FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/BG/OCE/2021/0052**
HMCTS code (paper, video, audio)	**:**	**CVP Video**
Property	**:**	**82 -84 Lockesfield Place, London, E14 3AJ**
Applicants	**:**	**(1) Nicholas Fellows** **(2) Michael Throne** **(3) Daksesh Patel**
Representative	**:**	**Mr Mark Galtrey of Counsel instructed by Brethertons LLP**
Respondent	**:**	**Lockesfield Management Company Limited**
Representative	**:**	**Dr Ana Mata Blasco**
Type of application	**:**	**A collective enfranchisement claim made under the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	**:**	**Judge Naomi Hawkes**
Date of hearing	**:**	**31 August 2022**
Date of decision	**:**	**7 September 2022**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVP VIDEO HEARING REMOTE. The documents that the Tribunal was referred to are in a digital bundle of 167 pages. The order made is described below.

The Tribunal's decision

The Tribunal determines that, insofar as the terms of the transfer remain in dispute, the form of transfer shall be that set out by the Applicant's solicitors at pages 80 to 84 of the hearing bundle.

Background

1. This application concerns a collective enfranchisement claim made under the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

2. The Tribunal has been informed that the Lockesfield Place Estate ("the Estate") consists of 91 dwellings originally leased for 999 years and that, pursuant to the leases, each property contributed 1/91 towards the costs of the repair, maintenance and upkeep of the Estate.

3. The claim is made by the Applicants in respect of a property known as 82-84 Lockesfield Place, London, E14 3AJ ("the Property"). The Respondent holds the reversionary interest in the Property.

4. The premium has been agreed and the only matters remaining in dispute concern the terms of the transfer.

5. The Property is currently demised under three long leases, each of which demises to the tenant a flat and a car parking space. The car parking spaces are situated in a separate building from the flats.

6. At the commencement of the hearing, Dr Blasco informed the Tribunal that it has never been disputed that the Applicants are entitled to acquire the freehold interest in the car parking spaces.

7. There is, however, a dispute concerning whether the Applicants can be required to contribute to certain costs.

8. The terms of the transfer on an acquisition pursuant to a notice served under section 13 of the 1993 Act is governed by Schedule 7 to the 1993 Act, applied by section 34(9) of the 1993 Act.

The hearing

9. The hearing of this application took place by CVP video on 31 August 2022. The Applicant was represented at the hearing by Mr Galtrey of Counsel and the Respondent was represented by Dr Blasco.

The Applicants' case

10. The Applicants' submissions include the following matters:

> *"The Applicants have agreed (without conceding that they are required by the 1993 Act to do so) to continue to contribute to the costs of running the whole of the Estate, including the costs of security, gardens, repair of boundary structures, and repair of all of the private roads and footpaths. What they do not accept is the proposed addition of an obligation on them to contribute to the cost of repairing and insuring the whole of the building above the car park. They will have no right to use that building other than their own three car parking spaces.*
>
> *This Tribunal does not have an unfettered discretion as to the terms of the transfer, but can only insert provisions when empowered to do so by the 1993 Act. Neither Schedule 7 nor any other part of the 1993 Act empowers this Tribunal to include in the transfer, against the nominee purchaser's wishes, any positive covenant or obligation: it is only possible to include rights requested by the nominee purchaser under Schedule 7 paragraph 4, and restrictive (but not positive) covenants under Schedule 7 paragraph 5. There is therefore no jurisdiction for the Tribunal to include the obligation sought by the Respondent, which is a positive covenant to pay money.*
>
> *That is the beginning and end of the matter. However, it is understood from correspondence that the Respondent seeks to rely on the principle of benefit and burden. This argument has not been clearly articulated, and it may be necessary to make further submissions once the exact argument is made clear, but to assist the Tribunal, an outline of the relevant law is provided here.*
>
> *The starting point is that any such principle has no application to the pure transfer of a freehold interest: just because I benefit from using my freehold property, there is no reason why I should make payment of money to my neighbour for that benefit.*
>
> *The true principle relates to easements, where one party is making use of another's land, and thereby contributing to the need to repair or maintain that land. In such circumstances, provided that the party with the benefit of the easement can genuinely choose whether or not to take the benefit, and if the relevant cost is closely connected to the benefit taken, then use of that easement will be conditional upon making a proportionate contribution to the type of costs incurred as a result of that use: see helpful summary of the authorities in Wilkinson v Kerdene [2013] EWCA Civ 44.*

There are therefore several reasons why the principle has no application here:

a. As noted, it has no application to the acquisition of a freehold interest.

b. In relation to the easements that were included in the lease (including rights of way over all the roadways leading to the car park), these in any event have no connection to the maintenance and insurance of the building above the car park but in any event, the Applicants have voluntarily agreed to contribute to the costs of maintenance, even though there is no power for the Tribunal to impose such an obligation,

c. The only potentially relevant easement would be a very short one from the entrance of the car park to the three spaces in question across the car park itself. As to such an easement:

i. It is not expressly included in the lease, and not sought by the Applicants in their initial notice, and so is entirely outside the scope of the enfranchisement process and the Tribunal's jurisdiction.

ii. The nominee purchaser has no real choice but to accept the easement in order to use his freehold interest, and so the principle does not apply.

iii. In any event, it has no close connection with the maintenance and insurance of the whole of the building: the only connected impact are minimal wear and tear on a short stretch of the car park surface, and the associated costs are de minimis.

d. For completeness, the principle does not apply to the right of support where two parties share ownership of a building: see Wilkinson at [22]."

The Respondent's case

11. The Respondent's submissions include the following matters:

"The argument made by the Applicants that by statute, positive covenants cannot be included in the freehold transfer was already tested in The First-tier Tribunal ('FtT') case GM/LON/00BJ/OCE/2018/003/005 Patel & Others v Lockes Field Management Company Limited [2018] where three questions were put in front of the Tribunal:

- *Are the Nominee Purchaser entitled to acquire the freehold of the parking space?*

Judge Tagliavini agreed that the NP were entitled to acquire the freehold of the parking spaces and garages but agreed with The Respondent that a lease was preferred due to the potential conveyancing problems created by flying freeholds to the properties above garages and parking space.

- *Should positive covenants on both parties be included in the transfer (one party to maintain, repair and upkeep and the other party to contribute towards the cost of maintaining, repairing and upkeeping the communal areas).*

The Tribunal decided that the transfer should be made conditional upon the burden/benefit principle due to the danger of The Estate falling into disrepair and passing the burden of the costs to other property owners who remain leaseholders.

- *In the absence of contribution towards maintenance expenditure, was compensation was payable to The Respondent?*

Since the Tribunal decided that contribution to the expenses of maintenance, repair and upkeep was due it concluded that there was no compensation.

The Applicants in the above case were given the right to appeal to the Upper Tier Tribunal but settled accepting a lease on the parking spaces/garages and contributing towards General Expenditure for services and amenities they benefit from. The wording of the freehold transfer and lease agreed by The Applicants in the case Patel and Others v Lockes Field Management Company Ltd [2018] has been used as 'Standard Terms' of transfer in all cases including 24 Lockesfield Place owned by Mr Dakshesh Patel, one of The Applicants in this case of 82-84 Lockesfield Place.

The parking spaces under consideration in the case of 82-84 Lockesfield Place are located in an underground car park containing 38 parking spaces. The underground car park is below ground level and is secured by a pedestrian gate and a vehicular gate. Inside the parking space there are sensor lights, a cupboard containing electric meters, a fire proof room where the rubbish bins are stored, the drains from the building above are exposed in the ceiling of the underground car park, and there is a room containing electric water pumps that pump water out in case of a flood. The property is located a few metres away from River Thames; hence the risk of flooding is high.

Above the parking space there is building containing 16 flats and a terrace that makes part of the ceiling of the parking space.

…

If the freehold of the parking spaces would be acquired, then the second point of whether positive covenants in relation to obligations of maintenance, repair and upkeep should be considered.

In Patel & Others v Lockes Field Management Company Ltd [2018] Judge Tagliavini interpreted the principle of burden/benefit in a wider context than typically applied to enforceability of positive covenants on successors in title. In paragraph 17 the Judge commented: "The Tribunal also finds that it is inequitable for the NP to benefit from the use of areas of The Estate to which they do not contribute and at the expense of other lessees, who for whatever reasons may not seek to acquire their freehold".

In addition, if positive covenants are not to be included in the transfer, The Respondent may not be able to guarantee certain rights to be included in the transfer. The transfer of the freehold of the parking space (and the properties) would include easements and rights that The Transferor must grant to the NP for the benefit and reasonable enjoyment of the property. The relevant rights that must be granted in relation to the parking space (and the properties) are:

- *The right of support and protection currently enjoyed by the property under the lease;*

- *The right to use at all times and for all reasonable purposes the footpaths and road inside the underground car park. Without this right the parking space cannot be accessed. This right extends to workmen, tenants and guests of the NP.*

2.7 In Wilkinson v Kerdene [2013], paragraphs 27-34 the judgement reads that positive covenants were enforceable if they are correlated to the right granted even in cases where the right was not granted conditional on the obligation. In Wilkinson v Kerdene [2013] a number of property owners enjoyed rights to use communal roads, paths and facilities of a holiday complex by virtue of rights granted. The property owners argued that the rights were not granted conditional upon the obligation to contribute towards the costs of maintenance and repair. The judgement dismissed the argument in the appeal because although the continued exercise of the rights was not conditional upon payment, the payment was intended to ensure that the rights remained capable of being exercised.

2.8 While Wilkinson v Kerdene [2013] is in relation to enforceability of positive covenants to successors in title, the conclusion that the payment of service charges was intended to ensure that the rights granted remained capable of being exercised directly applies to the case of 82-84 Lockesfield Place. For The Respondent to be able to provide and guarantee the continuity of the rights described in 2.6 to The Applicants, The Respondent must have the obligation to maintain, repair and upkeep the part of the property that grants the right and the right to receive payment to fulfil those obligations. The rights granted and the burden of maintenance and repair cannot be separated.

2.9 Right of support and protection: If the structure of the building containing the parking spaces falls into disrepair for whatever reason (movement, subsidence, fire, earthquake, lighting, explosion, aircraft accident, flood, terrorism, war, etc.) and there is no obligation from The Respondent to repair it, The Applicants will not be able to exercise their right of support and protection and most likely the right of way. This exposes The Respondent to potential litigation for breach of the terms of the transfer. Therefore, to grant the right of support and protection and other rights The Respondent should have the obligation to maintain, repair and upkeep the structure of the building. Given the associated costs with the perils to which the structure of the building is exposed, The Respondent (who has no income, the only funds it receives are those paid as service charges) should also have the obligation to insure the building, otherwise it risks not having the funds to fulfil its obligations of repair the structure of the building.

2.10 The Applicants previously argued that in Rhodes v Stephen [1994] the conclusion is that the burden/benefit principle is not capable of applying to the right of support and protection because the benefit cannot be renounced. In Rhodes v Stephen [1994], the obligation of maintenance of the roof was not directly correlated to the right of support and protection. In the case of 82-84 Lockesfield Place, the continuous right of support and protection can only be guaranteed if The Respondent has the obligation of maintenance and repair.

2.11The right of access to the parking space and right of way within the underground car park containing the parking space can only be provided and guaranteed if The Respondent has the obligation to maintain and keep in good state of repair the pedestrian and vehicular gates and other parts inside of the underground car park. The expenses involved in maintenance, repairs and upkeep to ensure that the obligation to provide access at all times is fulfilled include:

- *Regular maintenance and servicing of the gates;*
- *Electricity to ensure the gates are operational;*

- *Keeping the underground car park free from clutter and bulky items that may obstruct the internal paths and roads and may pose a risk of fire;*

- *Providing adequate lighting within the underground car park to minimise the risk of personal accidents while using the paths to access the parking space;*

- *Keeping the floor inside the underground car park clean and safe to avoid slips and falls and the risk of injury to The Applicants, their family members, tenants and guest who may access the underground car park from time to time;*

- *Preventing and dealing with floods in the underground car park. There are pumps in the underground car park that pump water out in case of flood. These are regularly maintained under a contract for services;*

A relevant case pertaining rights of way is Goodman and others v Elwood [2013] in the Court of Appeal. This shows that, where a buyer (of a freehold) acquires the benefit of a right over neighbouring (retained) land, the buyer must also take on the obligations which relate to that right, even where the buyer has not expressly covenanted to do so. In this case, the dispute was over contribution of maintenance and repair of a road that provided access to Mr Goodman's freehold unit and for which he had right of way. It appears that a positive covenant need not be registered in The Land Registry for it to be enforceable, it becomes enforceable when the party receiving the right elects to exercise the right. Therefore, if positive covenants are not to be included in the freehold transfer of 82-84 Lockesfield Place, and The Applicants choose to exercise their right of way over neighbouring or retained land, including the land within the underground car park, the covenant of contribution towards the cost of maintaining and repairing of the land retained by The Respondent becomes enforceable even if it is not included in the freehold transfer.

One of the most important points to consider in this case is that The Respondent already has the obligations of maintenance, repair and upkeep of the underground car park with 36 other property owners, including Mr Dakshesh Patel (one of The Applicants) on his property known as 24 Lockesfield Place. This a key differentiator between this case and others referred to by The Applicants. Since the underground car park is a single unit (continuous floor, ceiling and common structures), The Respondent cannot selectively renounce to the obligations of maintenance, repair, upkeep and other services to some parking spaces while still have the obligations to others. Consequently, if positive covenants are not included in the freehold transfer of 82-84 Lockesfield Place, it's only The Applicants who will benefit from not

including the positive covenants, The Respondent will tacitly continue to have the obligations to maintain and repair since it has the obligations with the other 36 property owners. Therefore, The Applicants will freely benefit from the maintenance services offered to and paid by others. This is an inequitable arrangement not only to the other property owners but also to The Respondent, which is a company without income and the irrecoverable part of the costs from 82-84 Lockesfield Place must be accounted for as a deficit because The Respondent would not be capable of recovering this shortfall from any other property owners under the current leases and freehold transfers.

The Respondent firmly believes that if The Applicants choose to acquire the freehold of the parking space (creating a flying freehold) without The Respondent having the obligation to maintain, repair, upkeep and insure the structure of the building containing the parking spaces, The Applicants will be creating for themselves and any potential buyer future conveyancing problems including the risk of not being able to secure a mortgage or having a limited number of potential lenders at higher interest rates. Mortgage lenders would be concerned that their interest in the freehold land of the parking space is at risk if there is no obligation from The Respondent to maintain and repair the structure of the building and the neighbouring land (inside of the underground car park)."

The Tribunal's determination

12. Dr Blanco was asked whether she could identify any provision of the 1993 Act which gives the Tribunal the power to insert a positive convent into the transfer. She confirmed that she could not but submitted that the Tribunal has a general discretion to do what is fair and that it would be unfair for the Tribunal to decline to insert a positive covenant of the type proposed by the Respondents.

13. I am not satisfied that the 1993 Act gives the Tribunal a general discretion to insert a positive covenant into a transfer if the Tribunal considers that it is fair to do so.

14. Subsection 34(9) of the 1993 Act provides (emphasis supplied):

(9) Except to the extent that any departure is agreed to by the nominee purchaser and the person whose interest is to be conveyed, any conveyance executed for the purposes of this Chapter ***shall—***

(a) as respects the conveyance of any freehold interest, conform with the provisions of Schedule 7,

15. There is no provision of Schedule 7 which grants the Tribunal the discretion to insert a positive covenant into the transfer. I am not satisfied that any of the binding authorities to which the Tribunal was referred support the proposition that the Tribunal has the power to insert a positive covenant into the transfer on a collective enfranchisement pursuant to the 1993 Act.

16. The previous decision of this Tribunal which is relied upon by the Respondent is not binding and it concerns the estate charge. Permission was granted to appeal that decision, following which the parties reached an agreement. Having considered the decision in case references LON/OOBJ/OCE/2018/003/005/006, in light of the mandatory wording of subsection 34(9) of the 1993 Act, I am not satisfied that the Tribunal has the power to potentially insert the covenant contended for by the Respondent into the transfer.

17. I therefore find that, insofar as the terms are in dispute, the form of transfer shall be that contended for by the Applicants' solicitors.

Name: Judge N Hawkes **Date:** 7 September 2022

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, Cambrai Court 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).