



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

Case Reference : CHI/00ML/OCE/2018/0038

Property : 5 St Aubyns, Hove BN3 2TG

Applicant : 5 St Aubyns (Hove) Limited

Representative : Mr Walker (counsel)

Respondents : Rushcavern Limited

Representative : Mr. Phillips (counsel)

Type of Application : Application to Determine the Terms of Acquisition in respect of Collective Enfranchisement

Tribunal Member(s) : Judge D. R. Whitney
Mr. R. Wilkey FRICS

Date and Venue of Hearing : 8th February 2019
Havant Justice Centre

Date of Decision : 22nd February 2019

DECISION

The Application

1. The Applicant is the nominee purchaser in respect of a collective enfranchisement of the Property. The Respondent is the freeholder.
2. An application was made dated 5th September 2019 seeking a determination of the terms of acquisition. The application indicated the premium payable was not in dispute.
3. Directions were issued dated 2nd November 2018 which appear to have been substantially complied with. A hearing bundle was supplied and references in [] are to pages within that bundle. At [176-178] was a “summary of issues in dispute”. Counsel for each side also supplied a skeleton argument and the tribunal was provided at the hearing with a Land registry office copy of a lease for the ground floor flat dated 14th June 1971.
4. The issue for determination was whether the freeholder was entitled to require certain rights to be included within the transfer in respect of certain retained land. The retained land was a small piece of land lying to the rear of the Property. The Respondent was seeking to include a right of way on foot to access the retained land and a right to enter the Property for the repair and maintenance of what are commonly referred to as service media benefiting the retained land. A copy of the transfer showing the proposed amendments was in the bundle [170-175].

The Law

5. The relevant law is set out in the Leasehold Reform and Housing Development Act 1993 (“the 1993 Act”) and particularly Schedule 7.

The Hearing

6. The parties confirmed that the proposed amendment to clause 12.3 [171] was agreed.
7. The tribunal was supplied with a copy of the lease for the Ground Floor Flat 1, 5 St Aubyns, Hove dated 31st October 2007 and the original lease dated 14th June 1971. The form of the original lease was the same as that of the lease within the bundle [90-99]. It was agreed that “Block” as defined in the lease included the land coloured green on the plan attached to the proposed transfer [175].
8. Both counsel confirmed they had been unable to identify any authorities which may assist the tribunal in making its determination.
9. Mr Walker relied upon his skeleton argument.

10. His main contention was that the Landlord was requiring to be included within the transfer rights which he himself did not currently enjoy under the leasehold structure. The Landlord was seeking a right of access to the land coloured green on the transfer by way of ground Floor Flat 1. The rights reserved under the lease of that flat were set out in the Third Schedule. The terms were the same as those in the lease within the bundle [96]. Clause 2 of the Third Schedule gave powers to the Lessor under that lease to have access effectively to comply with its covenant to repair and maintain the Block as set out in clause 6D of the lease [94]. Mr Walker contends that what was being sought went beyond this.
11. Mr Walker contends that if the nominee purchaser was to agree to the transfer in the form proposed [165-169] then this would amount to a derogation of the grant from the underlease of Ground Floor flat 1 or a breach of their right to quiet enjoyment. Inevitably if this was to be agreed it would lead to further litigation either from the flat owner or the Respondent if it could not gain access to the retained land.
12. Mr Walker contends that such clauses within the title would effectively improve the Respondents title to the retained land by providing rights they currently do not enjoy. In his submission the Act does not require any party to provide rights any better than they have already.
13. Mr Walker referred to Schedule 7 of the 1993 Act. This schedule refers to the terms of the conveyance in a statutory enfranchisement claim as exists in this case. Paragraph 4(a) refers to the fact that the nominee purchaser can require the freeholder to grant such rights of way “so far as the freeholder is capable of granting them...”. Clause 4(b) sets out what the freeholder may seek and refers to “rights of way necessary for the reasonable enjoyment...”. Mr Walker contends the proposed rights are not reasonably necessary as the freeholder never had the same.
14. Mr Walker also raised that such rights were not requested in the counter notice and therefore the tribunal does not have jurisdiction. He accepted this was a point never raised before.
15. Mr Phillips also relied upon his skeleton argument.
16. In respect of Mr Walkers point on jurisdiction he submits that the parties had not raised this within the agreed statement of issues [176-178]. In his submission this is not a point which the Applicant may now take.
17. He submitted that the wording of Schedule 7 and clause 4(b) is intentionally broad and deliberately does not contain the words included within 4(a). In his view this must include an ability to access the garden as this must be reasonably necessary. Otherwise the Respondent may not have any way of accessing the retained land.

18. Mr Phillips referred to the fact that the owner of the leasehold interest in Ground Floor flat 1 is a participating tenant. He should know what Schedule 7 provides.
19. On questioning by the tribunal both parties indicated they would not wish to see any right to be made subject to agreement by the owner from time to time of the lease of Flat 1. The tribunal also questioned Mr Phillips as to why the Respondent wished to retain the land? Mr Phillips said he did not know and had no instructions as to his client's purpose in retaining the land.

Determination

20. The tribunal thanks both counsel for their measured and sensible submissions. In reaching its determination the tribunal has had regard to all documents within the hearing bundle, the skeleton arguments and the oral submissions.
21. Neither party nor the tribunal itself could find any authority in respect of this matter.
22. The tribunal considered carefully the wording of clause 4 of Schedule 7 of the 1993 Act.
23. On the face of matters it may seem perverse that the Respondent could have retained land without a right of access from the land they will have previously owned. However both parties appear to accept that currently the Respondent only has limited rights to access such land under the lease of Ground Floor Flat 1. The Respondents current rights are those contained within The Third Schedule. These rights certainly do not go as far as the two disputed terms sought.
24. The tribunal considers that normal conveyancing practice is such that a party cannot be compelled to grant rights beyond what it is capable of granting having regard to its own title. This is a matter of common practice.
25. It is notable that the Respondent has chosen to retain this land. It did not have to. Further it must be correct that if the transfer is completed in the form proposed by the Respondent that there is a good prospect that this may lead to further litigation.
26. On balance the tribunal determines that clause 4(b) of Schedule 7 of the 1993 Act cannot require a transfer to include rights the nominee purchaser is unable to grant. The tribunal is satisfied that the grant of such rights may be a derogation of grant in respect of the Ground Floor Flat. In granting the lease to that Flat the Respondent could have expressly reserved such rights to access the retained land, it did not do so and yet now requires these.

27. The tribunal is not satisfied that the Respondent is entitled to the disputed clauses and prefers the arguments made by the Applicant. The tribunal determines that the transfer should be in the form at pages 170 to 175 of the bundle excluding clauses 12.9 and 12.10.

Judge D. R. Whitney

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking