UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – alleged procedural irregularity – extent of demise - terms of leaseback – need to specify additional leaseback proposals in counter-notice - appeal dismissed

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

BETWEEN

SAMANTHA TIBBER **Appellant**

and

(1) DECLAN BUCKLEY **Respondents**
(2) MATTHEW WILCOX

RE: 32 PETHERTON ROAD
LONDON N5 2RE

Before: Judge Edward Cousins

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 26th November 2013

Mr Benedict Sefi instructed by Derrick Bridges & Co,, solicitors, for the Appellant
Ms Nicola Muir instructed by Bolt Burden, solicitors, for the Respondents

The following cases are referred to in this decision:

Cawthorne v Hamdan [2007] Ch 187
Cadogan Estates Ltd v Morris [1998] EWCA Civ 1671
Burman v Mount Cook Land Ltd [2002] Ch 256

DECISION

THE BACKGROUND

1. This is an appeal from the decision ("the Decision") of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") handed down on 21st January 2012. The dispute derives from the proposed purchase by the Respondents of the freehold of a building comprising three flats known as and situate at 32 Petherton Road, London N5 2RE ("the Building") pursuant to the provisions of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). The Respondents are the long leaseholders of two flats within the Building of which the Appellant is the current freeholder. The First Respondent is the leasehold owner of flat A ("Flat A") and the Second Respondent is the leaseholder owner of flat B ("Flat B"). The appeal is concerned with the disputed terms of a leaseback of flat C ("Flat C") to the Appellant, and the extent of the demise to be granted within the Building ("the Leaseback").

2. The Decision followed a hearing which took place over two separate days, namely on 16th August 2011 and on 16th January 2012. The LVT referred to these hearing days as the "First Stage" and the "Second Stage".

3. The LVT's own summary of the Decision is as follows:-

> "The terms of the leaseback to Flat C in the specified premises will be on the basis of those provided for in Part IV, Schedule 9 of the 1993 Act. The departures[1] proposed by the [Appellant] are not reasonable or practical and are rejected. The appendix to this decision summarises the terms which are rejected."

4. By an application made to the LVT on 8th February 2012 the Appellant sought permission to appeal the Decision. Twelve grounds of appeal were cited in support. The application was refused by the LVT on 14th March 2012, detailed reasons being provided in the reasons to refuse permission ("the Refusal"). Thereafter the Appellant renewed her application for permission before the Tribunal (George Bartlett QC, President). On 26th June 2012 he granted permission and made the following Order:

> "There is a realistic prospect of success on the ground that the LVT was in error in its determination of the extent of the "unit" for the purposes of paragraph 5 of Schedule 9 to the 1993 Act; and the contentions on the terms to be included in the demise are reasonably arguable and the appellant should be permitted to advance them.
>
> The appeal will be by way of review."

[1] For these "departures" see the Decision, Appendix A, paragraph 38, and see **paragraph 19**, below.

5. In a letter dated 3rd July 2012 from the Tribunal, under cover of which the permission to appeal was sent to the Appellant's solicitors, it was explained that because the appeal would be by review only "….the only evidence that can be considered…is evidence that was presented to the lower tribunal and your arguments relating to the lower tribunal's decision."

6. I heard this appeal on 26th November 2013. Detailed submissions were made by Counsel for the Appellant and the Respondents. In this context it is to be noted that although the Appellant sought to persuade the Tribunal that the appeal should be way of a review with a view to a re-hearing, permission for the appeal was limited by the President to a review in the terms set out above. Despite the attractive arguments in the written and oral submissions presented by Counsel for the Appellant in order to persuade me on appeal to enlarge the debate to encompass wider issues, this Decision is limited to the grounds of appeal specified by the President, namely, whether the LVT was correct in its analysis in relation to the extent of the unit, and the terms to be included in the demise of Flat C back to the Appellant.

7. In essence, the dispute between the parties relates to the extent of the demise of the Leaseback of Flat C to the Appellant, and the terms on which the Leaseback should be granted. However, there is a preliminary point which also requires determination, namely whether the Appellant can rely upon the "departures" from the original terms of the Counter-Notice, or whether she is constrained by its original phraseology.

The relevant statutory provisions

Leaseback

8. The relevant statutory provisions governing leasebacks are to be found in section 36 of, and Schedule 9, Part III to, the 1993 Act. The effect of these provisions is that on a collective enfranchisement under the 1993 Act, the former freeholder is entitled as of right to require a leaseback of any "flats or other units" falling within Parts II or III of Schedule 9 not held on a qualifying lease. For the purposes of this appeal, this definition encompasses any unit (the freehold of which is owned by the same person, and which is contained within the specified premises) which is not a flat let to a person who is a qualifying tenant of it. Under Schedule 9, Part III, paragraph 5, the statutory machinery[2] is provided whereby the freeholder has the right to a leaseback of certain units and the nominee purchaser shall if so required grant to the freeholder a lease of the unit in accordance with section 36 and paragraph 7. Paragraph 7 provides that the leaseback "…shall conform with the provisions of Part IV of this Schedule…", and any departure can only be made if the parties agree to it or it is directed by the LVT on an application being made to it by either the nominee purchaser or by the freeholder.

[2] So described in *Cawthorne v Hamdan* [2007] Ch 187.

Terms of the Counter-Notice

9. Section 21(3)(a)(ii) of the 1993 Act provides that in addition to the requirement set out in subsection (2)(a) the counter-notice must specify any additional leaseback proposals by the reversioner. The relevant statutory language is mandatory and sets out in terms what the reversioner is required to do, namely the reversioner must specify any additional leaseback proposals in the Counter-Notice. The question therefore arises for consideration whether she did having regard to the contention made by the Respondents' Counsel that the Appellant's case has "constantly changed throughout these proceedings." There are a number of cases on the validity or otherwise on counter-notices, to which I shall refer again below.[3]

The Claim

10. The parties have agreed a statement of facts and issues ("the Statement of Facts and Issues) from which I take the following outline of the relevant facts.

11. The Building comprises a terraced house containing five floors within which three flats have been constructed. The present configuration of the Building is as follows:

Flat A	Lower and ground floor. The lease was granted on 30th August 1978 by the Appellant's father, Mr Bottrill. The Gross Internal Area ("the GIA") is estimated by the Respondents' expert witness as being 1,200 sq ft.
Flat B	First floor flat. The lease was granted on 26th September 1984. The GIA is estimated at 492 sq ft by Mr Bottrill.
Flat C	Second floor and an additional floor built into the loft space. This is retained by the Appellant and let to tenants on assured shorthold tenancies. The GIA is estimated at 1,200 sq ft.

12. At the rear of the Building there is a communal staircase with half-landings between the floors. Both Flats B and C are accessed at first floor landing level. The demise of Flat A includes the exclusive use of the rear garden and the front basement area. At the front of the Building there is also small garden which does not form part of the demise of Flat A. This front part (excluding the front basement area) comprises a planted area, and a partly fenced bin area situated by the steps to the entrance of Flats B and C, together with the path entrance to Flat A.

[3] See e.g. *Cadogan Estates Ltd v Morris* [1998] EWCA Civ 1671; *Burman v Mount Cook Land Ltd* [2002] Ch 256; and *Cawthorne v Hamdan* [2007] Ch 187.

13. The original conversion of the Building effectively divided it into two parts, namely Flat A and Flat B. At that stage Flat B comprised the remainder of the Building. Subsequently Flat C was configured by the creation of Flat C out of part of Flat B. This involved the re-configuration of the upper part of the Building by the removal of the second floor from Flat B and adding to that area the additional floor which had been formed out of the loft space. These two floors then formed the new self-contained flat (Flat C). In this context it is also to be noted that in about 1990 the Appellant was apparently granted planning consent to convert Flat C itself into two flats, but the permission lapsed about 20 years ago.

14. For historical reasons the lease of Flat A specifies that the contribution payable by the leaseholder is 50% of the service charge for the Building. However, in practice there has been an informal arrangement whereby Flat A makes a contribution of 40%, Flat B's contribution is 20%, and Flat C's contribution is 40%. This arrangement reflects the current GIA of each flat, but the lease of the Flat A has never been varied to accommodate this.

15. The initial notice ("the Initial Notice") is dated 26th July 2010 in which the Respondents claim that they are entitled to acquire the freehold of the Building pursuant to Part I of the 1993 Act ("the Specified Premises"). In paragraph 2 of the Initial Notice the further claim is made by them to acquire additional freeholds ("the Additional Freeholds"), namely (i) of the rear garden (which forms part of the demise of Flat A), and (ii) of the front garden/lightwell.

16. The counter-notice ("the Counter-Notice") is dated 27th September 2010. In the Counter-Notice the Appellant admits that the Respondents are entitled to acquire the Specified Premises and Additional Freeholds, but she did not accept the proposed purchase price. The Appellant also stated that the proposals contained no provision for the Leaseback to the reversioner of Flat C. In paragraph (5) of the Counter-Notice she then sets out additional leaseback proposals in addition to those specified in section 38 to, and Schedule 9 of, the 1993 Act namely that the Leaseback should include:-

> "the second and third floors of 32 Petherton Road aforesaid shown edged red on the attached plans marked "A" and "B" (including all roofs and windows therein) and the staircase leading thereto from the first floor on the attached plan marked "C" . .".

17. The claim was therefore limited in scope to Flat C itself, together with the roofs and windows, and the staircase leading to it. At the stage of the Counter-Notice the claim therefore did not extend to the exterior walls of the flat, the front garden, or the area on the half landing between the ground floor and the first floor for storage purposes (referred to as "the Mezzanine Landing"). Prior to the grant of the lease to Flat B in 1984 part of the Mezzanine Landing had been partitioned from the staircase and used for storage, but according to the evidence of Mr Bottrill it was removed probably in about 1984 in order to comply with fire regulations.

18. In the Counter-Notice the Appellant also claims the right to undertake future development of the upper flat. This includes the enlargement of or addition to the dormer windows and/or conversion of the property into two separate units and any consequential alteration to the roof line, and the right to place a dustbin and a bicycle in the communal from area. The Appellant had formerly been granted planning permission to convert the upper floors into two self-contained flats, but this lapsed about 20 years ago.

19. It is submitted by the Respondents that as the Counter-Notice does not claim a leaseback of those parts of the Building. It is contended by them that it is too late to make such an extended claim,[4] Therefore, it is contended that the Appellant's claim is limited to a leaseback of Flat C as originally specified in the Counter-Notice.

The Hearing before the LVT

The First Stage

20. The Application to the LVT was made on 24th March 2011. It is apparent that the Appellant's Counsel went beyond the terms originally sought by the Appellant in her Counter-Notice. Mr Sefi submitted that the relevant "unit", of which the Appellant was entitled to a leaseback under paragraph 5(2) of Schedule 9 of the 1993 Act, extended beyond Flat C itself so as also to include the front garden, the Mezzanine Landing and indeed all the stairs and landings in the Building. In his written submission to the LVT Mr Sefi stated that the Leaseback of Flat C should extend to:-

> "…the common parts of all the structures of the building which are not included in the demises under the leases registered respectively under title NGL879289 and NGL516465…"

21. At the First Stage of the Hearing the LVT considered the Appellant's submissions in relation to the terms of the leaseback of Flat C and whether there should be (as it was put) "…several departures from these terms[5]…[to include] in the demise the roof and airspace, parts of the common parts and the front garden" (see paragraph 10 of the Decision). In paragraph 11 of the Decision it is stated that the LVT "…told the parties that that [it had] concluded that the demise should only include Flat C "….as it currently exists with rights over the common parts and the garden and front entrance of the specified premises"

22. It is common ground between the parties that during the hearing the LVT "advised orally" that the demise should be limited to Flat C itself, and would therefore not include the common parts of the Building, the front garden or the Mezzanine

[4] In this regard the Respondents rely upon the case *Cawthorne v Hamden* [2007] 1 EGLR 67, at paragraph 19, considered below at paragraph 52.
[5] i.e. from the terms contained in Schedule 9, Part IV.

Landing (see paragraph 13 of the Statement of Agreed Facts and Issues, and paragraph 11 of the Decision).

23. However, as Counsel for the Appellant asserts in his skeleton argument (paragraph 9), the parties are in contention as to whether the VT was actually making a ruling at the First Stage of the hearing on 16th August 2011, or was merely giving an "indication of a probable ruling" (as he puts it). Mr Sefi asserts that the parties "….expected [the case] to be heard and a ruling given in the ordinary way". He now contends that after Counsel for the Respondents had opened her case the LVT then "abbreviated" the hearing, and gave various "indications" and invited the parties to go away and agree the issues in the light of those "indications." Counsel for the Appellant further submits that no oral evidence was invited, and that he did not have an opportunity to argue his case properly.

24. According to the perceptions of the Respondents this is not what occurred at the First Stage. For her part, Counsel for the Respondents contends that in fact the LVT made an oral determination on a preliminary issue as to the extent of the demise to be comprised in the Leaseback, whereupon it adjourned the hearing part-heard so that the parties could try and agree the other terms of the Leaseback on the basis of the preliminary findings. This interpretation by Counsel for the Respondents does appear to conform with the subsequent circumstances by reference to a letter dated 18th August 2011 sent by the LVT to the parties dated 18th August 2011 (see below), and to paragraphs 11 and 12 of the Decision.

25. The determination made by the LVT at the First Stage of the hearing was incorporated in the letter dated 18th August 2011 from the LVT, signed by one of its Case Officers. This sets out the preliminary findings made by the LVT during the course of that hearing. That letter contains the following statements:-

> "I have been asked to remind you that the tribunal made a determination of a preliminary issue of the extent of the demise under the leaseback under the provisions of [the 1993 Act]….
>
> The tribunal determined that the total extent of the demise under the leaseback is Flat C itself, and that neither the front garden, nor the internal common parts (or any of them) can form part of the demise. The issue having been determined the hearing of the application has been adjourned to enable the advisers to the parties to agree the terms of the leaseback including terms relating to the easements necessary for the proper enjoyment of the new lease of Flat C. This should be drafted and agreed in accordance with the terms of Part IV of Schedule 9 to the 1993 Act and it should where possible resemble the terms of the leases of Flat A and Flat B. For example it should contain a covenant that the leaseholder will not carry out alterations without the consent of the landlord…. the tribunal has determined that it is unnecessary to include a specific easement for the internal parking of bicycles. I also understand that it is agreed that the leaseback of

> Flat C will include the right to place a rubbish bin in the bin area of the front garden of the building."

26. It is asserted by Mr Sefi that this was the first time the Appellant or her advisers were aware that a preliminary issue of the extent of the demise was being considered or that a determination had been made. It is also contended by him that there was a "serious and prejudicial irregularity of procedure", to which I shall refer again, below. In this context it is to be noted that in the Statement of Agreed Facts and Issues it is accepted by Counsel for both parties that the "oral indications" of the LVT were "confirmed" in this letter.

27. In paragraph 10 of the Decision the LVT states that it was informed by the parties at the close of the First Stage that the sole issue to be determined was the terms of the Leaseback. It is common ground that after the LVT had given "oral indications" (the LVT use the word "concluded") that the demise should only include Flat C as it currently exists with rights over the common parts and the garden and front entrance of the specified premises, it then adjourned the hearing part-heard to enable the parties to try and reach agreement of the terms of the leaseback (see paragraphs 11 and 12 of the decision). The option was given to the parties to seek a further hearing if they were unable to agree terms. As the parties were unable to agree terms directions were given for the Second Stage of the hearing. For their part the Respondents submit that the Appellant's case has constantly changed throughout the proceedings, and it has proved impossible at any stage to reach any common ground owing to her unrealistic expectations.

28. However, no decision was made by the LVT insofar as the split of the service charge was concerned as it was hoped that the parties could reach agreement on this. It is to be noted that the LVT was incorrect in so far as the rubbish bin was concerned in that the parties had not in fact reached agreement on this issue at that stage (see the letter dated 18th August 2011).

Directions for the Second Stage

29. As it transpired, the parties were unable to agree the terms of the Leaseback, and in a letter dated 30th September 2011 the Respondents' solicitors defined the remaining issues. Subsequently on 12th October 2011 the LVT gave directions pursuant to which the parties were required to file their submissions on the issues to be determined. In a letter dated 26th October 2011 the Respondents' solicitors confirmed their submissions on the Leaseback. Counsel for the Appellant then filed his submission together with a schedule dated 1st November 2011. It is to be noted that in paragraph 4 of this submission it is stated by Mr Sefi that a further oral hearing was unnecessary, and that the LVT was "…invited to make the formal ruling and issue the full written decision having taken into account the respective written submissions of the parties and those made at the oral hearing". Despite this entreaty the Second Stage of the hearing was fixed by the LVT for 16th January 2012.

30. In this context it should be noted that at no stage following the First Stage of the hearing on 16th August 2011, and more particularly following the letter dated 18th August 2011 from the LVT, did the Appellant or her legal representatives raise any queries or contentions as to what had transpired during the First Stage of the hearing as reflected in the contents of the LVT's letter, or indeed that contents of the letter did not reflect what he said occurred during the First Stage. Also in particular it is to be noted that in his submission dated 1st November 2011 no point was taken by Mr Sefi as to any procedural irregularity or unfairness in the conduct of the proceedings at the First Stage of the hearing. Indeed he invited the LVT the make the formal ruling and to issue the full written decision.

The Second Stage

31. The Second Stage of the hearing then proceeded on 16th January 2012. Following this on 21st January 2012 the LVT handed down the Decision on the extent of the demise and the terms of the Leaseback of Flat C. In paragraphs 28 to 31 of the Decision the LVT sets out the terms which it found must be included in the Leaseback and the rejection of the various submissions made by Counsel for the Appellant for the proposed departures from the standard terms. The summary of its reasons is set out in paragraph 33 where it is stated that "… the departures from the standard terms are rejected as they not reasonable." In short it concludes that the leaseback of Flat C will include all of the standard terms, and that the demise will be of the existing structure of Flat C with rights over the common parts, and there will be a term forbidding alterations to the flat without the consent of the landlord. In these circumstances it concluded that it did not have to reach a conclusion on the point raised by Counsel for the Respondents as to the limited claim made in the Counter-Notice, and the subsequent departures sought by the Appellant (see paragraph 17, above).

The Appellant's submissions

32. These fall into two parts. First, it is contended that that there was some form of procedural irregularity and unfairness on the part of the LVT during the course the hearing, and in particular at the First Stage. This is a point taken for the first time in the grounds of appeal. Secondly, it is submitted that the LVT was in any event incorrect in its analysis of the extent of the demise and the terms of the Leaseback of Flat C.

Irregularity and procedural unfairness

Letter dated 18th August 2011

33. As a preliminary point, Mr Sefi asserts that there was a "serious and prejudicial irregularity of procedure" in that the LVT determination has not made been in accordance with the procedural requirements of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (as amended) ("the 2003 Regulations"). The specific issue raised relates to the requirement that, in every case, a decision should be recorded in a document as soon as possible after the decision has been made (see

Regulation 18(3)), and that a document recording a decision, or the reasons for a decision, should be signed and dated "by an appropriate person" (see Regulation 18(6)). It is submitted that the Case Officer was not such a person in accordance with Regulation 18(7) of the 2003 Regulations in that she was not the single member, or the chairman of the tribunal.

Procedural unfairness

34. The Appellant's Counsel has contended on a number of occasions, both in his skeleton argument and during the course of the submissions made at the appeal hearing before me, that he did not have an opportunity to argue his case fully by way of oral submissions at the First Stage of the hearing on 16th August 2011. This is in the context of the assertion that in effect he did not appreciate that the LVT had made determinations by way of a preliminary issue at that point in time. In short he appears to be contending that he was taken by surprise in some way.

35. Mr Sefi has further asserted that he was prevented from developing his argument on behalf of the Appellant in relation to the issues of the front garden and the Mezzanine Landing at the Second Stage of the hearing on 16th January 2012. It is also said by Mr Sefi that he only saw a submission made by the Respondents that morning (although dated 12th January 2012) and that this was at variance with that originally filed in accordance with the directions made by the LVT.

36. However, in this regard, Mr Sefi acknowledges that he did not make any submissions at the time during the course of either the First Stage or the Second Stage that the hearing had been, or was being, conducted on an irregular basis, or that he in some way had been disadvantaged (see paragraph 26**,** above). Mr Sefi's answer to this when the point was put to him acknowledged that he raised no issue at the time, but stated that he did not ask for an adjournment at that stage because he was going to appeal "whatever happened". This is a somewhat curious statement in view of the fact that in his submissions he had previously stated that a further oral hearing was "unnecessary" (see paragraph 31, above).

The extent of the demise

37. It is submitted by the Appellant's Counsel that he was in effect taken by surprise at the Second Stage of the hearing on 16th January 2012 as to the proposal that the roof and walls contiguous to that part of the Building should be excluded from the demise of Flat C. He also says that the LVT took a radically different course to that taken at the First Stage in relation to the roof structure. In fact, as the Respondents' Counsel has submitted, the Appellant did not originally claim that the walls should be included in the demise of Flat C in her Counter-Notice (see paragraph 17, above). Also this claim nowhere appears in Mrs Sefi's "argument of the landlord" dated 15th August 2011 prepared for the First Stage of the hearing. The dispute between the parties as recorded in his skeleton argument was restricted to the use of the front garden, and the claim to

the Mezzanine Landing and the stairs and landings, together with mention of the Appellant's "right" to develop Flat C, reference also being made to a covenant against alterations.

38. The issue relating to the inclusion of the roof and airspace above Flat C was introduced into the proceedings by the Appellant during the hearing at the First Stage, being one of the "departures" referred to by the LVT – the others being those already referred to i.e. the demise should include parts of the common parts, and the front garden (see paragraph 10 of the Decision). As noted above, at the First Stage of the hearing the LVT concluded that "…the demise should only include Flat C as it currently exists with rights over the common parts and the garden and front entrance of the specified premises." In paragraph 27 of the Decision the LVT repeated what it had told the parties at the close of the first hearing, namely that "… she is not entitled to include the roof (nor logically the air-space above it)… and for the sake of clarity…the demise does not include any part of the front garden".

39. Mr Sefi now argues that the LVT at the Second Stage "became equivocal" as to whether it had previously made a determination as to the question of the roof, and in this context he asserts the LVT could remember little of what occurred at the hearing at the First Stage, and did not appear to have read the papers. However, as Mr Sefi acknowledges in his skeleton argument, at the Second Stage the LVT "repeatedly indicated" that it had made a ruling on the extent of the demise at the First Stage.

40. In summary the analysis of the extent of the Appellant's claim is that the Leaseback of the "unit" should include:

(1) structure and exterior of Flat C i.e. the walls the roof and roof structure and air space contiguous to the demised premises;

(2) the front garden area; and

(3) the Mezzanine Landing;

(4) And indeed at one stage the Appellant was claiming an entitlement to all the stairs and landings in the Building;

It is contended that the LVT failed to address these issues.

The terms of the Leaseback

41. The terms in dispute as set out in the Statement of Agreed Facts and Issues are whether:-

(1) The structure and exterior of Flat C should form part of the demise (Appellant's case);

(2) The Respondents should be responsible for the repair and maintenance of the structure and exterior of Flat C, and the Appellant should be liable

for the cost of such repair and maintenance of the structure and exterior (Appellant's case); or

(3) The structure and exterior of Flat C should be retained by the freeholder, and the freeholder should be responsible for the repair and maintenance of the Building, subject to the payment of the appropriate service charges (Respondents' case);

(4) The Appellant should pay a service charge of 30% - not 40% (Appellant's case), bearing in mind that the service charges payable under the current leases of Flats A and B extends to the common parts but not to the exterior parts of the Building; or

(5) The service charge in respect of Flat C should be 40% which reflects the fact that Flat C occupies 2/5th of the Building (Respondents' case);

(6) There should be an easement under the Leaseback for storage of bicycles and other such items in the event that the Mezzanine Landing is not to form part of the demise of Flat C (Respondents' case);

(7) There should be an easement under the Leaseback for the placement of waste bins and bicycles, in the event that the front garden is not to from part of the demise of Flat C, and if so how many waste bins should be placed in the front garden area (Respondents' case);

(8) In the first paragraph of the Schedule of Further Covenants the word "flats" should appear in substitution for the word "flat".[6]

The Decision

42. Having regard to the extensive submissions made by Counsel for the Appellant, both made orally and in writing, and to the various responses made by Counsel for the Respondents, and having regard to the evidence before the LVT, I find there is no merit in the point made by the Appellant that the conduct of the LVT at the First and Second Stages of the hearing was procedurally irregular. I also find that there is no merit in the assertions that LVT did not properly address the issues before it, namely the extent of the demise, or the terms of the Leaseback. Accordingly, in this review I dismiss the Appellant's appeal and find that the LVT conducted the First and Second Stages of the hearing in an ordered and proper manner with full regard to all the issues presented to it. I also have come to the conclusion that the Appellant is bound by the terms specified in the Counter-Notice and that she is not entitled to rely upon the subsequent departures sought to be made on her behalf by Mr Sefi. My reasons are as follows:-

[6] As noted above, the Appellant submitted to the LVT that the roof and roof structure and air space should be included as part of the demise of Flat C. The purpose of this submission is that she wishes to convert Flat C into two flats in respect of which planning permission had formerly been granted (see paragraph 18, above) To this end the Appellant submits that the proposed lease of Flat C should contain a statement that it will be converted into two flats, and that Schedule of Further Covenants should reflect this by the substitution of the word "flats" for "flat". In the Decision of the LVT this proposal was rejected for the reasons given in paragraph 29. It is also to be noted that in paragraph 30 the LVT also rejected the submission made by the Appellant that the there should be no covenant against alterations.

Irregularity and unfairness

Letter dated 18th August 2011

43. As to the issue of irregularity, I have already said that no point was taken by Mr Sefi at the time as to any irregularity or procedural unfairness arising from the production of the letter dated 18th August 2011. This point has only emerged more recently at the appeal stage. In this regard I find that there was a technical breach of Regulation 18(6) of the 2003 Regulations in that the LVT's Case Officer was not an "appropriate person" as defined by Regulation 18(7).

44. However, I find that any technical breach or irregularity that might have occurred in the procedural stages has been perfected for the following reasons: at the conclusion of the First Stage the LVT made an oral determination on a preliminary issue, which was then confirmed in the letter dated 18th August 2011, albeit not by an "appropriate person". Subsequently, however, in its Decision the LVT then provided the necessary written record of its determination on the preliminary issue in conformity with Regulation 18(3). In my judgment this has retrospectively validated any technical breach of the 2003 Regulations, and accordingly the oral decision on the preliminary issue made at the First Stage, as incorporated in the letter dated 18th August 2011, was then perfected in the Decision of the LVT.

45. I also find that no criticism can be levelled at the LVT as to the manner in which it incorporated its determination in the letter dated 18th August 2011, and that there was no "serious and prejudicial irregularity of procedure" as asserted. Clearly it would have been more appropriate for the letter to have been signed by the Chairman as it was intended to be determinative of the issue of the extent of the demise.

Procedural unfairness

46. I am satisfied that there was no irregularity or procedural unfairness in the conduct of the case by the LVT either at First or Second Stages of hearing on the 16th August 2011 and 16th January 2012. It is clear, in my judgment, that Counsel for the Appellant had every opportunity to argue his case fully at the First Stage of the hearing on 16th August 2011, although he is now asserting that this was not so. As I have already indicated above, this assertion contradicts his written submissions dated 1st November 2011 when he said that a further oral hearing was unnecessary and that the LVT should make a formal ruling based upon the written submissions at that stage.

47. Further, as I have already stated, no point was taken at the time by Mr Sefi, nor was any point taken subsequently by him following the letter dated 18th August 2011 from the LVT. I am satisfied that this letter reflects what occurred at the LVT during the First Stage of the hearing, as confirmed in the LVT's Refusal dated 14th March 2012. In the Refusal the LVT expressed surprise at the subsequent suggestion made by the Appellant's Counsel that the course of the hearing had been irregular. The assertion as to irregularity was made for the first time in the grounds of appeal. In

short the points subsequently taken were not taken at the time, nor had the issues subsequently raised been the subject of submissions at the time.

48. I also find that the LVT did make findings which were then incorporated in the letter dated 18th August 2011, and in this context it is to be noted that the word "determined" appears in four separate places in the letter from the Case Officer, to which I have made reference above. Thus, in my judgment, the LVT did so determine those issues to which reference has been made in the letter, and no challenges were made either to the LVT or to the Respondents at that stage to the effect that those findings were in some way flawed.

49. Further, it is, in my judgment, significant that the Appellant's Counsel did not avail himself of the opportunity to request an adjournment of the Second Stage of the hearing. This he could have done if he had considered that in some way he was being prevented from fully developing his submissions, or that the Appellant's case was is some way being compromised. Indeed no request for an adjournment was made at either Stage of the hearing. I have already made reference in paragraph 36 above as to Mr Sefi's response on this point.

50. Thus, I am therefore satisfied that at the First Stage of the hearing the Appellant was given every opportunity to make appropriate submissions based upon the materials supplied to the LVT and upon which preliminary findings were made. Similarly, it is clear that at the Second Stage that there was full argument on the merits of the case based upon those preliminary findings.

The terms of the Counter-Notice

51. It is stated in Hague on Leasehold Enfranchisement[7] that the 1993 Act makes no provision for the amendment of a counter-notice, "..so that the reversioner only has one opportunity to state his requirements." This is in the context of the fact that the relevant statutory language in section 21(3)(a)(ii) is mandatory. Subsection (3) provides as follows:

> "If the counter-notice complies with the requirements set out in subsection 2(a), it ***must*** in addition –
>
> a. state which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which (if any) of the proposals are not so accepted, and specify-
>
> (i) in relation to any proposal which is not accepted, the reversioner's counter-proposal, and
>
> (ii) ***any additional leaseback proposals*** by the reversioner." (my emphasis)

[7] 5th Edition, 2009, at paragraph 26-06; and see paragraph 9, above.

> Thus any additional leaseback proposals must be specified. As Hague puts it, it seems likely, therefore, that the failure to specify any of the mandatory requirements of a counter-notice will invalidate it, with potentially serious consequences. If the counter-notice does not contain a leaseback proposal, "the opportunity will have been missed; it will be too late to do so subsequently."[8]

52. In the present case the Appellant did specify some leaseback proposals in the Counter-Notice, but these were limited in scope to those specified i.e. Flat C itself, together with the roofs and windows, and the staircase leading to it. Although during the hearing Counsel for the Respondents urged that as some of the proposed departures from the standard provisions were claimed after the Counter-Notice had been served, the LVT should not consider them based upon the decision of the Court of Appeal in the case of *Cawthorne v Hamdan*.[9] However, the LVT chose to consider all the departures sought by the Appellant and decided that these departures from the standard terms were not reasonable or practical in the circumstances. In paragraph 34 of the Decision the LVT came to the conclusion that it did not have to reach a conclusion on the submission made by Counsel for the Appellant that the proposed departures from the standard terms should not be permitted under the principles set out above.[10]

53. In my judgment I consider that the LVT in its analysis of the effect of the terms of the Counter-Notice was incorrect in its approach. The statutory language is mandatory in its effect, and I find that the Appellant should have clearly specified in detail her leaseback proposals in the Counter-Notice. This she did not do. Subsequently during the First and Second Stages of the hearing she has attempted to rely upon a number of departures from the standard terms. In my judgment that this was too late and the opportunity was missed. Thus in this review I consider that she is in principle bound by the terms of what has been specified in the Counter-Notice and her claim is limited to the proposals therein set out.

54. I therefore dismiss the appeal.

Dated 19 February 2014

Judge Edward Cousins

[8] *Ibid*, citing the case of *Cawthorne v Hamdan* [2007] Ch 187. See also *Cadogan Estates Ltd v Morris* [1998] EWCA Civ 1671; and *Burman v Mount Cook Land Ltd* [2002] Ch 256.
[9] As referred to in paragraph 24 of the Decision.
[10] Ibid, paragraph 34.