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

Case Reference : **LON/00/00BC/OCE/2013/0155**

Property : **18 Cambridge Road, London E11 2PN**

Applicant : **18 Cambridge Road (Freehold) Ltd**

Representative : **Mr Lloyd Thompson of Pinney Rogers
solicitors**

Respondent : **Mr J K Forrester**

Representative : **Mr S Upton (counsel)**

Type of Application : **Section 24 of the Leasehold Reform
Housing and Urban Development Act 1993**

Tribunal Members : **Siobhan McGrath
Mr W R Shaw FRICS**

Date and venue of Hearing : **5th November 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **21st November 2013**

DECISION

DECISION AND REASONS

Introduction

1. This was the hearing of an application by the nominee purchaser for the determination of the terms of acquisition of the freehold of 18 Cambridge Road, London E11 2PN, under section 24 of the Leasehold Reform Housing and Urban Development Act 1993
2. Most of the terms of acquisition had been agreed between the parties. The remaining issue for the Tribunal's determination was whether the freeholder, Mr Forrester, is to be entitled to a right of way over a pathway between 18 Cambridge Road and 16 Cambridge Road.
3. The Tribunal heard submissions from the parties on the issue at a hearing on 5th November 2013. At the hearing, the applicant was represented by Mr Lloyd Thompson, a solicitor with Pinney Rogers and the respondent was represented by Mr S Upton of counsel. Evidence was heard from Mr Forrester and from two of the leaseholders at 18 Cambridge Road, Ms A Harkins and Ms J Lobel. Following the hearing, the Tribunal inspected the exterior of the property in the company of Mr Forrester and Ms Lobel.

The Property and the Proposed Right of Way

4. Mr Forrester, the respondent is the freehold owner of 18 Cambridge Road. He is also the freehold owner of 16 Cambridge Road where he resides.
5. Number 18 Cambridge Road is divided into four flats. The lease for flat A, includes a demised front garden and a demised rear garden which is situate closest to the house. The lease for flat B includes a demised rear garden which is situate behind the garden for flat A and further away from the rear of the property. Behind the garden for flat B is a further area of garden which had been retained and not included in any demise of the leases at number 18.
6. Mr Forrester owns the freehold of number 16 Cambridge Road and has lived there since 1977. He purchased the freehold of number 18 in 1986. Mr Forrester use the land at the rear of number 18 as part of his garden. On inspection it was clear that the retained land was well established and incorporated as part of the garden for number 16 and a large pond has been formed which straddles land behind both number 16 and number 18.
7. Between number 16 and 18 at the front, is a shared accessway to two garages. One belongs to Mr Forrester and one belongs to flat A at number 18. To the side of the garage belonging to number 18 is a path which travels along the side of the garage and sufficiently beyond the end of the garage to accommodate a side gate. The gate marks the

entrance to the land retained to number 16. It is this path that is the subject of this determination. The path is not included in the demise of any of the leases of the flats but by paragraph 1 of schedule 2 to the leases of the flats, the lessees have the right to use the pathway in common with all other persons entitled to that right.

The Claim

8. In its initial notice dated 4th January 2013, the applicant, claimed the right to acquire the premises and appurtenant land, included all of the land at the rear of the premises. In his counternotice dated 13th March 2013, Mr Forrester admitted the right to collective enfranchisement but did not accept the extent of the appurtenant property to be acquired. Instead he proposed that the appurtenant property to be acquired be limited to the extent of the two gardens demised with flats A and B and the pathway and garage. Additionally, Mr Forrester proposed the grant of a right of way over the pathway between the garage and the gardens at number 18. By the time this matter came to hearing, the applicant no longer claimed the right to acquire the land at the rear of the premises but the grant of the right of way over the pathway remained in dispute.

The Law

9. Section 1(2) of the Leasehold Reform Housing and Urban Development Act 1993 provides:
“Where the right to collective enfranchisement is exercised in relation to any such premises (“the relevant premises”) –
(a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3)”
10. Section 1(3) provides:
“(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or
(b) it is property which any such tenant is entitled to under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).”
11. By section 1(7) “appurtenant property” means any garage, outhouse, garden, yard or appurtenances belonging to or usually enjoyed with the flat. By section 13(3)(a)(iii) the initial notice must specify any property over which it is proposed that rights (specified in the notice) should be granted in connection with the acquisition of the freehold.
12. By section 21(3)(a)(i) the counter-notice must specify in relation to any proposal which is not accepted, the reversioner’s counter-proposals.

13. By section 34(9) the nominee purchaser and the person whose interest is being conveyed may agree to depart from the remaining statutory provisions. Otherwise, the conveyance of any freehold interest must conform with detailed provisions in schedule 7 to the 1993 Act.
14. Paragraph 4 of schedule 7 provides:
“Any such conveyance shall include –
- (a) such provisions (if any) as the nominee purchaser may require for the purpose of securing to him and the persons deriving title under him rights of way over other property, so far as the freeholder is capable of granting them, being right of way that are necessary for the reasonable enjoyment of the relevant premises; and
 - (b) such provisions (if any) as the freeholder may require for the purpose of making the relevant premises subject to rights of way *necessary for the reasonable enjoyment of other property, being property in which he is to retain an interest after the acquisition of the relevant premises.*”
15. Therefore, by paragraph 4(b) of schedule 7, the conveyance must reserve such rights of way as the freeholder may require for the reasonable enjoyment of other property in which he is to retain an interest after the acquisition of the relevant premises.

The Submissions

16. On behalf of Mr Forrester, Mr Upton acknowledged that although the pathway is not included in the demise of any flat, the applicant is entitled to acquire it under section 1(3)(b). However, he contended that Mr Forrester requires a right of way over the path for the reasonable enjoyment of the retained land at the rear of the demised gardens since it is the only access from the land to the road. He also suggested that a right of way was required for the reasonable enjoyment of the land at number 16. There was nothing, he said, in paragraph 4(b) which states that the property to be retained has to be registered in the same title number as the premises being acquired under the Act nor was there any reason why paragraph 4(b) should not apply to neighbouring land retained by the reversioner.
17. Mr Forrester gave evidence that use of the pathway is seasonal and that he very rarely uses it in the winter months. He said that he uses the pathway to take garden waste such as prunings from trees. Sometimes, he said, he used the access to take items to his studio in the garden of number 16. This is situate at the end of the garden at number 16 and slightly over on to number 18. Mr Forrester also told the Tribunal about a friend of his who has Multiple Sclerosis and whose condition is deteriorating. She finds it extremely difficult to get through the house of number 16 because of the stepped access and the arrangement of the corridors.

18. Just beyond the gate at the end of the accessway, Mr Forrester has build a brick barbecue across the remainder of the path to the retained land. He said that he would be able to remove this without difficulty. Therefore if he sold number 16 but retained number 18, he would be able to have access along the whole of the path.
19. Mr Forrester acknowledged that access to the road could be achieved either through the house at number 16 or through his garage. However, he said that the door at the rear of the garage is a pedestrian door and although he could get a wheelbarrow through that entrance only with difficulty and since there is a step up, it would have to be ramped. Furthermore, he said, the garage is full of junk and houses his central heating boiler. For that reason it is securely locked.
20. In cross examination it was put to Mr Forrester that he had lived at the property since 1977 and did not buy number 18 until 1986. During this time he did not have the benefit of access across the pathway. Mr Forrester accepted this but said that it was difficult to manage. In 1985 Ms Lobel had allowed Mr Forrester to use the path. Also, he said, the situation was different at that time because he was working and had little time for gardening.
21. It was also put to Mr Forrester that he could widen the door to the garage. He considered that this would be a difficult matter because of the nature of the construction of the door with a low lintel and position of the coping stones.
22. During negotiations for the acquisition of number 18, Mr Forrester's son had offered to purchase the garage to 18A and had this gone forward there would have been no need to have access via the pathway.
23. On behalf of the applicant, Ms Hawkins of flat A said that if the pathway was acquired with no right of way, then the leaseholders planned to put up a fence for security. At present the back of the property was vulnerable from the road. Ms Lobel of flat B said that she had lived at the property since 1983 and that before Mr Forrester purchased number 18, he used to access the road through his garage.
24. Mr Lloyd Thompson, solicitor for the applicants submitted that the right of way was not necessary for Mr Forrester's reasonable enjoyment of other property. He emphasised the fact that Mr Forrester had not had access before 1986 and that his current use of the pathway was not on a regular basis. In any event, he said, the brick barbecue itself limit access to the pathway which demonstrates the low priority for use of the path. He drew the Tribunal's attention to the fact that the test to be applied was "reasonable" enjoyment.
25. Mr Thompson also contended that any suggestion that number 16 might be sold with the land at the rear of number 18 was merely fanciful. Mr Forrester has formed a large L shaped garden both parts of which are fully incorporated together. He suggested that the land at the

rear of number 18 is really only of practical use as part of the garden at number 16.

Consideration

26. The question for the Tribunal is whether of right of way across the pathway between the garage for number 18 and the rear gardens for flats A and B at number 18 is “necessary for the reasonable enjoyment of other property, being property in which he is to retain an interest after the acquisition of the relevant premises”.
27. For the reasons set out below, the Tribunal does not consider that a provision making the premises subject to a right of way is necessary for the reasonable enjoyment of other property in which Mr Forrester, as freeholder, is to retain an interest.
28. The question is primarily one of fact and the Tribunal must consider the particular circumstances and layout of the property concerned. The Tribunal based its conclusion on the evidence and submissions of the parties and its own inspection of the property.
29. Firstly, the Tribunal considered that it was very unlikely that number 16 might be sold and the rear garden at number 18 retained. The two areas of land have been fully incorporated together and now form one garden, at the rear of which is a large pond spanning parts of both gardens. This is also demonstrated by the fact that the extension of the pathway has, in any event, been blocked by Mr Forrester’s barbecue.
30. Secondly, the Tribunal were satisfied on the evidence that Mr Forrester does not make regular use of the pathway. Although it may be convenient for him to use the path for moving garden waste and bringing in materials, it is not, in the Tribunal’s view “necessary for the reasonable enjoyment” of the land. Also whilst the Tribunal is sorry to hear of Mr Forrester’s friend’s ill-health, it considered this to be a personal circumstance which could not be given sufficient weight to tip the scale in favour of Mr Forrester.
31. Thirdly, the Tribunal were satisfied that it would not be unreasonable for Mr Forrester to achieve access to the road from his rear garden, including the land behind number 18, through the house or garage at number 16. Mr Forrester’s access had been restricted in this way for nine years until he purchased number 18. In evidence, although he said it was difficult, he did agree that a wheelbarrow could be taken through the garage. The fact that the garage is made more inaccessible by the presence of Mr Forrester’s belongings and the locks on the front door to the garage are matters that can be addressed without the grant of a right of way.

Decision

32. Accordingly, the Tribunal refuses to require the applicants to include any provision in the conveyance which makes the relevant premises subject to a right of way for the freeholder.

Chairman:

Siobhan McGrath, President First-tier Tribunal (Property Chamber)

21st November 2013