

4267



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

Case reference : **LON/OOAK/OCE/2015/0214**

Property : **15 and 17 Stonard Road, Palmers
Green, London N13 4DJ**

Applicant : **Angela McAuley (“the tenant”)**

Representative : **Barnes & Partners, solicitors**

Respondent : **Hilham Properties Limited (“the
landlord”)**

Representative : **Conway & Conway, solicitors**

Type of application : **An Enfranchisement Claim**

Tribunal members : **Angus Andrew
Helen Bowers BSc (Econ) MSc
MRICS**

**Date and Venue of
Hearing** : **11 November 2015
10 Alfred Place, London WC1E 7LR**

Date of Decision : **18 December 2015**

DECISIONS

Decision

1. The extent of the property to be transferred to the tenant is shown coloured red on the plan at page 28 of the tenant's document bundle and does not include the passage to the side and the rear of the property.
2. If the parties are unable to agree the rights to be granted over the passage in favour of the tenant they may by 15 January 2016 apply to the tribunal for further directions. If no such application has been made by that date the tribunal will close its file.

The application and hearing

3. The tenant applied under section 24(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") for a determination of the terms of acquisition remaining in dispute. In her application the only term identified was a "determination of the right of way".
4. We considered the application at a hearing on 11 November 2015. The tenant was represented by Stephen Evans, a barrister. The landlord was represented by Andrew Conway, a solicitor.
5. By the end of the hearing a sensible compromise appeared possible and we said that we would not issue our decision for at least four weeks to allow further time for negotiation. We have since been told that terms have not been agreed and that the parties prefer to rely on our decision.

Background

6. 15 to 61 Stonard Road (odd numbers) is a terrace of almost identical properties. Each property comprises two flats, one on the ground floor and the other on the first floor so that there are 24 flats in total. 15/17 Stonard Road is at the eastern end of the terrace. A 10 foot wide passage runs from Stonard Road along the side of number 15/17 and leads to a 5 foot wide passage that runs along the rear of all 12 properties. A 5 foot wide passage also bisects the 6th and 7th properties permitting pedestrian access from the rear passage to Stonard Road.
7. The landlord owns the freehold interest in the entire terrace including the 10 foot wide passage adjacent to number 15/17 and the 5 foot wide passage that runs behind all 12 properties. It is apparent from the official copy entries included in the hearing bundles that 17 of the 24 flats have been sold on long leases. The tenant owns the leasehold interest in both 15 and 17 Stonard Road and has exercised her right to acquire that freehold of the property under the 1993 Act.

8. Copies of the leases of both flats were included in the hearing bundles. The lease of number 15, the lower flat, is particularly relevant to the dispute between the parties. It was granted on 11 January 1977. In that lease the demised property is described in the following terms:

“All that self contained maisonette situate in Stonard Road Palmers Green in the London Borough of Enfield shown on the plan drawn hereon and thereon edged red comprising the lower floor of the building known as numbers 15 and 17 Stonard Road TOGETHER with the front and rear gardens thereto belonging and shown on the said plan and thereon coloured green and the soil of the five foot passageway coloured brown on the said plan and abutting on the rear of the said garden ALL of which said property is known as Number 15 Stonard Road aforesaid AND TOGETHER ALSO with (a) the full and free right to use (in common with the Lessor its tenants and all others authorised by it or them or any for them) the entrance porch coloured blue on the said plan for the purposes of access to and egress from the demised premises (b) a right of way at all times during the said term with or without a private motor car only in common with all persons entitled thereto over and along the right of way leading from Stonard Road to the passageway at the rear of the demised premises and over and along so much of the five foot passageway at the rear leading to the demised premises as is not included in the demise.”

9. Both the 10ft wide side passage and that part of the 5 foot passage immediately adjacent to the rear gardens of the property are coloured brown on the lease plan. In this decision we refer to these two sections as the “disputed passage”.
10. The description continues by including a number of other rights and reservations but they are not material to the dispute between the parties. The lease of number 15 is registered at HM Land Registry. The whole of the disputed passage is included in the leasehold title. That is HM Land Registry have included in the registered leasehold title all the land shown coloured brown on the lease plan.
11. Included in the hearing bundles were copies of the leases of numbers 23, 27, 29 and 57 Stonard Road. These leases also include rights over the passages although the rights granted are not all identical to those granted by the lease of number 15.
12. The lease of numbers 27 and 29 was granted in 1956 and the right is expressed in the following terms:

“a right of way at all times during the said term with or without private motorcars only in common with the Lessor and all other persons entitled thereto over the right of way leading from Stonard Road to the rear of the said premises”.

13. The lease of number 57 was granted in 1976 and the right is identical to that granted in respect of number 15.
14. The lease of number 23 was granted many years later in 2001 and the right is expressed in the following terms:

“a right of way at all times with or without vehicles in common with the Lessor and the tenants and occupiers of the adjoining and adjacent maisonettes and all others authorised by them or any of them over and along that part the right of way at the back of the property and leading into Stonard Road as it is not included in this demise”.

15. Mr Conway informed us that all the other leases included a right similar if not identical to one of the above rights. Mr Evans took the point that it could not be assumed that all the other leases included a similar right. However when Mr Conway volunteered to disclose all the counter-part leases (that he had brought with him) Mr Evans did not pursue the point.

Statutory framework

16. In the context of this dispute the provisions of sections 1 and 3(1) are relevant and they are set out below:

1. *The right to collective enfranchisement.*

(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf—

- (a) by a person or persons appointed by them for the purpose, and*
- (b) at a price determined in accordance with this Chapter;*

and that right is referred to in this Chapter as “the right to collective enfranchisement”.

(2) 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); and*
- (b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.*

(3) Subsection (2)(a) applies to any property if at the relevant date either—

- (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 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).

(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—

(a) there are granted by the person who owns the freehold of that property—

- (i) over that property, or
- (ii) over any other property,

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

(b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted.

(5) A claim by qualifying tenants to exercise the right to collective enfranchisement may be made in relation to any premises to which this Chapter applies despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise that right.

(6) Any right or obligation under this Chapter to acquire any interest in property shall not extend to underlying minerals in which that interest subsists if—

- (a) the owner of the interest requires the minerals to be excepted, and
- (b) proper provision is made for the support of the property as it is enjoyed on the relevant date.

(7) In this section—

- “appurtenant property”, in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;
- “the relevant premises” means any such premises as are referred to in subsection (2).

(8) In this Chapter “the relevant date”, in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13.

3. Premises to which this Chapter applies.

(1) Subject to section 4, this Chapter applies to any premises if—

- (a) they consist of a self-contained building or part of a building;
- (b) they contain two or more flats held by qualifying tenants; and
- (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.

Issues in dispute

17. The parties agreed a premium of £17,500 in April 2015. They could not however agree the transfer terms and a copy of a heated exchange of correspondence between the parties’ solicitors was included in the hearing bundle. By the time that the matter came before us the only issue between the parties was the treatment of the disputed passage. The landlord was prepared to include it in the transfer provided that it was subject to the rights of way granted by the other leases. The tenant however was not prepared to accept that condition. She asserted that the tenants of the other properties had not exercised their rights for many years and she insisted on a transfer of the disputed passage free from any rights of way. The landlord resisted the tenant’s request because it considered that it would be acting in derogation of grant and could face a claim from other leaseholders who may well be physically denied access to the disputed passage.
18. Neither side had put in any witness evidence as to the use of the disputed passage. Although we offered an adjournment to allow for the production of witness evidence both parties asked us to decide if the tenant was entitled to acquire the freehold of the disputed passage on the basis that any rights to be granted or reserved over the passage could be determined at a later date if the parties were unable to agree them. We acceded to that request and we heard submissions from both parties’ advocates.
19. Mr Evans on behalf of the tenant offered three alternative arguments. He said because the disputed passage was included in the tenant’s registered leasehold title she was entitled to have the freehold of it. If we were against him on that he argued that the disputed passage was appurtenant property within the meaning of section 1(3)(a) of the 1993 Act and that consequently the tenant was entitled to the freehold of it by virtue of section 1(2). Finally, he said if we were against him on his first two arguments then the disputed passage must fall within section 1(3)(b) as being property used in common with others. He developed his third argument by asserting that section 1(4) did not prevent the tenant from acquiring the freehold of disputed passage because the landlord would not

be able, on completion, to grant rights over it that are “*as nearly as may be*” the same rights as those now enjoyed by the tenant under the terms of her lease because she had a leasehold interest in the disputed passage that could not be replicated by the grant of any right.

20. Mr Conway on behalf of the landlord went directly to section 1(3)(b) and said that the disputed passage was clearly used in common with the occupiers of the other flats in the terrace and that the landlord could easily grant the tenant rights over the passage that were the same as those that she currently enjoyed.

Reasons for our decision

21. Mr Evans’ first argument rests on the proposition that both sections of the disputed passage were demised by the tenant’s lease. It is axiomatic that in interpreting the lease the “*meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but disregarding subjective evidence of any party’s intentions.*” (from Lord Neuberger’s judgement in *Arnold v Britten* [2015] UKSC 36).
22. Although the 10ft wide passage was coloured brown on the lease plan it is clear from the wording of the flat description that only “*the soil of the five foot passageway*” was included in the demise. That is consistent with the scheme that must have been envisaged when the lease was granted: namely that the 10ft side passage would provide a means of vehicular access to the rear pedestrian passage, sections of the soil of which would be included in the demises of the adjacent rear ground floor flats. If it had been intended to include the 10ft wide side passage in the demise of 15 Stonard Road there would have been no need to grant an express vehicular right of way over it. The inclusion of the 10ft wide side passage in the registered title appears to have been a mistake but if so it is one that has never been rectified.
23. Unfortunately neither advocate dealt with this contradiction. This case raises a number of interpretation issues relating to both the 1993 Act and the leases and it is surprising that our attention was not drawn to any relevant authorities. We have therefore throughout worked from what might loosely be called “first principles”.
24. However, in the context of Mr Evan’s first argument we can put these inconsistencies to one side. The argument that a nominee purchaser is entitled as of right to acquire the freehold of all that is included in the demise of any flat is not sustainable. By section 1 the acquisition right extends to “*premises to which this Chapter applies*”. That takes the reader to section 3 and in particular section 3(1) from which it is apparent that the

right in the first instance extends only to “*a self-contained building or part of a building*”.

25. This interpretation is reinforced by sections 1(2) and (3) that grant additional rights to acquire other property included in the demise of a flat. If there was an automatic right to acquire everything included in the demise of a flat those sections would be redundant: they would serve no purpose.
26. Mr Evan’s next argument was that the disputed passage was “*appurtenant property*” within the meaning of section 1(3). Again we were handicapped by a dearth of authorities although we did draw the parties’ attention to the relevant passage in Hague.
27. It is clear that the nominee purchaser can only acquire appurtenant property to the extent that it is included in the demise of a flat and for the reasons set out above we do not consider that the 10ft wide side passage was so included.
28. Again it is unnecessary to decide the issue on that point. As Mr Evans pointed out the definition in section 1(7) is to an extent circular in that it includes “*appurtenances*”. However the preceding list of examples gives a clear indication of what was intended. Garages, outbuildings, gardens and yards are all examples of enclosed features over which a lessee will exercise effective day to day control if not exclusive possession. Likewise at paragraph 20-04 the authors of Hague refer to “*property belonging to or usually enjoyed with the flat and let with it, being within the curtilage of the flat or the building containing it*”.
29. In the context of the property the front and rear gardens and the entrance porch are clearly appurtenant property as the landlord conceded. The same cannot be said of the disputed passage. All the occupiers of the other 15 leasehold flats enjoy rights of way over the disputed passage: it is open and not included within the garden walls or fences of the property: in short it is not within the curtilage of the property and is not appurtenant property.
30. On the basis that we rejected Mr Evan’s first two arguments it was effectively common ground that the disputed passage must fall within section 1(3)(b). That is, it is used “*in common with the occupiers of other premises*”. The issue was not whether it was common property but whether the landlord could grant to the tenant over the disputed passage “*such permanent rights as will ensure that the occupier of the flathas as nearly as may be the same rights as those enjoyed*” by the tenant when she served her claim notice.
31. Mr Evan’s argument that that the tenant’s leasehold interest in the disputed passage could not be replicated by the grant of any right meets

with the same objection to which we have already referred. Namely that the tenant does not have a leasehold interest in the 10ft wide side passage.

32. However it is again unnecessary to determine the issue on this point. We were told that the tenant has used the disputed passage as a means of access to the property and to park her cars. The landlord can grant rights over the disputed passage that will "*as nearly as may be*" preserve that use.
33. Furthermore section 1(3)(b) envisages that the common property may include demised property because relevant premises will include the flats owned by the qualifying tenants. Indeed it would be surprising if Parliament had intended that enfranchising tenants could either deprive other tenants of proprietary rights granted by their leases or put the landlord in derogation of grant.
34. Consequently and for each of the above reasons the tenant is not entitled to acquire the disputed passage. She is however entitled to be granted rights over the disputed passage that will preserve her existing use of it. With a modicum of common sense the parties should be able to agree those rights. If they cannot, they may apply for further directions so that we can determine those rights having heard evidence as to the extent of the tenant's use. It is however reasonable to time limit any further application both to bring finality to this litigation and to preserve the tribunal's limited resources.

Name: Angus Andrew

Date: 18 December 2015