



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

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| Case reference | : | LON/00BK/OCE/2015/0187 |
| Property | : | 45-47 South Street, Mayfair, London W1K 2ZQ |
| Applicant | : | Mr Nigel Wiggins |
| Representative | : | Mr Stephen Jourdan QC, instructed by Withers LLP |
| Respondents | : | (1) Langbourn (FH4547SS) Properties Limited (2) Regent Wealth Limited (3) Silver Garden Investments Ltd (4) Garden Bay Holdings Limited |
| Representatives | : | (1) Withers LLP (2)-(4) Ms Ciara Fairley, instructed by Pemberton Greenish |
| Type of application | : | Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 |
| Tribunal members | : | Judge Timothy Powell Mr Richard Shaw FRICS |
| Date of determination and venue | : | 7 January 2016 at 10 Alfred Place, London WC1E 7LR |
| Date of decision | : | 13 January 2016 |

DECISION

Summary of the Tribunal's decision

- (1) The terms of acquisition numbered 1 to 7 listed in the email dated 15 October 2015 (page 274 of the hearing bundle) were agreed by the

parties on 23 October 2015 (upon the sending of the email that appears at page 298 of the bundle).

- (2) The issues as to (i) whether or not “Recital 5” should be included in the post-agreement contract of sale, and (ii) the completion date, have not been agreed by the parties, but they do not constitute terms of acquisition within section 24(8) of the 1993 Act.
- (3) Accordingly, terms of acquisition within the meaning of section 24(8) of the Act were agreed on 23 October 2015.

Background

1. This is an application made by Mr Nigel Wiggins, the applicant nominee purchaser, pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”) for a determination of the premium to be paid and the terms of acquisition for the collective enfranchisement of 45-47 South Street, Mayfair, London W1K 2ZQ (the “property”).
2. By a notice of a claim dated 22 December 2010, served on the then reversioner, Grosvenor (Mayfair) Estate, pursuant to section 13 of the Act, the applicant exercised the right for the acquisition of the freehold of the subject property. The notice was served on behalf of the participating qualifying tenants, being Mr Wiggins himself and several companies he controls, who together owned four of the seven flats in the building. Members of the van Praag family, who owned the remaining three flats in the building, are non-participating tenants.
3. On 5 March 2011, Grosvenor (Mayfair) Estate served a counter-notice admitting the validity of the claim but made counter-proposals for the premium and terms of acquisition of the freehold.
4. On 2 June 2011, Pemberton Greenish, as solicitors for the second to fourth respondents, companies controlled by the van Praag family, served a notice under paragraph 7 of Schedule 1 to the 1993 Act, that they intended to deal directly with the applicant in connection with negotiating and agreeing the terms of acquisition and intended to be separately represented in any legal proceedings.
5. On 7 September 2011, the applicant applied to the then Leasehold Valuation Tribunal (“LVT”) for a determination of the premium and terms of acquisition.
6. There are several complicating factors to the enfranchisement claim, some of which are set out in the tribunal’s preliminary decision of 9 July 2012 and others in the decision of the Court of Appeal in *Wiggins v Regent Wealth Ltd & Ors* [2014] EWCA Civ 1078 (30 July 2014).

However, it is not necessary to go into detail for the purposes of this decision.

7. Of note, however, is that Mr Wiggins agreed terms with Grosvenor for the acquisition of the freehold and two Grosvenor leasehold interests in the property; so that, on 26 June 2012, one of Mr Wiggins' companies, Langbourn (FH4547SS) Properties Limited ("Langbourn"), acquired the freehold and Mr Wiggins himself acquired the two Grosvenor leasehold interests. Langbourn is now the first respondent to the application, in substitution for Grosvenor (Mayfair) Estate.
8. Also of note, is that following the issue of the Court of Appeal decision mentioned above, on 30 July 2014, there were negotiations about the outstanding terms of acquisition, which needed to be agreed or determined, in relation to what were termed the "Old Leases" (held by the van Praag family members) and the "Management Lease" at the property.
9. On 29 October 2014, Mr Wiggins applied to the First-tier Tribunal (as successor to the LVT) for directions for the determination of the terms of acquisition of the Old Leases and the Management Lease. Directions were issued and, after some difficulties with listing, on 22 October 2015, the matter was listed for hearing on 7 January 2016.
10. Meanwhile, the parties have been in more wide-ranging negotiations, conducted on a without prejudice basis, with emails passing between Withers LLP, acting for Mr Wiggins, and Pemberton Greenish LLP, acting for the second to fourth respondents, with a view to trying to reach a settlement.

The issues

11. The sole issue to be determined by the tribunal at the hearing was whether or not the terms of acquisition had been agreed between the parties (about which there was a dispute). If not, directions were sought for the future conduct of the matter.

The hearing

12. The hearing took place on 7 January 2016. The applicant was represented by Mr Stephen Jourdan QC and the second to fourth respondents by Ms Ciara Fairley, both of counsel. Also in attendance were Ms Emma Copestoke and Jacqueline D'Arcy of Withers LLP, Mr Nigel Wiggins and one of his co-directors, and Ms Katherine Simpson of Pemberton Greenish LLP.

13. Neither party asked the tribunal to inspect the property and the tribunal did not consider it necessary to carry out a physical inspection to make its determination.
14. The tribunal was provided with a lever arch file of relevant documents, which contained copy correspondence passing between the parties' solicitors between 8 August 2014 and 18 December 2015, and a ring binder containing a skeleton argument prepared by Mr Jourdan and various legal extracts and case law. References to page numbers in this decision are references to page numbers of the hearing bundle, housed in the lever arch file.
15. The parties have requested an early decision from the tribunal, given the potential consequences of an agreement as to terms of acquisition having been reached. The tribunal has therefore produced this decision as quickly as it can, without the fullest recital of the facts. However, this does not mean that the documents produced by the parties have not been considered very carefully and, in any event, the background facts are well known to the parties.

The tribunal's determinations

16. The terms of acquisition numbered 1 to 7 listed in the email dated 15 October 2015 (page 274 of the hearing bundle) were agreed by the parties on 23 October 2015 (upon the sending of the email that appears at page 298 of the bundle).
17. The issues as to (i) whether or not "Recital 5" should be included in the post-agreement contract of sale, and (ii) the completion date, have not been agreed by the parties, but they do not constitute terms of acquisition within section 24(8) of the 1993 Act.
18. Accordingly, terms of acquisition within the meaning of section 24(8) of the Act were agreed on 23 October 2015.

Reasons for the tribunal's determination

The Langbourn issue

19. In his skeleton argument, Mr Jourdan submitted that there could not be an effective agreement as to the terms of acquisition for the purposes of section 24 of the Act, because such an agreement could only have been made by Langbourn, as reversioner; but Langbourn had not been involved in the negotiations.
20. The tribunal does not accept this submission, for the following reasons.

21. Mr Wiggins is one of the two directors of Langbourn. The shares in it are owned by another company, Langbourn Properties Ltd. Mr Wiggins is one of the four directors of Langbourn Properties Ltd and owns the majority of shares in it. For all practical purposes, the negotiations carried out by Mr Wiggins were on behalf of himself, as nominee purchaser, and on behalf of Langbourn, as reversioner. It would be inaccurate to say that Mr Wiggins' solicitors, Withers, were not also acting for Langbourn: in their letters to the tribunal dated 20 April and 20 July 2015 (at pages 111 and 119 of the bundle), Withers stated, in each case: "In accordance with the above matter, we are pleased to enclose the listing questionnaire completed on behalf of Langbourn (FH4547SS) Properties Ltd as required by the directions."
22. The present hearing on 7 January 2016 arose from an application made by Withers LLP by letter dated 29 October 2014. That application named Mr Wiggins as applicant and Langbourn as the first of four respondents (the others being Regent Wealth Ltd, Silver Garden Ltd and Garden Bay Holdings Ltd). Paragraph 2 explains the "Purpose of this Application" (at page 102 of the bundle); and, at 2.1, it states that "the parties are currently seeking to agree on the terms of acquisition in respect of the outstanding interests which the applicant is entitled to acquire pursuant to the Notice..." and this must, by definition, include Langbourn, as the first respondent and one of the parties.
23. Finally, the whole tenor of the negotiations between Withers, acting for Mr Wiggins and the companies he controls, on the one hand, and Pemberton Greenish, acting for the van Praag family and the companies they control, on the other, is that all parties were involved in negotiating the outstanding issues relating to the same building. It is clear that everyone considered that the negotiations and agreements reached were within their abilities. That is clearly why the parties have spent all the time and money that they have on negotiations (and litigation) over several years. The parties proceeded as if they were the only relevant parties to the transactions and no point did any party say that they were not in a position to agree an issue on behalf of a Wiggins company or a van Praag company, because, for example, resolutions needed to be passed.
24. For all of these reasons, the tribunal has no doubt that Langbourn were fully involved in the negotiations and Mr Jourdan's submission on this point fails.

The "package" issue

25. A detailed examination of the course of the negotiations in the hearing bundle leads to the following conclusions.
26. There was no notification by either party to the other that the terms of acquisition were being negotiated "as a package", that is to say that

until all the terms of acquisition were agreed, none of them could be considered to have been agreed.

27. Although Mr Jourdan, rightly, pointed out the limitation of the Upper Tribunal decision in *Curzon v Wolstenholme* [2015] UKUT 0173 (LC), it is, nonetheless, indicative of common negotiating practice that (as stated in paragraph 55 of the decision) “parties who are negotiating over terms may give themselves added flexibility by stipulating that agreement on any of the terms of acquisition is conditional on agreement on them all, or that agreement on, for example, the price is conditional on agreement on other specific terms.”
28. There is no such stipulation in the correspondence before the tribunal. The exchange of emails in the hearing bundle reflects the normal to-and-fro of negotiations under the Act, the purpose of which is to narrow the issues in dispute, thereby leaving any outstanding issues, not agreed, to be determined by the tribunal. Phrases such as “in order to avoid further time and costs...” (page 213) and “... in the interest of achieving an overall settlement...” (page 259) are merely indicative of a desire to reach an agreement on the points of dispute, making offers and/or concessions where these may be felt to facilitate and advance agreement.
29. In the tribunal’s view, they do not amount to an explicit stipulation that “all issues must be agreed, or none are agreed”. In the case of the phrase extracted from page 259 of the bundle, these were just a few words added to the fourth point of an email, limited to the question of the recovery of valuation fees, and it should not be elevated to the status of a general pre-condition or contingency that there has to be an overall agreement on all issues; or none.

The extent of any agreement between the parties

30. The negotiations culminated in an email dated 15 October 2015 sent by Withers to Pemberton Greenish (page 274). This email summarises how far agreement had been reached by the parties on the individual elements up to that point. The points listed 1 to 7 in the email include the premiums payable, the transfers, the contract, costs, valuer’s fees and the distribution of a premium by and the transfer of shares in the management company.
31. As at that date, the only two items outstanding, that had not been agreed, were: (i) whether “Recital 5” should or should not be included in the contract; and (ii) whether completion should be simultaneous with exchange, or take place 14 days afterwards.
32. It may be helpful at this point to set out the wording of the disputed Recital 5 in the draft contract. It read:

“WHEREAS ...

(5) as regards the Headlease the parties have agreed that there are no premises in the Headlease which are not:

(i) a flat contained in the relevant premises held by a qualifying tenant or

(ii) common parts, or

(iii) property as is mentioned in sub section 2(3)(b) of the Act to the intent that the obligation or right under sub section 2(1) extends to the entirety of the premises comprised in the Headlease.”

33. Returning to the numbered points 1 to 7 in the email of 15 October, these items were not strictly agreed until Pemberton Greenish responded by email dated 23 October 2015 (page 298), to confirm “In effect, there are only two issues between us...” Therefore, in the tribunal’s determination, all the items 1 to 7 in the email of 15 October were agreed as between the parties, as at 23 October 2015.

Were Recital 5 and the completion date agreed?

34. What then of the remaining two issues, Recital 5 and the completion date? There was clearly an attempt to agree to those, which began with an offer by Withers dated 10 November 2015 (page 299). That offer linked the two outstanding issues for the first time, in the following way: “[Mr Wiggins] will agree to the inclusion of Recital 5 in order to get the contract agreed, provided that we can agree a 14 day period between exchange and completion. Can you take instructions?”
35. By email dated 17 November 2015 (page 302), Pemberton Greenish noted the offer and said they were taking instructions. Then, on 19 November 2015 (page 303), Withers sent a further email stating “I attach a revised contract and the transfers which are agreed between us, subject to agreeing the completion date. I look forward to hearing from you.”
36. The attached draft contract includes Recital 5. However, the tribunal rejects Ms Fairley’s submission that by this email Mr Wiggins had indicated that he now accepted the inclusion of Recital 5 in the contract and that the only remaining outstanding issue related to the completion date.
37. Rather, the tribunal agrees with Mr Jourdan that there was no convincing reason why Mr Wiggins would have taken this step, in the middle of negotiations and just shortly after having made a linked offer; and there was no evidence that Mr Wiggins had unilaterally accepted the inclusion of Recital 5 in the contract. The tribunal is satisfied that Withers, by sending a completed contract to Pemberton Greenish on 19 November, were merely seeking to advance the negotiations in

- anticipation of what they, no doubt, hoped would be an eventual agreement on the completion date.
38. In terms of evidence before the tribunal, nothing further appears to have happened until four weeks later on 17 December 2015. On this day, at 13:58 pm, Withers sent an email in these terms (page 322): “Given the time that has elapsed, my client’s offer is withdrawn and he is unwilling to agree to the inclusion of Recital 5. My client’s position has always been that the recital is unreasonable and unnecessary.”
 39. The offer withdrawn by Withers was that made on 10 November 2015 (page 299, but also appearing at the bottom of page 322), namely that Mr Wiggins would agree to the inclusion of Recital 5 in order to get the contract agreed, provided that the parties could agree a 14-day period between exchange and completion.
 40. Shortly afterwards, at 14:09 pm on 17 December (page 325), Withers sent a further email, seeking confirmation from Pemberton Greenish that the terms of acquisition had not been agreed, and saying: “I think that the negotiations have been conducted on the basis that until all the issues have been agreed, there will be no agreement on any of them.” The email seeks confirmation of this fact from Pemberton Greenish and advises that if it is not forthcoming, a protective claim would have to be made for a vesting order under section 24(4) of the 1993 Act (i.e. to the county court).
 41. The reply from Pemberton Greenish at 16:06 pm on 17th December (page 326) must have been received by Withers with mixed blessings. It starts by confirming that the terms of acquisition had not yet been agreed, but immediately disagrees that negotiations have been conducted on the basis that, until all the terms had been agreed, none had been agreed. The email then refers back to the Withers’ email of 19 November (page 303) and extrapolates from that that there was only one term of acquisition not agreed, namely the completion date. The email then purports to agree a period of 14 days for completion and states that: “On that basis, the terms of acquisition (as set out in the documents attached to your email sent to me on 19th November but with a 14 days completion date) are agreed as at today’s date.”
 42. One might have thought that with this reply, the Withers’ email at 13:58 had achieved its purpose, by prompting, or forcing, the other side just to get on and agree the 14-day completion period, so that both parties at that stage could have proceeded to completion of the transaction, on the basis of all of the terms that they had been happy to accept. However, that was not the case. Mr Wiggins had changed his mind, which may or may not have been for commercial reasons, but in respect of which, in any event, there was no evidence before the tribunal. What now appears to be the case is that Mr Wiggins wishes to reopen all, or most, of the points that were previously under

negotiation and not to be bound by any (“provisional” or “contingent”) agreements that he had previously been willing to reach.

43. When asked, Mr Jourdan would not go so far as to say that the Pemberton Greenish email at 16:06 on 17 December (page 326) itself constituted an acceptance of the 14-day completion date, because that “acceptance” was made on the assumption that Recital 5 had been agreed to; but it had not.
44. Therefore, as at 17 December 2015, the tribunal determines that both the question of the inclusion of Recital 5 in the contract and the date of completion were not agreed by the parties.

Were Recital 5 and the completion date “terms of acquisition”?

45. The next question is whether Recital 5 and the completion date are terms of acquisition, within the meaning of the 1993 Act, over which the tribunal has jurisdiction.
46. Both counsel submitted that they were terms of acquisition under the Act, emphasising that the parties had negotiated from the start on the basis that all these issues were such. Both maintained this position at the hearing and disputed any suggestion by the tribunal that these were essentially contractual matters, rather than terms of acquisition. Counsel relied on the terms of section 24(8) and, in particular, subsection (e) and the “catch-all” words “or otherwise”.
47. Notwithstanding their stance, both counsel accepted that the tribunal was entitled to at least question the assumption of the parties that these were terms of acquisition, in order to establish that it had appropriate jurisdiction to determine these matters that were still in dispute; and, if necessary, to dispel the parties’ mistaken belief that they were terms of acquisition under the Act.
48. Mr Jourdan said that Recital 5 had been inserted into the draft contract but that the issues it sought to cover could easily have been in the transfer and, therefore, it would squarely fall within section 24(8)(e). With regard to the date of completion, he gave an example of a nominee purchaser who had funding issues and needed a period of time, say four weeks, between exchange and completion, in order to access his rights under the 1993 Act. In Mr Jourdan’s submission, that would certainly have been a matter - a term of acquisition - that a tribunal would have considered had it been presented to it.
49. The tribunal has considered very carefully whether and to what extent the two remaining outstanding issues might be considered as terms of acquisition under the Act. They were certainly “terms of acquisition” in the negotiations, in the very widest sense - as may have been all kinds

of terms and stipulations that the parties may have sought to agree, some of them perhaps not even property-related. However, notwithstanding the “catch-all” words “or otherwise” in section 24(8), the tribunal has come to the conclusion that the two outstanding issues in this case cannot sensibly be considered terms of acquisition within the meaning of that section.

50. This is so notwithstanding the apparent agreement of the parties that they are to be treated as terms of acquisition. Certainly, the parties may consider that they are important terms in relation to reaching an overall agreement; however, if agreement cannot be reached on the issues by the parties, in the tribunal’s view they would not fall within the tribunal’s jurisdiction to determine, on an application made to it for this purpose.
51. In reaching this conclusion, the tribunal notes that Recital 5 deals with the premises comprised in the Headlease (which is the Management Lease) and that this was one of the leasehold interests, which the participating tenants sought to acquire at paragraph 6.2 of their Initial Notice under section 13 (page 3 of the bundle); and which the then reversioner, Grosvenor (Mayfair) Estates, expressly accepted could be so acquired, by paragraph 2 of the counter-notice (page 12). As such, it is not an interest which is in dispute between the parties.
52. Mr Wiggins’ initial nervousness about Recital 5 may have been because it touched on a dispute between him and the van Praag families, about the usage by the latter of certain areas of the building that apparently fall within the Management Lease. The tribunal obviously cannot make any findings in relation to any such dispute, or in relation to the effectiveness of Recital 5 to clarify or resolve it.
53. However, it appears that the terms of Recital 5 did not concern Mr Wiggins unduly. His solicitors had objected to the inclusion of Recital 5 because it had been “not necessary” (page 271) and, in the event, Mr Wiggins was willing to agree to the inclusion of Recital 5 “in order to get the contract agreed” and to trade his earlier objection to the recital, merely for a 14-day delay between exchange and completion.
54. If there is a dispute as to the demise or occupation of certain parts of the building, that might be a matter for this tribunal to determine as a term of acquisition under section 24(8), but a mere recital in a contract of the general elements of the interest to be acquired is not. This must be so, since the counter-notice accepts that the Headlease is an interest to be acquired in its entirety by Mr Wiggins as part of the enfranchisement process. It does not assist to say that Recital 5 might have been included in the transfers: it was not in the transfers, which in any event have already been agreed by the parties.

55. So far as the completion date is concerned, it is hard to see how any tribunal could make a determination as to when or how completion must take place; and the timing of a particular transaction does not sit easily with repeated references in section 24(8) to the determination of “interests” to be acquired.
56. Both the issue of Recital 5 in the draft contract and the question of the completion date are contractual matters, which arise normally after the agreement of the terms of acquisition under the 1993 Act.
57. While the tribunal accepts Mr Jourdan’s submission that subsequent statutory regulations are not to be relied upon for the interpretation of earlier primary legislation, it is instructive that the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 (SI 1993/2407) bind the parties in any transaction undertaken to give effect to an Initial Notice, unless they agree otherwise.
58. Paragraph 6 of Schedule 1 to the Regulations relates to collective enfranchisement transactions. By paragraph 6(1) (with emphasis added): “The reversioner shall prepare the draft contract and give it to the nominee purchaser within the period of twenty-one days beginning with the date the terms of acquisition are agreed or determined by the appropriate tribunal (as defined in section 38).” The paragraph goes on to deal with amendments to the contract, but it is clear that a distinction is already made between terms of acquisition that come before, and contractual terms that come afterwards.
59. For all of these reasons, the tribunal concludes that neither Recital 5, nor the completion date, are terms of acquisition under section 24(8). Therefore, the tribunal has no jurisdiction to make any determinations in relation to either issue.

Conclusion

60. As all terms of acquisition under the 1993 Act have been agreed by the parties with effect from 23 October 2015, this tribunal has no further jurisdiction in the matter. If a binding contract has not been entered into within four months of that date, the parties are already well aware of their rights.
61. It follows from the above that there is no need for further directions to be given in relation to this matter.



Name: Judge Timothy Powell

Date: 13 January 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for 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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.