FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/OCE/2018/0179**
Property	**:**	**45 – 47 South Street, London W1K 2XQ**
Applicant	**:**	**Nigel Wiggins**
Representative	**:**	**Mr Stephen Jourdan QC and Mr Tom Jefferies, Counsel both instructed by Withers LLP**
Respondent	**:**	**(1) Langbourn Properties (FH4547SS) Limited** **(2) Regent Wealth Limited** **(3) Silver Garden Investments Limited** **(4) Garden Bay Holdings Limited**
Representative	**:**	**For Respondents (2), (3) and (4) Mr Jonathan Gaunt QC and Mr Anthony Radevsky, Counsel instructed by Pemberton Greenish**
Type of Application	**:**	**Application under section 24 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mrs E Flint DMS FRICS IRRV** **Mr L Jarero BSc FRICS**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on 21st January 2019**
Date of Decision	**:**	**7th February 2019**

DECISION

DECISION

1. **The Tribunal determines that the price payable in respect of the overriding lease 2 for Flat 3 (as defined below) is £3,035,000.**
2. **The Tribunal determines that the price payable in respect of the overriding lease 2 for Flat 4 (as defined below) is £1,085,000.**
3. **The Tribunal determines that the price payable in respect of the overriding lease 2 for Flat 5 (as defined below) is £1,025,000.**

BACKGROUND

1. On 12th February 2018 notice was served under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act) on Langbourn Properties (FH4547SS) Limited by the participating qualifying tenants set out in schedule 1 to that notice. The premises for which the freehold was proposed to be acquired is 45 – 47 South Street, London W1K 2XQ (the Property).

2. The section 13 notice proposed that there should be an acquisition of a number of leasehold interests in the Property but for the purposes of this hearing we are requested only to deal with the overriding leases dated 31st January 2005 and 7th April 2011 as are set out on the schedule attached to this decision. With thanks to the parties we were told at the commencement of the hearing that all valuation issues had been agreed. The only issue that we needed to determine was the effect of a covenant concerning underletting contained in the Licence to Underlet (the Licence) dated 7th April 2011 between Grosvenor West End Properties (GWEP) and in the case of the 3rd and part 4th floor flat between Regent Wealth Limited (2) and Silver Garden Investment Limited (3). We were told that the Licence had been granted in the same terms in respect of the three overriding leases, the details of which are set out in the schedule annexed to this decision. The issue we needed to determine was the interpretation of clause 3.3 under the heading 'Under Tenants Covenants' which says as follows:

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

   The parties had very helpfully agreed the impact that the imposition that such clause would have on the value of the overriding leases dated 7th April 2011 which we shall call OL2's. In respect of Flat 3, if it is found that the alienation covenant is qualified, that is to say that consent could be obtained from the party holding the benefit of the covenant, the price to be paid is £4,295,200. In respect of Flat 4 on the same assumption, the price to be paid is £1,539,000 and finally in respect of Flat 5, the price to be paid is £1,447,300.

3. However, if we find that the alienation covenant in the Licence is absolute, that is to say that the holder of the OL2 is unable to subsequently assign or part with possession etc, then the value in respect of Flat 3 reduces to £3,035,000, for Flat 4 to £1,085,000 and to Flat 5 £1,025,000.

4. Accordingly, there is a difference in total value that might be required to be paid by Mr Wiggins to the three companies of some £2,136,500 depending upon which route we take.

5. It is we think helpful to provide something of the background as to how the matter got to this position.

6. At the time the matter came before us on 21st January 2019 the title to the Property was as follows: the freehold was held by Langbourn Properties Limited. A lease to GWEP was now held by Mr Wiggins and expires on 24th March 2184. From that lease overriding leases called for the purposes of this case OL1's, and as set out on the schedule annexed hereto, were granted to Regent Wealth Limited(RW), Silver Garden Limited (SG) and Garden Bay Limited (GB). Mr Wiggins also had an overriding lease granted to him but is not relevant for the purposes of considering this matter. Accordingly, when Mr Wiggins first served a notice seeking collective enfranchisement on 22nd December 2010, the initial notice indicated an intention by Mr Wiggins as the nominee purchaser for the participating tenants to acquire the freehold of the Property with rights over adjacent property, a management lease, two intermediate Grosvenor Estate leases, including what was termed the enforcer lease, and for the purposes of these proceedings the overriding leases granted to RW, SG and GB on the 31st January 2005.

7. Unfortunately, for reasons that can presumably only be put down to an error, registration of this initial notice was not made at the Land Registry and accordingly section 19 of the Act did not come into play. To exploit this error the companies RW, SG and GB entered into in effect cross overriding leases so that SG took from RW, GB took from SG and RW took from GB these leases being known as OL2 in this scenario and all dated 7th April 2011 expiring on 15th September 2122. The OL2's were essentially on the same terms as the OL1's and with remarkable alacrity registered at HM Land Registry on 8th April 2011.

8. This resulted in proceedings by Mr Wiggins attempting to amend the original section 13 notice so that he could acquire the OL2's. He was unsuccessful in that attempt and the reasoning is set out in a Court of Appeal judgement in case [2014]EWCA Civ 1078. Mrs Justice Gloster gave the lead judgment and sets out in considerable detail the history of the ownership, which we have paraphrased above. The upshot of this, however, was that Mr Wiggins did not proceed with the initial notice under section 13 as that would have resulted in him paying more than the true value for the overriding lease. A witness statement from Mr Huibert Johannes Van Praag was included with the papers and expanded upon the history and the reasoning behind the steps to create the OL2's.

9. Matters become further complicated because on 20th February 2015 Mr and Mrs van Praag who own the occupational leases for the three flats, served notices under section 42 of the Act seeking extensions. The existing occupational leases expire on 19th September 2023 and the section 42 notice, if proceeded with would result in these lease terms being extended to 19th September 2113. The reasoning for this is set out in a report by Mr Martin prepared for the purposes of assessing the value of the section 42 notice, in which he says as follows at Background 1.3 " *Although you possess long leases of the flats already through companies you ultimately control, those leases are presently intermediate leases and therefore vulnerable to being compulsorily acquired by Mr Wiggins. By serving a notice of claim for each flat (the claim/the notices) you will ensure that, even if he does*

acquire the intermediate leases, you will still possess an interest of nearly 100 years which he will not be able to acquire. At the same time, it is proposed that Alexander Van Praag assigns his interest in Flat 5 to Dr and Mrs van Praag. The effect of this will be to reduce the number of qualifying flats in the Property to below the minimum required assuming this tactic is successful it will relegate the claims to a secondary line of defence." As can be seen there has been a good deal of tactical manoeuvring by individuals and through companies to get to the position where we find ourselves at the time of this hearing. Further tactical manoeuvring enabled Mr Wiggins to serve a further section 13 notice in February of this year when he granted an intermediate lease to his sister of the 3rd floor property giving him the necessary control to serve this further notice.

10. Prior to the hearing we received a substantial amount of papers, the most of which were of irrelevance at the time the matter came before us as so much had been agreed between the parties. What, however, was important to note was the terms of the original overriding leases by GWEP to either RW, SG or GB dated 31st January 2005. Of particular importance in this case are the provisions contained at paragraph 12 onwards of the Third schedule. It is helpful if we set those out.

11. Paragraph 12 says as follows: *"A tenant will not charge any part (as opposed to the whole) or 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 under lease subsisting at the date hereof provided that 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 (a breach (sic)) of this paragraph <u>SUBJECT TO</u>:*

12.1 The tenant notifying the landlord of the occupiers from time to time if 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 hereby created.
13 (subject to paragraphs 14-16) 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 <u>PROVIDED THAT</u> with such approval (not to be unreasonably withheld). The tenant may assign or underlet a whole floor of the premises either on the terms of paragraph 16 or for the term hereby created less a nominal reversion for a peppercorn ground rent (other than service charge).
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 both 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;
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 absolutely prohibit absolutely any further assignment underletting charging or parting with or sharing possession or occupation of the whole or any part of the premises.

12. It is accepted we understand that the provisions of the 2005 OL1 and 2011 OL2 are the same in this regard.

13. We also received skeleton arguments from Mr Jourdan QC and unfortunately not until the morning of the hearing from Mr Gaunt QC, although through no fault of his. We had the opportunity of reading both, which were of assistance to us and we are grateful to Counsel for their assistance.

14. We should also mention that the proceedings were recorded by way of stenographer and we received on the day after the hearing a transcript of the submissions made to us by both Counsel, which has also been of assistance. We hope that both sides will forgive us if we do not recount in great detail the matters set out in the parties' respective skeleton arguments and as are set out in the transcription of the submissions made to us.

15. On behalf of the Applicant Mr Jourdan, whose skeleton was prepared before so much of the valuation issues were agreed, gave detailed views as to his interpretation of the Licence covenant which are set out at pages 13 onwards of his skeleton. Reference is made to a number of cases but in particular Arnold v Britton [2015]UKSC36 as well as Thompson v Goblin Hill [2001]UKPC8, Chartbrook Limited v Persimmon Homes [2009]UKHL38 and Ali v Petroleum Company of Trinidad and Tobago [2017]UKPC2. In addition to these cases, Mr Jourdan took us to the provisions of the Landlord and Tenant Act 1927 (section 19(1) and the Landlord and Tenant Act 1988. His submission in regard to the legislation was that the statutory provisions did not apply to a covenant given by a prospective sub-tenant to a landlord in a licence. Further where the licence covenant was an absolute covenant and not a covenant against alienation without consent of the landlord, the legislation does not apply. His submission was that the effect of the Licence means that the hypothetical purchaser of OL2 will not be able to assign, underlet or part with possession or occupation of whole or any part of the flat unless he is able to secure a release of the covenant from the owner of the GWEP lease.

16. This obviously has an impact on the price that a purchaser would pay for the OL2 and that impact has been agreed by the parties depending upon the route that we take.

17. Mr Jourdan went on to address what he understood to be the Respondent's arguments either that clause 3.3 of the licence covenant was in error, that there was a mistake and that it should be interpreted as though it included the wordings not without the landlord's consent (not to be unreasonably withheld) or in the alternative that there was an implied term to the effect that the tenant may assign

charge underlet etc if the landlord's consent is first obtained and such consent should not be unreasonably withheld.

18. Mr Jourdan then went on to consider the law in respect of the correction of mistakes and here relied on the judgment of Lord Neuberger in the Arnold v Britton case and by reference to comments made by Brightman LJ in the case of East v Pantiles [1982]2EGLR111 all of which dealt with the basis upon which a court could correct a mistake by interpretation for which the Chartbrook case was cited as assistance. His submission to us was that in order to correct an instrument by construction two conditions must be satisfied. The first was that there must be a clear mistake on the face of the instrument and secondly it is clear what correction ought to be made to cure the mistake. He submitted to us that if there was more than one plausible alternative correction the mistake can only be put right by rectification, which is not within our jurisdiction and not by construction. His submission was there was no obvious mistake in clause 3.3 of the Licence as this was also consistent with the Grosvenor's published residential policy letting in October 2008. It was said that this was relevant at the time of the granting of the OL2 in 2011.

19. The policy is as follows: *"The majority of residential leases contained a clause regarding subletting of residential property. Subletting is the occupation of the premises by someone other than the lessee. This occupation is usually on a contractual lease or on an assured shorthold tenancy. 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 20 years. The 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 premises and not part.* It was, Mr Jourdan said, clearly Grosvenor's intention to create "tight restrictions on what sub-tenants can do." It was submitted also that there were very good commercial reasons why a person in GWEP's position might wish to impose an absolute covenant, not least of which is the ability to charge for the release of same.

20. It was drawn to our attention that the licence appeared to have been prepared by Boodle Hatfield and that Pemberton Greenish had acted for the Respondent companies. Both eminent law firms and experts in the field of residential leasehold and it was submitted that it would be inconceivable that they would have agreed to clause 3.3 of the licence covenant if it was intended to be a qualified covenant. Accordingly, there was no obvious mistake.

21. Mr Jourdan then went on to deal with the implication of a term rather than the interpretation of same. Here the cases of Marks and Spencer and Ali v Petroleum Company of Trinidad and Tobago were of assistance and sections of the judgments were recited, which we will return to as necessary in the findings section of the decision. In essence, however, it was Mr Jourdan's submission that there was no possible basis for implying a term in the present case nor was there any business efficacy that needed to be considered and to be read into the Licence.

22. He expanded on these points in his verbal submissions to us. He reminded us that no correspondence had been produced by the Respondents at the time of the

grant of the overriding lease OL2, which in certain circumstances is inadmissible but may have been of some assistance.

23. In response Mr Gaunt on behalf of the Respondent companies RW, SG and GB, drew to our attention that the covenants in the OL2 are as those in the OL1 containing a fully qualified covenant against assignment or subletting with approval of the landlord. His submission was that the Licence properly interpreted did not prevent the undertenant from dealing with the property.

24. He set out five principles which we should consider and they were as follows:

- The documents are to be interpreted in the light of all the surrounding facts known to both parties at the date of the document.
- That it includes contemporaneous documents forming part of the same transaction which are to be read together as a single document.
- The apparent inconsistencies are to be resolved by giving effect of that part which is calculated to carry into effect the main purpose of the transaction as a whole.
- The obvious mistakes in the drafting can be corrected as a matter of construction.
- That a term may be implied where it is necessary to give the transaction commercial coherence.

25. After reciting the history of the dealings between the companies and Grosvenor and the involvement of Mr Wiggins, he was of the view that the licence at clause 3.3 omitted wording which was obviously a mistake on the part of the draftsman. His submission was that it would make no sense whatsoever to enter into an underlease for over 100 years intending to govern the right to occupy from 2023. The licences he submitted were part of a transaction entered into where it was known that Mr Wiggins was about to become the landlord for the purposes of clause 3.3 of the licence and the OL1 and 2. An absolute prohibition on alienation in one document would be wholly inconsistent with the qualified prohibition in another. It was said that the Licence and OL2 were contemporaneous documents and part of the same transaction and should therefore be read together.

26. He then went to outline the basis upon which we could correct mistakes by construction and referred to the case of East v Pantiles Plant Hire Limited [1982]2EGLR111. The judgment of Lord Justice Brightman says that 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. It was suggested to us that we must take into account such evidence of background facts as would be admissible in order to interpret the document, which include the aim and genesis of the transaction but that no evidence of subjective intention of the parties or evidence of the negotiations could be accepted.

27. Alternatively, we should imply wording into the contract which removed any inconsistency or absurdity. That wording would be that clause 3.3 of the licence would be amended to include *"without the landlord's consent, not to be*

unreasonably withheld." The implication of this term would be to satisfy the business efficacy test. In verbal submissions to us he repeated elements of the skeleton argument. He reminded us that Dr and Mrs van Praag had undertaken the creation of the OL2's to secure their occupancy, they having spent a good deal of money on the flats, one of which was intended to be their London home and another had provided a home for their son. He referred us to the inter-relationship between the OL1's and OL2's and drew to our attention some of the wording such as 'supplemental', 'collateral' and cross-reference between the various documents. He accepted that the OL2 did not comply with the provisions of OL1 in that it was a lease of more than 20 years. Clearly it was the intention to create a lease in the same terms of the OL1 and indeed at clause 3.2 of the licence the following wording is to be found under the heading Not to Commit Breach of Lease:

"3.2 Not to do or permit to do or suffer to be done or omitted at or in relation to the premises any act or thing which would or might cause the tenant to be in breach of or which if done or omitted or suffer to be done or omitted by the tenant would or might constitute a breach of the lessee's obligation in the lease."

28 This clause comes under the heading for clause 3 of undertenant's covenants. In effect, therefore, this bound the undertenant to the terms of the OL1. However, his submission was that underletting by the subtenant would not be breach of the OL1. The alienation clause prevented any use save by the undertenant for their own use of the property and for a lease with 110 years left to run this, he submitted, was impracticable and absurd. The granting of the lease between the companies was made with the original section 13 notice in mind and before the Court of Appeal had made their findings known on the ability to amend.

29. The indications were that Mr Wiggins would become the landlord in place of GWEP and the landlord under the OL1. The intention was to avoid this causing problems with alienation and the whole exercise was to enable the Respondents to continue to occupy under the terms of the occupation leases. His submission was that on the face of it, the present situation as submitted by the Applicants was an absurdity. You were faced with 111 year lease with an absolute prohibition against assignment, the covenant was inconsistent between those two leases and that it could be nothing but a drafting mistake.

30. He took us through the various authorities but also drew our attention to the textbook by Lewison and various sections therein. He reminded us that it was said that a document executed contemporaneously with, or shortly after, the primary document to be construed may be relied upon as an aid to construction if it forms part of the same transaction as the primary document. This textbook also referred to the East v Pantiles case and the judgment of Lord Justice Brightman which we have referred to above. That textbook also goes on to say that if it is not clear what correction should be made the court cannot intervene. He reminded us that pre-contractual correspondence was not admissible and therefore had not been disclosed in this case.

31 Under the question of implication, he submitted that this was similar to interpretation but that implication meant *adding*. He referred us to the Marks and Spencer's case and the need for business efficacy to be achieved. He

reminded us again that the Licence and the OL2 contained differing wording and that no-one would take a lease for 100 years which you could do nothing with. Indeed, he posed the question, why would Grosvenor want to impose such a restriction when it was not contained in the OL1. The policy document which we had referred to earlier from Grosvenor applied to short leases. There had he said been a mistake by both solicitors and it would be correct to put that right by construction and/or implication. He accepted, however, the burden of proof rested with the party who alleges such "absurdity."

32. In response, Mr Jourdan indicated that it was apparent to all concerned that Mr Wiggins would become the owner of both leases. However, the promises were not made to Mr Wiggins but to GWEP. The consents related to a transfer between companies controlled by Dr and Mrs van Praag. The point of creating the OL2 was to block Mr Wiggins. The section 42 notice gave the protection to Dr and Mrs van Praag as the new leases would be granted to them on the same terms as the existing one, which contained very little prohibition against assignment save for the last seven years of the term. To all intents and purposes, therefore, his submission was that the OL1 and 2 would become inconsistent and somewhat irrelevant.

33. He submitted that whilst he accepted that Grosvenor had been asked to help Dr and Mrs van Praag this was to be a "one off" hence clause 3.3 in the licence. If there was a mistake, it was not obvious as to what is was. He also reminded us that even though the clause would stop commercially renting it would not prevent the transfer of the Property by use of a company vehicle.

34. As a matter of comment on the question of disclosure, his view that correspondence would be admissible to show what facts were known to the parties. These were professionally drafted documents.

FINDINGS

35. We are grateful to Mr Jourdan and Mr Gaunt for their eloquent submissions made to us both in writing and at the hearing. We can see force in both sides. In reaching our decision we have taken into account the various cases cited to us. We have also noted the judgment of Carnworth LJ in KPMG LLP v Network Rail in which it was said that in deciding whether there is a clear mistake the Court is not confined to reading the document without regard to its background or context. As the exercise is part of a single task of interpretation, the background and context must always be taken into consideration. What was required of us it appears was "that there should be something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant." However, it has been said in further cases that it is something wrong with the language as opposed to the implementation of the bargain.

36. The decision of Arnold v Britton and the judgment of Lord Neuberger was referred to us in some detail. In his judgment he emphasized seven factors to be taken into account. At paragraph 17 of case report he confirmed that reliance on commercial common-sense and the surrounding circumstances should not be invoked to under value the importance of the language which is to be construed.

As he said, save in very unusual cases the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision. At paragraph 18 he said as follows: *"Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or to put it another way, the worse their drafting, the readier the Court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the Court embarking on an exercise of searching for let alone constructing, drafting infelicities in order to facilitate the departure from the natural meaning. If there is a specific error in drafting it may often have no relevance to the issue of interpretation which the Court has to resolve."* The judgment then sets out the remaining points that should be considered in dealing with the interpretation of the contract.

37. In the Chartbrook v Persimmon case it was held that the Court would not easily accept that linguistic mistakes had been made in formal documents, but if the context and background drove the Court to conclude that something had gone wrong, then applying the reasonable person review changes could be made and corrections of mistake undertaken. The judgement also dealt with the admission of previous communications between the parties and accepted that evidence of pre-contractual negotiation was not admissible in support of construction of the contract.

38. In the East v Pantiles case it was said by Brightman LLJ that there were clear authorities that a mistake in a written instrument can in certain limited circumstances be corrected as a matter of construction without an action for rectification. However, two conditions must first be satisfied; one, that there must be a clear mistake on the face of the instrument and secondly, that it must be clear what correction ought to be made to cure the mistake. If those are not clear, then an application for rectification should be made. We noted also the decision of the Supreme Court in Marks and Spencer as to implication of terms and Thompson v Goblin Hill which set out the basis upon which the plain and ordinary meaning of words used in a commercial contract could be displaced.

39. The background to the licence consent and the grant of the OL2 is clearly on the basis that Mr Wiggins had issued a section 13 notice to the surprise of Dr and Mrs van Praag who were concerned to ensure that they could maintain their position in the Property, notwithstanding this course of action by Mr Wiggins, which appears to have been contrary to discussions that they had previously.

40. The solicitors acting on behalf of Dr and Mrs van Praag and their companies devised the plan, largely as a result of Mr Wiggins' failure to register the original section 13 notice, which enabled further overriding leases to be created. These leases did not form part of the original section 13 notice. With changes to the occupational leases by Dr and Mrs Van Praag it meant that Mr Wiggins would be unable to subsequently serve a section 13 notice as there was insufficient qualifying tenants. However, this was overcome by some tactical movement on leasehold interests to enable a fresh section 13 notice to be issued in February of 2018. In that intervening period, in fact in February of 2015, section 42 claims had been issued by Dr and Mrs van Praag to seek extensions to their occupational

leases until 19th September 2113. These would be nine years short of the terms of the OL2's. Nonetheless, it would give them a period of occupancy, which would, we suggest, see them off this mortal coil and as a result of the terms of the occupational leases include little or no prohibition against subletting or assignments.

41. The licence to underlet is between GWEP and two of the companies controlled by Dr and Mrs van Praag. In the Licence GWEP are referred to as the landlord, in the copy we have RW is the tenant and SG the undertenant. The Licence is said to be supplemental to the underlease, which is defined in schedule 2 as that dated 31st January 2005 made between GWEP and RW. This Licence is said to be supplemental and collateral to that lease. The Licence is on the basis that the landlord has agreed to grant consent on the terms set out below, to an underletting of the premises to the undertenant SG until 14th September 2122. The term of the underlease is annexed to the Licence.

42. The undertenant's covenants are set out at paragraph 3, which include an obligation to comply with the underlease and to pay rents reserved, not to do anything which may cause RW to be in breach of the obligations under the 2005 lease and, importantly for the purposes of this case, not to assign charge underlet or part with or share possession or occupation of the whole or any part of the premises. There then follows a tenant's covenants which includes an obligation to enforce compliance by the undertenant with the obligations in the underlease. We have already set out the wording in the underlease concerning the ability to assign or sublet and there is no doubt that on the face of the OL2 and the licence covenant there is inconsistency between the subletting provisions. However, it seems to us that the Licence is made by reference to the underlease dated 31st January 2005. That contains at paragraph 16 the following wording:
"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."

43. In this case it seems to us that the consent that is being granted by GWEP is to RW to create an underlease for more than 20 years which is on terms no less onerous than those in the original OL1 but which prohibits further assignments, sublettings etc. That is exactly what the Licence says. That is consistent it seems to us, and we find, with the provisions of the OL1. The error in this case seems to rest with the provisions of the OL2 that mirror the OL1 subletting provision. When one considers the restrictions on subletting which were imposed by Grosvenor in the 2008 document, which we have referred to above, and the fact that the real intention in this was to prevent Mr Wiggins from proceeding with a collective enfranchisement, the OL1 and the licence seem to us to be consistent. Furthermore, the licence prepared by Boodle Hatfield is, we assume, as they intended. The underlease is prepared by Pemberton Greenish. Both firms of solicitors are acknowledged experts in this realm. If it is such a glaring error we do not understand why it was not corrected at the time.

44. We need to be satisfied that there is a clear mistake presumably either in the Licence or in the OL2. The Licence is quite clear in its language and we accept Mr Jourdan's submission that it makes commercial sense for GWEP to include such a restriction when seeking to help Dr and Mrs van Praag avoid the actions of Mr Wiggins. In so helping, why should GWEP not take advantage of any payment that may come from a licence to assign. That ability to grant a licence to assign would, on the basis of the values attributed by the parties in this case, appear to be quite substantial and may be something that would be borne in mind on any enfranchisement. We do accept that in 2011 the question of the section 13 notice then issued was still in the air but we are satisfied that the advice given to Dr and Mrs van Praag by Pembertons resulting in these OL2's remove that as a potential threat. In those circumstances, GWEP would remain the prospective landlord for some time. There is, therefore, business efficacy in them including such a provision in the licence to underlet. Further, the inclusion of that provision is not inconsistent with the terms of the OL1.

45. If the OL2 contains a mistake then it seems to us that mistake is not to reflect the Licence wording. Accordingly, a correction to include in the OL2 the Licence wording would be of no assistance to the Respondents.

46. We find, therefore, that the wording of the licence to underlet is quite clear and does not in our findings create a mistake that we can resolve. Furthermore, if rectification is sought, that is not within our jurisdiction. There is no implication it seems to us that we can carry forward. The wording proposed by Mr Gaunt as being inserted into the licence would in our finding be inconsistent with the provisions for underletting contained in the OL1 and the Licence itself. In those circumstances, it does not seem to us that we can correct any document by way of implication.

47. On the question of business efficacy, the OL2's are held by limited companies and it seems to us it would be possible for those shares to be transferred to another, which would allow a continued occupation of the premises. Furthermore, it would be open to the companies owned by Dr and Mrs van Praag to reach some agreement with GWEP, or subsequently Mr Wiggins, to have the restriction on alienation removed. However, that is perhaps not a step that needs to be contemplated. If the section 42 notice is proceeded with, both Dr and Mrs Van Praag will have leases for a substantial period of time, only some nine years less than the OL2's, with which they can occupy their flats with little or no prohibition against subletting save in the last seven years. In those circumstances, therefore, we prefer the arguments of the Applicants in this case and conclude that the values payable for the OL2's are as set out in the supplemental statement of agreed facts, namely £3,035.000 for Flat 3, £1,085,000 for Flat 4 and £1,025,000 for Flat 5.

Andrew Dutton

Judge: A A Dutton

Date: 7th February 2019

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

LON/00BK/OCE/20189/0179

45-47 South Street, London, W1K 2XQ

Schedule of overriding leases

OL1's

Overriding lease of the 3rd and 4th floor flat dated 31st January 2005 made between Grosvenor West End Properties (1) and Regent Wealth Limited (2) for a term commencing on 31st January 2005 and expiring on 25th September 2122.

Overriding lease of the 4th floor flat dated 31st January 2005 made between Grosvenor West End Properties (1) and Silver Garden Investments Limited (2) for a term commencing on 31st January 2005 and expiring on 25th September 2122.

Overriding lease of the 5th floor flat dated 31st January 2005 made between Grosvenor West End Properties (1) and Garden Bay Holdings Limited (2) for a term commencing on 31st January 2005 and expiring on 25th September 2122.

OL2's

Overriding lease of the 3rd and 4th floor flat dated 7th April 2011 made between Regent Wealth Limited (1) and Silver Garden Investments Limited (2) for a term commencing on 7th April 2011 and expiring on 15th September 2122.

Overriding lease of the 4th floor flat dated 7th April 2011 made between Silver Garden Investments Limited (1) and Garden Bay Holdings Limited (2) for a term commencing on 7th April 2011 and expiring on 15th September 2122.

Overriding lease of the 4th floor flat dated 7th April 2011 made between Garden Bay Holdings Limited (1) and Regent Wealth Limited (2) for a term commencing on 7th April 2011 and expiring on 15th September 2122.