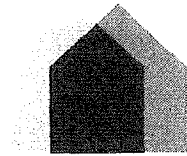




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London Rent Assessment Panel

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER SECTION 24 LEASEHOLD REFORM, HOUSING
AND URBAN DEVELOPMENT ACT 1993**

Case Reference: LON/00BJ/OCE/2011/0194

Premises: 184-203 Massingberd Way, London SW17 6AQ

Applicant : Massingberd Way Freehold Limited

Representative : TWM Solicitors LLP

Respondent : Ground Rent (Regis) Limited

Representative : Ms Laura Cleasby In-House Solicitor

Date of Hearing : 17 January 2012

Appearances for

Applicant : Ms Caroline Shea Counsel

Appearances for

Respondent : Ms Laura Cleasby Solicitor

Leasehold Valuation : Mr John Hewitt Chairman

Tribunal : Mr Philip Tobin FRICS MCI Arb

Date of Decision : 30 January 2012

Decision of the Tribunal

1. The Tribunal determines the preliminary issue in favour of the Applicant and determines that the subject car parking spaces are subject to rights granted under the respective occupational leases and the Respondent is not free to dispose of or to deal with those car parking spaces freely as it may wish.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

The Application, the Background and the Issue

2. By an application dated 15 September 2011 the Applicant applied to the Tribunal for the determination of the terms of acquisition of the freehold interest in specified premises known as 184 – 203 Massingberd Way, a block containing 16 two bedroom flats and 4 three bedroom flats.
3. By an initial notice dated 21 April 2011 and given pursuant to section 13 of the Act a requisite majority of qualifying lessees of flats within the specified premises sought to acquire the freehold interest of the specified premises edged red on a plan annexed to the notice together with the land edged blue on that plan – the additional freeholds. The price proposed for the specified premises was £79,000 and the price proposed for the additional freeholds was £500. The Applicant was named as the nominee purchaser.
4. By a counter-notice dated 29 June 2011 the Respondent admitted that on the date the initial notice was given the participating tenants were entitled to exercise the right to collective enfranchisement in relation to the specified premises. The Respondent accepted that the specified premises were as shown edged red on the plan annexed to the initial notice and that the additional freeholds were shown edged blue on that plan. The Respondent counter-proposed the prices of £133,087 and £216,500 for the respective parcels of land.
5. The additional freeholds comprise several amenity areas including three separate areas designated for car parking. The dispute concerns the value of the three areas for car parking. Evidently all other terms of acquisition have been agreed.
6. The value of the three car parking areas turns on the question whether or not they are subject to rights granted under the occupational leases and whether the Respondent is free to dispose of those areas as it may see fit. We were told that if the Respondent was free to dispose of those areas as it sees fit there were issues of value to be determined and both parties would wish to call expert valuation evidence. However, if the Respondent was not free to dispose of them as it saw fit, the areas had no value over and above that already taken into account in the value of the leases which reflect the rights of the lessees with regard to amenity land enjoyed pursuant to the leases.

7. The Tribunal was asked to determine, as a preliminary issue, the proper construction of the leases and the rights, if any, granted with respect to the three parking areas and whether or not the Respondent was free to dispose of those areas as it saw fit.

The hearing

8. At the hearing the Applicant was represented by Ms Caroline Shea of Counsel. The Respondent was represented by Ms Laura Cleasby an in-house Solicitor with Pier Management Limited, which, like the Respondent is a member of the Regis Group, which has substantial investment holdings in the residential and commercial property markets.
9. The parties considered the preliminary issue to be a matter of law on which they both wished to make submissions; neither wished to call evidence.
10. For the purposes of the hearing we were provided with a helpful volume of relevant papers page numbered 1- 310. In addition we were handed a copy of a planning permission dated 2 May 1997 and granted by Wandsworth Borough Council. Although it had been produced late Ms Cleasby had no objection to it being put in. We have page numbered it 311 – 314.
11. Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the trial bundle.

The development

12. In 1997 Fairview New Homes Plc (the developer) obtained a planning permission to redevelop part of a site which was formerly occupied by Tooting Bec Hospital. The permission is at [311].
13. The permission permitted the development of 142 houses and 456 flats in two, three and four storey buildings, a two-storey 120 bed nursing home, a 600 sq.m. community building and a 600 sq.m. primary health care facility. The permission also permitted new vehicular accesses from Church Lane and Franciscan Road and associated highway works.
14. The permission contained a number of conditions and reasons. Material for present purposes is paragraphs 8 and 9 on [312] which read:
 - “8. *All external parking accommodation shall be provided and retained permanently for parking purposes.
To ensure the permanent retention of the space for parking purposes.*

9. *The whole of the parking accommodation shown on the approved plans shall be retained for parking purposes for the users of the approved development and for no other purpose. To ensure that adequate provision is made for off-street parking."*

The approved plans were not made available to us. There appears to have been an assumption on the part of the parties that the car parking areas discussed in greater detail below accord with the permitted development. For present purposes we are prepared to adopt that assumption.

15. It appears that the development, or at least a large part of it, was duly carried out. An enlarged and sample lease plan provided to us [126a and 126b] shows a substantial development of houses, flats, estate roads. Part of the site at the north eastern corner is undeveloped and marked: "*Area Of Future Development*".
16. It would appear that the scheme for management of the blocks of flats was that three flat management companies were to be set up. Each company was to be allocated several blocks of flats and associated car parking areas and amenity space. The management companies were to be controlled by the lessees of the flats within the blocks allocated to each company.

The lease set up

17. We were told that the flat leases across the development had been granted in common form, save for price, demise and possibly service charge percentage payable, which may have been variable, depending on floor area.
18. There were three parties to each flat lease, the developer, the management company and the lessee.
19. The building which is the specified premises in the subject application is block M which contains 20 flats, numbered 184 to 203 Massingberd Way. We were told that all 20 lessees were participating in the collective enfranchisement. The leases of Block M were granted between June and October 1998.
20. We were asked to assume that for material purposes the leases were in common form. We were taken in detail through a sample lease at [102 – 126].
21. Material provisions of the lease are as follows:
- Parties:**
- (1) Fairview New Homes Plc – the Lessor
 - (2) Heritage Park (Blocks K, L, M, N, P, & Q) Management Company Limited – the Company
 - (3) {the Lessee}

Title Number: TGL135251

Term: The term granted was 99 years from 1 January 1998.

Recitals:

1(a) There is erected or to be erected on parcels of land shown on the annexed plan ('the Plan') edged with a thick black line a building of buildings ('the Blocks')

1(b) The Blocks together with the parcel or parcels of land being within the Management Company area shown on the plan and all other buildings for the time being thereon (collectively called 'the Property') the demised premises being situate in the particular Block referred to in paragraph (d) of Part V of the Schedule.

1(c) A definition of 'common parts' to mean all those parts of the Property shown stippled on the Plan enjoyed or used in common by the lessees of the parts of the Blocks and not included in the lease to them including in particular all those parts of the Property for the maintenance repair redecoration and renewal of which the Company is responsible under Part IV of the Schedule.

1(d) A definition of 'the Estate' to mean all land (excluding the demised premises) in respect of which the lessor is or was the registered proprietor of the above Title Number.

2. That the lessor has offered to lease parts of the Blocks in accordance with a general scheme and intends that every lease should impose upon the lessee and upon the Company in accordance with the said general scheme the obligations and restrictions set out in Parts III and IV of the Schedule.

3. That the Company has been incorporated with the object of providing certain services to and for the lessees of the Blocks and otherwise to manage the Property.

Clause 1 Demises the premises: *"Together with the easements rights and privileges set out in Part I of the Schedule..."*
Paragraph 12 of Part I of the Schedule reads: *"The right in common with all others entitled thereto from time to time to park a domestic private motor vehicle in any free parking space other than those specifically allocated or to be allocated (if any)"*

Clause 3 Contains a number of covenants on the part of the lessee. The introduction to clause 3 reads:
"In accordance with the said general scheme for the benefit of the Lessor and the lessees of the remainder of

the Blocks the Lessee HEREBY COVENANTS with the Lessor and the Company and the other lessees for the time being of the other parts of the Blocks ..."

There is then set out a number of covenants.

Sub clause (4) is an obligation to perform and observe the obligations and restrictions set out in Part III of the Schedule. Paragraph 18 of Part III of the Schedule is in the following terms:

"Not to park or keep or permit to be parked or kept any motor car wheeled vehicle or other form of transport or any caravan boat or trailer on the Property or any other part of the land now or formerly comprised within the Title except this covenant shall not prevent (i) the parking in accordance with clause (12) of Part I of the Schedule hereto of a domestic private motor vehicle which is of a roadworthy nature and in regular use (ii) ... and (iii) ..."

Sub clause (5) imposes an obligation to contribute to the service charges incurred by the Company.

Sub clause (6) reads: *"Comply with and observe any reasonable regulations which the Company may consistently with the provisions of this Deed make to govern the use of the Property and any part thereof such regulations may be restrictive of acts done on the Property detrimental to its character or amenities..."*

Clause 4 Sets out a number of covenants on the part of the Lessor with the Lessee and the Company. Sub clause (3) reads: *"That the Lessor will allow the Company and person authorised by the Company to have such access to the Property and any part thereof as may be necessary and proper for enabling the Company to carry out its obligations hereunder"*

Clause 7 The Company covenants with the Lessee to perform and observe the obligations set out in Part IV of the Schedule.

Clause 8 The Company covenants with the Lessor to perform and observe the obligations set out in Part IV of the Schedule. Paragraph 1 of Part IV of the Schedule imposes on the Company and obligation to maintain, repair, redecorate and renew various parts of the Property including (d) *"All such dustbin areas drying areas ... and parking spaces as are included in the Property (excluding any parking area specifically included in this demise (if any))"*

22. It was common ground that:

22.1 subsequent to the grant of the leases the freehold reversion of the specified premises and the additional freeholds has been assigned to the Respondent. It was not made clear to us

whether the freehold reversion of the whole Estate was assigned or just parts it, but is not material;

- 22.2 the Property as defined in the lease comprises Blocks K, L, M, N, P and Q and associated amenity areas stippled on the plan which includes the three car parking areas the subject of this application and that, on the ground, within the Property there are roughly 100 residential flats and roughly 100 parking spaces;
- 22.3 prior to the assignment of the freehold reversion the developer had not exercised its right to allocate any car parking spaces within the Property;
- 22.4 since its acquisition of the freehold reversion the Respondent has not exercised its right to allocate any car parking spaces within the Property;
- 22.5 the Company has exercised its right to make regulations to control the use of the car parking spaces within the Property;
- 22.6 the lease grants a right to park in a free space (if available) but there is no absolute or exclusive right to park or the right to park in a defined or particular space and that the leases do not demise any parking spaces; and
- 22.7 in accordance with the planning permission the whole of the parking accommodation is to be retained for parking purposes *“for the users of the approved development and for no other purpose.”*

The rival submissions

- 23. Neither Ms Shea nor Ms Cleasby wished to make submissions to us on the law relating to the proper construction of written instruments, or to cite any authorities to us. Both were content to assume that the members of the Tribunal were familiar with the concepts and the canons of construction.
- 24. Ms Cleasby submitted that:
 - 24.1 the reference in paragraph 12 of Part I of the Schedule is a right to park in a free space anywhere upon the Estate and is not limited to the car parking spaces within the Property;
 - 24.2 paragraph 12 properly construed entitles the freeholder to allocate any car parking space at any time as it sees fit. This includes the right to allocate all of the spaces to whomsoever it saw fit, even third parties and even though the exercise of such right would deprive all of the lessees of flats of all parking spaces so that there was no longer any parking provision available to them;

- 24.3 the allocation of car parking spaces to third parties who were not lessees of flats would not be contrary to the planning permission because upon a person being allocated a parking space, whether by demise or licence that person thereby becomes a 'user of the approved development'.
25. Ms Shea submitted that:
- 25.1 'Allocate' was to be construed narrowly because it sought to restrict a wider right granted;
 - 25.2 the planning permission was plainly intended to ensure that off-street parking was to be available to the occupiers of the proposed flats and their visitors and it is fanciful that the developer or a subsequent freeholder can sell off all of the parking spaces to an outsider thus depriving the lessees of all off-street parking;
 - 25.3 the lease was part of an estate scheme;
 - 25.4 the plain intention was that some, possibly limited, parking was to be available and that the lessees were to bear the cost of repairs and upkeep through the service charges payable by them;
 - 25.5 the freeholder had no right to deprive the lessees of the parking provision, but had the limited right to allocate some spaces to lessees in appropriate circumstances;
 - 25.6 the lease imposes an obligation on the Company to keep the parking areas in repair and maintained, and empowers the Company to make regulations which may be restrictive of acts done on the Property and which may be detrimental to its amenities. This will include the power to make regulations as to the use of the parking areas and the power has been exercised. Having imposed such an obligation and granted such a power the freeholder cannot simply take back all of the parking areas and prevent the use of them by the lessees and the freeholder has no right to undermine that part of the scheme concerned with parking.

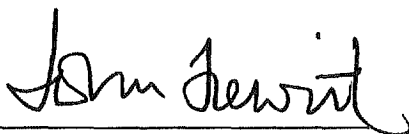
Conclusions

26. A lease, like any other written instrument is to be construed in accordance with well-established principles. We have set out in the Schedule to this Decision the principles we have taken into account in approaching construction of the lease.
27. We have to have regard to the factual matrix and the matters that the parties would reasonably have in their mind in 1998 when the leases were granted. We find this will include the details of the planning permission. The developer is well known and experienced in building out housing estates. We infer that its professional advisers, including its solicitors, will be familiar with conveyancing of bulk plot sales. We infer that such solicitors will have produced a 'buyer's pack' containing draft contract, draft lease and other documents which a prospective purchaser's solicitor is almost bound to ask for. We consider it more

likely than not this pack will have included copies of the planning permission amongst other things. We infer that the terms of the planning permission will have been known to all parties to the leases.

28. We have no doubt that part of the overall scheme was that there should be some off-street parking and that provision was to be made available for the occupiers of the flats on a permanent basis and in compliance with the planning permission.
29. Part I of the Schedule to the lease can be construed as granting the lessee the right to use the common parts. The definition of the common parts includes the car parking areas. The lease imposes the obligation on the Company to keep the car parking areas in repair and properly maintained and imposes an obligation on the lessee to contribute to the costs incurred. We are satisfied that rights so granted and the obligations so imposed preclude the freeholder from interfering with or restricting those rights. This scheme, we find, also is strongly suggestive that the rights to park are limited to the car parking areas within the Property and not across the Estate as a whole. The Estate was to be broken up into three sectors and managed under the control of the lessees of flats and properties within those sectors. It seems to us incongruous that a lessee should be granted a right to park a vehicle in that part of the Estate he has no connection with and in respect of which he does not any obligation to contribute to the cost of repairs and maintenance.
30. We accept that by including in paragraph 12 of the Schedule the power to allocate parking spaces the developer retained the right to do so at some future time. Developers invariably prefer to retain flexibility in dealing with an estate. At the time of the early sales the developer might not be aware of the particular needs of a later buyer. We can see, for example, that if a disabled buyer were to require a permanent space close by to his or flat the developer had the ability to provide that. Alternatively, if a prospective buyer wished to have a permanent space and was willing to pay a premium for it the developer could secure a transaction. However, such flexibility has to be viewed in the context of the overall scheme and restricted accordingly. It cannot be so flexible as to deprive the lessees of the whole or a substantial amount of the parking areas.
31. Having given careful consideration to the rival submissions we prefer those of Ms Shea on behalf of the Applicant.

Chairman:



John Hewitt

Date:

30 January 2012

The Schedule

The Construction of Leases

1. The general legal principles.

Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201E, that

'...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

2. The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

'The principles may be summarised as follows:

- (1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
- (2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.*
- (3) *The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
- (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant*

background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.

(5) *The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...'*

3. Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'

4. Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'

5. Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but

makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

6. Regard may be had to the general background as part of the factual matrix in order to help construe words in a document – see *Partridge & others v Lawrence & others* [2003] EWCA Civ 1121.
7. Obvious mistakes can be corrected by construction in order to give effect to the written intention of the parties. Once corrected, the lease is interpreted in and has effect in its corrected form. See for examples *St Edmundsbury v Clark (No.2)* [1975] WLR 468 and *Littman v Aspen Oil (Broking) Limited* [2005] EWCA Civ 1579; [2006] 2 P & CR 2
8. In *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 the House of Lords held that although a court would not easily accept that linguistic mistakes had been made in formal documents, if the context and background drove a court to conclude that something had gone wrong with the language of a contract the law did not require it to attribute to the parties an intention which a reasonable person would not have understood them to have had; and where it was clear both that there was a mistake on the face of the document and what correction ought to be made in order to cure it, in that it was clear what a reasonable person having all the background knowledge which would have been available to the parties would have understood the parties by using the language in the contract to have meant, the court was entitled to correct the mistake as a matter of construction. The House went on hold that a material definition in the contract was ambiguous and obviously defective as a piece of drafting and to interpret the definition in accordance with the ordinary rules of syntax made no commercial sense.
9. In *Multi-Link Leisure Developments Limited v North Lanarkshire Council* [2010] UKSC 47 Lord Hope cited with approval (at paragraph 21) the words of Lord Steyn in *Deutsche Genossenschaftsbank b Burnhope* [1995] 1 WLR 1580:

“The Court must not try to [divine] the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background.”

Although this was a Scottish case Lord Clark noted (at paragraph 45) that he *“detected no difference between the principles applicable to the construction of a lease in Scotland and in England.”*
10. Sometimes as part of the process of construction of a document it is necessary to imply a term or terms into it. In order for a term to be implied the following conditions must be fulfilled:
 1. the term must be reasonable;

2. the term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
3. the term must be so obvious that it goes without saying;
4. the term must be capable of clear expression;
5. the term must not contradict any express term of the contract.

A clear statement of the criteria was set out in *B.P. Refinery (Westport) Pty Ltd v Shire of Hastings* [1978] 52 ALJR 20.

However, in the context of residential leases a more restrictive approach is generally taken. See *Woodtrek v Jezek* [1982] 1 EGLR 45. Similarly sweeping up clauses tend to be restrictively construed. See *Jacob Isbicki & Co Ltd v Goulding & Bird Ltd* [1989] 1 EGLR 236. An entitlement to recover interest on money borrowed to fund the cost of services will not be implied. See *Boldmark Limited v Cohen* [1986] 1 EGLR 47.