4501

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BJ/OCE/2017/0030**
Property	:	**16 Egliston Road, London SW15 1AL**
Applicant	:	**16 Egliston Road Limited**
Representative	:	**Ms Katie Helmore (Counsel)**
Respondent	:	**Kaan Ramis Guler as executor for the estate of the late Dennis George Mockford**
Representative	:	**Mr Christopher Green Solicitor**
Type of Application	:	**Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	:	**Mr J Donegan (Tribunal Judge)** **Mr D Jagger FRICS (Valuer Member)** **Mrs H Gyselynck MRICS (Valuer Member)**
Date and venue of Hearing	:	**16 May 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5 June 2017**

DECISION

Decision of the Tribunal

Upon the Tribunal deciding the preliminary issue and the parties subsequently agreeing the price of the freehold of 16 Egliston Road, London SW15 1AL ('the Building'), the Tribunal no longer has any jurisdiction to determine this application.

The background

1. The application concerns a collective enfranchisement claim for the Building, which is a three-storey semi-detached property containing three flats that are let on long leases. Flat 1 is on the ground floor, Flat 2 is on the first floor and Flat 3 is on the second floor. The Respondent is the freeholder of the Building.

2. On 17 June 2016 the leaseholders of the three flats served an initial notice on the Respondent, pursuant to section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'). The Applicant was named as the nominee purchaser in this notice, which proposed a purchase price of £19,000 for the freehold interest in the "*Specified Premises*" and £500 for the property referred to in paragraph 2, being "*garden land and side access passage at 16 Egliston Road*".

3. On 22 August 2016 the Respondent served a Counter-Notice admitting the enfranchisement claim but proposing a purchase price of £220,000 for the freehold interest in the Specified Premises and £1,000 for property within paragraph 2 of the Initial Notice.

The application

4. On 19 January 2017 the Applicant submitted an application to the Tribunal under section 24 of the 1993 Act, to determine the terms of acquisition. Directions were issued on 16 February 2017 and the application was listed for hearing on 16/17 May 2017.

5. Paragraph 1 of the directions provided

> ***"Recoverable costs***
>
> *1. Any application to determine the landlord's recoverable costs is stayed. Any application to lift the stay must include confirmation that the recoverable costs are in dispute."*

6. There was no application to lift the stay and the Tribunal was not asked to determine the costs payable by the Applicant, under section 33 of the 1993 Act.

7. The relevant legal provisions are set out in the appendix to this decision.

The hearing

8. The hearing took place on the morning of 16 May 2017. The Applicant was represented by Ms Helmore who was accompanied by Mr Stewart White MRICS (valuation surveyor), Ms Kathryn Winster (solicitor), Ms Caroline Pead (leaseholder of Flat 1) and Ms Camilla Beloe (one of the leaseholders of Flat 2). The Respondent was represented by Mr Green, who was accompanied by Mr Matthew Price MRICS (valuation surveyor) and the Respondent.

9. The Tribunal members were supplied with a paginated hearing bundle together with helpful typed submissions from Ms Helmore. The bundle included copies of the application, directions, initial notice, counter-notice, Land Registry entries, the lease of Flat 2, a draft transfer deed, valuation reports, a statement from Ms Pead and a deed of surrender and lease for Flat 3.

10. By the time of the hearing, the parties had agreed the form of the transfer deed and the surveyors had agreed nearly all valuation issues. The only outstanding matter was whether any hope value should be paid in respect of a restrictive covenant at clause 2(p) of the leases. The parties were unable to agree the interpretation of this clause, which affects the use of the garden areas at the Building. The Tribunal decided to deal with this as a preliminary issue, pursuant to Rule 6(3)(g) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the 2013 Rules').

Submissions

11. Ms Helmore took the Tribunal through the ownership of the garden areas. The front and rear gardens were originally demised in the lease of Flat 2. The front section of the rear garden was then transferred to Ms Pead (Flat 1) on 30 October 2015. Flat 2 retains the front garden and the rear section of the rear garden. Flat 3 has no garden.

12. Ms Helmore and Mr Green both referred to various clauses in the Flat 2 lease, which was granted by Dennis George Mockford (*"the Landlord"*) to GE Life Limited (*"the Tenant"*) on 17 May 2001. Clause 1 provides:

"IN CONSIDERATION of the rents and covenants hereinafter contained the Landlord hereby demises unto the Tenant all that flat ("the Flat") on the first floor and being Flat No.2 in the building known as 16 Egliston Road, Putney, London SW15 1AL and the garden ground shown edged red on the plan annexed hereto together with the right in common with the Landlord and others having the like right to

use the common entrance hall for purposes only of access to and egress from the Flat together with the right more specifically set out in the First Schedule hereto and excepted and reserved unto the Landlord for the benefit of the owners and leases of the other flats in the building or any of them the easements rights and privileges more specifically set out in the Second Schedule hereto TO HOLD the same unto the Tenant from the 25th day of March 2001 for the term of NINETY-NINE years paying therefore during the said term the yearly rent of a peppercorn."

13. The Tenant's covenants are at clause 2 of the lease and include:

"(b) During the said term to keep the interior of the Flat and all fittings and fixtures therein and all glass in the windows and the doors thereof in good and tenantable repair and upon demand to contribute one-third of the cost of all work carried out by the Landlord in connection with complying with its covenants under Clause 3(a) hereof and also one-third of the premiums paid by the Landlord in respect of insurance of the whole building within twenty one days of payment thereof by the Landlord.

...

(g) Not without the written consent of the Landlord to make any alterations in or to the Flat or remove any partitions doors or cupboards or other fixtures therein and not to cur maim or injure any of the floors walls or timbers thereof.

...

(j) Not to assign underlet or part with possession of the Flat or any part thereof without the previous consent of the Landlord or his agent (such consent to any assignment or sub-lease not to be unreasonably withheld on proof being furnished of the respectability of the proposed assignee or sub-tenant).

...

(l) To use or permit the use of the Flat for the purpose of a private residence only.

(m) Not to do or permit or suffer anything in or upon the Flat or any part thereof which may at any time be or become a nuisance or annoyance to the Tenant or occupants of any other flats in the said building or injurious or detrimental to the reputation of said flats as private residential premises and in particular not without the Landlord's permission to keep any dog or other animal bird or reptile in the Flat nor to permit any singing or instrumental music (including

oral or visual radio) between the hours of midnight and 7.00am or so as to be audible in adjoining premises if the occupier thereof objects thereto and not to allow coal or coke to be brought to the Flat or refuse to be removed therefrom except in proper receptacles and at such times as may be approved by the Landlord.

(n) At the determination of the tenancy to yield up the Flat and all fixtures and fittings therein (except Tenant's fixtures and fittings) in good and tenantable repair in accordance with the Tenant's covenants hereinbefore contained.

...

(p) Not to use the gardens in the front or rear of the said building except as may be permitted by the Landlord from time to time."

14. The Landlord's covenants are at clauses 3, 4 and 5 and include an obligation to insure (clause 3(b)) and a covenant for quiet enjoyment (clause 4). Clause 5(b) provides:

" If the Flat or any part thereof or the means of access thereto shall at any time be destroyed or damaged by any of the Insured Risks so as to be unfit for occupation or use the rents hereby reserved or a fair proportion thereof according to the nature and extent of the damage sustained shall as from the happening of the event be suspended until the building be again rendered fit for occupation or use and the Tenant's covenants shall only be enforceable so far as they are capable of taking effect."

15. Ms Helmore submitted that the covenant at clause 2(p) should be construed within the context of the lease as a whole, being a lease of a flat and gardens. There are no special rules when construing leases. Rather this should be an objective exercise, based on the wording of the lease and the surrounding facts when the lease was granted.

16. Ms Helmore pointed out the lease contains no express obligations to cultivate or maintain the gardens and no specific rights over the garden. She submitted that clause 2(p) is not an absolute covenant entitling the Landlord to prevent the Tenant from using the gardens. Such a covenant would be contrary to the demise of a flat and gardens. Ms Helmore suggested the only proper and sensible construction of this clause was that the Tenant required the Landlord's consent for any change of use. This is consistent with the covenant at clause 2(l), which requires the Flat to be used as "*a private residence only*". Any alternative use would require the Landlord's consent.

17. Ms Helmore also referred the Tribunal to the Regulations 5, 7 and 8 of the Unfair Contract Terms on Consumer Contract Regulations 1999

('the 1999 Regulations') and the High Court's decision in ***Governors of Peabody Trust v Reeve [2008] EWHC 1432 (Ch).*** If there is any doubt about the meaning of clause 2(p) then this should be resolved in favour of the Tenant; if the clause is unfair then it should not be binding on the Tenant and a contractual term that has not been individually negotiated should be regarded as unfair if it causes a significant imbalance in the parties rights and obligations to the detriment of the Tenant.

18. In response, Mr Green submitted that the wording of clause 2(p) is clear and unambiguous. This gives the Landlord an unfettered right to control the use of the gardens. It is an absolute covenant and the Landlord can prevent the Tenant from using the gardens. The Tribunal queried how the Tenant would access the front door of the Building, if it could not use the front garden. Mr Green suggested the covenant for quiet enjoyment would prevent the Landlord from blocking access. He also referred to the final section of clause 5(b), which provides *"the Tenant's covenants shall only be enforceable so far as they are capable of taking effect."*

19. Mr Green did not consider clause 2(l) to assist when construing clause 2(p). He submitted the former does not apply to the gardens, as it specifically prohibits the use of "*the Flat*" as a private residence. The gardens are not part of the Flat and are not capable of being used as a private residence.

20. Ms Helmore took a differing view. She considered clause 2(l) to include the gardens, which form part of the Flat and can be used for purposes ancillary to a private residence. She also submitted that Mr Green's interpretation of clause 2(p) could give rise to a breach of the covenant for quiet enjoyment. A breach would occur if the Landlord prevented the use of the gardens, which are demised.

21. Having heard submissions from both advocates, the Tribunal retired to make its decision.

The Tribunal's decision

22. The covenant at clause 2(p) of the lease does not entitle the Landlord to prevent the Tenant from using the gardens whatsoever. Rather it requires the Landlord's consent for any change of use.

Reasons for the Tribunal's decision

23. The Tribunal agrees with the various submissions advanced by Ms Helmore.

24. The lease is poorly drafted and there is a tension between clauses 1 and 2(p). When construing the latter, the Tribunal had regard to the entire lease. There is no obligation for either party to maintain and cultivate the gardens. However, some assistance was derived from the other Tenant's covenants at clause 2. Many of these refer to "*the Flat*", including the alienation provisions (2(j)) and the obligations not to cause a nuisance (2(m)) and to yield up at the end of the term (2(n)). Logically these must extend to both the flat and the gardens; otherwise the Tenant could do what he wants with the gardens. The Tribunal finds that definition of "*the Flat*" in clause 1 extends to the flat and gardens. It follows that the private residence restriction at clause 2(l) applies to both.

25. This is not a case where the Tenant simply has rights over the gardens, which the Landlord might wish to modify in the future. Rather this is a lease of a flat and gardens, which are both demised. If the Landlord could prevent the Tenant from using the gardens this would be a clear breach of the covenant for quiet enjoyment and a derogation from grant. It would also remove the Tenant's means of access to the front entrance. The Tribunal accepts there might be an implied right of access, based on other provisions in the lease (or long usage). However, when viewed objectively, it cannot have been the original parties' intention that the Landlord could remove this means of access.

26. The clear purpose of clause 2(p) is to give the Landlord control over the future use of the gardens, rather than an absolute right to prevent the Tenant from using these areas.

27. The Tribunal was able to construe clause 2(p) based on the wording of the lease. This meant it was unnecessary to go on to consider the application and relevance of the 1999 Regulations.

Settlement terms

28. On resuming the hearing, the Tribunal informed the parties of the preliminary issue decision. During the lunch adjournment the parties agreed the price of the freehold in the total sum of £32,931 (Thirty-Two Thousand, Nine Hundred and Thirty-One Pounds). This figure covers both the Specified Premises and the property at paragraph 2 of the initial notice. The parties had already agreed the form of the transfer deed, which meant that all of the terms of acquisition had been agreed. This brought the hearing and the proceedings to an end, as Tribunal no longer had any jurisdiction under section 24(1) of the 1993 Act.

Name: Tribunal Judge Donegan **Date:** 05 June 2017

ANNEX - 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.

Appendix of relevant legal provisions

The Leasehold Reform, Housing and Urban Development Act 1993 Section 24(1)

(1) Where the reversioner in respect of the specified premises has given the nominee purchaser -

(a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 22(3) or section 23(5) or (6),

but any of the terms of acquisition remain in dispute at the end of the period two months beginning with the date on which the counter-notice or further counter-notice was so given, the appropriate tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 6

Case management powers

6. - (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may –

(a) extend or shorten the time for complying with any rule, practice direction or direction, even if the application for an extension is not made until after the time limit has expired;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether under rule 23 or otherwise);

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide or produce documents, information or submissions to any or all of the following –

(i) the Tribunal;

(ii) a party;

(iii) in land registration cases, the registrar;

(e) direct that enquiries be made of any person;

(f) require a party to state whether that party intends to –

(i) attend,

(ii) be represented, or

(iii) call witnesses,

at the hearing;

(g) deal with an issue in the proceedings as a preliminary issue;

(h) hold a hearing to consider any matter, including a case management issue;

(i) decide the form of any hearing;

(j) adjourn or postpone a hearing;

(k) require a party to produce a bundle for a hearing;

(l) require a party to provide an estimate of the length of the hearing;

(m) stay proceedings;

(n) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and

(i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;

(o) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision.