



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

Case Reference : MM/LON/OOAC/OCE/2021/0060

HMCTS Code: : V: CVPREMOTE

Property : Flats 2,4,6,8,10,12 Somercoates Close, Barnett,
Hertfordshire, EN4 9ED

Applicant : 2-12 Somercoates Freehold Limited

Representative : Howard Lederman (Counsel)

Respondent : The Mayor and Burgesses of the London Borough
of Barnet

Representative : Victoria Osler (Counsel)

Tribunal Members: Judge Robert Latham
Mark Taylor MRICS

**Date and venue of
Hearing** : 7 October 2021 at
10 Alfred Place, London WC1E 7LR

Date of Decision : 18 November 2021

DECISION

(i) The Tribunal determines that the proposed Transfer should include the terms specified in paragraphs 13 to 33 below.

(ii) The Tribunal determines that the Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents of 175 pages.

The Application

1. On 25 March 2021, the Applicants issued the current application for the Tribunal to determine the of acquisition of their collective enfranchisement of Flats 2,4,6,8,10,12 Somercoates Close, Barnett, Hertfordshire, EN4 9ED pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”). The parties have agreed the premium at £18,300.
2. On 2 July, the Tribunal gave Directions. On 30 July, the Respondent submitted a draft Transfer. On 13 August, the Applicant returned the Transfer highlighting in red the issues in dispute. The next stage was for the Respondent, by 27 August, to provide a list of the draft transfer terms that remain in dispute. The Respondent was late in complying with this Direction. On 21 September, the Respondent provided and amended transfer. On 4 October, the Applicant commented on this.

The Hearing

3. Mr Howard Lederman (Counsel) represented the Applicant. He was accompanied by Ms Lisa Cornish from his instructing solicitor. Ms Victoria Osler (Counsel) appeared for the Respondent instructed by HB Public Law (Jagdeep Kandola). Both Counsel provided Skeleton Arguments.
4. At the commencement of the hearing, Mr Lederman suggested that the Respondent should be debarred for failing to comply with the Directions. Having regard to the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is satisfied that it would have been disproportionate to do so.
5. We are grateful to the assistance provided by both Counsel. The parties provided a draft TP1 Transfer Deed and a Scott Schedule. As the hearing progressed, the issues in dispute were narrowed. After the hearing, the parties provided the Tribunal with their Notes on the Issues that remain in dispute. The Respondent has also provided a plan of those parts of Somercoates Close which form part of the adopted highway. This is different from the information which the Applicant had obtained from the Respondent’s website and may raise issues outside the scope of those which we have been asked to determine.

The Background

6. There are five blocks in Somercoates Close (“the Estate”), a small estate built by the Respondent, local housing authority, in the 1960s. Each red brick block has

their own parking space. The blocks consist of (i) Nos. 1, 3, 5, & 7 (Block 1); (ii) Nos. 2, 4, 6, 8, 10 and 12 (Block 2 – the subject block); (iii) Nos. 9, 11, 13 & 15 (Block 3); (iv) Nos. 14, 16, 18, 20, 22 & 24 (Block 4); and Nos. 17, 19, 21 & 23 (Block 5). There are enfranchisement applications pending in respect of Blocks 3 and 4. The terms of the current transfer may therefore have wider implications.

7. On 21 August 2020, the Applicant served the Tenants' Initial Notice Claim Collective Enfranchisement (at p.13). The Applicant proposed a premium of £18,200 for the freehold interest in the demised premises and £100 for the freehold interest in the additional property specified in the Schedule (at p.15 and 20). The additional freehold property was shown edged green. This area included the parking areas, gardens and other grounds enjoyed by the qualifying tenants. There are two parking areas, one reserved for Flats 2, 12, 8 and 14 and a second reserved for Flats 6 and 10. In this second area, there is a parking space marked "V" which was reserved for any visitor to the Estate.
8. On 28 October, the Respondent served its Counter Notice (at p.21). The Respondent admitted the Applicant's right to enfranchise and the premium proposed. The Respondent disputed the scope of additional property which was to be transferred and specified rights to be granted and rights to be reserved. The Respondent sought to reserve a right of way over a pathway marked yellow. The Respondent did not dispute the Applicants right to acquire the parking space marked "V".
9. The Tribunal has been provided with a copy of the lease to Flat 8 (at p.89). This is dated 28 April 1987. It is not entirely clear whether all the six leases are in this form.

The Legislation

10. Section 34 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") provides for the conveyance to the nominee purchaser (emphasis added):

"(1) Any conveyance executed for the purposes of this Chapter, being a conveyance to the nominee purchaser of the freehold of the specified premises of a part of those premises or of any other property, shall grant to the nominee purchaser an estate in fee simple absolute in those premises that part of those premises or that property, subject only to such incumbrances as may have been agreed or determined under this Chapter to be incumbrances subject to which that estate should be granted, having regard to the following provisions of this Chapter.

.....

(9) Except to the extent that any departure is agreed to by the nominee purchaser and the person whose interest is to be conveyed, any conveyance executed for the purposes of this Chapter shall—

(a) as respects the conveyance of any freehold interest, conform with the provisions of Schedule 7, and

(b) as respects the conveyance of any leasehold interest, conform with the provisions of paragraph 2 of that Schedule (any reference in that paragraph to the freeholder being read as a reference to the person whose leasehold interest is to be conveyed and with the reference to the covenants for title implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 being read as excluding the covenant in section 4(1)(b) of that Act (compliance with terms of lease).

11. Paragraph 3 of Schedule 7 provides for “Rights of support, passage of water, etc:

(1) This paragraph applies to rights of any of the following descriptions, namely—

(a) rights of support for a building or part of a building;

(b) rights to the access of light and air to a building or part of a building;

(c) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;

(d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions;

and the provisions required to be included in the conveyance by virtue of subparagraph (2) are accordingly provisions relating to any such rights.

(2) The conveyance shall include provisions having the effect of—

(a) granting with the relevant premises (so far as the freeholder is capable of granting them)—

(i) all such easements and rights over other property as are necessary to secure as nearly as may be for the benefit of the relevant premises the same rights as exist for the benefit of those premises immediately before the appropriate time, and

(ii) such further easements and rights (if any) as are necessary for the reasonable enjoyment of the relevant premises; and

(b) making the relevant premises subject to the following easements and rights (so far as they are capable of existing in law), namely—

(i) all easements and rights for the benefit of other property to which the relevant premises are subject immediately before the appropriate time, and

(ii) such further easements and rights (if any) as are necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date.

Agreed Terms

12. The parties have now agreed a number of the disputed items which were identified in the Scott Schedule. This Schedule summarises the issues which this Tribunal is asked to resolve.

Clause in the Transfer	
1. Panel 3 – plan	The parties have agreed the wording and the plan as per email of 5 October 2021 sent at 11.15.
2. Definition of accessway	This relates to the access way edged yellow on the Plan annexed to the Respondent’s Counter Notice. It is understood that the parties have agreed to refer to this land as the “shared accessway” and that the cost of the cost of the maintenance of the wall will be shared.
3. Definition of “Retained land”	The Respondent has agreed the form of words proposed by the Applicant
4. Definition of “additional land”	Agreed
5. Definition of Services	Disputed
6. Definition of Service Installation	Disputed
7. Clause 12.2.1	Disputed
8. Clause 12.2.1 (a)	Now agreed (see below)
9. Clause 12.2.1 (b)	Now agreed (see below)
10. Clause 12.2.1 (c)	Now agreed (see below)
11. Clause 12.2.1 (d)	Now agreed (see below)
12. Clause 12.2.1 (e)	Now agreed (see below)
13. Clause 12.2.1 (f)	Now agreed (see below)
14. Clause 12.3.1 (a)	It is agreed that the right should be subject to a contribution by the Transferor.
15. Clause 12.3.1 (b)	Disputed
16. Clause 12.3.1 (d)	It was agreed that this clause should be deleted.
17. Clause 12.3.1 (f)	Disputed
18. Clause 12.3.1 (k)	Agreed subject to a contribution clause
19. Clause 12.3.1 (l)	Disputed
20. Clause 12.3.1(i)	Disputed
21. Clause 12.4.(v) and 12.6.7(c)	It was agreed that “Retained Property” should replace the word “Estate”
22. Clause 12.6.6	Agreed – see 2 above
23. Clause 12.6.7(b) and (c)	It was agreed that these clauses should be removed

Terms in Dispute

Issue 1: Definition of Services

13. The Applicant contends for the following definition:

“water, soil, sewerage, effluent, gas, fuel, oil, electricity, telecommunications (including fibre/laser optic and other electronic communication) and other services”

14. The Respondent contends for the following definition:

“pure and foul water soil sewerage effluent gas and other pipe fuel smoke or fumes oil electricity telecommunications for the receipt directly or by landline of visual or other wireless transmissions”

15. The lease does not define “services”. The parties are agreed that a definition must be included. Mr Lederman argues that the Respondent’s version is a reduction in rights granted by First Schedule and definition in recital (g) of Lease and that the rights are required by para 3(1)(d) and 3(2)(a) of Schedule 7 of the Act. He has provided extracts from the Encyclopaedia of Forms and Precedents upon which he has based his draft. Ms Osler argues that the tenants do not currently enjoy “fibre/laser optic and other electronic communication and services” and that they have no entitlement to these expanded rights. We disagree. We are satisfied that these additional rights are necessary for the reasonable enjoyment of the premises.

Issue 2: Definition of Service Installation

16. The Applicant contends for the following definition:

17. “boilers cisterns tanks water and gas supply pipes sewers drains tubes meters soil pipes waste water pipes conduits laser optic fibres electronic data or impulse communication transmission or reception systems and other conducting media tanks holding tanks and sewerage treatment works and also wires or cables used for the conveyance of electrical current and all valves traps and switches appertaining thereto”

18. The Respondent contends for the following definition:

19. “boilers cisterns tanks water and gas supply pipes sewers drains tubes meters soil pipes waste water pipes conduits and also wires or cables used for the conveyance of electrical current and all valves traps and switches appertaining thereto but shall not extend to or include any wires cables or apparatus belonging to British Telecom or any public utility supply authorities”

20. The Tribunal has highlighted the substantive differences between the parties. Recital (g) of the lease does include a definition of “service installations”. The Respondent adopts this wording and contends that there is no warrant under either the lease or the 1993 Act for the expanded definition. The Applicant repeats its

argument that these rights are required by para 3(1)(d) and 3(2)(a) of Schedule 7 of the Act. We agree with the Applicant and are satisfied that these additional rights are necessary for the reasonable enjoyment of the premises.

Clause 12.2: Rights granted for the benefit of the Property

Issue 3: Clause 12.2.1

21. There is now only a modest dispute between the parties and the additional words proposed by the Respondent are highlighted:

“Subject to the Transferee paying to the Transferor a sum equal to a fair and reasonable proportion of all payments, costs and expenses incurred or expended by or on behalf of the Transferor in the carrying out any necessary maintenance, repairs, renewals, reinstatements, rebuilding, cleansing to or in relation to the Retained Land and Service Installations in so far as the same affects the Property or any part thereof and subject to those exercising the rights causing as little damage as possible and making good any damage caused **to the reasonable satisfaction of the Transferor**, the Transferor grants the following rights for each part of the Property for the benefit of the Transferee its successors in title and all persons authorised by it in common with the Transferor and its successors in title to the Retained Land or part thereof and all other persons having the like right:

- a) The full right and liberty to pass and repass on foot over and along the footways of the Retained Land for the purposes of access to and egress from the Property;
- b) The full right and liberty to pass and repass on foot and with or without vehicles and machinery over and along the roadways within the Retained Land for the purposes of access to and egress from the Property and for the purposes of parking and turning vehicles on the roadways or hard standing;
- c) The free and uninterrupted passage and running of the Services from and to the Property in through under and along the Service Installations now laid or hereafter to be laid in or upon the Retained Land;
- d) The right to subjacent and lateral support and to shelter and protection for the Property from any part of the Retained Land, any part of the Transferor’s adjacent land as currently enjoyed and any party walls or party structures as are adjacent to and afford support to the Property.
- e) The right to the Transferee and all persons authorised by it to enter upon the Retained Land at all reasonable times after giving at least 10 days’ written notice (except in emergencies) to repair, renew, cleanse or maintain, support and uphold any part of the Property including any party walls or structures together with any boundary walls fences or

structures or any part thereof or to remedy any failure to maintain the rights of support and protection granted by this Transfer, to use any inspection chambers at the Retained Land and to place on the retained land ladders scaffolding and other apparatus necessary for those purposes the persons exercising such right causing as little damage as possible and making good any such damage caused to the reasonable satisfaction of the Transferor.

f) The right for the Transferee and its successors in title as owners or occupiers for the time being of the Property or any part thereof to uninterrupted and unimpeded access to light and air to the Property and all parts thereof.

g) All rights (any) over the Property that would by virtue of Section 62 of the Law of Property Act 1925 have passed on a transfer of the Retained Land or adjoining or neighbouring land of the Transferor to another person if this Transfer had been made one day before this deed and there had been diversity of occupation at that date.”

22. The Applicant argues that the additional words are unnecessary as there is an arbitration clause. The Tribunal agrees.

Clause 12.3: Rights reserved for the benefit of other land

Issue 4: Clause 12.3.1(b)

23. There is now only a modest dispute between the parties and the additional words proposed by the Respondent are highlighted:

“The full and free right and liberty for the Transferor and any person or persons authorised by it at any time or times to rebuild or use any building adjoining or adjacent to the Property or to erect new buildings on the Retained Land, **or any property adjacent thereto** to such height elevation extent or otherwise as the Transferor may think fit but may not exercise such right in such a way that will substantially restrict interrupt or otherwise inhibit the access of light and air to the Property.

24. The Respondent argues for the highlighted words to be removed as they are “too wide”. No further explanation is provided. The Tribunal cannot see the basis of this objection. The additional words should be included.

Issue 5: Clause 12.3.1(f)

25. There is now only a modest dispute between the parties and the additional words proposed by the Respondent are highlighted:

“The right to re-build or alter the Retained Land or any part thereof subject to the Transferor not causing significant damage or inconvenience to the owners and/or occupiers of the Property and making good any damage caused **to the reasonable satisfaction of the Transferor.**”

26. The Applicant argues that the additional words are unnecessary as there is an arbitration clause. The Tribunal agrees.

Issue 6: Clause 12.3.1(k)

27. This Clause gives the Transferor a right of way over the area shaded purple on the lease plans which is the parking spaces for Flats 4, 8, 12 and 2. The Applicant has argued that the Respondent has not justified the need to retain this right of way. We are satisfied that this may be required. The parties are agreed that this right of way should be subject to the Transferor making a contribution:

“Subject to

(i) the Transferor paying to the Transferee a sum equal to a fair and reasonable proportion of all payments, costs and expenses incurred by or on behalf of the Transferee in maintaining those parts of the Property over which the following rights may be exercised for the benefit of the Retained Land; and

(ii) the rights of the Transferee, or occupiers of the Property or their licensees, to park upon the part of the Property shaded purple

(a) a right of way with and without vehicles plant and machinery at all times for all purposes in connection with the use and enjoyment of the Retained Land and every part over the part of the Property shaded purple which is north west of the land shaded yellow colour on the attached plan; and

(b) a right of way on foot at all times for all purposes in connection with the use and enjoyment of the Retained Land and every part over the area coloured yellow on the attached plan (“the accessway”)

Issue 7: Clause 12.3.1(l)

28. The Respondent argues for the following clause to be included:

“The right to use (on a first come, first served basis) for parking vehicles, the parking space at the southern end of the Property which is shown marked “V” on the plan in the lease for No. 8 Somercoates Close Northfield Road New Barnet and Parking Space 8 dated 16 March 1987 between the Transferor and Peter John Corning and Karen Corning.”

29. The Applicant argues that there is no justification for including this clause. The Tribunal agrees with the Applicant. When the Respondent served its Counter Notice, it did not exclude this parking spot from the land to be transferred to the Applicant. Neither did it reserve any easement in respect of this land. The Tribunal is satisfied that it is now too late for the Respondent to seek to do so. In any event, were this plot to be available for any visitor on the Estate to use, the Tribunal would expect the Respondent to agree to the upkeep of this parking space. It has made no offer to do so.

Issue 8: Clause 12.3.1.(i)

30. The Respondent argue for the following clause:

“Rights equivalent to rights granted in Leases now existing of other parts of the Retained land”. The Applicant contends that this clause is much too wide and is not justified by Schedule 7 of the 1993 Act.

31. At the end of the hearing, the Respondent agreed to specify the rights that it seeks to reserve. In their further submissions, it seeks to reserve the rights included in Clause 3(b), and paragraphs 1 to 5 of Schedule 2 of the lease for Flat 8. It is unclear whether the leases for the other flats are in identical terms.
32. The Applicant has considered each of these provisions. Mr Lederman argues that adequate rights are reserved in Clause 12.3 of the proposed TP1 Deed of Transfer. He highlights Clauses 12.3.1(a) and 12.3.1(g). Ms Osler argues that this provision is “essential” to ensure coherence between the different blocks if they are to pass into different ownership. We agree with the Applicant that the Respondent should have raised these issues at a much earlier stage. We are satisfied that it would be inappropriate to include such uncertain provisions at this late stage.

The Highway

33. At 13.44 on 7 October, the Respondent emailed the Tribunal a new “adopted highway plan”. It is headed “PCODE CBA103 CBA107” and the file name is “GIS Plan”. Miss Kandola states that the “adopted highway plan” which had been provided by their Highways Department is incorrect. This new plan indicates that the majority of the road in front of the subject block is adopted highway which should be maintained at public expense. The plan would indicate that the only section that forms part of the Estate is a small area in front of the parking places for Flats 10 and 4. Unless the Respondent produces a more definitive plan within 7 days of this decision, the TP1 Transfer Deed should reflect the area of adopted highway which is indicated in this “GIS Plan”.

Tribunal Fees

34. At the end of the hearing, the Applicant made an application for a refund of the fees that it has paid in respect of the application. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders that the Respondent refund the fees paid of £300 paid by the Applicant within 28 days of the date of this decision. The Applicant has been largely successful. The Respondent has not complied with the Directions given by the Tribunal. The issues which the Tribunal has been required to determine would have been substantially reduced had the Respondent engaged more proactively with this application.

Judge Robert Latham
18 November 2021

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.