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**Residential
Property**
TRIBUNAL SERVICE

Decision of the London Leasehold Valuation Tribunal

Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993

LON/00AJ/OCE/2009/0212

Address: 7 Montpelier Road, Ealing, London W5 2QP

Applicant: 7 Montpelier Freehold Limited

Represented by: Mr. H Webb, counsel, Instructed by Mr. S Syen of Montague Lambert & Co. solicitors

Respondents: Mr. A Lindsay, Ms. J Lindsay and Ms. K Lindsay

Represented by: Mr. A Lindsay and Mrs. A Wilkinson

Tribunal members: Mr T J Powell LLB (Hons)
Ms. M Krisko BSc FRICS

Date of tenant's notice: 30 March 2009

Valuation date: 30 March 2009

Date of counter notice: 26 June 2009

Application dated: 22 December 2009

Directions: 21 January 2010

Hearing: 18 May 2010 & 5 August 2010

Decision: 27 August 2010

Background

1. This was an application by 7 Montpelier Freehold Limited, as nominee purchaser on behalf of the five qualifying tenants of 7 Montpelier Road, London W5 2QP ("the Property") to determine the terms of acquisition in respect of the collective enfranchisement of the freehold of the Property under section 24 of the Leasehold Reform, Housing and Urban Development Act 1993.
2. The freehold of the Property is owned by Mr. Alan Geoffrey St. Clair Lindsay, his wife Mrs. June Lindsay and his daughter Ms Karen Adele St. Clair Lindsay.
3. The Property consists of a detached building on ground and upper floors, a basement, a detached garage to the left-hand side, a front forecourt and a rear garden. The accommodation comprises five flats, the lessees of whom are all qualifying tenants and are all participating in the collective enfranchisement. The front forecourt is used for car parking. The rear garden is split into three parts: the part nearest the house, which is demised to flat 5 on the ground floor, a middle portion retained by the Respondents and a rear portion, which has been let on a long lease to the owners of a neighbouring, unrelated property.
4. A plan of the premises is attached to this decision for clarity and it corresponds to the coloured plan filed with the Tribunal.
5. Neither party invited the Tribunal to inspect the property; and the Tribunal did not consider that an inspection was necessary.
6. In the absence of agreement between the parties as to the terms of acquisition or the enfranchisement price an application was made to the Tribunal. The hearing was listed on 18 May 2010, when both parties applied for an adjournment, on the grounds that there was no relevant valuation evidence from either party and it was not exactly clear what the issues to be decided were. On that date the Tribunal granted the adjournment and gave directions to assist the parties to focus on those issues, which appeared to require determination. A fresh hearing was fixed for 5 August 2010.

Agreed matters

7. At the adjourned hearing it was agreed by the parties that the valuation date was 30 March 2009. In addition, reference was made to a schedule of outstanding issues. By reference to that schedule it was agreed that the front part of the rear garden demised to Flat 5 (and numbered 3 on the plan), was to be included in the enfranchisement. However, it was also agreed between the parties, that none of the following areas were to be included in the enfranchisement:
- i) the rear part of the garden demised to a neighbour (coloured green on the plan);
 - ii) the middle part of the garden retained by the Respondents (coloured brown);
 - iii) the garage retained by the Respondents (marked yellow on the plan), which Mr Lindsay said he wished to develop into a residential coach house; and
 - iv) the forecourt area in front of the garage and to the left hand side of the main building, running up to and parallel to the main building (also coloured yellow).

The issues remaining in dispute

8. At the start of the hearing the following issues were said to be in dispute between the parties:
- i) whether the remaining front forecourt area (coloured purple on the plan) was to be included within the enfranchisement, or not;
 - ii) what was the value to be paid for the enfranchisement (with a possible area of dispute being the basement and whether it had any value); and
 - iii) what rights should be included in the conveyance for the benefit of the Respondents who wanted to retain and develop the garage in the future?
9. The Tribunal considers these issues separately below.

The Tribunal's decisions

10. On the basis of the evidence and submissions received, and a consideration of the documents filed, the Tribunal has made the following determinations on the issues in dispute.

The remaining front forecourt area (purple)

11. Mr. Webb, for the Applicant, submitted that at the relevant date the front forecourt was used by lessees as permitted under their leases: they had rights to pass and re-pass over the forecourt and to park their vehicles on it. Consequently, he said that the tenants were entitled to enfranchise the front forecourt, although they were willing to provide the Respondents with rights of access and egress over, and the right to park on the forecourt area, and to connect any services and conduits under the forecourt as may be necessary in relation to the proposed development of the garage.
12. Initially, Mr. Lindsay on behalf of the Respondents objected to the inclusion of the front forecourt within the enfranchisement. However, after a lengthy discussion and the making of submissions, Mr. Lindsay withdrew his objection and agreed that the front forecourt area should now be included within the enfranchisement, subject to the granting of all necessary rights to the Respondents.

Rights sought by the Respondents over the front forecourt area (purple)

13. Mr. Lindsay provided the Tribunal with a verbal list of the rights that he wished the Applicant to grant him over the forecourt. Mr. Webb was able to agree that the following rights should be granted:
 - i) The Applicant would agree that the Respondents' contribution to the cost of maintaining the front forecourt area should be one-sixth, from the date of transfer (although Mr. Lindsay asked the Tribunal to say that this should be from the date when the garage redevelopment was complete and it was ready to be lived in);
 - ii) The Applicant agreed to allocate a specific parking space to the Respondents, being the last space on the left of the forecourt nearest to the yellow strip of land and garage retained by the Respondents;
 - iii) The Applicant agreed that the Respondents should have the right to use the waste bins situated at the front of the building, along with lessees.
14. However, the Applicant did not agree to grant the following rights:
 - i) the right to the Respondents to lay a paved pathway from the road to the hall entrance of the building and then left to the boundary fence;

- ii) any right of contribution from any of the lessees to the cost of laying or maintaining such a pathway; or
 - iii) any restriction that only six cars should park on the forecourt at any one time.
15. There was a subsidiary issue raised by Mr. Lindsay about the obligation imposed by the building insurers to lop trees at the front of the Property, an obligation that he sought to impose on the Applicant after transfer of the freehold.

Right to lay a pathway

16. Mr. Lindsay wanted the right to lay a pathway 3 feet wide across the front forecourt area from the road to the building and then left to the boundary fence. He said that the front forecourt area is currently covered with pebbles and shingle; he wanted to lay slabs as a path for use by a wheelchair in the future. The Respondents foresaw that this path would also serve the front entrance to the building used by Flat 1 and, as a minimum, there should be a contribution by that flat to the cost of laying the path and its future maintenance.
17. Mr. Webb argued that the Tribunal had no jurisdiction to order that a pathway be laid, firstly because it was not in the Respondents' counter notice and, secondly, because the right to construct a paved pathway went further than the granting of a right of way as envisaged by paragraph 4(b) of Schedule 7 to the 1993 Act.

The Tribunal's decision

18. The Tribunal declines to give the Respondents a right to lay a paved pathway as proposed, because the Tribunal determines that it has no jurisdiction to do so.

Reasons for the Tribunal's decision

19. Schedule 7 of the 1993 Act sets out the matters which shall be included in a conveyance to the nominee purchaser on enfranchisement. Paragraph 4 relates to rights of way and, so far as material, states as follows:

"4. Any such conveyance shall include – ...

- (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."

20. The Tribunal accepts Mr. Webb's argument that paragraph 4(b) gives the Tribunal power to impose a right of way on behalf of the freeholders' retained property; but it does not give the Tribunal power to create an easement to construct something on someone else's land (the front forecourt, after transfer to the Applicant). The most that the freeholders are entitled to under paragraph 4(b) is an easement for a right of way, which the Applicant is willing to grant. The Tribunal accepts Mr Webb's argument that there would be a problem if the Applicant obstructed the right of way that it had granted to the freeholder, but that falls short of the positive obligation on the nominal purchaser either to provide a paved pathway, or to allow the freeholders a right to lay a paved pathway across the front forecourt.
21. In any event, the Respondents have not included any such proposed restriction, obligation or easement in their counter notice and the Tribunal determined that it was too late to add it now, at the hearing.
22. It follows that the question of a contribution to the cost of laying and maintaining a paved pathway does not arise, but the Tribunal cannot see, in any event, how the owner of Flat 1 (or any of the other lessees) could be compelled to contribute to such costs if they are not referred to in their lease.
23. So far as the lopping of trees is concerned, this obligation depends on whatever requirement is imposed by the particular buildings insurance policy for the time being. This is a matter between the nominee purchaser and the insurance company. After discussion, it was agreed by the parties that this was a matter outside of the terms of conveyance, but that should insurers require trees to be lopped, the Applicant would comply with such an obligation.

Restriction to six cars parking on the forecourt at any one time

24. The Tribunal was provided with several differing lease plans and Land Registry plans of the Property. They were of varying quality and none of them was to scale. One of the plans (at page 75 of the bundle) showed the locations of six parking spaces marked A – F and denoted which flat was supposed to be using which space. The Tribunal was told that the forecourt is made up of pebbles and shingle, and that individual spaces are not marked out in any way.

25. While each flat is granted the right to use a car parking space in its lease, it appears that due to an error, two of the leases have been allocated the same parking space; but without copies of all the plans it was not possible for the Tribunal to have a complete picture. Mr. Lindsay for the Respondents said that it was necessary to restrict the number of cars parking on the forecourt to six, partly for safety reasons and partly to ensure that he would continue to have unobstructed access to the retained areas. This was a restriction that the Respondents had sought in the counter notice.
26. For the Applicant, Mr. Webb claimed that more than six cars had been parked on the forecourt for many years. While this was not supported by any evidence from the Applicant, Mrs. Wilkinson for the Respondents said that she had once had a call from a lessee complaining that there were eight cars parked on the forecourt.
27. Mr. Webb made two further points. First, he said that the Applicant had already agreed to allocate a space in front of the retained yellow area for the Respondents to use as car parking and it had also granted rights of access: so both of Mr. Lindsay's concerns had been addressed, without the need for any restriction on numbers of cars. Secondly, he said that, in any event, this was not a restrictive covenant that would fall within paragraph 5(1)(c) of Schedule 7 to the 1993 Act, because there was no evidence that the imposition of such a restriction would materially enhance the value of the property to be retained by the Respondents.

The Tribunal's decision

28. The Tribunal determines that there should be no restrictive covenant restricting the numbers of cars parking on the forecourt at any one time to six.

Reasons for the Tribunal's decision

29. It was for the Respondents to make out a case if they wanted a restrictive covenant to be imposed as part of the conveyance to the nominee purchaser. The Respondents had provided no evidence as to the number of cars that could be parked on the forecourt. There were no scale plans, no accurate measurements and no evidence of any kind as to the appropriate layout, size or number of car parking spaces, which might exist at any one time and, at the same time, would allow full vehicular access to the retained yellow area. Accordingly,

the Tribunal was not able to reach any judgment as to Mr. Lindsay's assertion that a restriction was needed for reasons of safety or unobstructed access to the retained area.

30. The imposition of restrictive covenants is referred to in paragraph 5 of Schedule 7 to the 1993 Act. So far as relevant this reads:

"5(i) As regards restrictive covenants, the conveyance shall include – ...

- c) such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which –
 - (i) will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired, but
 - (ii) will materially enhance the value of other property in which the freeholder has an interest at the relevant date."

31. Due to the lack of evidence, it was not possible for the Tribunal to say whether or not more than six cars were using the forecourt on or before the relevant date; however, there was no evidence at all that if such a restriction were to be imposed, that would "materially enhance the value" of the property to be retained by the Respondents.

32. As for the time from which the Respondents should pay their one-sixth maintenance contribution towards the front forecourt area, the Tribunal could see no reason why this should be delayed to the point where the Respondents had completed the redevelopment of the garage and it was ready to live in. The right of access and the right to park in the allocated car parking space would exist from the date of transfer and may well be used by the Respondents from time to time and especially during the redevelopment phase. Therefore, the Tribunal determines that the Respondents should begin to meet their one-sixth contribution to the maintenance costs from the date of the transfer to the nominee purchaser.

Mutual covenants in the lease of Flat 5

33. In anticipation of the future development of the garage into a residential coach house Mr. A Lindsay (alone) executed a supplemental lease dated 16 November 1979 with then leaseholder of Flat 5, Mr. Dominic Byrne. That supplemental lease contained mutual agreements by the parties not to raise objections if the Respondents erected a bungalow on the middle part of the garden, or converted the garage into a studio flat, or if the lessee of Flat 5 erected an lounge extension

into their garden. The precise wording of clause 3 of the supplemental lease is as follows:

"3. The Lessee hereby covenants for himself and his successors in title with the Lessor that the Lessee will not offer or make any objections to the Lessor erecting a detached bungalow (subject to Town and Country Planning Permission being obtained) in that part of the rear garden of Number 7 Montpelier Road aforesaid and shall not be included in this demise or to the conversion of the Lessor's garage into a Studio Flat and the Lessor for himself and his successors in Title hereby covenants with the Lessee and his successors in Title that the Lessor will not make any objection to the Lessee erecting an extension in that part of the rear garden as is hereby demised of a lounge or some other extension to the demised premises (subject to Town and Country Planning Permission therefore having been obtained)."

34. Clause 5 of the supplemental lease goes on to state:

"5. The Lessee hereby covenants with the Lessor that should he or his successors receive approval prior to the application of the Lessor that he will give to the Lessor and the other Lessees in the Building a full indemnity in respect of all such works whilst erecting his lounge and HEREBY AGREES at his own expense to install sewerage and water pipes as shall be reasonably required by the Lessor connecting to the manhole such monies to be refunded as and when the Studio Flat is approved.

- (A) The joint brick wall if erected shall be shared and if the present application for a Studio Flat is granted the Lessee hereby covenants to pay one-third of such costs AS AND WHEN his own planning application is approved and each party shall keep the other fully informed in respect of such applications and the grants and approvals and refusals
- (B) Should permission be given to the Lessor after the Lessee has erected this wall for a Sun Lounge the Lessor hereby covenants to pay one-third of such costs AS AND WHEN permission for his Studio Flat is granted
- (C) Quotations for any works affecting jointly the Lessor and Lessee shall be mutually agreed between the Lessor and the Lessee before works begin."

35. As mentioned in note 8 of the counter notice, the freeholders desired to retain the rights agreed with the lessee of Flat 5, by the imposition of restrictive covenants or the reservation of rights in the conveyance to the nominee purchaser.

36. For the nominee purchaser Mr. Webb made two points. The first was that the Tribunal was concerned about the terms of the conveyance to the nominee purchaser; even if Mr. Lindsay had reached an agreement with the owner of Flat 5, that cannot bind the nominee purchaser. Secondly, whilst clause 3 does bind successors in title, clause 5 was a personal covenant that did not run with the land.

37. The question therefore for the Tribunal was whether any condition could be put into the conveyance to the nominee purchaser, which would allow the Respondents to retain those rights which had been agreed by Mr Lindsay with the lessee of Flat 5. Mr Lindsay did not address the Tribunal on the law; he said that he was a retired table tennis lecturer, with a long-term interest in property, and he would leave the matter to the Tribunal's expertise.

The Tribunal's decision

38. The Tribunal determines that the mutual covenants, which are set out in the supplemental lease, should not appear in the conveyance of the freehold to the nominee purchaser.

Reasons for the Tribunal's decision

39. The Tribunal has not heard any detailed legal argument as to whether any of the covenants and reservations in clause 3 or clause 5 of the supplemental lease run with the land, whether any of them could be characterised as personal covenants only, whether they will survive the transfer of part of the freehold reversion to the nominee purchaser, or whether any or all of them may still be enforceable after the transfer of part, as between Mr. Lindsay and the lessee for the time being of Flat 5. Without proper legal submissions on these points, the Tribunal is unable to reach any definite conclusions.
40. What is clear is that the agreements contained within the supplemental lease were made between the then lessee of Flat 5 and Mr. Lindsay, for the mutual benefit of Flat 5 and the middle part of the garden and the garage, to be retained by the Respondents. The supplemental lease is referred to in the Property Register of the Land Registry title to Flat 5. However, none of the other lessees in the building are bound by those mutual agreements (and so they could, for example, object to any future planning application for a lounge extension or garage redevelopment). In a conveyance of part of the freehold not including the middle part of the garden and the garage, there appears to be no reason why the nominee purchaser should become bound to those mutual agreements either.
41. Mr. Lindsay may be well advised to take his own legal advice about the enforceability of the mutually agreed covenants in the supplemental lease, either

now or once the transfer of the freehold to the nominee purchaser has taken place. It could be that the mutual covenants remain enforceable by him but, if the legal advice is doubtful about this, he may wish to consider approaching the current owners of Flat 5 to renew the agreements, if both parties still consider them to be mutually beneficial.

Valuation

42. Although there was a lack of valuation evidence before the Tribunal, after a short adjournment the parties indicated that they had agreed on the valuation price at £2,500, which includes the value of the basement referred to in paragraph 8(ii) above. Therefore, the Tribunal needs to make no separate determination concerning this.

Costs

43. The Respondents did not have details of their costs available at the hearing. The costs claimable by the leaseholders are set out in section 33 of the 1993 Act as follows:

- "33(1) Where a notice is given under section 13... the nominee purchaser shall be liable, to the extent that they have been incurred in pursuant of the notice by the reversioner or by any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely –
- a) any investigation reasonably undertaken -
 - i) of the question where any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or
 - ii) of any other question arising out of that notice;
 - b) deducing evidencing and verifying the title to any such interest;
 - c) making out and furnishing such abstracts and copies as the nominee purchaser may require;
 - d) any valuation of any interest in the specified premises or other property;
 - e) any conveyance of any such interest;
- but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void...
- (5) The nominee purchaser shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a Leasehold Valuation Tribunal incurs in connection with the proceedings."

44. The Respondents may wish to put such charges as they have incurred to the nominee purchaser in the completion statement, together with any apportionments in respect of ground rents, service charges and insurances. If the costs cannot be agreed through negotiation, the parties may re-apply to this Tribunal to determine those costs: an application which may be made on the papers (without a hearing), provided that sufficient evidence of those costs is provided by the Respondents.
45. Equally, as the transfer is likely to need a Land Registry scale plan to be prepared, the parties may wish to use it to delineate the parking space to be allocated to the Respondents and any rights of way (if these are to be specified). Once again, it is open to the parties to re-apply to the Tribunal if any matter cannot be agreed in relation to this.
46. Lastly, the Tribunal determines that this is not a case to award any penalty costs against either party on the grounds of misinformation, or for any other reason.

Chairman:



Timothy Powell

Date: 27 August 2010

Annexure: plan of the property

Land Registry
Official copy of
title plan

Title number MX184948
Ordnance Survey map reference TQ1781NE
Scale 1:1250
Administrative area EALING



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