



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

Case reference : **CAM/22UN/OCE/2019/0021**

Property : **Mill Court
Saville Street
Walton-on-the-Naze
Essex CO14 8PW**

Applicant : **Mill Court Walton Ltd**

Representative : **Miss K Gray, counsel**

Respondent : **Patricia Ashford**

Representative : **Mr R Plant, solicitor**

Type of application : **Application for determination of
the terms of acquisition remaining
in dispute, pursuant to s.24 of the
Leasehold Reform, Housing and
Urban Development Act 1993**

Tribunal member(s) : **Tribunal Judge S Evans
Regional Judge R Wayte
Mrs M Hardman FRICS IRRV
(Hons)**

**Date and venue of
hearing** : **9 December 2019
Lifhouse Spa and Hotel, Frinton
Road, Thorpe-le-Soken, Essex CO16
oJD**

Date of decision : **2 January 2020**

DECISION

The Tribunal determines that:

- 1. Pursuant to rule 9(3)(c) and/or (d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, part of the Respondent's case which contends that the parking spaces are not appurtenant property is struck out;**
- 2. Pursuant to rule 35(1) of the said Rules, the Tribunal considers it appropriate, at the request of the parties, to make a consent order regarding the extent of the property to be acquired, in the terms set out in this decision;**
- 3. The rights to be granted/reserved, in so far as they are disputed, are those set out in paragraphs 29, 31, 33 and 36 of this decision.**

The Application

4. By its Application dated 15 August 2019 the Applicant nominee purchaser sought the determination of 3 issues:
 - (1) The extent of the property to be acquired under a collective enfranchisement;
 - (2) The premium payable;
 - (3) The terms on which the freehold is to be acquired.

Background

5. The property consists of a modern purpose-built block of 4 flats, 2 on the ground floor and 2 on the first floor. The building was constructed by the Respondent lessor's father. The Respondent is now the freeholder, and she is also the lessee of Flat 1 in the block.
6. Between the building and Saville Street is a courtyard area with 6 parking spaces, the rights over which are contentious.
7. On 21 December 2018, the Applicant nominee purchaser sent a notice under s.13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") seeking collective enfranchisement of all the land comprised in the freehold registered title.
8. On 26 February 2019 the Respondent served a counter-notice disputing the extent of the land to be acquired, the premium payable, and other terms of acquisition. In particular she indicated that she wished to retain the freehold of the parking spaces and courtyard area, with permanent rights granted over some but not all of these areas.

9. On 15 August 2019, as terms of acquisition remained in dispute, the Applicant made the current application under s.24 of the Act.
10. On 20 November 2019 the Tribunal wrote to the parties directing that no inspection of the property was necessary and that the hearing would proceed with a 1 day time estimate.
11. At the end of November 2019/beginning of December 2019 the parties exchanged witness evidence and expert reports as to valuation.

Relevant Law

12. Sections 1, 24, 34 and Schedule 7, so far as are material, are set out in the Appendix to this decision.

The Hearing

13. Before the hearing, counsel for the Applicant provided the Tribunal with a skeleton argument which advanced (amongst other matters) a submission that the Respondent's contention that the leaseholders have no right to park in the parking spaces on the forecourt was an abuse of process, such that the Tribunal ought to strike out the Respondent's case on this point pursuant to Rule 9(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
14. Rule 9(3) of the Procedure Rules provides as follows (so far as is material):
 - “(3) The Tribunal may strike out the whole or a part of the proceedings or case if—
 - (a)...
 - (b)...
 - (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;
 - (d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal...”
15. The Tribunal heard submissions from the parties, and gave an oral decision allowing the application.
16. The reasons of the Tribunal for the decision to allow the oral application are:

- (1) In case reference CAM/22UN/LSC/2019/0030 dated 5 November 2019, the Tribunal decided that the right to park in the parking spaces immediately in front of the Mill Court was a right expressly demised under the lease to Flat 1, and in relation to the each of the 3 other leases, it was an appurtenant right;
 - (2) Whilst the decision in CAM/22UN/LSC/2019/0030 was a service charge determination on an application brought by the leaseholders of flats 3 and 4 against the Respondent, the Tribunal noted that much of the dispute between the parties concerned parking (see paragraph 42 of the decision). Moreover, it is clear that the finding in (1) above was essential to the decision made in the case: see paragraphs 2(b)(ii) and 45 of the written decision. It was not, as Mr Plant contended for the Respondent, what lawyers call “obiter dictum”. Nor did it have the effect of varying the leases;
 - (3) Given that the leases for Flats 2,3 and 4 in the building are in near identical terms, the Tribunal does not consider it fatal to the Applicant nominee purchaser in this case that the named Applicants were different in case CAM/22UN/LSC/2019/0030. The decision of 5 November 2019 determined the substantive rights between the leaseholders and the freeholder, so as to amount to an issue estoppel against the Respondent;
 - (4) Whilst the Respondent informed the Tribunal that she was seeking permission to appeal the decision of 5 November 2019, it was established that her appeal has been made out of time, and in any event that decision will stand until suspended, reviewed in her favour, or set aside on appeal;
 - (5) The Respondent is not procedurally prejudiced. Should permission to appeal out of time be granted, and the matter proceed to an appeal hearing which is ultimately successful, without binding any future Tribunal as to any decision it might make, the Respondent may apply for the part of these proceedings which has been struck out to be reinstated pursuant to rule 9(5) of the Procedure Rules and/or seek permission to appeal this decision.
17. Accordingly, the Tribunal strikes out part of the Respondent’s case in relation to the car parking spaces, on the grounds that it is a decided issue between the same parties, which arises out of facts which are similar or substantially the same as those contained in an earlier decision.
18. But even if that is not strictly the case, this Tribunal considers that the part of the Respondent’s case relating to the car parking spaces is otherwise an abuse of process under Rule 9(3)(d). It would prejudice the good administration of justice to expose the parties to the jeopardy of a decision inconsistent with the findings of 5 November 2019.

19. No other dispute arising as to the extent of the property to be acquired, the Tribunal's decision on the oral application therefore determined the first issue set out in paragraph 4 above.

20. The Tribunal then moved to the second issue, and invited the parties to call evidence and make representations on the premium payable, at which point the parties informed us that settlement had been reached.

21. The settlement agreement was reduced in writing to a Memorandum of Agreement signed by the Respondent on the one part and Mr Trevor Wood as Director of the Applicant on the other, in the following terms:

“Premium - £41,500 to include

- (1) Specified Premises;
- (2) Gardens to the rear and passageways
- (3) Loft space
- (4) Airspace above Specified Premises
- (5) Such rights over the courtyard and parking area as the Tribunal may determine
- (6) Optional leaseback to the Respondent in accordance with Sch 9(6)(2) of the 1993 Act as per the Respondent's Notice dated 9th December 2019.”

22. The Tribunal considers it appropriate, at the request of the parties, to make a consent order in the terms set out above, pursuant to rule 35(1) of the Procedure Rules.

23. The Tribunal then proceeded to hear submissions on the third issue, i.e. item (5) in paragraph 21 above.

24. It is right to record at the outset that Mr Plant, solicitor for the Respondent, informed that the Tribunal that until any determination of the Respondent's application for permission to appeal against the tribunal decision of 5 November 2019, there were certain clauses in the draft transfers in respect of which he would not be making representations, at least at this stage.

25. The first item to be determined was one of a number of rights to be granted for the benefit of the property by the transferor to the transferee. Clause 12.2.2 in the Applicant's draft transfer at page B14 of the bundle, is in these terms:

“12.2.2 The right to use in common with the Transferor and all others entitled to the like right and all persons authorised by the Transferee of The Courtyard and Parking Area for all proper purposes in connection with the use and enjoyment of the Property but not for any purpose likely to cause offence or to constitute a nuisance to the Transferor and/or the owners or tenants in occupation of the flats contained in the Property.”

26. For reference purposes, the draft transfer defines (at clauses 3 and 12.1 respectively) the following terms:

“Property: Mill Court Saville Street Walton on the Naze Essex CO14 8PW”

“The Courtyard and Parking Area: The courtyard and parking spaces shown collectively as hatched blue on the Plan”

27. The Respondent’s case was that any clause should effectively mirror the lease as nearly as may be, such that it should provide the following (per her draft transfer, at clause 12.2.3 on p.B22):

“12.2.3 The right to use (in common as aforesaid) the Courtyard for domestic and recreation purposes only but not for any purpose likely to cause offence or to constitute a nuisance to the Transferor and/or the owners or tenants in occupation.”

28. The Tribunal considers that “for all proper purposes in connection with the use and enjoyment of the Property” would be too imprecise and would give rise to a potential for dispute. Further, we consider that the Respondent’s wording does not accurately reflect the extent of the property to be acquired in accordance with the determination of issue (1) above.

29. The Tribunal therefore determines that the relevant clause should read:

“The right to use in common with the Transferor and all others entitled to the like right and all persons authorised by the Transferee of The Courtyard and Parking Area for domestic and recreation purposes only but not for any purpose likely to cause offence or to constitute a nuisance to the Transferor and/or the owners or tenants in occupation.”

30. The next item in issue was the “sweep-up” clause (at p.B14) of the Applicant’s draft, in these terms:

“12.2.8 All other rights that the lessees of the flats contained in the Property may have the benefit of under the terms of their leases of the flats”

31. The Respondent objects to the inclusion of the clause, as creating uncertainty. We disagree. The clause is a standard clause. Necessity is not the threshold. Therefore the Tribunal determines that the clause should be included in order to ensure that the occupiers of the flats have as nearly as may be the same rights as those enjoyed previously under their leases.

32. The next item in dispute was whether there should be restrictive covenants by the transferee. The Applicant’s case is that there should be

none, as per its draft transfer (p.B15 of the bundle). The Respondent's case is that there should be restrictive covenants which require the transferee to pay on demand sums of money (including advance payments on account) towards insuring and maintaining the land to be retained by her, and for any consequential administration charges and preparation of accounts (bundle, p.B23-B24). The Applicant submits that the effect of these clauses would be to create the equivalent of estate rentcharges.

33. The Tribunal determines that there should be no restrictive covenants imposed on the transferee. Firstly, the covenants sought are not truly restrictive, since they require the transferee to take positive steps and to expend money. Secondly, we decide that these clauses do not fall within s.34 or Schedule 7, paragraph 5 of the Act. Thirdly, in so far as paragraph 5(1)(c) is relevant, the Tribunal is of the view that the restrictions would interfere with the reasonable enjoyment of the premises as they have been enjoyed during the currency of the leases.
34. The last items which required the Tribunal's determination were clauses 12.6.6 to 12.6.9 of the Respondent's draft transfer (p.B27 of the bundle). These provide in summary that neither the reversioner nor its servants or agents should be responsible for accidents, acts or omissions, inconvenience or loss occasioned to the transferee/ tenants in occupation except in limited circumstances. The Applicant objected to these clauses.
35. We asked Mr Plant, solicitor for the Respondent, where in the Act the Tribunal had power to determine the inclusion of these clauses. He was unable to direct us to any such provision, nor could the Tribunal find within s.34 or Schedule 7 of the Act any such power.
36. The Tribunal therefore determines that the terms of acquisition should not include clauses 12.6.6 to 12.6.9 of the Respondent's draft transfer.

Name: S J Evans

Date: 2 January 2020

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).