FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UH/OCE/2021/0019/AW
Property	**:**	Flats 1-6 Sunbury Court Mews, Lower Hampton Road, Sunbury-on-Thames, TW16 5PF.
Applicant	**:**	River Mews Limited
Representative	**:**	Lease Law Limited
Respondent (1)	**:**	Beata Anna Bailey
Representative	**:**	KWW Solicitors

Type of Application	**:**	Collective Enfranchisement S.24(1) Leasehold Reform Housing and Urban development Act 1993
Tribunal Member(s)	**:**	Judge D Whitney Mr W H Gater FRICS MCIArb
Date of hearing	**:**	15th June 2022
Date of determination	**:**	25th July 2022

DETERMINATION

BACKGROUND

1. The application was made on 25 August 2021. Various sets of directions were issued including listing the matter for a hearing.

2. It appeared that the parties had agreed the premium payable for the Specified Premises and matters in dispute related to the form of the transfer to be entered into.

3. The Applicant supplied an electronic bundle and references in [ ] are to pages within that bundle.

The Law

4. The relevant law is set out in the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). Section 1 of that Act is annexed hereto.

Hearing

5. The hearing took place in person at Havant Justice Centre. The Applicants were represented by counsel Mr Piers Harrison and the Respondents by counsel Mr Stan Gallagher. Both had provided skeleton arguments.

6. The below is a synopsis of the submissions made.

7. The Tribunal confirmed they had sight of the updated bundle provided on 14th June 2022 and counsel's skeleton arguments. They had also watched in advance a YouTube video prepared by one of the leaseholders showing the site in question. Whilst not provided for within the directions Mr Gallagher confirmed he had no real objection the Tribunal having viewed the same.

8. It was agreed by counsel that whilst the Premium for the specified premises had been agreed, in fact there was no agreement as to the premium payable for the appurtenant land and whether or not this was to be enfranchised. Mr Gallagher submitted it was agreed that the appurtenant land, referred to as the yellow land, was not to be enfranchised. He relied on the statement of agreed matters [141-142]. It was agreed by both counsel that this was a matter the Tribunal would have to determine.

9. Counsel for the Applicant suggested the matters to be determined were:

a) Whether the rights offered in lieu of acquisition of the appurtenant land meet the requirements of s. 1(4) of the 1993 Act.
b) Whether the Respondent is entitled to seek to impose terms which were not set out in the counter-notice and if so the wording of those terms.
c) Whether the Respondent is entitled to any restrictive covenants.
d) The terms and wording of the Transfer.

10. Mr Harrison suggests that it was clear that the extent of the appurtenant land was not agreed. He suggested that nothing in the statement of matters agreed [141] suggested that the Applicants agreed the extent of the appurtenant land. Further he suggests Mr Gallagher is not taken by surprise given he addresses the issue within his skeleton argument.

11. Mr Harrison referred to the Initial Notice [26-29]. The same attached a plan and provided that it was proposed to acquire the Head Lease. It identified the Specified Premises and the appurtenant property which was edged in yellow and throughout the hearing was referred to as "the Yellow Land". The Counter Notice [34-37] admitted the right to enfranchise but proposed different terms. Mr Harrison suggested that the Respondent was now seeking to improve on the terms claimed within the Counter Notice.

12. Mr Harrison referred to the Head Lease [52-64] and the covenants contained within the same. It was said the Headlease title was not as extensive as the land which the Initial Notice sought to enfranchise. It was now agreed by both counsel that the Headlease would continue to subsist after the enfranchisement. Mr Harrison agreed the plan at [166] set out all the various different areas to which both counsel had referred in their respective skeletons.

13. Mr Harrison accepted that clause 3(8) of the Head lease provided for the leaseholder of that lease being, Sunbury Court Mews Limited (a company in which all leaseholders, including those not participating, had an interest) contributing 52.5% of any maintenance costs. Mr Harrison submitted that lease contained no express landlords repairing covenant.

14. Mr Harrison referred to the lease of Flat 5 which was included as a sample lease [102]. The various schedules set out the rights and reserved property and had a plan attached [124].

15. Mr Harrison stated that Section 1(2) of the 1993 Act allowed those looking to enfranchise to purchase what is known as appurtenant land. Section 1(4) provided three different alternatives to acquisition which a freeholder

could offer. The issue in this case was whether the Respondents offers satisfied these tests.

16. Mr Harrison submits that all of the Yellow Land on the plan attached to the Initial Notice falls within section 1(2)(a) of the 1993 Act. Mr Harrison submits the Respondent as freeholder cannot grant rights as are required under Section 1(4) of the 1993 Act as she cannot grant rights on behalf of the intermediate freeholder.

17. The Applicant submitted that the Respondent is bound by the terms of the Counter Notice served and in support he relies on Hague Seventh Edition paragraphs 28-15. Further he relies on the case of Greenpine Investment Holding Ltd v Howard de Walden Estates Ltd [2016] EWHC 1923 (Ch) in support of his contention the Respondent cannot seek terms not set out in the Counter Notice.

18. Mr Harrison also referred the Tribunal to 4–6 Trinity Church Square Freehold Ltd v Corporation of the Trinity House of Deptford Strond [2017] L. & T.R. 25.

19. Turning to the proposed restrictive covenant the Applicant submits this materially enhances the Respondents position. Mr Harrison suggests no evidence was advanced by way of a surveyor or otherwise that the Respondent required such a covenant to maintain the value or otherwise of the retained land.

20. With regard to further rights he suggested there was no basis upon which the Applicants should be required to contribute towards the land retained by the Respondent. Likewise costs they may incur.

21. Mr Harrison concluded his submissions on the terms in dispute and the Tribunal took an early luncheon adjournment.

22. Upon resumption Mr Gallagher made his submissions. He relied on his earlier preliminary submission that the parties had agreed that the Yellow Land was not to be conveyed but to be retained and it was simply the terms of the transfer that remained in dispute. It was his submission that it was too late for the Applicant to now challenge this point and relied on section 38(4) of the 1993 Act.

23. He suggests that the statement of agreed facts [141] is silent as to the appurtenant land. He suggests that this sets out binding and enforceable terms. Likewise he suggests the application [9] is silent on this issue.

24. If the Tribunal is against him on that point he suggests that the Respondent can satisfy the Tribunal that the rights offered are equivalent to what they enjoy.

25. He agreed with Mr Harrison that it is only the Respondent who can grant rights. He submits it can do so subject to and with the benefit of the head lease. He suggests that Section 1(4)(a) and the words "as nearly as maybe" are words designed to cater for a situation such as exists here. Provision can be made for after the head lease falls in and the rights then take place in perpetuity. He reminded the Tribunal the intermediate leaseholder is a company owned by the lessees.

26. Mr Gallagher confirmed that the Respondent had proceeded on the basis the head lease would fall in but he accepts that as a matter of law this will not happen and that the Applicant can acquire the head lease as part of the enfranchisement. For completeness he confirmed his client does not oppose the fact that the Applicant may acquire the entirety of the head lease. The area of dispute is essentially whether or not the Applicant can acquire the reversion of the "Yellow land".

27. Mr Gallagher then referred to the schedule of terms in dispute attached to his skeleton argument. He explained that he was instructed late and this was what he described as a team effort between himself, his client and his instructing solicitor.

28. He suggests that in respect of the roadway it is fair and reasonable for there to be a covenant requiring the Applicant to contribute to the cost of the whole of the roadway notwithstanding part is unregistered land with the owner being unknown it having not been adopted.

29. Turning to the proposed restrictive covenant he accepts there is no valuation evidence but the retained garages are close to the block and in his submission any development would be detrimental and as an expert tribunal we can determine the same.

30. Mr Gallagher explained his instructions were that the Respondent simply looked to recover costs of managing the interests for the benefit of all leaseholders.

31. Mr Gallagher confirmed he had no instructions to make any concessions in respect of the "rights granted" as requested within the transfer [286]. Further he could not assist the Tribunal as to why the Respondent needs a right to access the Property.

32. Mr Gallagher suggested that if the Tribunal does find that the appurtenant land should be enfranchised then no need for valuation evidence but if the Tribunal believes is required short form valuations could be directed.

33. Mr Harrison replied briefly. He relied again on his primary submissions. He suggests that it was clear from the Statement of Agreement that there

was not a meeting of minds. He suggested now it was conceded the Head lease was to be acquired it was clear he suggests the freehold for that land should be acquired and the two knitted together.

34. At the conclusion both counsel confirmed they had nothing further to add.

Determination

35. The Tribunal thanks both counsel for their helpful oral and written submissions. In reaching its determination careful consideration has been given to the same and all authorities to which we were referred.

36. The parties did, via their solicitors after the conclusion of the hearing, request the Tribunal to delay issuing is determination as it was hoped agreement could be reached. The Tribunal acquiesced to this but on the 21st July 2022 it was confirmed that agreement was not possible and so this decision has been finalized.

37. The first point for us to consider is whether or not it was agreed that the appurtenant land coloured yellow on the Initial Notice plan [27] would not be acquired (the Yellow Land).

38. The Statement of Terms Agreed and Disputed Issues [141-142] is completely silent as to this issue. The application to the Tribunal [9] stated that "*The extent of the appurtenant other freehold land to be acquired by the Nominee Purchaser pursuant to s1 (2) of the 1993 Act*".

39. Limited evidence was put forward by both parties within the bundle. The Applicants relied upon two witness statements from leaseholders and the Respondent had filed a witness statement which simply exhibited various documents. None of the statements assist with the issue as to whether or not there was an agreement over the acquisition or otherwise of the Yellow Land.

40. We are satisfied that there was no agreement. We prefer the submission of Mr Harrison on this point. It seems this point was not specifically addressed by either party in preparing the statement of agreed matters. What was clear was that matters relating to the Yellow Land were in issue as to how this could be properly dealt with. Whilst the focus may have been on the understanding that it might be retained by the Respondent we are satisfied that it was never unequivocally agreed as such. We take account of the fact we have been told various negotiations took place with suggestions being put forward as to terms which were outside of the range of terms open to this Tribunal. We note neither party sought to adduce any other evidence suggesting there was an agreement.

41. What is clear is that the title and arrangements as to the land is far from straight forward. There is a roadway owned by neither party and whom no one knows the owner. It appears to have been thought that possibly the local authority might have adopted this road but they have not done so. As an aside we comment that we are satisfied we cannot make any determinations over the use of this land or the maintenance and associated costs of the same.

42. The land demised under the headlease (see plan at [67]) does not include all of the Yellow Land. It excludes the roadway owned by the Respondent. This lease purports to grant rights of way over the whole of the roadway notwithstanding that the Lessor of that lease did not own the entirety of the roadway.

43. We are not satisfied that the Respondent can satisfy Section 1(4) of the 1993 Act and grant equivalent rights. We preferred the submissions of Mr Harrison in this regard. The Respondent as a freeholder is limited as to what rights she can grant given the existence of the head lease which it is conceded will be acquired and does not fall in on acquisition given the particular arrangements of this site.

44. We are satisfied that the Respondent is not able to offer such rights as would ensure that the lessees end up in a reasonably similar position as to that which exists prior to the enfranchisement.

45. In our judgement the Applicant is entitled to acquire the whole of the Yellow Land.

46. We have considered whether or not the Respondent is entitled to seek matters not included within the Counter Notice. Again, we prefer the submission of Mr Harrison and the authorities to which he refers us. The purpose of a counter notice is to clearly set out what terms the landlord is prepared to dispose of their interest upon. It is not unusual for a draft transfer to be annexed to such notices particularly where a title is complex. As Mr Harrison submitted if then a Nominated Purchaser accepts such counter notice they are bound by the same and so it is vital it is clear what is intended.

47. The counter notice [34-37] sets out only very limited rights to be retained or granted and save for reference to a covenant that the Specified Premises should only be used as a residential block of 6 flats. We have considered the references to Hague to which we were referred and to Greenpine Investment Holding Ltd v Howard de Walden Estates Ltd [2016] EWHC 1923 (Ch). We are satisfied that the authorities are clear that a Respondent is bound by the terms as set out in the counter notice.

48. We have considered the from of Transfer and attach the same as approved by this Tribunal. We comment on particular areas to assist the parties in understanding our reasoning.

49. We agree the issue of the apron should be delineated by reference to the plan. In this way it will be clear as to what land is being referred to.

50. We can see no good reason for a right of access to undertake works to be reserved to the Respondent. No positive case was advanced at the hearing and we decline to provide for the same. Again the Respondent could have adduced evidence if she had any but did not do so.

51. We see no reason to include the restrictive covenants. The Counter Notice as we found above made reference to effectively one restrictive covenant only as to the use of the Specified Premises.

52. We note the Respondent adduced no evidence as to why it may require such covenants as was proposed within the counter notice. We were invited by Mr Gallagher faced with the lack of evidence in support of his client's case that we should approach this as an expert tribunal.

53. We note the land retained by the Respondent is currently used as ordinary residential garages. Some of these are let on long leases to which the Respondent has the benefit of the reversion. It is hard to see what particular detriment the covenant seeks to avoid. Even as an expert tribunal we would expect some evidence to be adduced for us to consider whether or not it is reasonable to include the same in the face of opposition from the Applicant. There was no evidence put forward.

54. For the above reasons we decline to agree that any restrictive covenants should be inserted within the transfer.

55. This leaves the issue of the price payable for the Yellow Land. The parties both appeared to accept, reluctantly, that further valuation evidence may be required. At one point again it was suggested as an expert tribunal we could determine the value. However again we comment that we do require some evidence to assess and reach any determination and we had none.

56. We direct that the parties shall endeavour to agree the same and by not later than 4pm on 2nd September 2022 the Applicant shall confirm to the Tribunal whether or not agreement has been reached. If not they will propose directions which should be agreed if possible and thereafter the Tribunal shall issue further directions if required.

57. For the sake of completeness we confirm we have not determined what if any costs are payable to the Respondent and if the parties are unable to

agree the same either party may make application for determination of the same.

58. Finally we record that the Respondent in person made a case management application on 19th July 2022 inviting the Tribunal in reaching its determination to have regard to certain terms of the garage leases. It was not clear exactly what point the Respondent wished to make save that effectively she was seeking to make further submissions after the conclusion of the hearing and her case. The Applicants solicitor objected to the same. We refuse the application. The Respondent was represented by counsel whom on her behalf made very full submissions. This point was not raised, and we are satisfied that it could have been so raised at the hearing. We have not taken account of these matters and make no findings as to the same.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk

2.The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3.If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.