another example where the clause made no grammatical sense as it stood. I asked Mr Gaunt QC if there were any cases where the *East v Pantiles* principle had been used to correct a mistake that was not obvious on the face of the clause itself. He suggested that *Prudential Assurance Co Ltd v Ayres* [2008] 1 EGLR 5, referred to in *The Interpretation of Contracts* at page 494, might be such an example, where the author suggests that the Court of Appeal interpreted the offending clause in a way that "did violence to the language". There was no copy of that case in the authorities bundle and therefore no further argument was made about it at the hearing; I note on reading the case that the clause to be corrected was not obviously ungrammatical. However, it did contain problematic wording, for example the use of the words "such default" without there being any such default for the words to refer to (see paragraph 30, and further paragraphs 31 and 32), and the Court of Appeal was able to correct it by re-arranging the wording of the clause itself, having concluded that certain words had been inserted in the wrong place.

55. Finally, as to the obviousness of the mistake Mr Gaunt QC points to the price that GWEP was paid for its interest in 2012, namely £147,000. He argues that that was too low a price if they intended to have, or knew they had, the ability to extract from the OL2 tenants any price they chose for their licence to assign or sublet – and where their ability to demand such a price is agreed to devalue the three leases together by £2m.

56. Turning to the second requirement, that the way to correct the mistake must be clear, Mr Gaunt QC observed that whilst it must be clear what the correction ought to be, it is not necessary for the exact words of the correction to be obvious: it is sufficient if the gist of the correction is clear. As Lord Carnwath put it in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA 363 at paragraph 64:

> "… it is sufficient if the court is able to ascertain the "gist" of what has been omitted….Once the court has identified an obvious omission, and has found in admissible background material an obvious precedent for filling it, it should not be fatal that there may be more than one possible version of the replacement."

57. I asked Mr Gaunt QC why he proposed the addition of words that would create a simple fully qualified covenant, rather than for example the substitution of an alienation clause that matched the ones in OL1 and OL2. His response was that the proposed addition was the simplest available, and one that would achieve the same objects as would that much bigger insertion. The licence obliges the undertenant not to do anything that would put the OL1 tenant in breach of covenant; that would give GWEP reason to refuse permission to grant, say, a 50 years lease from 2030, since that would be outside what is permitted under the OL1 lease.

The respondents' submissions

58. Mr Jourdan QC, like Mr Gaunt QC, begins with the factual and legal context, but he emphasises a different aspect of it. At paragraph 19 of Dr Van Praag's witness statement he said that on receipt of the section 13 notice in 2011 he instructed Pemberton Greenish to investigate the claim and "to advise us of our possible options in order to maintain and protect our flat". To that end, he says the Van Praag family in 2015 served notice under section 42 of the 1993 Act claiming an extended lease of each of the flats. It will be recalled that the ground floor tenant had done that some years previously in preference to the grant of an OL1 lease. Accordingly, it is argued for the respondents that this was the appellants' plan and purpose when seeking the grant of the OL2, and the licence and OL2 have to be read in the light of that purpose. The grant of the OL2s was intended to deter the first respondent from going ahead with the enfranchisement, but if that failed then the Van Praags would just have put off the day when the first respondent took control of the building. However, the Van Praags' position could be secured by an extended lease, which could not be jeopardised by the statutory procedures open to the first respondent.

59. Furthermore, the extended lease granted under Chapter 2 would contain the same provisions as to alienation as do the current occupational leases of flats 3, 4 and 5, which it

will be recalled are unrestricted until the last seven years of the term. If Dr Van Praag's wish was not to sell the OL2, but to enjoy the extended lease, then the alienation provisions in the licence would not have troubled him.

60. Turning to a different element of the background, Mr Jourdan QC submits that the licence is consistent with the objective of the provisions of the OL1 leases and with the Grosvenor estate's letting policy (referred to above at paragraph 37). An exception has been made to allow this one long under-lease, but no further underleases are allowed. The absolute covenant prevents any argument about the reasonableness or otherwise of withholding consent; it prevents further complication to the leasehold structure. And whilst there is no evidence that GWEP intended to extract a premium in return for future consents, there is no reason why it should not have done so. It could of course have required the alienation provisions of the OL2 leases to be re-drafted in order to achieve this, in the form of an absolute covenant against all forms of alienation; but the licence covenant was an easy and straightforward way to achieve its purpose. Mr Jourdan QC suggests that the licence might well have been in the Grosvenor estate's standard form, and says that the alienation clause in the licence was wholly consistent with GWEP's policy of control – although of course it could not have prevented the grant of extended leases pursuant to the section 42 notices.

61. Thus, according to the respondents, there is no obvious mistake.

62. Turning to the authorities, Mr Jourdan QC referred to *The Interpretation of Contracts*; he agreed with Mr Gaunt QC that the factual, legal and commercial context was relevant, but stressed the limitations to the use of that background discussed at page 167 and following. At page 168 it is said that "the background cannot be used to introduce by a sidewind evidence of the subjective intentions of the parties". Nor can the background be used "to create the uncertainty of meaning [in the contract] and then use it again to resolve that uncertainty" (Hardie Boys J in *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 CA. Reliance on the background must be tempered by loyalty to the contractual text.

63. Moreover, a contract cannot be constructed or corrected on order to improve a bad bargain. Mr Jourdan QC relied on *Arnold v Britton* and referred to the bargain that was the subject of that appeal. The service charge provisions were apparently out of all proportion to the services to be provided, with the increase mushrooming over the years so as to overtake inflation and produce a payment that exceeded an index-linked payment by several orders of magnitude. Even faced with that obviously bad bargain, the Supreme Court refused to intervene. So here, even if the appellants are right to say that the effect of the alienation clause in the licence is to produce something commercially disastrous, there is no reason to regard it as a mistake that can be remedied by construction.

64. What is needed for the operation of the *East v Pantiles* principle, according to the respondents, is something wrong with the language rather than the bargain. And there is a high bar to be crossed. It must be the case that something *must* have gone wrong with the language; a failure to anticipate the consequences of the language is not enough (*The Interpretation of Contracts,* page 495). This case is a long way from the sort of error that was

corrected in *Re Daniels' Settlement Trusts* (1875) 1 Ch D 375 where a settlement declared trusts for a son, and then referred to "his or her" executors; the provision was corrected to refer to a son or a daughter; a similar correction was made in *Re Hargraves' Trusts* [1937] 2 All ER 545 where the clause in question had referred to grandchildren "who being male shall have attained the age of 21 years or being female shall have married under that age". The missing "shall have attained the age of 21 years or" was supplied after "female" so as to make sense of the provision.

65. Mr Jourdan QC observes that those advising the appellants, Pemberton Greenish (as they then were), and Boodle Hatfield who advised GWEP and the Grosvenor estate, were and are among the foremost experts in the field. It is not conceivable that they would have made a mistake, or allowed a mistake to go uncorrected. They of all people knew what they were doing.

66. Finally Mr Jourdan QC turned to the conclusions of the FTT. It found that there was no mistake in the terms of the licence, and that any mistake lay in the alienation provisions of OL2 which should, instead, have matched those of the licence. The single sub-letting permitted by OL1 has taken place, albeit for a longer term than anticipated, but further alienation is not allowed (pursuant to clause 16.3 of OL1). Therefore OL2, as well as the licence, should have prohibited further alienation, and Mr Jourdan QC adopts the conclusion of the FTT on this point. Again, such a covenant would not have prevented the grant of the long lease under Chapter 2 of the 1993 Act.

Conclusions on the correction of an obvious mistake

67. For a mistake to be corrected in the manner argued for by the Appellants the mistake must be obvious, and it must be obvious what the correction, or at least the gist of the correction, must be. I am unpersuaded that either of those conditions can be met.

68. First, the clause makes perfect sense as it stands, and I have not been referred to any case where the *East v Pantiles* principle has been used to make a correction to such a clause. Second, its inconsistency with the alienation clause in the OL2 lease does not necessarily mean that it is a mistake, because the licence and OL2 are between different parties. Third, even if a grammatically correct clause that fails to make commercial sense can be corrected in this way, it is not necessarily the case that this clause made no commercial sense.

69. To expand on that last point, whether or not the clause makes sense depends upon what the parties wanted to achieve. Their subjective intentions are of course irrelevant and I have to consider what parties in this position might have intended. The appellants and respondents characterise the situation in different ways; Mr Gaunt QC describes an act of generosity by the Grosvenor estate; knowing that it was about to lose its interests in the building it departed from its sub-letting policy for the benefit of its occupational tenants by permitting the grant of the OL2 leases, but in preparing the licences it inadvertently imposed a restriction on

alienation that it did not intend, and cannot have intended, and that the lessees of OL2 could not have accepted.

70. Mr Jourdan QC focuses on what happened later, namely the claim to extended leases under section 42 of the 1993 Act. The reality was that what mattered to the Van Praag family was the extended leases; they would survive a collective enfranchisement, and their alienation clauses would match those in the current occupational leases. After the grant of extended leases the Van Praag family would be able to continue living in the flats, or to alienate them without restriction until the last seven years of the term. The restrictions on alienation in licences were simply not a problem to them.

71. I do not have to decide what the plan was in 2011, nor what GWEP knew or intended when it granted the licences. I have to decide whether there is an obvious mistake in paragraph 3.3 of the licence. That might be the case if Mr Gaunt QC's characterisation of the situation were obviously right. I do not think it is. Overall it is unlikely that a party in GWEP's position would be particularly generous, and in these unusual circumstances – orchestrated by expert and ingenious lawyers - it could not be certain that it was about to lose its interest in the building.

72. Events that took place relatively soon after the service of the section 13 notices suggests that one reason why the OL2 leases were granted was to deter the respondent from proceeding with the collective enfranchisement. The Van Praag family argued that the respondent would have to buy the OL1 leases at their value on the date of the enfranchisement claim rather than subject to the OL2 leases. If that had succeeded then the Grosvenor estate might have retained its interests in the property. It is not known whether the Grosvenor estate was privy to this plan when it granted the licences, but looking purely at the objective picture built up by subsequent events it is perfectly possible that those advising the Grosvenor estate were aware that it might well have stayed on the scene for some time. It is therefore far from obvious that the Grosvenor estate in granting the licences was making a parting gift to the Van Praag family, and indeed it is unlikely that the Grosvenor estate would have been generous, let alone careless, about its future position.

73. I am unpersuaded by the suggestion that the price at which the GWEP lease was purchased by the respondent in 2012 demonstrates that it did not regard itself as having the benefit of paragraph 3.3 and a corresponding ability to extract premiums. In the absence of valuation evidence I cannot draw any conclusion from that price.

74. Another reason for the grant of the OL2 leases is likely to have been the creation of leases that the respondents could not acquire; see paragraph 32 above. If that was the plan, and it succeeded, then the Van Praag family would have been on both sides of the section 42 notice and their right to an extended lease would have been secure. If what the Van Praag

family was most concerned about was the grant of extended leases then, as Mr Jourdan QC argues, the alienation provisions of the licences would not have troubled them.[2]

75. I accept Mr Gaunt QC's point that the section 42 notices were not served until 2015 and that the Van Praag family may not have been planning to acquire extended leases in 2011 when the OL2 leases were granted. But it is unlikely that the Van Praag family was unaware of the possibility of doing so, in light of the expertise of those advising them and of the fact that another occupational tenant in the house had already gone down the section 42 route. I also accept Mr Gaunt QC's point that an extended lease granted pursuant to section 42 is vulnerable to the exercise by the competent landlord of the right given by section 61 of the 1993 Act to break the lease before its original termination date where he wishes to redevelop the building.[3] What seems to me significant is, first, that the Grosvenor estate was not necessarily about to lose its interest in the property and therefore had reason to protect its own position in granting the licences, and second that the terms of paragraph 3.3 may not have troubled the Van Praag family. Even if the collective enfranchisement went ahead and the Van Praag companies eventually lost the OL2 leases, the family would be entitled to extended leases with almost unrestricted alienation clauses. Even if section 61 was be invoked by Mr Wiggins, they would be entitled to the value of the extended leases, again with their almost unrestricted alienation clauses.

76. I do not, by the way, assume for a moment that those advising the Van Praag family and the Grosvenor estate were immune from error; but they were thoroughly familiar with the provisions of the 1993 Act and are likely to have advised their clients about the choices available to them.

77. The reason for the inconsistency between the alienation provisions in OL2 and the licence is not known. But in the light of what is known what is known about the transaction that took place on 11 April 2011 and the events that took place soon afterwards, paragraph 3.3 of the licences is not an obvious mistake.

78. If I am wrong about that, it is in any event unclear what to do about the mistake if there is one. Whilst it is possible for the court to add words to correct a mistake, their gist must be obvious, and that is not the case here. I asked Mr Gaunt QC why the tribunal would add the words he suggests, so as to create an alienation covenant which is in fact far more generous

[2] I draw no conclusions either from the making of the agreements between the OL2 lessees and the occupational tenants in 2015 (paragraph 31 above) or from their subsequent revocation (see the footnote to that paragraph). It is clear without reference to those transactions that the extended leases were in 2015 what the Van Praag family wanted; the additional agreements and their later tactical revocation add nothing to my understanding of what the parties intended in 2011 when the OL2 leases were granted.

[3] The respondents say that this is not relevant because the whole point of the creation of the OL2s was to create an interest that Mr Wiggins could not acquire; but it would have been known to all parties that that tactic might fail, as indeed it did.

than the covenant in OL2, thus replacing one inconsistency with another. His response was that it is not unusual for a superior landlord to have less control over alienation than the immediate landlord and that such an inconsistency would not be troubling. GWEP would in any event be protected by the operation of the covenants in the OL2. That may be right, but it leaves me wholly unclear as to whether the Tribunal should add the words contended for by the appellants, or the terms of paragraphs 12 to 16 in OL2, or something else. This is a far cry from circumstances where the missing words could be found in a previous draft of the clause, or the clause could be rescued by re-arranging the words without addition.

79. Accordingly I take the view that there is no obvious mistake in the words of the licence and that, even if I am wrong about that, it would not be obvious how to correct it.

80. Still less is it possible to see any mistake in the words of OL2, as the FTT suggested. The alienation provisions in OL2 matched those in OL1 and it is simply not possible to see why that would not be exactly what the parties wanted, even if GWEP was imposing something far more restrictive. I disagree with the FTT on that point, but like the FTT I find that the wording of the licence stands as it is.

The implication of a contractual term

81. The alternative argument for the appellants is that a term should be implied into the licences by the addition of the missing words to paragraph 3.3 so as to turn it into a fully qualified covenant. Mr Gaunt QC takes the view that this does not amount to the contradiction of an express term, but rather to the qualification and completion of what is express.

82. The leading authority is *Marks and Spencer Plc v BNP Paribas Securtities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; at paragraph 21 the familiar tests are reiterated. A term will be implied into a contract where it is necessary to give business efficacy to a contract or where it is so obvious that it goes without saying. The latter is often referred to as the “officious bystander” test. The two tests are alternatives but will normally generate the same conclusion, and it was not suggested that they would not do so in this case.

83. As to business efficacy, Mr Gaunt QC emphasised the need to rely upon context and upon the commercial situation. He argued that in the circumstances, where GWEP was about to be bought out but was willing to assist the Van Praag family to retain their rights, it was inconceivable that GWEP would impose a term that would leave the Van Praag family so much worse off than they had been. The implication of the qualification to the alienation covenant is necessary to make the licence work – not in the sense that the licence does not work at all without the qualification, but in the sense of giving it practical and commercial coherence.

84. In the same vein, if the officious bystander were to ask what was to happen if the OL2 tenant sought permission to assign to an unimpeachable assignee, and whether GWEP might

demand a premium for consent. Mr Gaunt QC suggests that GWEP would say no, of course that is not what is intended.

85. In *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56 the Supreme Court implied terms into an agreement for overage, where the parties had made provision for overage to be paid by reference to the price of an arms-length sale but had failed to provide for overage on the basis of value where the property was sold at an undervalue. At paragraph 15 Lord Hope (with whom the rest of the justices agreed) said that it was right to begin with what the agreement appears to have had in mind in the overage provisions. At paragraph 22 Lord Hope asks what the parties would have said about their intentions if they had been asked:

> "the context shows that the intention of the parties must be taken to have been that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. In other words, it can be assumed that this is what the parties would have said if they had been asked about it at the time when the missives were entered into".

86. Similarly, it is argued that if GWEP had been asked whether it intended an absolute lock on alienation, it would have said no, and that that was why the terms of OL2 matched the alienation provision of OL1.

87. Mr Gaunt QC accepts that the language of paragraph 3.3 is against the appellants and imposes a high hurdle. Nevertheless the parties must have intended a qualified prohibition. They could not have intended the grant of inalienable leases for 111 years; implication is necessary to make the contract work.

88. The respondents' case on implication is that it is unnecessary. This is not a case where the parties have failed to make provision for a particular eventuality, as did the parties in *Aberdeen City Council v Stewart Milne Group Ltd* [2011 UKSC 56. The licence makes comprehensive provision for alienation and there is no reason to imply anything further.

89. Again I am unpersuaded by the arguments for the appellants. The tests for implication are clear. It is not necessary to imply a term into the licence to make it work. The officious bystander who asked whether GWEP would be content for the tenant under the OL2 lease to grant a 15 year lease in accordance with the terms of OL2 would not get an "oh of course"; the bystander would be told to read paragraph 3.3.

90. The FTT rejected the argument for implication. It took the view that the mistake lay in the alienation provisions of OL2, which should have matched the provisions of the licence, and that therefore there was no reason to imply anything different in the licence. I would not put it that way, since I see no obvious mistake in the provisions of OL2. Nevertheless, but on the basis of different reasoning, I agree with the FTT that there is no scope for the implication of a term in the licences, and the appeal fails on this point too.

Conclusions

91. Accordingly, both the arguments for the appellants fail and the appeal is dismissed.

Elizabeth Cooke
Upper Tribunal Judge
17 October 2019