



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

**Case reference** : **RC/LON/OOAR/OAF/2017/0028**

**Property** : **9 Heritage House, 6-8 Manor Road,  
Romford, Essex RM1 2RA**

**Applicants** : **(1) Katherine May Bowles  
(2) John Peter Bowles**

**Representative** : **Zoe Gibbon of Counsel**

**Respondents** : **(1) Mr Zahoor Hussain  
(2) Mr Mohammed Ahmad  
Shaikh**

**Representative** : **Meadows & Moran Solicitors**

**Type of application** : **Part 1 of the Leasehold Reform Act  
1967**

**Tribunal members** : **Judge O'Sullivan  
Mr D Jagger MRICS**

**Date of determination  
and venue** : **7 November 2018 at 10 Alfred  
Place, London WC1E 7LR**

**Date of decision** : **22 February 2018**

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**DECISION**

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**Background**

1. This is an application made by the applicant leaseholders pursuant to Part 1 of the Leasehold Reform Act 1967 (the "Act") for a determination of the terms in dispute and price to be paid in relation to the acquisition of the freehold of 9 Heritage House, 6-8 Manor Road, Romford, Essex RM1 2RA and associated car parking space (the "Property").
2. By a notice of a claim dated 8 February 2017, served pursuant to section 5 of the Act, the applicants exercised the right to acquire the

freehold of the Property. On 30 March 2017 the respondent freeholder served a counter-notice admitting the validity of the claim.

### **The issues**

3. The parties are agreed that as a consequence of the Notice of Tenant's Claim the landlords are contractually bound to grant the freehold of the Property to the tenants. The price payable is agreed to be nil. The only matters in dispute are the terms to be included in the conveyance and the tribunal has jurisdiction pursuant to section 21 of the Act to determine those.
4. The disputed provisions relate to service charges.
5. A hearing took place on 7 November 2018. The applicants were represented by Mr Cohen of Counsel and the respondents by Ms Gibbon of Counsel.

### **The Applicants' case**

6. The issue between the parties is whether the conveyance should include provision obliging the tenants to pay for the cost of maintaining the Common Parts in respect of which they are to be granted a right to use. It is agreed that the tenants are to be granted a "*right to use the Common Parts for all reasonable purposes connected with the use of the Property*" (which reflects paragraph 10 of Schedule 2 of the lease) As referred to above the issue is whether the Conveyance should include provision obliging the tenants to pay for the cost of maintaining those areas.
7. The applicants say that the terms of the conveyance are governed by section 10 of the Act. It is said that section 10 makes no provision for service charges and expressly prohibits the exclusion of section 62 of the Law of Property Act 1925 without a tenant's consent. The effect of section 62 is to pass all existing easements which benefit the Property to the freehold interest but also elevates quasi- easements into full legal easements. The applicants say that this means that the tenants are entitled subsequent to the conveyance to all rights that they previously enjoyed pursuant to the lease.
8. The applicants further say that there is no mechanism in the Act by which a tenant can be compelled to pay contributions towards maintenance or other costs for parts of the landlord's retained land over which the tenant has an easement. It is said that this is a reflection of the fact that at law the burden of a covenant will not pass with the freehold land.
9. The applicants rely on Hague at 6-24 which provides that "*the tenant cannot be required to enter into a direct covenant to pay a proportionate part of the maintenance and other costs*" of any

landlord property. Even if the tenants could be compelled (which the applicants say they cannot) or even agreed to pay a proportionate part that covenant would not bind a successor in title. Specifically it is said that (a) there is no mutuality sufficient to amount to a benefit/burden and/or opportunity for a successor to disclaim; (b) the grant of the rights to use the Common Parts is not conditional on the payment of service charge/costs of maintaining the same in the lease.

10. The applicants conclude that the conveyance cannot, in the absence of agreement, contain a covenant in respect of the use of the Common Parts as sought by the landlords. It is therefore submitted that the tribunal is pursuant to section 21 of the 1967 Act bound to reject the covenants at 12.2.13, 12.5.17, 12.8, 12.10 and 12.11 as they all relate to a form of covenant deliberately absent from section 10 of the Act.

### **The Respondents' case**

11. The respondents say that; (a) the outstanding service charge of £7166.83 must be paid prior to completion and (b) the tenants' current use to use the Common Parts under their leasehold does not amount to an easement and therefore the tenant is not entitled to the inclusion of the benefit of the Common Parts in the Conveyance.
12. The respondents say that the tenants' right to use the Common Parts cannot amount to an easement and reliance is placed on *Rance v Elvin [1985] 50 P & C.R.9* as authority for the principle that where the exercise of the right requires the servient owner to spend money the right cannot be an easement. In *Rance v Elvin* it was held;  
*"It is an essential feature of an easement that it merely requires the owner of the servient tenement to suffer something to be done on the servient tenement: a positive obligation on the owner of the servient tenement to do something is inconsistent with the existence of such an easement."*
13. Pursuant to s 10(5) of the 1967 Act the respondents say that if the tenants object to the payment of a service charge in the Conveyance then objection must be taken to the tenants' entitlement to the rights at clause 12.3 of TR1. The grant with the house and premises of an easement (if accepted) over the Common Parts cannot be included in the Conveyance for unreasonableness.
14. Section 10(5) provides *"Neither the landlord nor the tenant shall be entitled under subsection (3) or (4) above to require the inclusion in a Conveyance of any provision which is unreasonable in all the circumstances, in view-*
  - a) *Of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and*

*b) Where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses.”*

15. The respondents say that the landlords have an obligation under the other leases to maintain communal areas including those shaded green on the plan. The tenants under those leases are required to pay a service charge for the costs of those services. The tenants cannot be expected to benefit from the maintenance of the communal areas at no cost and at the expense of the other tenants paying a service charge. On this basis it is unreasonable to include the communal areas in the conveyance.
16. Further it is said that the benefit of a positive covenant (such as to repair a fence or contribute to the cost of shared facilities) will not bind successors in title to freehold land. As a result of the benefit and burden principle the tenants can covenant to pay contributions towards maintenance.
17. Even if the above is not accepted the grant to the house and premises of an easement over the Common Parts cannot be included in the Conveyance for unreasonableness pursuant to section 10(5) of the 1967 Act. Even if that is not accepted the tenants can covenant to pay contributions towards maintenance or other costs for parts of the landlords retained land over which the tenants have an easement.

### **The tribunal's determination**

18. The tribunal determines that pursuant to section 10 of the 1967 Act the use of the gardens pass to the freehold as an easement but the tenants cannot be required to enter into a covenant to pay a proportionate part of the maintenance and other costs of those Common Parts.
19. The tribunal does not have the power to order that the transfer is dependant on the payment of any alleged arrears of service charge as this does not fall within our jurisdiction under the Act. The landlord does have rights to take separate action under other provisions to recover arrears of service charge.

### **Reasons for the tribunal's determination**

20. The difficulty before the tribunal is that the Act does not deal with common facilities. Paragraph 6-21 of Hague provides that section 62 will be implied in a conveyance of the freehold under the 67 Act. The tenants are entitled to exercise all of the rights they previously enjoyed pursuant to the lease.
21. There is no mechanism in the 67 Act by which a tenant can be compelled to pay contributions towards maintenance or other costs for parts of the landlord's retained land over which the tenant has an

easement. Even if they were compelled it would not bind a successor in title.

22. Equally the landlord cannot be compelled to enter into a covenant to continue to maintain the facilities even if the lease contains a covenant to that effect. As Hague records given the unsatisfactory provisions in the 1967 Act the only sensible solution open to the parties is for the landlord and tenant to agree voluntarily a practical scheme that ensures the common facilities are properly maintained and the cost can be recovered. Such a scheme would be enforceable against future owners.
23. The parties are now asked to agree an amended form of transfer incorporating the tribunal's decision and they may seek further directions from the tribunal within 28 days if they are unable to do so.

**Name:** Judge O'Sullivan

**Date:** 22 February 2018

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).