

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – HOUSE – substantial demolition and reconstruction of mews house – whether an improvement to be disregarded in determining price – whether necessary for property to have been a house at time of improvement – if so, whether requirement satisfied – whether work carried out by and at the expense of tenants’ predecessors in title – whether value of house increased by works – appeal allowed

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

BETWEEN:

THE PORTMAN ESTATE NOMINEES
(ONE) LIMITED
THE PORTMAN ESTATE NOMINEES
(TWO) LIMITED

Appellants

and

NIGEL DARE JAMIESON
LINDA CLARE JAMIESON

Respondents

Re: 7 Montagu Mews West,
London
W1H 2EE

Before: Martin Rodger QC, Deputy Chamber President and A J Trott FRICS

The Royal Courts of Justice, Strand, London WC2A 2LL
on
10-13 October 2017

Michael Buckpitt, instructed by Pemberton Greenish LLP, for the appellants
Thomas Jefferies, instructed by Mills & Reeve LLP, for the respondents

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The following cases are referred to in this decision:

Durley House Ltd v Cadogan [2000] 1 WLR 246

Fattal v John Lyon [2005] 1 WLR 803

Jewelcraft v Pressland [2015] EWCA Civ 1111

Lambert v Woolworth & Co Limited [1938] 1 Ch 883

Malekshad v Howard de Walden Estates Limited [2003] 1 AC 1013

Methuen-Campbell v Walters [1979] 1 QB 525

National Electric Theatres v Hudgell [1939] 1 Ch 553

Parsons v Gage [1974] 1 WLR 435

Rosen v Trustees of Camden Charities [2002] Ch 69

Sainty v Minister of Housing and Local Government (1964) 15 P & CR 432

Shalson v Keepers and Governors of the Grammar School of John Lyon [2004] 1 AC 802

Tandon v Trustees of Spurgeon Homes [1982] AC 755

Introduction

1. This appeal concerns the price payable for a mews house on the Portman Estate on its enfranchisement under the Leasehold Reform Act 1967 (“the 1967 Act”). To determine that price it is necessary for us to consider whether the demolition of a previous house on the same site in 1957 and its reconstruction in its current form constituted an improvement for the purpose of the Act. To do that we must first identify what works were done to the original house, when they were undertaken, by whom and at whose cost. Answering those questions has required considerable historical and architectural research.

2. The house in question is at 7 Montagu Mews West, London W1, the freehold of which is owned by the appellants, Portman Estate Nominees (One) Ltd and Portman Estate Nominees (Two) Ltd. The house was formerly the subject of a headlease which expired on 25 March 2017. The respondents, Mr and Mrs Jamieson are the owners of an underlease which expired ten days earlier on 15 March 2017.

3. On 1 August 2014 the respondents gave notice of their desire to acquire the freehold of the house under Part 1 of the 1967 Act. There was no dispute about their entitlement to do so. On 10 December 2014 the appellants applied to the First-tier Tribunal (Property Chamber) (“the FTT”) for the determination of the price payable for the freehold under section 9(1C) of the 1967 Act. The date of the respondents’ notice is referred to in the Act as the “relevant time” and is the statutory valuation date.

4. The FTT determined that that price was £1,771,185, the figure spoken to by the respondents’ valuation expert, Mr Michael Lee MRICS. The FTT granted permission to appeal on 17 February 2016; having considered the nature of the issues for which permission had been granted the Tribunal directed that the appeal would proceed as a re-hearing.

5. At the hearing of the appeal the appellants argued for a price of £2,792,410 and the respondents for £2,082,188, a difference of some £710,000.

6. Mr Michael Buckpitt of counsel appeared for the appellants and called expert evidence from Mr Victor Belcher MA, a consultant on the history of buildings; Mr Gareth Atkinson CEng, MStructE, of Civic Engineers Limited; and Mr Oliver French MRICS, of Savills.

7. Mr Thomas Jefferies of counsel appeared for the respondents and called expert evidence from Mr Peter Riddington BSc, BArch, RIBA, a consultant to Donald Insall Associates, architects and historic building consultants; Mr Steven Haskins, MStructE, CEng, a director of Haskins Robinson Waters Limited; and Mr Lee of Shaw & Co (Surveyors) Limited.

8. Additional evidence was received from a number of other experts who, by agreement, were not required to attend for cross examination. For the appellants the experts were Mr Nicholas Brindley MRTPI (town planning); Mr Mark Dendy MRICS (building surveying); and Mr James Jamieson MRICS (quantity surveying). For the respondents the experts were Ms Kate Green

IHBC, (historic buildings and town planning); Mr Simon Blausten FRICS (building surveying); and Mr Vincent Crew MRICS (quantity surveying).

Statutory provisions

9. Section 1(1) of the Act confers on the tenant of a leasehold house the right to acquire the freehold of the house and premises.

10. By section 2(1) a “house” includes any building designed or adapted for living in and reasonably so called, whether or not it is structurally detached. By section 2(1)(b), if a building is divided vertically the building as a whole is not a “house” though any of the units into which it is divided may be. This extension of the concept of a house is qualified by section 2(2) which provides that references to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house.

11. Section 2(3) explains that where reference is made to a “house and premises”, the reference to premises means any garage, outhouse, garden, yard or appurtenances which at the relevant time are let to the tenant with the house.

12. It is agreed that 7 Montagu Mews West is to be valued under section 9(1C) of the Act and that the value is therefore to be determined in accordance with section 9(1A). No additional compensation is payable to the landlord under section 9A.

13. Under section 9(1A) of the Act the price payable for the house and premises is the amount which, if sold in the open market by a willing seller, they might be expected to realise on certain assumptions. One of those assumptions is that the tenant has no liability to carry out any repairs, maintenance or redecoration under the terms of the tenancy (section 9(1A)(c)). Another is that the price payable is to “be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense” (section 9(1A)(d)).

The facts

14. In its current configuration 7 Montagu Mews West is a two-storey, mid-terrace mews house located between Montagu Square to the east and Bryanston Square to the west. Access to the mews is from George Street to the south. The property lies approximately 400m north of Marble Arch and is located in a high quality residential area on the Portman Estate.

15. From the evidence and statements of agreed facts we make the following findings about how the building came to be in its current form.

1817 to 1955

16. In about 1817 a coach house was built on the site, with stables on the ground floor and living quarters above. It served 7 Bryanston Square, a grand town house being built at the same time immediately to the west. We will refer to 7 Bryanston Square as “the main house” and to 7 Montagu Mews West as “No.7”.

17. Photographs of the mews taken before the Second World War show typical early 19th century brick-faced mews buildings. Most had, by then, two ground floor garages and living accommodation above with sash windows to the rooms. No.7 was differently configured. One of the garages had been replaced by a wide window and the facing brickwork appears to have been painted white. An aerial photograph taken in 1946 shows that most of the buildings, including No.7, had two parallel pitched roofs (known as “M” roofs). The exception was No.4 (a valuation comparable in this appeal) which had a flat roof.

18. On 5 June 1930 a single 30 year lease (“the 1930 lease”) comprising the main house and No.7 was granted by the Trustees of the Portman Family Settled Estate (“the Trustees”) to a Mrs Lloyd. On 8 January 1937 the 1930 lease was assigned to Charles Greville, 3rd Baron Greville. He occupied both properties until November 1940, after which they are shown in rating records as being vacant.

19. Plans from the late 1930s show the configuration of No.7 at that time. It was divided into two separate parts, with the rear being occupied together with the main house.

20. The kitchen in the basement of the main house was connected to a small scullery at the back of the ground floor of No.7. From the same level a staircase led up to a cook’s bedroom on the first floor of No.7. Most of the area occupied by the scullery lay below the cook’s bedroom, but part of it projected beyond the rear wall of No.7, so that the wall dividing the scullery from the kitchen, and part of the scullery itself, were not below any part of No.7.

21. From the ground floor of the main house a short flight of steps led up to a small first floor room in No.7 which was used as a library; the steps were enclosed in a narrow corridor with windows on either side. The cook’s bedroom and the library occupied about a third of the area of the first floor of No.7, but no door connected them to each other or to the remainder of No.7.

22. The main house was requisitioned during the War and not relinquished until 1954. The electoral register shows No.7 as being separately occupied by the Lord family until as late as 1956. There is no entry for No.7 in either the 1957 or the 1958 electoral registers.

The agreement for lease and the separation works

23. On 12 May 1955 the Trustees entered into an agreement for a new lease comprising the main house and No.7 with a Mr George Lane, described as a builder and contractor. This was one of a number of such agreements for Mr Lane to convert and then lease houses on the east

side of Bryanston Square, including Nos. 4 to 9, together with their associated mews, into flats and maisonettes. The agreement for No.7 recited that Mr Lane was negotiating to acquire the residue of the term of the 1930 lease, which was due to expire on 25 March 1960. He agreed to undertake works described in the second schedule and to surrender the 1930 lease in exchange for the grant of a new lease for a term of 62 year at a premium of £3,000.

24. The works specified in the second schedule to the agreement for lease, and which were to be completed by 30 September 1955, were to “convert the premises into self-contained flats and maisonettes” in accordance with plans and specifications to be previously approved by the Trustees. The parties’ intentions appear at that stage to have been imprecise as they included “such other works as the Landlords may require when the extent of the conversion scheme is known.”

25. A plan showing the extent of the works proposed for the main house (but with very little detail for No.7) was approved by the Trustees on 23 September 1955 (“the 1955 plan”). It shows the removal of the wall which had separated the scullery from the basement kitchen of the main house and the creation of a new paved garden in the area formerly occupied by that kitchen. The removal of the scullery wall would have created an open void extending for a short distance beneath the cook’s bedroom on the upper floor of No.7. A new fire escape is shown leading from the paved garden to the roof of No.7, blocking access to the staircase leading up to the bedroom. The 1955 plan also shows that the steps leading to the library and the corridor which contained them were to be demolished, the entrance to the library bricked up and the library itself was “to become part of mews”.

The Headlease

26. The new lease of the main house and No.7 was granted by the Trustees on 27 March 1957 (“the Headlease”). The Lessee under the Headlease was not Mr Lane, but was the Ludlay Brick and Tile Company Limited (“Ludlay”) of which he was a director. Ludlay had taken an assignment of the 1930 lease in June 1955, and Mr Lane joined in the Headlease as guarantor of its obligations.

27. Ludlay took similar leases of Nos. 4, 5, 8 and 9 Bryanston Square and their corresponding mews houses on 27 March 1957, each of which was guaranteed by Mr Lane.

28. As originally agreed, the Headlease was granted in consideration of a premium of £3,000 and the surrender of the 1930 lease; the grant was also described as being in consideration of the lessee’s covenant to put the premises “into complete and substantial repair and condition and to make substantial improvements thereto.”

29. Under the Headlease the lessee covenanted with the Trustees to convert the premises in accordance with the 1955 plan and to carry out works of repair set out in a schedule, all to be completed to the satisfaction of the Trustees’ surveyor by 30 September 1957. The 1955 plan related only to the conversion of the main house into self-contained flats and maisonettes, but the works of repair contained in the schedule to the lease were divided into two parts: the main

house, and No.7. The latter was sub-divided between roof, front elevation, rear elevation and interior. Reference to the roof was to the original “M-roof” and the specified work involved overhaul of slating and lead work and the renewal or re-fixing of defective slates. The remainder of the specified works were items of repair and redecoration to the existing building.

The Underlease and the works to No.7

30. Six weeks or so after taking the Headlease, Ludlay granted an underlease of No.7 to Mr Percy Simmonds on 15 May 1957 for a term of 62 years less 10 days from 25 March 1955 (“the Underlease”). Consideration for the grant was stated to be £2,500 together with the Underlessee’s covenant to put the demised premises into complete and substantial repair. That covenant mirrored the covenant in the Headlease (so far as it concerned No.7) and obliged Mr Simmonds, by 30 September 1957, to carry out the same works of repair as had been specified in the Headlease. In addition, in relation to both the interior and exterior of the premises, he covenanted as Underlessee to “overhaul all services (gas electricity water drainage etc) in to or in connection with the premises hereby demised and adapt all services as necessitated by the conversion and repair or renew so as to comply with the requirements of the appropriate statutory authority.”

31. Between May and July 1957 a number of regulatory notices were given and landlord’s approvals obtained by the architect, Mr John Gregory, and the builder, George Lane. Planning permission was granted for the conversion of No.7 into a two-storey dwelling-house with private garage on 4 July 1957.

32. On 28 May 1957, two weeks after the grant of the Underlease, an undated plan drawn by Mr Gregory was approved by the Trustees (“the 1957 plan”). It shows proposed alterations and improvements to No.7 involving extensive works at both ground and first floor levels to separate it entirely from the main house. Floors and internal walls were to be removed, as were the greater parts of both the front and rear walls, although the flank walls on both sides were to remain, but with chimney breasts and flues on the flank wall with No.6 being removed or repositioned. Small parts of the front and rear walls were also to be retained, as was a central column within the building which was to provide support to the new first floor structure and roof.

33. On the 1957 plan the ground floor area formerly occupied by the major part of the scullery, and which the 1955 plan had proposed to leave outside the walls of No.7 altogether, is shown as fully incorporated into No.7. A new WC cubicle was to be installed in the scullery space but the greater part was to become part of what is described as a “yard”. The yard was to be a small area created by the construction of a new rear wall dividing the scullery and separating it from the paved garden of the main house. No external door leads from the new enclosed yard to the paved garden area. Two internal doors lead into it, one from the back of the garage and the other from the entrance hall of No.7. An “ornamental metal open grill” (rather than a door or window) is shown in the new rear wall of the enclosed yard, suggesting that this was to be a secure storage area.

34. The steps which, in the 1930s, had led from the main house to the library in No.7 are not shown on the 1957 plan, but the walls of the short corridor enclosing the steps are indicated by dotted lines, indicating that they were still present but were intended to be removed. The area previously occupied by the library and the cook's bedroom was to be incorporated into No.7, becoming part of two bedrooms, a bathroom, a landing and stairs.

35. The 1957 plan also shows the replacement of the M-roof with a new flat roof. A lantern light and vent are shown over the stairwell but there is no internal access to the roof nor any indication that it was to be used as a roof terrace.

36. On 31 May 1957, three days after the Trustees approved the 1957 plan, the builder George Lane served notice on the District Surveyor that works for the "alteration and conversion" of No.7 would commence within two days. The estimated cost of the works was stated in the notice to be £1,500, and the "owner in possession" was named as Ernest Simmonds.

37. On 17 June 1957 Ludlay granted a licence to Percy Simmonds to use No.7 as a self-contained residence with private garage in one occupation only notwithstanding any provisions to the contrary contained in the Underlease.

38. On 20 June 1957 the Trustees consented to the assignment by Ludlay to Simmonds (Bryanston Square) Ltd of the four leases of Nos. 4, 5, 8 and 9 Bryanston Square/Montagu Mews West which had been granted to Ludlay three months earlier. The guarantors were Charles Simmonds and Percy Simmonds. The Trustee's records show that Ludlay completed the assignment of the Headlease to Simmonds (Bryanston Square) Ltd on 7 February 1958.

39. On 25 September 1957 the books of the General Rate record Nos. 5, 6 and 7 Montagu Mews West as having been demolished. No.7 is next shown as having been re-occupied on 28 October 1958, with Nos. 5 and 6 being reoccupied a few months either side of that date.

40. On 10 November 1958 Percy Simmonds entered into an agreement for a sub-underlease of No.7 to a Mr Walton, and on 31 December 1958 he assigned the Underlease to Percy Simmonds Investments Limited for £2,500 (the price he had paid for it). On 10 June 1959 Percy Simmonds Investments Limited granted the sub-underlease to Mr Walton for a term of 14.5 years from 25 March 1958.

41. We infer from these sources first, that substantial work had not yet been undertaken to No.7 itself by March 1957 when the Headlease was granted to Ludlay, and secondly that No.7 was substantially demolished and reconstructed between the summer of 1957 and October 1958 while the Underlease was vested in Percy Simmonds. The project involved the reconstruction of the three mews houses at Nos. 5, 6 and 7 at the same time and to a single design, creating a group of three with a common art deco façade.

42. A further plan produced by Watcyn Williams & Partners on 17 April 1962 and captioned “Survey of 7 Montagu Mews West” was approved by the Trustees on 19 April 1962. The plan shows No.7 after the completion of alterations, rather than in anticipation of further works. A different configuration of rooms is shown to that indicated in the 1957 plan; the floor of the enclosed yard has been raised and it has become part of the kitchen of No.7, and a more open arrangement is shown for the ground floor living space, as well as a revised staircase and a loft ladder giving access to the roof. The changes in design also included the removal of the central pillar, and the small part of the original front wall, both of which had been shown as retained in the 1957 plan. A fire escape ladder is also shown running from the rear paved garden of the main house (otherwise now fully separated) to the flat roof of No.7. It is not possible to tell whether the party wall between Nos.6 and 7, retained on the 1957 plan, was demolished and rebuilt in the course of the works but there is no indication on the 1962 plan that it was. The party wall with No.8 (which was not rebuilt until somewhat later) must have been retained.

43. It is possible, but we consider it unlikely, that these variations from the original design were made sometime between the completion of a first phase of works in 1958 and the preparation of the plan in 1962. We think it more likely that relatively significant changes to the original plan were approved informally during the course of the 1957 works or ratified at their conclusion. All of the works had been completed by October 1958, before the sub-underlease to Mr Walton.

Issues

44. The primary issue in this appeal is whether the demolition and reconstruction of No.7 in 1957/58 constituted an improvement the value of which is required by section 9(1A)(d) to be disregarded when determining the price to be paid for the property upon enfranchisement.

45. The valuation experts agree that the freehold vacant possession (“FHVP”) value of No.7 on 1 August 2014 was £3.05m. If the work done in 1957/58 was not an improvement to be disregarded, or if it did not increase the value of No.7 on the valuation date, it is agreed that that figure is the starting point for the determination of the price.

46. If the work was an improvement adding to the FHVP value on the valuation date, that additional value must be disregarded. The valuation experts agree that this should be done by determining the value which the original building would have had on the valuation date if the works had not been undertaken. This was referred to as the unimproved value; if the 1957/58 works must be disregarded, it is agreed that the unimproved value will be the starting point for the determination of the price.

47. In light of the arguments presented by the parties, before the price can be determined it is necessary to consider six sequential questions:

- (i) Does the statutory disregard of improvements apply only if the improvements were carried out to a “house” at the time they were undertaken?

- (ii) If so, was the building in its original form a “house”, or was it prevented from being a house, as defined in section 2 of the Act, by the arrangement of its rooms and its relationship to the main house?
- (iii) If the answers to questions (i) and (ii) are not determinative, then was the work carried out in 1957/58 an “improvement” of the original building or was it something different, namely a complete replacement, to which the statutory disregard of improvements should not apply?
- (iv) If the work was an improvement, was it carried out by a predecessor in title of the respondents at their own expense (as required by section 9(1A)(d))?
- (v) If the work was an improvement to be disregarded, what assumption ought to be made about the condition No.7 would have been in at the valuation date, if it had not been demolished and reconstructed?
- (vi) If it had not been demolished and reconstructed, would the original building, in its assumed condition, have been worth more than £3.05m on the valuation date?

48. A number of the earlier questions in this sequence may prove to be determinative, and require that the price be based on the FHVP value of No.7 in its current condition, which is agreed to be £3.05m. Nevertheless we will answer each of the questions, at least summarily, to reduce the risk of a further hearing being required in the event of any successful appeal.

Issue 1 - Must the improvements have been carried out to “a house” at the time they were undertaken?

49. On behalf of the appellants, Mr Buckpitt submitted that the statutory disregard of improvements applies only if the subject of the relevant work is a house, as defined in section 2, at the time the work is carried out. The fact that No.7 was a house on the valuation date in 2014 was not to the point; one could only improve a house and premises in the sense intended by section 9(1A)(d) if it was already a house, so the point in time at which the character of the subject had to be assessed was before the work began in 1957.

50. Mr Buckpitt relied in support of his submission on *Rosen v Trustees of Camden Charities* [2002] Ch 69 in which the Court of Appeal considered whether the erection of a new house on a bare site was an improvement to be disregarded under section 9(1A)(d), and agreed with the tribunal below that it was not. An improvement could not come into existence in a vacuum; it must constitute an improvement to something. The tribunal had reasoned that, as the Act did not refer to “demised premises” but only to “house and premises”, in the absence of a house there was nothing to improve, neither house, nor premises, nor house and premises. Evans-Lombe J with whom the other members of the Court agreed, thought that was right and said this at [16]:

“I respectfully agree with the tribunal. Paragraph (d) does not use such words as “the demised premises” nor are they used in the Act generally. The term used is “house *and* premises” not “house *or* premises”. From the definition of “house and premises” in section 2(3) it is clear that “premises” cannot exist independently of a house. The building of a new house on a bare site (whether a green field or a site on which a previous building

which was not a house has been demolished) is not the improvement of ‘the house and premises’ but the provision of the house.”

51. In this case (Mr Buckpitt suggested) the property to be valued was not the original building but the house as it existed on the valuation date, and the creation of that house could not constitute an improvement of the very thing which was being created.

52. Replying on behalf of the respondents, Mr Jefferies submitted that *Rosen* could be distinguished on its facts: it was simply authority that building a new house on a bare site was not an improvement which fell to be disregarded, but it said nothing about improvements carried out to an existing building. The purpose of section 9(1A)(d) was to avoid the unfairness of a tenant being required to pay twice for works they or their predecessors in title had carried out at their own expense. *Rosen* indicated that a different approach was required where the lease was of a bare site but that exception to the principle should be applied narrowly, to avoid unfairness to the tenant and an unjust windfall to the landlord.

53. Mr Jefferies submitted that the appellants’ own evidence showed that the development was not of a bare site. The works undertaken in 1957/58 were substantial but, as Mr Belcher (the appellants’ historian) had recognised, the 1957 drawing indicated that a complete rebuilding was not intended and that some of the existing structure was to be retained. The 1962 survey plan suggested that some features which were originally to be retained, including structural columns in the centre of the building, had in fact been removed and the layout changed. But, at the very least, the party wall with 8 Montagu Mews West must have been retained.

54. Once it was accepted that the improvements did not have to be to “*the* house and premises” as they were at the valuation date, there was no reason why they had to be improvements to a building satisfying the definition of a house when the work was carried out. Even if no work was done to the house, improvements to the premises (as defined in section 2(3)) also fell to be disregarded. The only time a tenant needed to establish that a building was a “house” was at the date of the claim to acquire the freehold. In *Tandon v Trustees of Spurgeon Homes* [1982] AC 755, at 765H Lord Roskill said that it was clear that the character of the premises must only be considered “as at the time of the tenant’s notice under the statute.”

55. Mr Jefferies concluded that it was not necessary to show that the improvements were carried out to a house, however described. Alternatively, it was not necessary to show that the improvements were carried out to a building which was a house as defined in section 2 prior to the improvements being undertaken.

Discussion

56. The proper approach to the application of section 9(1A)(d) was considered by the House of Lords in *Shalson*, which concerned a house let under successive leases and which had originally been converted into five flats; these works were later undone and the building was converted back to a single dwelling by a tenant who then exercised the right to enfranchise under the 1967 Act. The Court of Appeal decided that the tenant’s works, which had merely reversed an earlier

tenant's works and restored the house to its original condition, were not improvements within section 9(1A)(d) and did not fall to be disregarded despite the agreed fact that the house was worth more than if they had not been done.

57. The House of Lords allowed the tenant's appeal. Lord Bingham observed that the statutory formula used to determine the price payable for the freehold was "clearly intended to yield a fair result as between tenant and owner, conferring no undue benefit on either" (805C). Referring to the language of section 9(1A)(d) with its requirement that "the price be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense" Lord Bingham explained:

"This statutory language makes plain that the price will be diminished under this head if and only if it is found (i) that works of improvement (meaning works other than renewals and repairs) have been carried out by the tenant or his predecessors in title, (ii) that the tenant or his predecessors in title have carried out these works at their own expense, and (iii) that these works have increased the value of the house. To the extent of the increase attributable to those works the price payable for the house is diminished."

To Lord Bingham, the fairness of this provision was obvious. It avoided the tenant paying an enhanced price attributable to works done at their own or their predecessor's expense, and it prevented the owner "reaping an adventitious gain as a result of works which he had had no right to require." In each case where the assumption was in issue the question to be asked was: "has the value of this house been increased by any improvement carried out by the tenant or his predecessors in title at their own expense?"(805H)

58. Lord Hoffman, with whose speech the other members of the House agreed, said that for the tenant to secure a reduction, they must first identify improvements which they or a predecessor in title had carried out at their own expense, and secondly, satisfy the tribunal that but for those improvements the house and premises would have been worth less (808H). The first question required "consideration of any changes which have been made to the premises during the term of the lease" (or the extended period deemed by section 3(3)). All changes were potentially relevant, and at 814C Lord Millett said that it was wrong simply to compare the property at the valuation date with the property as it was when originally let.

59. There is no hint in the speeches in *Shalson* that it was necessary to consider the nature of the structure to which the supposed works of improvement were undertaken, although that is not surprising given the facts of that case. But both Lord Hoffmann at 809B and Lord Millett at 813E emphasised that the concept of an improvement "is a physical and not an economic one" and directed their attention solely to the works. The tenor of the speeches is very much that the focus should be on the works themselves and that "any improvements" should be disregarded provided they had been carried out at the expense of the tenant, or a predecessor in title, and so long as they enhanced the value of the building.

60. In our judgment, therefore, an additional requirement that the tenant must show that the structure in question was already a house before the works were carried out is not warranted by the statutory language.

61. As the evidence in this case demonstrates, the recognition of such a requirement would be likely in some cases to necessitate detailed and expensive investigations which may ultimately prove inconclusive. Such practical considerations had troubled the Court of Appeal in *Shalson* (as Lord Hoffmann noted at 808F). Lord Millett also recognised (at 815D) that there were practical problems in taking account of works carried out in the distant past, unless a reliable history of the property was available, but he was not willing to allow that to affect the principle that “any improvement” that satisfies the statutory criteria must be disregarded. Although practical difficulties were insufficient to persuade Lord Millett to accept a narrowing of the inclusive language of section 9(1A)(d), the same practical considerations seem to us to justify the rejection of an additional condition which is not clearly warranted by the statutory language.

62. A further reason for rejecting such an additional requirement is that it would tend to defeat the purpose of the disregard of improvements. A tenant who was entitled under the terms of their lease to carry out works, at their own expense, to convert into a house a building which was not one (perhaps because it was prevented from so being by the material overlapping provision in section 2(2)) might find that on carrying out those works an enhanced price became payable because they could not be disregarded. That would be unfair to the tenant. Conversely, there would be no unfairness to a landlord who had bargained for a lease giving the tenant the necessary freedom to carry out such works, if their positive effect on value was then disregarded in fixing the enfranchisement price.

63. Nothing in *Rosen* compels a different conclusion. Although Evans-Lombe J had referred to building on a bare site “(whether a green field or a site on which a previous building which was not a house has been demolished)” the Court of Appeal was not considering a case in which an existing structure has largely been demolished and replaced by something substantially new, but still incorporating some elements of the original. *Rosen* concerned the building of a new house on a bare site, albeit one which had formerly been the site of the Kensington workhouse; the account of the facts given in paragraph [2] of the judgment of Evans-Lombe J refers to the demise as being “of the site”, rather than of the workhouse on the site, and there is no suggestion that the agreement for lease obliged the tenant to demolish anything already on the site.

64. We agree with Mr Jefferies’ submission that the time at which to judge whether a house and premises exists is at the time the tenant gives notice claiming to be entitled to enfranchise. If its value has been increased by works which satisfy the statutory criteria that enhancement must be disregarded; whether it was a house at the time the works were undertaken is irrelevant, and the most that *Rosen* appears to require is that the house and premises must not be wholly new, and that some structure must have been demised which can be said to have been improved by the works to create the current house. In this case a dwelling existed on the site at the commencement of the lease, to which works other than renewals and repairs were carried out by the respondents’ predecessors in title. That those works comprised the substantial replacement of the original structure with one of a different design does not justify treating No.7 as if it had been built on a bare site. Major elements of the structure of the current

building were present in the original building, including at least one of its flank walls and a small part of the rear wall and, necessarily therefore, a significant part of the foundations. In those circumstances it is not unrealistic to conclude, if necessary, that the current building exists because of improvements undertaken to the original building.

65. In any event, in *Rosen* an independent ground existed for treating the construction of the house as not being an improvement requiring to be disregarded, namely that the work had been undertaken as a term of the original building lease and therefore could not properly be regarded as having been done at the tenant's predecessor's expense (*Rosen*, at 77 E-H; *Shalson*, 813 F-H).

66. For these reasons we determine issue 1 in the respondents' favour. It is not necessary for them to show that No.7 was a house in 1957.

Issue 2 - Was the original building a "house"?

67. This issue arises only if we are wrong in our conclusion on the first issue.

68. As Lord Millett pointed out in *Shalson* at 815D, the landlord is *prima facie* entitled to the full value of his interest in the property as it stands at the valuation date, and it is for the tenant to prove the facts which justify reducing that value on account of improvements to which section 9(1A)(d) applies.

69. The dispute is whether, as the respondents assert, the premises demised by the Underlease were a "house" as defined by section 2(1) of the Act, having regard in particular to the proviso in section 2(1)(b) that a building divided vertically is not a "house" though any of the units into which it is divided may be. One aspect of this issue is whether works to unite the front and rear parts of No.7 and to separate it from the main house had taken place by the time the Underlease was granted by Ludlay to Percy Simmonds on 15 May 1957.

70. If the premises were divided vertically when the Underlease was granted, section 2(1)(b) would have prevented the building as a whole from being a "house" at that time. It would not matter that the division was not in a continuous vertical plane, so long as it was divided vertically from top to bottom (Mr Buckpitt referred the Tribunal to *Malekshad v Howard de Walden Estates Limited* [2003] 1 AC 1013 and to Lord Millett's observations to that effect at [57]).

71. The Headlease granted to Ludlay demised the entirety of both the main house and No.7. The subsequent Underlease of No.7 alone had no plan attached and the precise boundaries of the demise are therefore uncertain. In particular it is in issue whether the rooms at the rear of No.7 which are shown on the 1930s plan as not interconnecting with the rest of the building (the ground floor scullery, the staircase, the cook's bedroom and the library) were within the demise. Nor have the experts been able to agree whether works to separate No.7 from the main house had been completed before the Underlease was granted.

72. Mr Buckpitt submitted that it was impossible for the Tribunal to be satisfied that the works of separation had been undertaken by 15 May 1957. The evidence suggested instead that No.7 had been divided vertically at that time and that part of the area at the rear was entirely separated from the remainder of the building and still occupied in conjunction with the main house.

73. The architectural historians, Mr Belcher and Mr Riddington, were unable to agree the layout of No.7 prior to the 1957 works. Mr Belcher, who gave evidence at the request of the appellants, thought that access from the main house to the cook's bedroom via the staircase from the scullery may have been closed off and an opening formed in an internal wall of No.7 at first floor level at some time between 1938 and 1957. The presence of such an opening was suggested on the 1957 plan. He thought the cook's bedroom may therefore have been accessible from the front of No.7 and been included in the Underlease. He found no similar indication that the scullery or library were accessible from No.7 or formed part of the Underlease demise.

74. Mr Belcher acknowledged that the steps from the main house to the first floor library were not shown on the 1957 plan although the walls enclosing the steps were indicated. Without the steps there would have been no means of access to the library as no internal door from the front part of No.7 was shown, so he considered that the room could not have formed part of the mews accommodation. It would have been unusual for any works to have been carried out before the Trustees had given their approval. Mr Belcher thought it most likely that the stairs were removed as part of the programme of work to No.7 rather than as part of the works to convert the main house into flats which appear to have started earlier.

75. Mr Buckpitt submitted that the front portion of No.7 was not a house in its own right, but would at best have been a flat or maisonette. If the premises demised by the Underlease comprised only the front section of No.7, they were not structurally detached, and a material part of them lay below the library or above the scullery, both attached to the main house.

76. Mr Riddington, who gave evidence at the request of the respondents, believed that the works of separation had been completed and the scullery removed by the time the 1957 plan was prepared. Ludlay had been in a position to carry out the separation works when the plans for the conversion of the main house were approved in September 1955. Rating records showed that the main house had been unoccupied in 1955 and uninhabitable in 1956 and 1957, making it unlikely that rooms in No.7 were in use in conjunction with it at that time. No.7 itself was still occupied in 1955 and 1956. The agreement for the Headlease obliged Ludlay to carry out the works shown on the 1955 plan by 30 September that year; the works included demolishing the staircase to the library and bricking up the opening in the rear wall leading into it, with the scullery area becoming part of an open yard with no access from No.7. The same obligation was included in the Headlease when it was granted on 27 March 1957 with the deadline for completion of the works on the 1955 plan now given as 30 September 1957. The obligation to carry out the works on the 1955 plan, and thus to separate No.7 from the main house, was not carried forward into the Underlease granted to Percy Simmonds, which required only the work of repair. That suggested that the separation work had already been done. Mr Riddington said that none of these considerations were inconsistent with the 1957 plan, approved in May 1957, but which must have been prepared some weeks if not months earlier.

77. Mr Riddington did not agree with Mr Belcher's view that the stairs leading to the first floor library were still present in 1957 even though they were not shown on the 1957 plan. The internal stairs at the rear of No.7 serving the cook's bedroom were correctly shown on the plan, as was the main staircase, all of which were to be removed as part of the works to No.7. He acknowledged that, if he was right, the library would no longer have been accessible from the main house yet there would have been no means of getting into it from the front of No.7.

78. Mr Riddington interpreted the 1957 plan as showing that the scullery wall adjoining the kitchen at the rear of the main house had been removed by that time, leaving an open void overhung by the cook's bedroom in the area which was intended for the enclosed yard but eventually became the kitchen of No.7.

79. Mr Jefferies invited the Tribunal to find that No.7 was not vertically divided and was a house within the meaning of section 2 of the 1967 Act when it was demised by the Underlease. By that time there was no material over-hang or under-hang of any attached structure not comprised in the demise. Two areas within No.7 as demised by the Underlease had no internal connection with the remainder: the area of the former scullery at ground floor level and the library at first floor level. The 1957 plan showed the cook's bedroom as accessible from the front part of No.7 and the staircase leading from the main house up to the cook's bedroom via the scullery had been blocked off. Those inaccessible areas nevertheless formed part of the demise and could not lawfully be used or accessed from or as part of the main house. They were part of No.7 which, taken as a whole, as it had been demised, was a house for the purpose of the Act. It did not matter that there was no intercommunication between certain parts of the house: in *Jewelcraft v Pressland* [2015] EWCA Civ 1111 a purpose-built shop with separate residential upper parts was a "house" notwithstanding that there was no direct access to the flat from the shop.

80. Alternatively these two areas were part of the "house and premises" within section 2(3), because they were "appurtenances". In *Methuen-Campbell v Walters* [1979] 1 QB 525 at 543A Buckley LJ explained that "appurtenances" extended to land or buildings within the curtilage of the principal subject matter of a conveyance. He continued at 543H:

"In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter that the former in truth forms part and parcel of the latter. ... To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as falling within one curtilage; they constitute an integral whole."

Mr Jefferies submitted that in this case those parts of No.7 inaccessible from the front of the original building, but which had been demised with it in contemplation of being incorporated into the new structure, were appurtenant to the building in its original form.

81. Mr Jefferies also argued that the parts of the house which lay below the library and above the former scullery were not "material" for the purposes of section 2(2).

Discussion

82. The starting point must be to determine the extent of the premises demised by the Underlease, which requires consideration of the description of the property in the Underlease itself. The document describes the demised premises as “ALL THAT the premises situate and known as Number 7 Montagu Mews West ... with the benefit of the cellars thereto belonging.” The demise was made together with a right of access over “the fire escape already provided or to be provided from the rear of the demised premises ...”

83. There is no indication in the Underlease that anything less than the whole of the mews building was demised. The contrary impression is given by “ALL THAT”, and by the express inclusion of cellars. If it had been intended that rooms at the rear of No.7 were not to be demised, that would have been made clear. Even if it is assumed that the rooms were not yet accessible from the front of No.7, it must have been within the contemplation of the parties that they would shortly be made accessible. In any event as subsequent works show, those rooms, in whatever condition they were in at the date of the Underlease, were treated as included in the demise.

84. The Underlease also reserved “mutual rights of access in case of emergency over the fire escape provided or to be provided from the rear of the demised premises to the rear of the courtyard at the rear of the demised premises”. On the 1955 Plan that fire escape is shown adjoining the rear wall of the former library at No.7 and the courtyard is presumably the new paved garden shown on that plan at the rear of 7 Bryanston Square. The relationship of these elements, and the description of the route of the fire escape, suggests that the demised premises included the rooms at the rear of No.7, the library, the scullery and the cook’s bedroom.

85. Nothing in the Underlease obliged the underlessee to close off the access between the library and the main house, yet nor was any right reserved for Ludlay to do so. Ludlay was required by the Headlease to brick up the opening and demolish the corridor and staircase leading into the main house (Mr Lane had been under the same obligation since 1955). The 1957 plan shows the staircase as having been removed, with the connecting corridor yet to be taken down.

86. One possible inference from the absence of relevant obligations or reservations in the Underlease, and from the 1957 Plan, may therefore be that the separation work had already been completed by the time the Underlease was granted, at least to the extent of removing the staircase and finishing the work which would otherwise have amounted to a trespass on No.7 if carried out by Ludlay. That work would have included closing off the access through the rear wall of the library at No.7 which had originally led on to the staircase, and removing the wall dividing the scullery from the kitchen (which is likely to have been done at the same time as closing off the access at first floor level).

87. An alternative inference may be that Ludlay did not need to rely on the underlessee to fulfil its obligations in the Headlease, because arrangements satisfactory to Ludlay had already been made with a third party for the required work to be completed after the grant of the Underlease.

We will have to consider that possibility in more detail when we address the separate issue of the identity of the person who carried out and paid for the works, but at this stage we will proceed on the basis that the more likely inference is the first, namely that the work of separation had already been done (at least to the extent that they involved work within the building envelope of No.7 itself) by the time the Underlease was granted.

88. Mr Belcher acknowledged that some work, at least, appears already to have been undertaken to achieve the necessary separation by the time the 1957 plan was drawn. In particular the cook's bedroom was no longer separated from the front area of No.7. Nothing in that arrangement would prevent No.7 from being a house.

89. If it is assumed that the 1957 Plan accurately depicts the former library then, by the date of the Underlease, no door had yet been created to unite that room with the remainder of No.7. That, we consider, would equally not have prevented No.7 from being a house. The building was not "divided vertically" in the sense intended by section 2(1)(b); it ceased to be divided at first floor level when the access between the library and staircase to the main house was closed off, as had happened by the time the Underlease was granted. We do not consider that section 2(1)(b) has the effect that the presence of an inaccessible area within a building prevents it from being a house, at least where the whole structure is comprised in the same demise. If that were so, the presence of a cupboard or garage only accessible from outside would create difficulties. The building was not divided at all, but was a single unit.

90. Even if we are wrong to treat the (as yet inaccessible) former library as not amounting to a division at first floor level, the building as a whole would only be "vertically divided" if there was also a comparable division at ground floor level. The relevant division need not lie in a single plane, but section 2(1)(b) will only be engaged if the building is divided "from top to bottom" (as Lord Millett had indicated was required in *Malekshad* at [57]).

91. We have already inferred that, on balance, the wall dividing the scullery from the kitchen of the main house (which was to become an open garden or yard as part of the works to the main house) is likely to have been taken down at the same time as the access at first floor level was closed off i.e. before the grant of the Underlease. If the 1957 Plan accurately depicts what remained to be done, the resulting open area lying beneath the cook's bedroom which had formerly been part of the scullery (and was soon to become the kitchen of No.7) would not yet have been enclosed within the four walls of the building. But the presence of that open area did not cause the building to be divided vertically, because it lay outside the walls, although overhung by part of the first floor.

92. The same arrangements would not have caused the house to be excluded by section 2(2). The 1957 plan indicates that no means of access had yet been created from the area of the former scullery to the rest of the ground floor of No.7. It was nevertheless included in the demise in anticipation of its full integration into the reconstructed house and no rights were reserved over it for the lessor. In our judgment those circumstances did not cause No.7 to fall foul of the exclusion in section 2(2) of a house which is not structurally detached but where a material part lies above or below a part of the structure not comprised in the house. The open area was not "a

part of the structure” not comprised in the house, because it was outside the structure of the building. The fact that part of the cook’s bedroom lay above the open area was therefore irrelevant, and did not engage section 2(2); nor, for the same reason, is it necessary to consider whether the extent of the overlap was material.

93. In relation to this open area we also accept Mr Jefferies’ submission that it was within the meaning of the expression “house and premises” because it was either a yard or an appurtenance, and was enjoyed with the rest of the demise.

94. We conclude, therefore, that if it is necessary for No.7 to have been a house in the statutory sense when the Underlease was granted, that requirement was satisfied.

Issue 3 – Was the demolition and reconstruction of No.7 an improvement?

95. Mr Buckpitt next submitted that the demolition and redevelopment of the original building was not an improvement to the original building but its replacement by a different structure, and that section 9(1A)(d) of the 1967 Act did not require that any resulting enhancement in value be disregarded.

96. Once again, the basis of this submission was the judgment of Evans-Lombe J in *Rosen*, where, at paragraph [13] he had said:

“An improvement cannot come into existence *in vacuo*. It must constitute an improvement to something.”

That something could not be the demised premises, but was rather the “house and premises” defined in section 2(3) of the 1967 Act. From that it followed that:

“The building of a new house on a bare site ... is not the improvement of the ‘house and premises’ but the provision of the house.”

Thus, Mr Buckpitt submitted, the building of the new house on the site, following the demolition of the original house, was not an improvement of the original house, and could not be disregarded. He also relied on *Sainty v Minister of Housing and Local Government* (1964) 15 P & CR 432, 434 in which the Divisional Court had upheld the view of the Minister that the complete replacement of one building by another does not constitute the “improvement” of the original building and therefore was not permitted development.

97. Mr Buckpitt also referred to *Shalson*, in which Lord Hoffmann had said at paragraph [19] that in considering whether an improvement had increased the value of the house and premises it was necessary to compare “the value of the house as it stands and what its value would have been if the improvement had not been made”. That comparison required the valuation of a hypothetical house which Lord Hoffmann said was “one which has all the features of the real house, including its history, save for one: that the improvement in question had not been made.” Mr Buckpitt submitted that the improvement must therefore have been made to the existing

house as it stood at the valuation date, whereas in this case the original building was not present on the valuation date; it had not been improved, it had been replaced.

98. Mr Jefferies pointed out that very substantial improvements could, in principle, be within the scope of section 9(1A)(d) and the appellants were therefore wrong to suggest that only improvements to the structure in existence at the valuation date were to be disregarded. That would mean alterations that radically changed the building would not be disregarded, yet in *Shalson v Keepers and Governors of the Grammar School of John Lyon* [2004] 1 AC 802, 806A the addition of an extra storey and a mansard roof were agreed to be improvements to be disregarded. In *Fattal v John Lyon* [2005] 1 WLR 803 substantial works to an existing house doubled its gross internal area yet were to be disregarded as improvements. Mr Jefferies submitted that those works could not sensibly be said to be improvements to the building which existed at the valuation date; they were improvements to a different and much smaller building.

99. Alternatively, Mr Buckpitt argued, works had to go beyond repair or renewal if they were to constitute improvements; he referred to Lord Hoffmann's statement in *Shalson* at paragraph [18] that "in general terms" improvements were "additions or alterations to the house and premises which are not mere repairs." Moreover, insofar as work was undertaken to comply with a repairing covenant it could not constitute an improvement carried out at the tenant's expense, because it was part of the consideration given for the grant of the lease and so could not fall within section 9(1A)(d). In this case the works were done in compliance with the lessee's covenant in the Underlease to put No.7 "into complete and substantial repair and condition".

100. We do not accept either of Mr Buckpitt's submissions. We remind ourselves once again that the purpose of the statutory disregard of improvements is to avoid the unfairness which would arise if the tenant was required to pay a price, on enfranchisement, which was enhanced by the tenant's own expenditure in improving the property. The effect of Mr Buckpitt's primary submission would be that the more comprehensive the work undertaken by the tenant, the less benefit he or she would be able to obtain from the disregard of improvements. That would be unfair, and would defeat the statutory purpose.

101. On long established principles, whether work to a building is an improvement is to be judged from the tenant's perspective (see *Lambert v Woolworth & Co Ltd* [1938] 1 Ch 883, 901). The assumption must be that the 1957 works were an improvement in that sense, otherwise the tenant would not have carried them out, and the Trustees would not have approved them.

102. As we have pointed out in determining the first issue above, *Rosen* concerned the building of a new house on a bare site, and there is no suggestion that the agreement obliged the tenant to demolish anything already on the site. In contrast, this case involves substantial works of demolition and reconstruction to a building which was present at the time the Underlease was granted. In our judgment that is sufficient to enable the work as a whole to be described as an improvement.

103. We are supported in this view by the current edition of Hague on Leasehold Enfranchisement, 6th Edition, at paragraph 9-38, on which Mr Jefferies relied. In any event, the

works in this case did not involve the complete demolition of the structure, but retained significant elements of it, including at least one flank wall, and possibly two, and their foundations. We therefore find no difficulty in viewing the house and premises now present at No.7 as the result of a process of improvement of the building originally demised.

104. Mr Jefferies referred to *National Electric Theatres v Hudgell* [1939] 1 Ch 553, which concerned an application by the tenants of a cinema for the approval of the court under section 3, Landlord and Tenant Act 1927 to the demolition of the cinema and its replacement with flats. For consent to be granted the work had to be an “improvement on his holding.” Morton J considered that the successive replacement of the defective elements of a building until the original building had been replaced by something entirely new would involve a series of improvements. That being so he considered that the simultaneous replacement of all such defective elements would also be “an improvement on his holding.” Although the context is much closer to our’s than *Sainty*, the statutory language of section 3 of the 1927 Act is significantly different to section 9(1A)(d) of the 1967 Act, and we do not consider *National Electric Theatres* assists in its interpretation. Equally, however, we do not find much of assistance in *Sainty*, which concerned permitted development rights under the Planning Acts, a context which justifies a more restrictive approach to the concept of an improvement. The Court of Appeal in *Rosen* found it helpful by analogy, but the factual circumstances of *Rosen* were different from those of this appeal.

105. As for the suggestion that the works to No.7 were undertaken to comply with the underlessee’s obligations to put the property into good and substantial repair and condition and to carry out the works of repair specified in the schedule, those works amounted to no more than mending the roof, redecoration, minor repairs and the adaptation of services. The true position was that the underlessee was prohibited by clauses 1(xix) and 1(xxi) of the Underlease from carrying out any development or pulling down or altering the building without the prior consent of both the landlord and the superior landlord. The works of repair in the schedule did not require the extensive alterations that in fact took place, and these cannot be considered to have been repairs, or to have been undertaken pursuant to any obligation imposed on the underlessee by the terms of the Underlease.

106. We therefore resolve the third issue in the respondents’ favour. The works were not prevented from being improvements by their scale.

Issue 4: Were the works carried out and paid for by the tenants’ predecessors in title?

107. On the assumption that the work undertaken in 1957/58 was an improvement, the next question is whether it was carried out by a predecessor in title of the respondents at their own expense, as required by section 9(1A)(d) of the Act. Once again the evidential burden of establishing this requirement falls on the respondents.

108. We have already considered and rejected (at paragraph 104 above) the appellants’ first submission on this issue, which was that the works were carried out pursuant to the original

underlessee's repairing obligation, as part of the consideration for the grant of the Underlease, and cannot therefore be regarded as having been done at his expense.

109. For the respondents to succeed on this issue we must be satisfied that the original underlessee, Percy Simmonds, carried out the works and that he did so at his own expense. On behalf of the appellant, Mr Buckpitt submitted that there was no evidence as to who carried out the works. It is certainly true that there is no building contract or licence for alterations and little or no direct evidence of how, or by whom, the work was commissioned and paid for. For the respondents to succeed on this issue they must do so by drawing inferences from the title documents and other contemporaneous clues.

110. To recap briefly, at the time the work of demolition and reconstruction was carried out No.7 was part of the premises demised, together with the main house, to Ludlay by the Headlease of 27 March 1957. The Headlease required Ludlay to convert the main house to flats in accordance with the 1955 plan (which showed the mews only as being separated from the main house). Leases of four adjoining houses and mews were also granted to Ludlay on the same day, and contained similar obligations. Ludlay's obligations were guaranteed by one of its directors, George Lane, a builder and contractor, with whom the Trustees had entered into an agreement to grant the Headlease on 12 May 1955. Ludlay granted the Underlease to Percy Simmonds on 15 May 1957, but it contained no development obligation. On 7 January 1958 Ludlay assigned the Headlease to Simmonds (Bryanston Square) Ltd. On 31 December 1958 Percy Simmonds assigned the Underlease to Percy Simmonds Investments Ltd, and it was that company which subsequently granted the sub-underlease of 10 June 1959 to Mr Walton.

111. Percy Simmonds is described in the Underlease of No.7 as a turf accountant, of an address in Essex. Little more is known of him or of the two companies which bear his or his family's name, and no records of Simmonds (Bryanston Square) Ltd are retained at Companies House. It is known, however, that in addition to taking the assignment of the Headlease from Ludlay in January 1958, in the same year Simmonds (Bryanston Square) Ltd took assignments of the leases of Nos. 4, 5, 8 and 9 Bryanston Square and their associated mews houses which had been granted to Ludlay by the Trustees on 25 March 1957. It is also known that in a licence to assign those four leases granted on 20th June 1957 the liabilities of Simmonds (Bryanston Square) Ltd were guaranteed by Percy Simmonds and by Charles Simmonds, also a turf accountant. Elsewhere in the contemporaneous documents a third Simmonds appears, Ernest Simmonds. We naturally assume that Percy, Charles and Ernest Simmonds were members of the same family.

112. The 1957 Plan drawn by J.E. Gregory shows the work approved by the Trustees on 28 May 1957 but does not identify the architect's client; nor does the letter from the Trustees' own architect dated 23 May 1957 informing Mr Gregory that the proposals were acceptable.

113. The only document on which the identity of Mr Gregory's client is indicated is a notice which he gave to the Borough of St Marylebone under the Public Health (London) Act 1936 on 20 May 1957 informing it of "my client's intention" to commence work at No.7. The name of the owner of No.7 is given in that notice as "Messrs. Simmonds (Bryanston Square)."

114. A similar pre-commencement notice was given to the District Surveyor by the builder on 31 May 1957 in which the “owner in possession” was named as Ernest Simmonds. Ernest’s name also appears on a drawing by Mr Gregory showing Nos. 5, 6 and 7 as part of one development.

115. The builder who gave notice to the District Surveyor on 31 May 1957 that works to No.7 described as “alteration and conversion of mews property” were to commence was G. Lane. This was the same George Lane who entered into the agreement for lease in 1955, acquired and then surrendered the 1930 lease, and guaranteed the obligations of Ludlay, of which he was a director, when it took the Headlease in his place on 27 March 1957. Mr Lane’s estimate of the cost of the proposed works to No.7, which was given in the notice, was £1,500.

116. On behalf of the respondents, Mr Jefferies submitted that the references in the contemporaneous documents to anyone other than Percy Simmonds being the owner of No.7 were simply mistaken. If Mr Gregory’s reference to Messrs. Simmonds (Bryanston Square) in the notice to the Borough of St Marylebone was intended to refer to the company of which Percy Simmonds was a director, it would have been improper and in breach of company law for it to spend money on a property owned by him. It should be presumed that the company acted properly, not improperly, and that if it did instruct the architect, or contract with the builder, it did so as agent for Percy Simmonds, on the basis that any expenditure it incurred would be reimbursed.

117. Mr Jefferies suggested that a conscious decision appeared to have been made to treat No.7 differently from Nos. 4, 5, 8 and 9. The leases of those buildings had been assigned by Ludlay to Simmonds (Bryanston Square) Ltd, whereas No.7 had been underlet to Percy Simmonds personally, before later being assigned to a company (Percy Simmonds Investments Ltd) bearing his name.

118. These facts indicated, Mr Jefferies suggested, that No.7 was Percy Simmonds’ personal project, from which the only reasonable inference was that he had paid for the work. Moreover, since Percy Simmonds owned the Underlease with a sixty-two year term, it was to be expected that he would pay for the work and that nobody else would have any reason to do so.

119. We find it difficult to accept that No.7 was treated as differently from the adjoining properties as Mr Jefferies suggested. We were not told what arrangements, if any, were made to underlet Nos. 4, 5, 8 and 9 Bryanston Square or their mews houses, and we assume none were. There is no information about No.6, except that it was given as the address of Simmonds (Bryanston Square) Ltd in documents. We do know, however, that the redevelopment of the mews behind Nos. 5, 6 and 7 was to a single architectural composition, supervised by Mr Gregory, and created a group of three properties in the same style. This was clearly a single project, albeit that the underlying titles may have been held separately.

120. For the appellant Mr Buckpitt submitted that there was no clear evidence at all of Percy Simmonds’ involvement in the project. The drawings and the development scheme were in existence before he acquired the Underlease of No.7. The project was a single scheme incorporating the mews at Nos. 5 and 6 as well as No.7, but there was no evidence that Percy

Simmonds had any interest in either of those properties. As Mr Buckpitt put it, apart from the fact he was the underlessee, there is no material which indicates he carried out the works.

121. Documents which might have been expected to evidence Percy Simmonds' involvement, had there been any, either do not exist, or suggest that he was not involved. In particular, none of the documents in which the architect or builder identify their client mention him. There is no licence from Portman or Ludlay authorising him to carry out alterations and the one licence which does exist, granted by Ludlay to Percy Simmonds on 17 June 1957, concerns the use of No.7 as a self-contained residence in accordance with the plans previously approved. The licence is not for the works themselves, yet those works had only very recently begun. If Percy Simmonds had just embarked on a significant building project why was that fact not mentioned in the licence? The inference, Mr Buckpitt suggested, was that someone else was responsible for carrying out the works.

122. That person, Mr Buckpitt submitted, was probably either Ernest Simmonds or Simmonds (Bryanston Square) Ltd (both of whom were separately named as owner in the pre-construction notices), with George Lane as their contractor. The continuing involvement of Mr Lane pointed to the redevelopment of No.7 being part of a much bigger project altogether. The fact that Simmonds (Bryanston Square) Ltd acquired Ludlay's interests in the leases of the four adjoining houses and mews in January 1958 supported the same inference. At the very least the redevelopment of No.7 was part of the project to redevelop the mews at Nos. 5, 6 and 7 in which the leading participant was Simmonds (Bryanston Square) Ltd, not Percy Simmonds.

123. We agree that the evidence establishes that No.7 was reconstructed as part of a single project involving Nos. 5 and 6, which in turn was one component of a much larger enterprise to convert a group of houses on the east side of Bryanston Square into flats. The obligation to carry out that work had first been assumed by Mr Lane personally, in the agreement for lease of May 1955, and then by Ludlay in the Headlease. For so long as Mr Lane continued to be involved as builder he and Ludlay could be assured that their obligations would be discharged. It is likely that there was more to these relationships than is apparent from the parts of the jigsaw we have access to, and that the grant of the Underlease to Percy Simmonds was one component of a more complex arrangement between Ludlay, Mr Lane and the Simmonds family or its companies. The culmination of that arrangement was the assignment of the Headlease and the leases of the adjoining properties by Ludlay to Simmonds (Bryanston Square) Ltd during 1958.

124. Mr Buckpitt submitted that the involvement of Simmonds (Bryanston Square) Ltd as the most likely developer of the scheme meant that the work was not "carried out" by Percy Simmonds as required by section 9(1A)(d) of the Act. Moreover, it could not be shown that the work was carried out at Percy Simmonds' expense.

Discussion

125. The requirement in section 9(1A)(d) that improvements must have been "carried out by the tenant or his predecessor in title at their own expense" has two components: the first concerning

the identity of the person who carried the works out, and the second concerning the person who paid for them. In each case that person must have been the tenant or a predecessor in title.

126. In *Durley House Ltd v Cadogan* [2000] 1 WLR 246 Neuberger J considered the requirement that, to be disregarded for the purpose of valuation, improvements must be shown to have been “carried out” by the tenant or its predecessor in title. The context in which the question arose was a mixed contractual and statutory one, in that a rent review valuation was to be undertaken on the same assumptions as are required by section 34(2), Landlord and Tenant Act 1954. Those assumptions include a disregard of improvements “carried out by a person who at the time it was carried out was the tenant.” The purpose of such a disregard is the same in whatever context it appears, namely to avoid the unfairness of a tenant being required to pay twice for improvements for which they have been responsible.

127. It was common ground in *Durley House* that the tenant need not have carried out the works personally, and that it was enough if a contractor appointed by the tenant had done so. At 250 A-D Neuberger J considered the ramifications of that consensus, as follows:

“Given that it is common ground that the tenant need not physically have done the works himself, and given the statutory language, it appears to me that, in the absence of good reason being shown to the contrary, the tenant will, at least normally, satisfy the statutory requirement if he can establish that he either physically did the specific works himself, or got a third party to do so. The tenant will usually satisfy that test if he could show that he had entered into an arrangement with a third party (which arrangement will typically be, but need not necessarily be, a contract) under which that party agreed with the tenant to do the specific works involved in effecting the improvements. Once it is accepted, as it plainly must be, that an arrangement under which the tenant gets a building contractor to do the works would not take the tenant out of the ambit of section 34(2) in a particular case, I do not find it easy to see at what point, or on what logical basis, it could be said that any arrangement with a third party under which the tenant gets that third party to do the works would take the tenant out of the section.”

128. Neuberger J could see no reason why more than one person could not be said to carry out the same works, so that where a tenant employed a builder to undertake works, as a matter of ordinary language the works could be said to have been carried out by each of them. He did, however, qualify his remarks on third party involvement by saying this:

“A tenant may well not satisfy section 34(2) in a case where he has got a third party to do the works unless he can establish some involvement in identifying, supervising and/or financing the works resulting in the specific improvements concerned.”

129. We can see no good reason to adopt a less flexible approach to the requirement of section 9(1A)(d) of the 1967 Act that an improvement must have been “carried out” by a tenant or its predecessor.

130. We would therefore be prepared to conclude that Percy Simmonds “carried out” the improvements to No.7 in 1957/58 if it could be inferred with sufficient confidence that he had

had entered into an arrangement with Symmonds (Bryanston Square) Ltd under which that company agreed with him that it would complete the improvements. We are satisfied that such an inference is a realistic one in this case. The critical considerations are that the Underlease itself belonged to Percy Simmonds and that no work could be carried out to No.7 except by arrangement with him, and that the evidence establishes that members of his family, whether individually or in partnership, were instrumental in instructing the design and execution of the work.

131. Our conclusion is not based on any supposed mistake on the part of the professionals involved in the project in identifying whom they were working for. The fact that the company, rather than Percy Simmonds, was named as the owner of No.7 by the architect supports the view that the company was undertaking the project as a whole. As far as the architect was concerned it was no doubt irrelevant which member of the Simmonds family held the Underlease. It is not necessary to make any assumption about Percy Simmonds' role other than to conclude that it is more likely that not that the works were carried out with his involvement and concurrence.

132. We find it much more difficult to be satisfied that the works were carried out at Percy Simmonds' expense. In a complicated transaction involving the improvement of a substantial block of property it does not follow automatically that the party in whose name one relatively modest component is held is responsible for the expenditure on that part of the property or indeed on any part of the project. They may hold it as a nominee, or benefit from expenditure by another (possibilities alluded to by Neuberger J in *Durley House* at 25G). No doubt, in a simple case, it will readily be inferred in the absence of reasons to think otherwise that on a balance of probabilities the owner of the property being improved was the person who paid for works of improvement. But this is not a simple case.

133. As Mr Buckpitt pointed out, it is difficult to understand the economics of the arrangements concerning No.7. The premium paid by Ludlay to the Trustees for the Headlease was £3,000. The Headlease included both the main house and No.7 in its original configuration. The consideration for the Headlease also included the surrender of the 1930 Lease (with about three years left unexpired) and the obligation to put the main house into good condition and convert it into five flats. Yet the premium paid by Percy Simmonds to Ludlay for the Underlease of No.7 alone was £2,500. Even taking into account the surrender of the 1930 lease, which is likely to have been acquired at a cost by Mr Lane, the payment for the mews alone of a sum equivalent to more than 80% of the price paid for the mews and the main house together is striking and unexplained.

134. Mr Jefferies discouraged us from speculating about the discrepancy between the prices paid for the Headlease and for the Underlease. He ventured that the explanation may lie in the surrender of the 1930 lease or in the fact that the Headlease premium was agreed two years earlier, when the agreement for lease was entered into in May 1955. He may be right, but the difficulty for the respondents is that we must be satisfied that it is more likely that Percy Simmonds was responsible for the cost of the works than that he was not. Without some credible hypothesis which fits the known facts we cannot be satisfied of that requirement.

135. One possible inference from the relative similarity of the premiums is that the sum paid by Percy Simmonds for the Underlease was in consideration of the works being done at the expense of Ludlay, and that he therefore paid for the work as part of the bargain by which he acquired the Underlease itself. It is known from the estimate provided to the district surveyor by Mr Lane that the cost of the works to No.7 was expected to be £1,500. If it is assumed that the premium of £2,500 was consideration not only for the Underlease but also for carrying out work at a cost of about £1,500, the relationship between the premium and the bargain for the Headlease becomes a little easier to understand.

136. Mr Buckpitt relied on *Rosen* in support of the submission that works paid for as part of the bargain in which the Underlease itself was granted do not amount to improvements carried out at the tenant's expense for the purpose of section 9(1A)(d). At paragraph [19] of *Rosen* Evans-Lombe J said that it could not be suggested that a tenant had carried out improvements where he paid a premium to take a lease of a house which has been improved by the landlord. The work was not an improvement, but part of the original bargain for which the tenant had already received full consideration. In *Shalson* at paragraph [23] Lord Hoffmann, referring to *Rosen*, also suggested that work carried out as part of the bargain for which the tenant had received consideration by the grant of the lease would not be work done at his own expense for the purpose of section 9(1A)(d).

137. We agree with Mr Buckpitt that where a premium is paid for a lease of premises to be improved at the expense of the landlord, although it may be possible to say that the work was carried out by the tenant, it cannot be said to be an improvement to the house and premises which the tenant has carried out at his own expense. It is not an improvement at all, but part of the original bargain; if it is an improvement, it has been paid for by the landlord; in those circumstances there is nothing unfair in the price payable on enfranchisement fully taking into account the effect of the works.

138. We make no positive finding that the grant of the Underlease was on the basis we have described. There is no agreement between Ludlay and Percy Simmonds for it to carry out the works, nor any other positive evidence that the premium was in return for the work. Nevertheless, we are unable to find affirmatively that the work substantially to demolish and then to reconstruct No.7 was carried out at the expense of Percy Simmonds. There may be a number of different explanations of the financial arrangements to which we are not privy. It is unsatisfactory not to be able to make a positive finding of fact, even on the balance of probability, but the effect of our conclusion is that the respondents have failed to prove that the work falls within section 9(1A)(d). It cannot therefore be disregarded when determining the price payable on enfranchisement.

139. The result of this conclusion is that the price payable for the freehold will be based on the freehold vacant possession value at the valuation date, which is agreed to be £3.05m.

Remaining issues

140. The remaining issues are therefore redundant (subject to the outcome of any appeal) and we can deal with them briefly.

141. If, contrary to our finding, the work carried out in 1957/58 was an improvement to be disregarded, it would have to be assumed for the purpose of valuation that No.7 had remained in its original configuration. There was a disagreement between the parties over the state of repair which it ought to be assumed the building would have been in at the valuation date if it had not been largely demolished and reconstructed sixty years earlier.

142. It was suggested on behalf of the respondents that the original mews house should be assumed to have been in the same condition as it would have been in if no repairs had been carried out to it since 1957. That was said to be required by the direction in section 9(1A)(c) to assume “that the tenant has no liability to carry out any repairs, maintenance or decoration under the terms of the tenancy.” The purpose of that disregard is not immediately obvious but we are satisfied that it does not require that No.7 be assumed effectively to have been derelict by 2014 when the claim was made. People do not repair their houses only because they have covenanted to do so, but because they live there and have regard to their own comfort. As Lord Hoffmann said in *Shalson* the assumption must be that the building in its assumed condition “has all the features of the real house, including its history, save for one: that the improvement in question had not been made.” It must therefore be taken to have been looked after as has the real house, and not allowed to fall into a notional state of dereliction. That means in this case that it would have been unmodernised and in need of complete refurbishment. Any more detailed description of its condition is unnecessary.

143. The final issue was whether, in its unimproved state as an unmodernised early nineteenth century mews house, No.7 would have been worth more or less than the £3.05m the parties agreed it was worth as an unmodernised 1950s mews house. The experts agreed that the value of both the original mews house and the house as it existed at the relevant time would be maximised by assuming a redevelopment project. They also agreed that an intending owner-occupier would pay more than a developer.

144. Mr French, the appellants’ expert valuer, considered that the original mews house would be worth marginally more (£3.15m) than the agreed value of No.7 as it existed at the relevant time. In other words he considered that the improvements had diminished the value of No.7, rather than increasing it. He based his valuation on sales of comparable properties in the locality.

145. Mr Lee, the respondents’ expert valuer, valued the original mews house using the residual method of valuation at £2.128m without a roof terrace and £2.195m with a roof terrace. Consequently Mr Lee concluded that the effect of the improvements was to add up to £0.922m to the value of No.7.

146. There is essentially little difference between the cost of the redevelopment of the original and existing buildings, being £839,743 and £793,201 respectively (excluding the cost of the

separation works which we consider are likely to have been undertaken before the grant of the Underlease). That being so we have been given no adequate reason why there should be such a large disparity as Mr Lee suggests between the values of the original and existing buildings when both are to be considered as similar redevelopment projects. Mr Lee's valuation of the original building seems to us to be far too low given his acceptance that the existing building is worth £3.05m. During cross-examination Mr Lee said that the agreed value of the existing building might have been too high and he suggested a revised figure of £2.85 to £2.9m. But that minor adjustment cannot explain his suggested difference in value. The sole reason for that difference, we consider, is Mr Lee's use of the unreliable residual valuation method to arrive at his figure for the original building. Mr French preferred, as we do, the comparative valuation method and we are satisfied that there is sufficient evidence of comparable transactions to justify its use in this instance.

147. We are therefore not persuaded that the works undertaken in 1957/58 led to any increase in the value of the freehold interest of No.7 as at the relevant time which would fall to be disregarded under section 9(1A)(d) of the 1967 Act.

Conclusion

148. The FTT determined that the improvements carried out in 1957/8 should be disregarded and that the enfranchisement price should be £1,771,185 as contended for by Mr Lee. We have come to the opposite conclusion on the issue of improvements. If we are wrong on that primary conclusion we are satisfied, in the alternative, that the building was worth no more as a result of the works being done than it would have been worth by the relevant time without them.

149. Having had sight of this decision in draft, the parties have now been able to agree the price payable for the freehold of No.7. The total sum payable is agreed to be £2,792,410, which includes £188,036 as the landlord's share of the marriage value. Of this total, it is agreed that £2,792,380 is payable the appellants, as freeholder, and a further £30 is payable to the headlessee.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)

28 February 2018