



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

**Case Reference** : **RC/LON/00AW/OCE/2015/0319**

**Property** : **10 Egerton Place, London SW3 2EF**

**Applicant** : **Place Properties Ltd**

**Representative** : **Mr Rainey QC**

**Respondents** : **Egerton Place Limited (1)  
Cacique Investments (2)  
Damor Investments (3)**

**Representative** : **Mr Johnson QC  
Mr Pryor**

**Type of Application** : **For the determination of terms of  
acquisition remaining in dispute**

**Tribunal Members** : **Mrs S O'Sullivan  
Mrs E Flint  
Mrs H Bowers**

**Date and venue of  
Hearing** : **10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **1 September 2017**

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**DECISION**

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## **Decision of the tribunal**

The tribunal determines that the Applicant is not entitled to acquire the two flats known as the Basement/Ground Floor Flat and Flat 4 in the property known as 10 Egerton Place, London SW3 pursuant to section 2(3) of the Leasehold Reform, Housing and Urban Development Act 1993.

## **The application**

1. In these proceedings commenced on 23 November 2015 the Applicant Nominee Purchaser seeks a determination of the terms of acquisition in the collective enfranchisement claim made pursuant to section 24(1) of the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act"). The property in question is known as 10 Egerton Place, London SW3 (the "Property") and the claim is made pursuant to a section 13 notice dated 20 May 2015.
2. By an order dated 19 September 2016 the tribunal directed that all the terms of the acquisition other than price should be determined as preliminary issues. This was the hearing of that preliminary issue. There was effectively only one preliminary issue to be determined which was whether the Applicant was entitled to acquire the leases of two of the flats in the Property.
3. The Property comprises a residential house on 6 floors, basement to fourth floor, divided into two maisonettes and two flats. The participating tenants are the tenants of Flat 1 and Flat 2. The Corporate Tenants are the tenants of the Basement/Ground Floor Flat ("the B/GF Flat") and Flat 4. There is also a dispute between the parties as to the extent of the premises demised by the leases of the B/GF Flat and Flat 4.
4. The current freeholder, Egerton Place Limited ("EPL"), and the current Applicant nominee purchaser, Place Properties Limited, are both nominees for the lessees of Flats 1 and 2, Jesk Properties Limited (previously Cigdem Erkman) and Karolina Baranowska.
5. There have been two collective enfranchisement claims in respect of the Property. On 19 March 2014 Cigdem Erkman and Karolina Baranowska made the first collective enfranchisement claim. The interests sought were the Freehold and Headlease. This completed on 19 May 2015. The participating tenants then made a second collective enfranchisement claim on 20 May 2015. In this second claim the participating tenants sought the Freehold (the Headlease having been merged into the Freehold) and the leases of the B/GF Flat, Flat 1 and Flat 4.

## **Inspection**

6. The Property is a six-storey inner terrace house dating from the early part of the nineteenth century and located in a conservation area within the Royal Borough of Kensington and Chelsea. The Property has a red brick and dressed stone façade construction with accommodation on the basement to fourth floors. Egerton Place is a small crescent of houses set back from Egerton Terrace with a front garden to the crescent. At the rear of the Property is Egerton Gardens, communal grounds which serve the houses on the crescent and adjoining properties.
7. The parties adopted an annotated plan that had been prepared by Carter Jonas to help identify the disputed parts of the Property which we will refer to as the Plan and numbered references made below refer to the numbering on the Plan. We attach a copy of the Plan as Appendix 1 to this decision. We adopt the same numbering used by the parties on the Plan in this decision.
8. The Property was originally constructed as a house and has been converted into four self contained flats; a basement and ground floor maisonette known as the Basement/Ground Floor Flat, a first floor flat known as Flat 1, a second floor flat known as Flat 2 and a third and fourth floor maisonette known as Flat 4. There are steps up to the front door giving access to the raised ground floor and the upper floors. At the front of the Property and to the side are steps leading down to a basement area, which give access to the main basement accommodation. The left hand pavement vault that is used as a storeroom was locked at the time of the tribunal's inspection. The right-hand vault, where the mains water, gas and electricity supplies enter the Property, is accessed from corridor 4 on the Plan. From the front steps there is a hallway with a passenger lift that serves the whole Property.
9. The tribunal's inspection focused on the two units in dispute, namely the B/GF Flat and Flat 4.
10. In respect of the B/GF Flat the basement can be accessed from the front courtyard. The access corridor (4) leads to a front vault with the incoming electric cable and main switchboard. Along the corridor at high level was a run of cables, pipes, two meters, one marked lift and the switch for the lift. There is a small triangular storage room and the lift motor room on the right of the corridor and on the left a large room with a bay window towards the front, which is labelled number 3 on the plan. There is a door connecting this corridor to the centre and rear part of the basement. There is a large hallway area with a door giving access to the internal stairs between the basement and ground floor accommodation; the dumb waiter and associated machinery plus the armoured cables all serving the whole property; a bedroom with a window opening onto a rear light-well (8B); a bathroom, numbered 9 and a door to a large living room, again numbered 9. From this large living room there is a door to a room (numbered 6) that houses

the communal boilers, hot water cylinders and associated controls. This boiler room then gives access to a rear lightwell (numbered 8A) in which is situated a manhole cover, the soil, waste water and rainwater pipes and an overflow pipe from the boiler room and a WC. The above mentioned large living room (9) is fitted with Victorian style kitchen cupboards and houses a dumb waiter, internal to the basement and ground floor areas. This room provides access to a kitchen (9) which leads into a room described as a bathroom, but where there are no fittings or any evidence of such use and a second rear lightwell (8B) where there is a covered area that previously appeared to house a WC.

11. The ground floor accommodation can be accessed either directly from the ground floor entrance hall of the house or internally from the basement. There is a fire door at the bottom of the internal flight of stairs. The accommodation comprises two reception rooms and a small bedroom with an en-suite bathroom. The whole of the basement and ground floor maisonette is in poor, un-refurbished order and there are signs of historic water damage to several areas the most extensive being in the rear reception room on the ground floor.
12. There is access from the rear reception room to the grounds at the rear of the Property. Externally there are two voids to the light-wells numbered 8A and 8B in the basement area.
13. In respect of Flat 4, the Tribunal made a brief inspection of the flat as a whole but focused its attention on the store-room located on the fourth floor, described on the Plan as area 7. The room was described as being for storage purposes and there was some evidence of historic use as a workshop. In a corner section of the room was a timber framework system housing a number of cold-water tanks. Four tanks were labelled 1 – 4. Tanks 2 and 3 were drained and tanks 1 and 4 were described as being in use. A fifth tank was the header tank for the communal boiler system located in the basement. Next to the timber framework was a hot water cylinder serving the third/fourth floor maisonette. The bulk-head over the stairs below effectively forms a high plinth along a substantial section of the right-hand of the room, reducing the useable floor area. The Tribunal were informed that there is an internal dumb waiter that serves the two floors within this maisonette; this was not observed at the inspection. The door to the dumb waiter stack housing the machinery for the lift is located on the top floor landing.

### **The hearing**

14. The Applicant was represented by Mr Rainey QC at the hearing and the Respondent was represented by Mr Johnson QC and Mr Pryor of Counsel.
15. Both parties had lodged extensive bundles and skeleton arguments.

### **Section 2(3) of the 1993 Act**

16. We consider it helpful to first set out the relevant legislation. The right to acquire leasehold interests in the relevant premises in a collective enfranchisement claim is contained in section 2 of the 1993 Act.
17. The relevant subsections of Section 2 are subsections (1) to (3) which provide as follows;
  - (1) *Where the right to collective enfranchisement is exercised in relation to any premises to which this Chapter applies (“the relevant premises”), then, subject to and in accordance with this Chapter—*
    - (a) *there shall be acquired on behalf of the qualifying tenants by whom the right is exercised every interest to which this paragraph applies by virtue of subsection (2); and*
    - (b) *those tenants shall be entitled to have acquired on their behalf any interest to which this paragraph applies by virtue of subsection (3);*  
*and any interest so acquired on behalf of those tenants shall be acquired in the manner mentioned in paragraphs (a) and (b) of section 1(1).*
  - (2) *Paragraph (a) of subsection (1) above applies to the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat contained in the relevant premises.*
  - (3) *Paragraph (b) of subsection (1) above applies to the interest of the tenant under any lease (not falling within subsection (2) above) under which the demised premises consist of or include—*
    - (a) *any common parts of the relevant premises, or*
    - (b) *any property falling within section 1(2)(a) which is to be acquired by virtue of that provision,*  
*where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, or (as the case may be) that property, on behalf of the tenants by whom the right to collective enfranchisement is exercised.*

## The dispute

18. Put simply it is the Applicant's case that the premises as demised consist of (in the case of Flat 4) or include (in the case of the B/GF Flat and in the alternative Flat 4) common parts of the Property. As such it is the Applicant's case that the flats fall within section 2(3)(a) and the acquisition of the flats is "*reasonably necessary for the proper management or maintenance of those common parts*".
19. There were therefore two questions before us;
  - i. Do the premises demised by the relevant lease of the B/GF Flat or Flat 4 consist of or include any common parts of the relevant test ("both limbs of the Common Parts Test")? and;
  - ii. If so, is the acquisition of the relevant lease reasonably necessary for the proper management and maintenance of those common parts ("the Reasonable Necessity Test")?
20. Both parties submit and we agree having regard to the decision in *Earl Cadogan v Panagopoulos [2010] EWHC 422 (Ch) at [45]* that the questions fall to be answered at the relevant date, as defined in Section 1(8), that is the date on which the second enfranchisement claim was made being, 20 May 2015. To that extent the history of the Property prior to that date is academic.
21. It was common ground between the parties that we were only concerned with "*those common parts*" within the demise pursuant to section 2(3). We accept that the Reasonable Necessity Test can only apply to common parts within the premises. The Common Parts test is therefore subdivided into two limbs, each of which must be satisfied for a claim to succeed being:
  1. Whether the part is within the demise ("Limb 1");
  2. Whether the particular part under consideration is a common part or not ("Limb 2").
22. By way of background we would also mention that in the County Court proceedings the Applicant contended that all of the items numbered 1-9 on the Plan lie outside of the demise of the B/GF Flat and Flat 4. If this were to be the case the Subsection and hence the Acquisition Issue does not apply as Limb 1 would not be satisfied. It followed that the more the Respondents accepted the Applicant's case the more the Applicant's case on the Acquisition Issue diminished. In the course of the proceedings the Respondents have conceded a number of items do lie outside the Property.

23. In the course of the 5 day hearing we heard much evidence. The Applicant relied on the lay evidence of Cigdem Erkman and witness statements from Sibel Erkman and John Anthony. For the Respondent we heard oral evidence from Sophie and Stephanie Gillibrand, Cara Jocelyn and Paul Hunt. We also had expert evidence from two management experts, Mr Unsdorfer for the Applicant and Mr Seifert for the Respondent, who addressed the reasonable necessity test. The Applicant also relied on the evidence of Mr Bugajski an expert plumber and a plumbing expert Julian Mc Carthy (whose evidence was not challenged). We also had evidence from Mr Pietrzyba for the Respondent who dealt with M & E issues. Both Counsel agreed that although we spent several days hearing evidence it was of limited assistance to us in relation to the decisions we had to make. For this reason we do not set out a full summary of the evidence heard. The relevance of this evidence was dependant on the conclusions we reached in relation to the whether a part was within the demise and whether it was a common part. Thus in our decision we include only those parts of the evidence which were relevant to those conclusions and as we mention above in fact only very limited parts of that evidence were relevant to the issues before us.
24. We would also mention that as referred to above the disputed areas were identified during the course of the hearing by reference to numbered areas on a Plan. This Plan is a product of the litigation rather than being a historic document. The Applicant has added manuscript annotations, colouring and numbering and these have been adopted by the Respondents for the purposes of argument. Mr Bugajski, a plumber, has added the further sub-lettered areas found on a version attached to his witness statement and Ms Sophie Gillibrand attached one to her witness statement to show how the B/GF Flat was used.

### **Extent of the demise**

25. The B/GF lease and the Flat 4 lease both derive from a head lease dated 24 June 1954 and made between the Official Trustee of Charity Lands, the Trustees of Henry Smith's Charity and the Earl of Hardwicke (the "Head Lease").
26. It was first necessary for the tribunal to consider the extent of the demise of the Head Lease and in turn the demises granted by the leases of both the B/GF Flat and Flat 4.

### **The Head Lease**

27. The Applicant says that the Head Lease demise, registered in 1954, excluded area 9 (kitchen and bathroom) as well as Area 6 (boiler room). It is said by the Applicant that the demise of the Head Lease is clear in that the demise of the land coloured pink on the lease plan, and reference to the lease plan, show that this includes the external lightwells but not the "cellars" coloured blue. The Applicant asserts there is no conflict between the parcels clause and the plan as the one

refers to the other. It is also said that the Head Lease clearly did not demise the garden area relying on planning documents dating from 1971/2 in relation to an application for the erection of a conservatory above the central cellar area. It also relies on the fact that the transfer of the freehold from Wellcome to EPL in 2015 transferred the freehold of the basement "cellar" areas to ELP but did not transfer any title to the garden areas lying above.

28. The Applicant also says it is clear that the previous freeholders considered that the gardens right up to the rear wall at ground level belonged to them and were not demised. We were referred to various planning documents in this regard.
29. The Applicant also says that if the tribunal accepts the Respondents' submissions that the Head Lease demise extended to the basement areas coloured blue, it submits that the demise plainly did not extend to the garden area above.
30. The Respondents say that on its true construction the Head Lease granted the entire building at the property, namely including the outside areas and vaults. This therefore includes items 5, 8 and 9. It is submitted that every single provision within the Head Lease is consistent with it demising the whole of 10 Egerton Place and the idea that certain parts were omitted is not consistent with the provisions. As far as the filed plan is concerned the Respondent says that an error has occurred given the lack of reference to the different colours contained on the plan.
31. Mr Johnson relied on the following authorities. He submitted that traditionally where there was any conflict the plan overcame the wording save for where this would result in an absurdity. In *Wesleyvale Ltd v Harding Homes (East Anglia) Ltd* [2013] EWHC 2291 considering *Wallington v Townsend* [1939] 2All ER 225 and *Eastwood v Ashton* [1915] AC 900 it was held that it was not possible to construe the conveyance to give effect to every part of it and in this case the words were held to prevail over the plan. In that case there was a contradiction between the plan and the parcels clause. Mr Johnson submitted we should adopt the same approach in finding that the lightwells (Item 8) and rooms coloured blue (Items 6,9 and the storeroom) are within the demise. The Respondents say that no issue of encroachment arises but contend in any event that during the lengthy period in the 1960s and 1970s when the head tenant and the undertenant of the B/GF Flat were distinct legal persons, there was 12 years of encroachment by the tenant of the B/GF Flat which added those areas permanently to the B/GF demise which addition would not have been undone by the subsequent unity of ownership and which survived the termination of the Head Lease by merger.



### **The tribunal's decision - the Head Lease demise**

32. We first considered the freehold title as shown in the office copy entries at HM Land Registry of title number BGL 114233. The title is stated at paragraph 1 to be;

*“The Freehold land shown edged with red on the plan of the above title filed at the Registry and being 10 Egerton Place, London 9SW3 2EF).*

*NOTE: As to the land tinted pink on the title plan only the basement vaults are included in the title.”*

33. The filed plan shows the whole basement area within the pink line and it is clear that only the basement vaults are included in the title at basement level. By implication any land above the basement falling within the same area tinted pink would in our view likewise be excluded from the title.
34. The Head Lease attaches a plan which is based on the freehold filed plan. Although no specific reference is made in the Head Lease to the area coloured mauve it can be seen that it clearly mirrors the area shaded pink on the freehold title. There was obviously an omission in the Head Lease in the failure to reference this shaded area. However in our view as a matter of logic the Head Lease demises the whole of the freehold title. The reference in the parcels clause to “*cellars under*” makes clear in our view that this is a reference to the basement level and not the ground level.
35. We consider that conclusion is supported by the provisions of the Head Lease as a whole; this is a full repairing lease and all the references therein are fully consistent with the demise having been of the whole of the freehold title.
36. We did not place any reliance on the various references to the boundaries contained in old correspondence as we did not feel it necessary to do so. We considered the demise to be clear once the freehold title and the Head Lease plans and parcels clauses were considered together.
37. As far as the lightwells were concerned (Item 8) the Applicant had argued that they were excluded as there was no reference to outside space in the parcels clause and no reservation of access through the boiler room. However we considered they had been included. There was no exclusion of any part of the title and we considered that, although there were no express rights of access granted through the boiler room, there would be implied rights of access to the WC and/or lightwells for access.

38. We found that there was no persuasive evidence that the demise extended to the garden area and did not find so.
39. Given our conclusions we did not need to rely on the authorities. However in any event we considered the case could be differentiated as here we did not have a clear description of the property and therefore placed reliance on the plan.
40. Both Counsel agreed that the lease of Flat 4 did not include a plan and it was common ground that the parcels clause was "*all that suite of rooms closets and passages situate and being Flat Number 4 on the third and fourth floors..*".
41. The parties both agree that the goods lift shaft (item 2) and the communal water tanks and associated plumbing are not demised and are common parts. The dispute between the parties relates solely as to whether the entirety of the room described as Item 7, a storeroom within which the water tanks are situated, is demised. There is also a more minor point between the parties as to whether the timber frames housing the communal water tanks are demised or are common parts.
42. Mr Rainey described Item 7 as an oddly shaped room dominated by the stair head and water tank enclosure being quite different from the flat itself. He also said that there was no evidence that it ever formed part of the living accommodation or flat proper. Mr Rainey submitted that Item 7 should simply be seen as a tank room and is clearly a common part as it houses the communal tanks. He invited us to find that it is simply an access way to the tanks themselves and hence it follows that it must be a common part. As far as the wooden timbers supporting the tanks were concerned he submitted that as the tanks and pipes were not demised, the enclosures which house and support them are likewise not demised. However he went on to say that if the tank housing was technically demised it was obvious that its acquisition was reasonably required. In this regard he also referred to Mr Unsdorfer's evidence in relation to the necessity of having sufficient room to work on the tanks.
43. Mr Rainey went on to consider whether Flat 4 as a whole is a common part and acknowledged that this is a more difficult question. It is said to be inescapable that the principal corridors of Flat 4 provide the only access to Room 7 and the tanks. On the other hand Flat 4 clearly comprises a substantial flat. The Applicant says that on balance the whole of Flat 4 must be considered a common part as a matter of common sense as access is required through the flat to access the communal water tanks. It is compared to the boiler room in the basement which has been agreed to be a common part.
44. Mr Johnson said that Item 7 clearly forms part of the demise of Flat 4. Mr Johnson submitted that the position could not be clearer and that there was no evidence before us of any communal use of Item 7. He urged us to rely on the

evidence of Sophie Gillibrand who says that the room known as Item 7 was used by her grandfather as a workshop during the early 1960s. We were urged to place reliance on her evidence on the basis that it was careful and considered and that she displayed obvious familial recollection.

#### **The tribunal's decision - Flat 4 - extent of the demise**

45. We considered the description of the demise of Flat 4 which is "*all that suite of rooms closets and passages situate and being Flat Number 4 on the third and fourth floors.*".
46. The parties agree the water tanks themselves are common parts and disagree as to whether the room in which they are housed is likewise a common part.
47. The definition of "common part" was considered in some length in *Westbrook Dolphin Square v Friends Life [2014] L & TR 28 (Ch.D)*. It was held in that case that corridors which were otherwise empty and unused but provided access to boiler rooms were common parts. *Dolphin Square* applied the earlier case of *Panagopoulos v Cadogan [2011] Ch 177* where it was held that a caretaker's flat was a common part because of the services provided by the caretaker living in the flat. Otherwise however it is clear from those authorities that determining whether a particular area is or is not a common part is fact specific and requires the application of common sense.
48. In the absence of any exception to the contrary and having regard to what appeared to us to be a very clearly worded parcels clause we concluded that the room within which the water tanks are housed referred to as Item 7 forms part of the demise. In this respect we had regard to the oral evidence of Sophie Gillibrand's evidence as to the previous use of the room as a workroom by her grandfather. In our view the room was not very different to the remainder of the flat and was in fact sufficiently large to have a "*function*" and be of some value to the tenant despite it housing substantial water tanks. We saw nothing within the lease to suggest that the room was excluded from the demise.
49. We went on to consider whether the timber structure around the water tanks was likewise part of the demise or a common part. We had not been referred to any legal authorities which might be of assistance in this regard. We took a commonsense approach. It was our view that the water tanks do not float in air but that rather the timber structure forms an intrinsic support to those tanks and would not otherwise be in place. We therefore concluded as a matter of common sense that like the water tanks themselves the timber structure must form part of the common parts.
50. We were not convinced by Mr Rainey's submission that the entirety of Flat 4 is a common part. Having inspected the flat and heard evidence as to its previous use

and function we did not agree that the flat as a whole should be viewed simply served as an access way to the tanks themselves.

51. We would mention that there are 4 tanks within the room with only 2 being currently in use. We had limited evidence before us on the tanks and a suggestion from Mr Unsdorfer that not all 4 tanks might be communal. However given their position and the fact that all of the flats appear to have been served by these tanks at some point in time we would expect that all 4 tanks would be communal.
52. We should add that there is also an internal goods lift in Flat 4 which connects the 3<sup>rd</sup> and 4<sup>th</sup> floor. The Respondents' position was that this was included in the demise. We had very little evidence on this before us. Were this originally a dumb waiter it would in our view form part of the demise. However from our inspection it appeared that the internal goods lift originally served the whole of the Property although it now connected only the 3<sup>rd</sup> and 4<sup>th</sup> floors. Doing the best we could on the evidence before us we concluded that, like a service conduit, the internal goods lift would be a common part and is thus excluded from the demise.
53. We therefore agreed that as far as the Common Parts test is concerned Limb 1 is satisfied only in relation to the water tanks and their housing. In relation to those items we went on to consider the second issue, namely the reasonable necessity test.

#### **Flat 4 -Item 7 – the reasonable necessity test**

54. As far as the reasonable necessity test is concerned the Applicant relies on its general submissions and also on the evidence of the management experts in relation to access visits and obstruction to that access and increased cost.
55. Assuming that Item 7 was demised Mr Rainey submitted that the acquisition of Item 7 was reasonably necessary for proper management and maintenance. Likewise assuming the tank enclosure is demised acquisition of the tank enclosure was also said to be reasonably necessary for proper management and maintenance. If nothing else it was said that the possibility of future reconfiguration of the tanks requires it. It was also said that the ability to secure the tanks against interference by the tenant or occupier of Flat 4 also requires it. Reliance was also placed on Mr Unsdorfer's evidence which pointed out the necessity to have sufficient room to work on the tanks.
56. Mr Bugajski considered that the tanks would require monthly checks. Mr Unsdorfer also explained that tenant co-operation in providing access would depend on self-interest so that while access to fix a structural defect may elicit co-operation, access to drain the tanks down for another tenant's works may not. He also did not consider a key waiver scheme could be used for casual or quantity access as a charge is made to a tenant. He concluded that any tenant would be

asked to “put up with a lot” once all the statutory inspections and reactive visits were taken into account. As far as implied rights of access were concerned Mr Unsdorfer’s evidence was that he could not recall the last occasion upon which he had relied on implied rights. It was the Applicant’s case that the managing agent does not have a tribunal member available to explain implied rights to a tenant.

57. Mr Pietrzyba considered the tanks would require quarterly checks with 6 months being the maximum gap between inspections.
58. The lease of Flat 4 is acknowledged to contain at clause 3(7) a provision that 7 days notice for access must be given. Mr Rainey points out that there is no exception for emergencies and none may be implied as this would be contrary to the express term. The rights of access under clause 3(7) cannot be said to be construed as permitting the landlord to take on new areas of the demised premises for new services. The landlord may expressly change a tank but could not by way of example use part of the room to install a separate pressurised hot water cylinder for each flat as installed for Flat 4. In this regard Mr Rainey relies on Mr Pietrzyba’s evidence that the water tanks are small and would ideally be bigger and it is said that a potential need for a further tank for some communal use cannot be dismissed as pure speculation. Mr Rainey also submitted that even if the implied and express rights of access covered all of the required visits it is obvious he said that it would not be practicable to obtain access to a let flat on all of these occasions. Although an implied right of access may be all that is required to deal with the occasional or one off incidents such rights would be unworkable when a large quantity of regular visits is required. Mr Seifert accepted that there may be difficulties on occasion in relying on implied rights and that it may be necessary to take advice on and enforce those rights.
59. Mr Rainey also addressed us on the issue of security for the tanks and valves and the maintenance of temperature. Mr Seifert’s evidence was that the tanks must not be kept too warm due to the risk of Legionella. If Room 7 is not kept within the control of the freeholder the control of the temperature cannot be guaranteed. Mr Seifert’s evidence was that lagging would suffice but he did accept that temperature control would be more difficult. Mr Unsdorfer in his evidence expressed concern that the tenants might interfere with the tanks. Mr Rainey submitted it was plainly essential or adopting section 2(3) “reasonably necessary” to restrict that access and this is a good example of a wider concept of proper management. Mr Rainey urged us to reject Mr Seifert’s evidence that signage would suffice as it does not ameliorate the vulnerability of the tanks and valves to interference.
60. Mr Johnson addressed us on the scope of the reasonable necessity test by reference to “*the proper management or maintenance of those common parts*”. It is submitted that the landlord must have sufficient rights to meet any repairing or other obligations it has in the lease as well as any limited rights to carry out improvements it may enjoy. It is therefore necessary to consider whether the

reserved rights in the lease in relation to a specific common part accommodates the obligations a landlord owes to its tenants. Only if the reserved rights do not accommodate the landlord's rights or obligations may it be reasonably necessary for a nominee purchaser to acquire a flat. There was a right of entry on notice at clause 3(7). He also submitted that a right of emergency access could be implied.

61. Mr Johnson submits that it is difficult to see why the acquisition of Flat 4 is said to be reasonably necessary for the proper maintenance and management of the common parts in question. There will not, it is said, be any need for urgent or regular access to manage or maintain the airspace and the need for management and maintenance will only relate to the water tanks and their enclosures. Mr Johnson points out that the landlord is able to rely on the full range of access rights it has. We were asked to prefer Mr Seifert's evidence that although there may be difficulties in access on occasions, enforcement action can be taken to enforce the landlord's rights. Mr Johnson submitted that this should be preferred to Mr Unsdorfer's evidence that it may be difficult to persuade a tenant to accept access rights and that it would be preferred if argument could be avoided. The real question it is said is whether the existing rights of access are sufficient for the existing obligations or rights to carry out improvements.
62. Should the tribunal find that Item 7 includes the casing of any water tank, it is submitted that the rights of access in clause 3(7) will be sufficient and in any event urgent access is unlikely to be required for the casing alone in contrast to the water tanks.

### **The tribunal's decision Item 7 – the reasonable necessity test**

63. In our consideration we took into account the intention behind section 2(3). In our view the fact that there may be difficulties in managing a property does not in itself mean that its acquisition is reasonably required. Many leases are inadequate and lead to problems in management.
64. Both experts had given evidence on the likely access requirements to the water tanks. The lease clearly contains provision for access on notice. We considered that the landlord had adequate rights to access the common parts within the lease. These might involve certain difficulties at times with gaining access at required times especially where emergency access is required, by way of example, to fix a broken pipe. However as Mr Johnson points out the landlord has implied rights of access in the lease for emergency access in such situations and can enforce those rights if so required. We accept Mr Unsdorfer's evidence that difficulties may be encountered in placing reliance on implied rights of access with tenants. However in our view a landlord is able to rely on implied rights of access albeit that it may be necessary to enforce these rights from time to time. Such enforcement action would fall within a managing agent's general remit. We also concur with Mr Johnson's submission that the parties will of course have the

benefit of this decision which records our view that implied rights of access can be relied upon to gain emergency access where it is not possible to give the requisite notice.

### **Demise of the B/GF Lease**

65. The parties disagreed as to the basement demise.
66. The Applicant says that the demise is of "*all that suite of rooms closets and passages situate and being the basement and ground floor flat of the Building.*". It was stressed that the demise is of the basement and ground floor *flat* rather than the basement and ground floor. There is no lease plan and the office copy entries at HM Land Registry simply outline the building and state that the demise lies "*within*" the area edged red.
67. Mr Rainey accepts that there is limited evidence as to the demise as at the date of grant of 26 October 1959 and the tribunal will have to do its best with the limited evidence available.
68. The ground floor is straightforward with it being common ground that the whole of the ground floor internal area is demised except for the communal dumb waiter/service lift shaft. As far as the basement is concerned it is common ground that the front external steps are not demised nor is the boiler room.
69. The issue of the alleged caretaker's flat also arises here. The question of a caretaker and whether the B/GF Flat was a caretaker's flat is said by Mr Rainey to arise in two different ways. First it is said that on the grant of the B/GF Flat lease there was caretaker's accommodation in the basement occupied by Mrs Matysiak and that accommodation was not included in the B/GF Flat and was therefore not demised by the lease. The second way in which this issue arises is in relation to whether the whole of the B/GF Flat was a common part as at the relevant date of 20 May 2015 (see below).
70. Mr Rainey's case is that part of the basement was used as caretaker accommodation. It is said that this may not have been what would properly be called a "flat", certainly not a self contained flat. It is also said that this accommodation may not have included all the amenities required for living; the caretaker may have used the WC in the left rear vault, Item 3 may have had to utilise the cooking facilities located in other areas of the basement. It is accepted that there is no evidence either way and that this is speculation. The Applicant's case is simply that there was some caretaker's accommodation in the basement and that this is not included in the B/GF Flat. We were referred to various evidence in support of the Applicant's contention; the fact that the Head Lease user covenant reflected the state of the building as at 1954; the fact that the user covenant of the B/GF Flat is for use as a private residence in the occupation of

one family and that this could only be complied with if the caretaker's accommodation was outside the demise; the fact that the entry phone buzzer has five rather than four buzzers and the evidence of Ms Erkman that from her own knowledge Mrs Matysiak lived in the basement, went in through the basement door and had her own buzzer. Mr Rainey submitted that the only real question was the extent of the caretaker's accommodation. He accepted that he was unable to give any definitive answer and provided three different scenarios; the whole of the basement, the basement excluding the area around the foot of the stairs and the front basement.

71. Mr Rainey submits that the evidence of the Gillibrand sisters has no probative value as to which areas they used from 1999 or 2000 or what they used them for. In any event it is said that their use of the basement area would be lawful by right of the Head Lease.
72. As far as the Respondents' alleged encroachment was concerned Mr Rainey says there was no period of 12 years upon which the Respondents could rely.
73. The Respondents say that once the true construction of the Head Lease is apparent, i.e. including the entire building and curtilage premises such as the rear and front lightwells and the rear ground rooms in the basement, the construction of the demise of the B/GF Lease is said to be more apparent. There was no plan and the parcels clause provides "*all that suite of rooms closets and passages situate and being the basement and ground floor flat of the Building*". It is therefore said that the B/GF Lease thus carved out of the Head Lease likewise contains areas 3, 4, 5, 8 and 9.
74. Mr Johnson also considered the issue of whether there had been a separate part of the demise used as caretaker's accommodation. He asked if that were the case why there had been no reference in the lease. He also questioned where that caretaker's accommodation might have been. Mr Johnson also asked us to take into consideration the fact that the Applicant had at one time advanced 6 separate cases of where that caretaker's accommodation might have been, this had now been reduced to 3. Mr Johnson further submits that there is evidence to the contrary of Mr Rainey's submissions in the 1985 plans to create separate caretaker's accommodation but this was not followed up. As at 12 January 1998 Cluttons had noted that there was no separation within the basement. Mr Johnson also highlights that there is only one kitchen in the B/GF Flat.

#### **The tribunal's decision - B/GF Flat – demise**

75. We were not satisfied that the Applicant had established on the evidence that an area had been excluded from the demise in respect of caretaker's accommodation. Plans lodged in support of the planning application in 1985 show the existing layout of the basement at that time and evidence no caretaker's



accommodation. Proposed plans show the front area being used as housekeeper's accommodation but these works did not take place. The planning permission granted for the building was for 2 flats and 2 maisonettes with no mention of caretaker's accommodation. Mr Rainey has been despite his best efforts unable to say definitively where that caretaker's accommodation was and what it comprised. We also took into account the fact that the obligation contained in the lease is to use the flat as a one family residence (which can include a caretaker as per *Regents Park v Maler* relied on by Mr Johnson).

76. We therefore find that the demise of the B/GF Flat flows from the Head Lease demise and includes areas 3, 4, 5, 8 and 9.
77. It was not therefore necessary for us to go on to consider the alternative case of encroachment but in any event we were not persuaded that any encroachment had been established as there had been no continuous period of 12 years established.

#### **B/GF Flat - the issue of common parts**

78. Mr Rainey argued firstly that the whole of the B/GF Flat was a common part as it became the lease of a caretaker's flat as a result of the Gillibrand's express covenant in the 1999 Licence or by de facto caretaking use by the Gillibrands.
79. The Applicant's main contention is that there was a caretaker's flat at the Property. It is submitted that at all material times from the grant of the Head Lease in 1954 until early 1998 a resident housekeeper, Mrs Matysiak, lived in the Property. When the building was then split into flats it is said that there were separate caretaker's rooms in the basement. It is then said that when the caretaker retired, Henry Keswick incorporated the caretaker's rooms into the B/GF Flat and the present partitioning was created. Reliance is placed in this regard on the section 146 documentation served by Wellcome in 1998 following which the right to forfeiture was subsequently waived and an assignment to the Gillibrands permitted on the express undertaking to act as resident caretakers.
80. The Applicant bases its case upon both "*as of obligation*" and "*de facto use*". Mr Rainey submitted that the freeholder is bound to maintain caretaker's accommodation in the basement.
81. Mr Johnson agrees that a caretaker's flat is capable of being a common part of a building as per Roth J. in *Panagopoulos*. However Mr Johnson says there is no caretaker's flat in the present case; the building comprises 4 self contained flats none of which is a caretaker's flat. Mr Johnson says that there is simply no evidence that there has ever been a caretaker's flat. It is also emphasised that the rooms identified by the Applicant as constituting caretaker's accommodation were not occupied on the relevant date when the B/GF Flat was unoccupied.

82. As there was no occupation by a caretaker of any part of the basement on the relevant date the Respondents say that this is the end of the matter. However if it were relevant the Respondents say that their evidence is that there has been no resident caretaker since at least 1998. It is not admitted that there was a resident caretaker prior to that date.
83. Mr Johnson in particular relies on a file note of Roland Cullum dated 12 January 1998 who inspected the basement flat on behalf of Wellcome and wrote
- “Inspected the basement flat of this property today....The headlease requires the property to be used as two maisonettes, two flats and caretaker’s accommodation in the basement. It is plain that the caretaker’s accommodation is incorporated in the ground and basement maisonette and this area is not the subject of an underlease and is therefore available to Keswick through the tenure of his head lease. It is in pretty poor repair and Keswick would like to dispose of his head lease. Before doing so he would like a deed of variation regularising the incorporation of the caretaker’s accommodation within the maisonette. Derek Fuller advises that the Estate is well supplied with caretaker accommodation and there is no Estate reason to stand in the way of his proposal.”*
84. Mr Johnson acknowledges that the Head Lease contains the following user covenant on the part of the tenant at clause 14;
- “And that the Lessee shall not at any time during the said term without the previous consent in writing of the Charity Trustees use the said messuage and premises or any part thereof nor permit the same to be used by any other person or persons for any other purpose than that of two self contained flats and two self contained maisonettes for private residential purposes in single occupation and with caretakers accommodation in the basement”.*
85. However Mr Johnson submits that the Head Lease was determined by merger on 19 May 2015, a matter agreed by the parties. As a result Mr Johnson submits that the restriction on use of the basement disappeared along with any covenant in the various underleases by the landlord to comply with the Head lease.
86. Accordingly Mr Johnson says that on the relevant date there was no caretaker in occupation of any part of the basement and there was no obligation to use any part of the basement as caretaker accommodation.
87. It therefore follows says Mr Johnson that the rooms shown as Items 3 and 9 were not common parts of the Property on the relevant date.

### **The tribunal's decision - B/GF Flat - the issue of common parts**

88. We considered that the correct question to ask was whether on the relevant date, 20 May 2015, the B/GF Flat or a distinct part of it had the identity of caretaker's accommodation. On the evidence before us it was clear that the B/GF Flat was in fact vacant on the relevant date. Although Mrs Gillibrand had agreed to provide caretaking services these could have been provided from a different address and we considered she occupied the property as a long leaseholder rather than a resident caretaker.
89. The second way the B/GF Flat or a distinct part of it might qualify as caretaker's accommodation was if there had been a scheme of legal obligation to provide that result. The user covenant in the Head Lease imposed on the head lessee is to house a resident caretaker and is not an obligation to provide a resident caretaker. In any event on 19 May 2015 the Head Lease merged and any obligation thus came to an end. We therefore did not find there had been a scheme of legal obligation to provide a resident caretaker.
90. We were also not persuaded that the authority of *Panagopolous* was of any great assistance to us. That case centred on the issue of whether a flat which solely served as caretaker's accommodation was a common part. In this case the submission is that part of a flat provided caretaker's accommodation and the facts are entirely different.
91. We went on to consider the parties' arguments on specific items within the B/GF Flat and whether they were common parts.
92. We have set out our approach to deciding whether a particular area is a common part above and the same considerations apply.
93. We think it useful to first summarise the items in contention by reference to the plan;
- a) Item 1 – admitted to be outside the demise of the B/GF Flat;
  - b) Item 2 – admitted to be outside the demise of the B/GF Flat and Flat 4;
  - c) Items 3 and 9 – the Respondents say these are within the demise of the B/GF Flat;
  - d) Items 4 and 5 – the Respondents say these items are within the demise of the B/GF Flat but are not common parts;
  - e) Item 6- this is admitted by the Respondents to be outside of the demise of the B/GF Flat subject to a right of way to the adjacent lightwell and external store;

- f) Item 7 – the Respondents say this is within the demise of Flat 4 save for the water tanks and associated pipework, as considered above;
- g) Item 8 – this is said by the Respondents to be within the B/GF Flat save for the outside steps which are admitted to be outside the demise subject to a right of way in favour of the tenant under the B/GF lease

94. A summary of the submissions heard in relation to each separate item is set out below together with our findings. We would mention that the Applicant also introduced several what we will call “New Items” introduced in Mr Bugajski’s evidence and are also marked on the Plan. These comprised items such as a gas meter and pipework, communal soil pipes and stopcocks and so on. Almost all of the New Items fell away and were not before us as they were conceded to be outside the demise. Those that remained are identified as New Items below.
95. We would mention that Mr Rainey referred us to various authorities in relation to airspace. However we accepted Mr Johnson’s submissions and agreed that these were not relevant as these authorities were not concerned with items within a structure as in this case.
96. As far as the shooting gallery case relied on by Mr Rainey is concerned we consider that can be distinguished from the facts in this case as the shooting gallery corridor in that case was not used for any other purpose. Its main function was to provide access whereas that is not the case here; the main purpose of the B/GF Flat was to provide accommodation to the occupier.

#### Items 3 and 9

97. As a result of our general findings above we found that Items 3 and 9 are not common parts but were rooms with functionality capable of providing living space.

#### Items 4 and 5

98. It was Mr Rainey’s submission that both Items 4 and 5 were the essential means of access to the lift motor room and as such were clearly common parts.
99. Mr Johnson’s case was that there was no evidence of these areas having been common parts. He suggested that items 4 and 5 doubtless consist of passages and closets within the basement and more likely than not as rooms within the parcels clause.
100. As far as Item 4 was concerned we considered its principal function is access to the basement flat. We therefore did not consider it a common part.

101. On inspection we had noted that Item 5 was a vaulted room which is used to store refuse. The stairs leading down to Item 5 are not demised but the bins are stored here for the Property. On the basis that Item 5 is purely a means of access to the vault where refuse is stored with no other function we found Item 5 to be a common part.

#### Item 8

102. Item 8 consists of lightwells and the room within them.
103. The Applicant says that the lightwells are communal but in any event outside the demise. The Respondents say they are within the demise.
104. We considered that Item 8's principal function was access to the manholes and that basis a common part

#### Fire door – New Item

105. We were not persuaded that the fire door is a common part. It is simply a door leading to the basement level.

#### WC New Item

106. We preferred Mr Johnson's submissions in relation to the WC and did not find it to be a common part.

#### Item 8B – New Item

107. We preferred Mr Johnson's submissions in relation to Item 8B and did not find it to be a common part.

#### **Common parts within the B/GF Flat demise–Reasonable necessity test**

108. When this matter came before us many of the items shown on the plan were no longer in contention as they had been conceded to be outside the demise and as such cannot be taken into account for the purposes of section 2(3).
109. We had found that Items 5 (back corridor) and 8 (lightwells) were common parts within the B/GF Flat. We went on to consider whether the acquisition of those areas was reasonably necessary pursuant to section 2(3).
110. As far as Item 5 was concerned the Respondents' case was simply that the reasonable necessity test was not satisfied. The exceptions to this are the

communal services (meters/pipework/cabling) located in the areas which were acknowledged to be common parts.

111. As far as Item 8 was concerned the Respondents' case was likewise that the reasonable necessity test was not satisfied. The exceptions were the outside steps to the front of the Property admitted to be outside the demise and the communal pipework manholes and a boiler flue which are accepted to be outside the demise.
112. Mr Johnson submitted that the reasonable necessity was of necessity not desirability. The Respondents' case is that the test is not satisfied in relation to the common parts in question. In order to decide the issue of reasonable necessity we had to consider the question of rights under the leases. It was the Applicant's case that a lot of difficulties arise. However Mr Johnson submitted that we had to decide what those rights meant and could not discount them on the basis that they were difficult to enforce or that there may be some argument on what they meant. We had heard much evidence from the management experts on the access required but the majority of the evidence was not relevant given the conclusions we reached on the areas which we found to be common parts.

### **The tribunal's decision - B/GF Flat-Reasonable necessity**

113. Our decision in relation to whether the acquisition of the B/GF Flat was reasonably necessary for the proper management and maintenance of the common parts is as follows;
  - i. As far as Item 5 (back corridor) is concerned we did not consider its acquisition to be reasonably necessary. Access to the area where the bins are stored can be gained by the external steps and the reservations contained in the B/GF lease were in our view sufficient for the maintenance of that area;
  - ii. As far as Item 8 (lightwells) is concerned we had heard conflicting evidence from the experts as to the access required. On balance of the evidence we did not consider that the acquisition of the areas was reasonably necessary for the purposes of section 2(3).

### **Comment**

114. We heard several days of evidence and lengthy submissions from Counsel. We considered that the circumstances of the present case may be relatively common; a large house which has long ago been converted into several flats with a

leasehold regime which is less than satisfactory and not in accordance with best practice.

115. In our view the 1993 Act does provide some difficulties in that it makes no provision of the scenario as in this case where common parts are outside the demise. Section 2(1)(b) gives a right but not an obligation to acquire leasehold interests in the relevant premises. Subsection 2(3) and the reasonable necessity test only apply to common parts within the premises demised by the relevant lease. If the common parts are outside the relevant demised premises they cannot be relied on for the purposes of the subsection. It is of course not unusual for common parts such as pipework to run through the physical space of a flat and for such items to be excluded from the demise. However any such items cannot be relied on for the purpose of subsection 2(3) as they are outside the demise and are not a reference to "those common parts". Mr Rainey made great play of what he referred to as tactical concessions made by the Corporate tenants by which they accepted many items were in fact common parts which is said to have enhanced their case. We are not in a position to comment on whether those concessions as to common parts were tactical. However there is no doubt that had certain concessions as to the extent of the common parts not been made, we may have well made a very different decision under section 2(3) on considering the reasonable necessity case.
116. We would usually go on to make a decision in the alternative in a case such as this. However in our view this is not necessary in this instance as there is very little evidence upon which we can safely rely to support any of the 3 alternatives put forward by Mr Rainey.

### **Transfer provisions**

117. The parties sought the tribunal's determination in relation to two provisions as follows.
118. Firstly the Respondents sought the inclusion of the draft clause 11.2 on the basis that they wished to make it explicitly clear that there was no implied covenant in relation to the physical condition of the Property. This was challenged by the Applicant. It said that it was clear on inspection that there had been no compliance with the covenant on internal repairs in relation to the B/GF Flat and they saw no basis upon which that should be released.
119. Secondly the Respondents likewise sought the inclusion of clause 11.3 which was a merger provision. This was sought on the basis that the Respondents say this should be a clean break rather than the leasehold interest remaining in existence. The Applicant says that they do not wish to be forced to merge and it is a matter for their election.

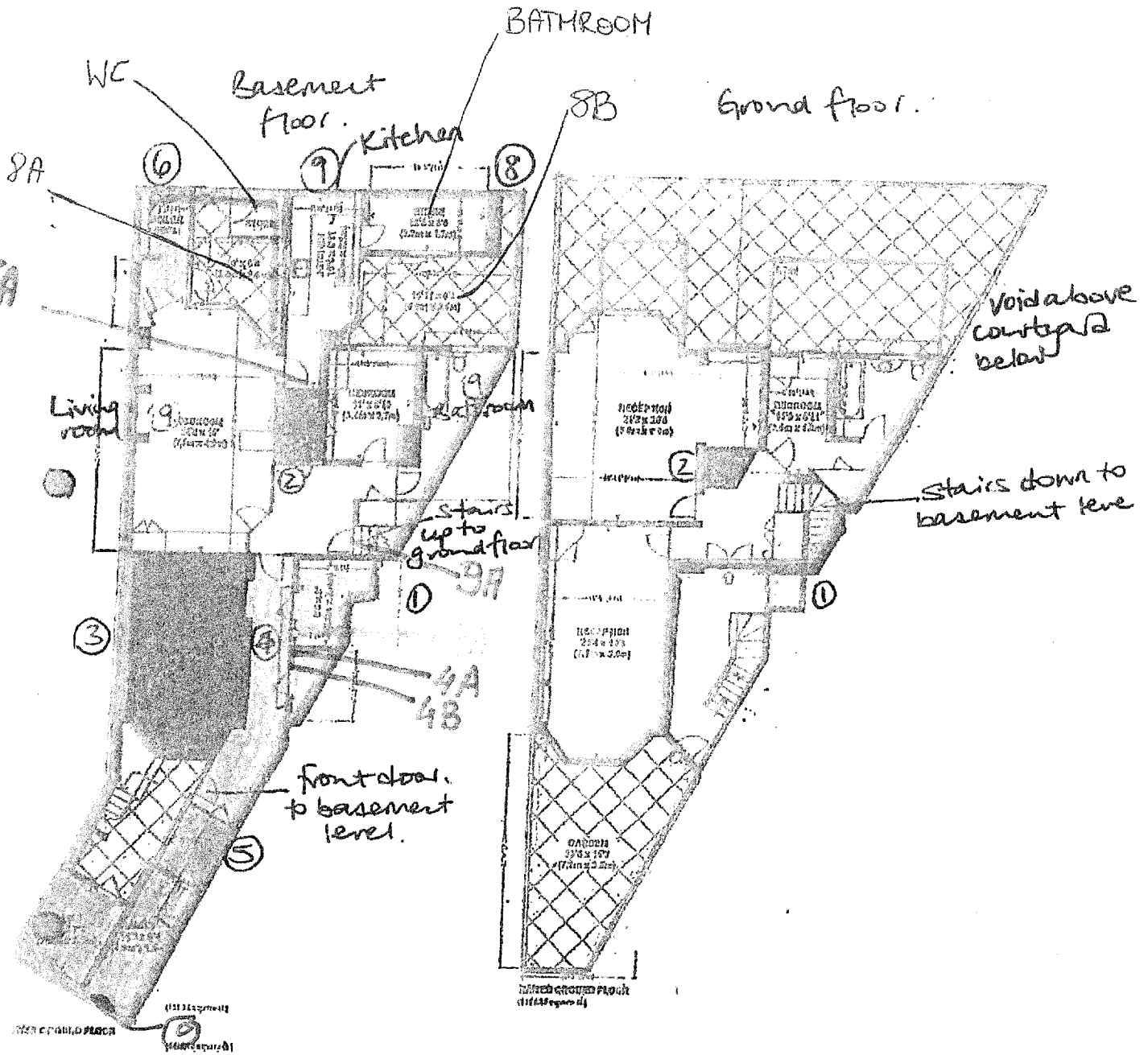
120. The Respondents say that both of these provisions were standard and uncontroversial. The Applicant did not accept this.
121. We consider that there is no basis upon which clause 11.2 should be included given the concerns about the physical condition of the B/GF Flat.
122. As far as clause 11.3 is concerned we consider that this is a matter for the Applicant as to whether they wish to merge and therefore consider this should not be included.

**Name:** S O'Sullivan

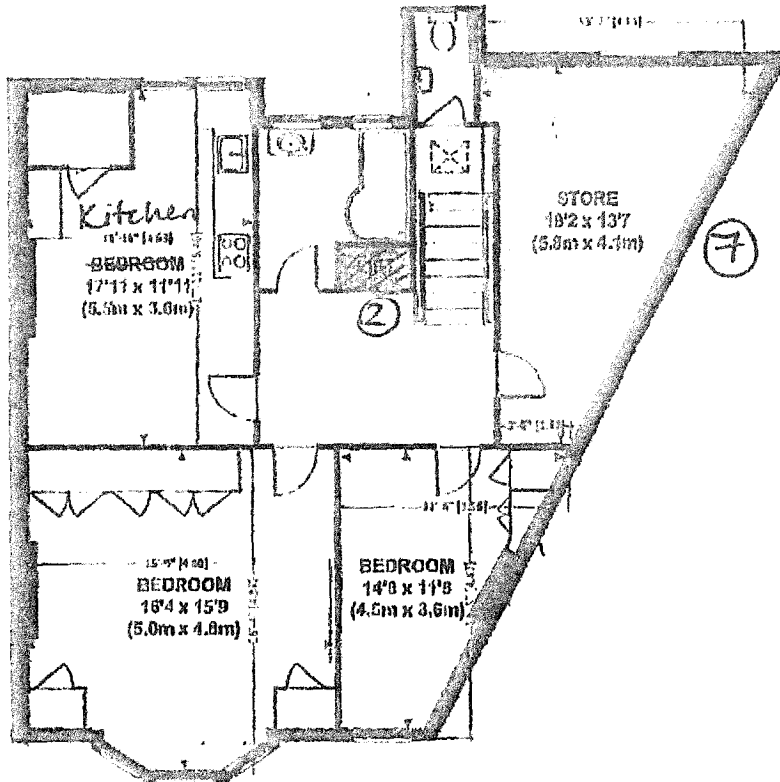
**Date:** 1 September 2017



# 10 Egerton Place.



- |  |  |
|--|--|
| 1. <input type="checkbox"/> Life (life plant room) in basement.  | 5. <input type="checkbox"/> Meters in store room & vault and adjoining vaults. |
| 2. <input type="checkbox"/> Dumb waiter and associated machinery | 6. <input type="checkbox"/> Boilers  |
| 3. <input type="checkbox"/> Caretaker's Bedroom.                 | 7. <input type="checkbox"/> Store room with water tank (Flat 4)                |
| 4. <input type="checkbox"/> Meters on wall in hallway.           | 8. <input type="checkbox"/> Outdoor courtyards and lightwells                  |
| <input type="checkbox"/> Sense of flats claimed                  | 9. <input type="checkbox"/> Additional caretaker's accommodation.              |



FOURTH FLOOR (870.29 square ft.)

