



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

Case Reference : **CAM/26UE/OCE/2021/0003**

Property : **2-48 Howton Place, Bushey Heath,
Bushey, Hertfordshire WD23 1HX**

Applicant : **Howton Place Estates Limited
(Nominee Purchaser)**

Representative : **Orme Associates**

Respondent : **Reo Estates & Property Investment Company
Limited**

Representative : **TWM Solicitors LLP**

Date of Application : **28th January 2021**

Type of Application : **To determine the purchase price and terms for
collective enfranchisement under Section 24
of the Leasehold Reform Housing and Urban
Development Act 1993 (the 1993 Act)**

Tribunal : **Judge JR Morris
Miss M Krisko BSc (Est Man) BA FRICS**

Date of Hearing : **22nd June 2021**

Date of Decision : **27th July 2021**

DECISION

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Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing together with the papers submitted by the parties which has been consented to by the parties. The form of remote hearing was Video. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Decision

1. The price payable for the Freehold Interest in the Additional Freehold Land is **£45,000.00**

Reasons

Notices & Application

2. An Initial Notice was served on the Respondent by the Applicant on 19th May 2020 under section 13 of the Leasehold Reform Housing and Urban Development Act 1993 Act to acquire the freehold of Flats 2-48 Howton Place, Bushey Heath, Bushey WD23 1HX (“the Property”). The Applicant is named as the Nominee Purchaser and was formed for this purpose by the Qualifying Tenants listed in the Schedule to the Initial Notice to the Respondent. No objection has been raised with regard to any of the Leaseholders and therefore the Tribunal has not found a need to reproduce the schedule here.
3. The Initial Notice claims the freehold of the Premises:
Flats 2 – 48 Howton Place, Bushey Heath Bushey WD23 1HX being part of the title known as Land and Buildings on the North East side of Howton Place, Bushey, WD23 1HX and is shown Pink on the Plan annexed to the initial Notice.
4. The Specified Premises are premises to which Chapter 1 of Part 1 of the 1993 Act applies because they consist of a self-contained building containing 12 flats and 12 garages, all of which are held by qualifying tenants, which is not less than two thirds of the total number of flats contained in the premises.

5. The Additional Freehold Property to be acquired under section 1(2)(a) is:
The land shown edged Green on the attached plan to the Initial Notice and known as the grounds to Flats 2 – 48 (evens) Howton Place Bushey Heath, Bushey WD23 1HX but excluding the Premises edged Pink) which forms part of the land registered under title number HD63295 of which the Respondent is the registered proprietor.
6. None of the flats is subject to the lease back provisions in Part II of Schedule 9 of the 1993 Act.
7. The proposed Purchase Price was:
 - (i) £5,400.00 for the freehold of the Specified Premises
 - (ii) £1,800.00 for the freehold interest in the property referred to in the Schedule of Additional Freehold Property
8. On 29th July 2020 the Respondent as Reversioner served a Counter Notice under section 21 of the 1993 Act which admits the participating tenants were entitled to exercise the right to Collective Enfranchisement in relation to the Specified Premises referred to in the Initial Notice and that they were also entitled to claim the freehold interest in the Additional Freehold Property referred to.
9. The Respondent did not accept the Proposed Purchase price and made the following Counter Proposals:
 - (i) £846,000.00 for the freehold interest in the Specified Premises
 - (ii) £108,000.00 for the Additional Freehold Property
 - (iii) The Transfer also was to contain the covenants set out in Clause 6 of the Counter Notice.
10. A Copy of the entry for HM Land Registry Title Number HD63295 for the freehold title to the Property was provided which showed the Registered Proprietor as being the Respondent since 13th July 1970. The copy included a Schedule of Notices of Leases.
11. Copies of the entries at HM Land Registry of the leasehold titles for the leaseholders were provided.

The Description of the Property

12. The Tribunal was not able to make an inspection of the Property or the Development in which it is situated due to Government Coronavirus Restrictions. From the Statements of Case, the Lease, Photographs and the Internet the Tribunal was able to obtain a description as follows:
13. The Development consists of 36 purpose-built two and three-bedroom flats which are arranged over two separate three storey blocks. The two blocks are separated by an access way to 36 rear garages, one for each flat, and 18 off street

car parking spaces. There are 24 Flats in Block numbered 2-48 (the Property), which occupies a rectangular plot on one side of the accessway to the rear of which are 24 corresponding garages together with 9 car parking spaces. There are 12 Flats in the other Block numbered 50-72 which occupies a plot on the other side of the accessway to the rear of which are 24 corresponding garages together with 9 car parking spaces.

14. The Property comprises for the purpose of this Application:
 - a) “the relevant premises” (edged pink on the plan attached to the Initial Notice) as per section 1(2) of the 1993 Act; and
 - b) “the appurtenant property” (edged green on the plan attached to the Initial Notice) as per section 1(3)(a) and (b) of the 1993 Act.

a) Specified or Relevant Property
15. The Property relevant to this Application is the larger Block of 24 Flats numbered 2-48 occupying a rectangular plot of the Development. The other block comprises 12 flats numbered 50-72, and is the subject of a corresponding application by the Nominee Purchaser.
16. The Property is situated on Howton Place which is a made up and adopted road which provides access to the private estate road within the Development. Howton Place adjoins the A4140 (High Road) where there is a variety of convenience stores, cafes and other amenities located within the town centre of Bushey Heath. There is a car showroom/garage opposite the block facing the High Road. The Property is approximately 3.4 km from Bushey train station which is served by Overground and West Midlands Trains which has a regular service into London Euston, Watford Junction and Tring.
17. Flats 2-48 were constructed circa 1966-68 as a three-storey block of flats from a reinforced steel frame with concrete intermediate floors, and a façade of red brick beneath a flat roof. The Property is arranged as two wings that are placed at an angle to each other, and they are interconnected by a glazed staircase. The wing fronting High Road has a flush façade and the wing fronting Howton Place has a façade that steps back every three windows to avoid a flush frontage. The façade fronts onto High Road and the return to Howton Place. The building has vertical tile cladding, and a fenestration comprising flush windows in series of one row to one floor, and they are UPVc casements, presumably having been replaced in the past.

b) Appurtenant Property
18. The Appurtenant Property comprises: -
 - (i) a long terrace of 24 single storey garages located on the western site boundary, one garage is allocated to each flat, constructed from red brick beneath a sloping corrugated panel roof; and
 - (ii) the garden space surrounding the flats and access roads.

19. The Tenants are entitled to use the Appurtenant Property under the terms of their leases, as garden space, Schedule 3, paragraph (f) and to pass and re-pass over to access the garages Schedule 3, paragraph (b). Other rights include the right to keep a dustbin, Schedule 3, paragraph (a), a right to use the drains and cables that run across the Appurtenant Property, Schedule 3, paragraph (c), and an express right of support, Schedule 3, paragraph (e).
20. In addition, some of the Appurtenant Property is in use to accommodate 9 parking spaces. These are 9 marked out and situated to the rear of flats 2-48, these are hereinafter referred to as “the Parking Spaces”.
21. The Freeholder considers that the Nominee Purchaser should pay for these as if they were unencumbered. The Nominee Purchaser claims the leaseholders have acquired a right *in rem* to park in the nine spaces, and therefore their value is nominal.
22. The freeholder acknowledges the Nominee Purchaser’s right to acquire both the relevant premises and the Appurtenant Property.

The Leases

23. The Leases are all for a term of 999 years from 31st December 1966 at a rent of £15.15s.0d (15 guineas) and were granted by Croxley Estates Limited in 1968 or 1969.
24. The provisions of the Lease relevant to this Application are:

First Schedule paragraph 11

“Not to park a car or other vehicle in the access roads to the Building or garages or any other access road or otherwise obstruct the same.”

Third Schedule paragraph b)

“The right in common with the Lessor and the Lessees or occupiers of other parts of the building (and all the person authorised by them) at all times during the said term for the Lessee and the Lessee’s workmen servants invitees and other persons having lawful occasion to use the same in connection with the use and enjoyment of the said Flat as a single private residence to pass and repass over and along the entrance ways and the common hall passages stairs and landings in the Building and over and along the footpaths and access roads”

Matters Agreed

25. The parties had agreed the Transfer and the price for the Specified Premises at £6,300.00.

Matters Not Agreed

26. Only one matter was not agreed which was the price of the Freehold Value of the Appurtenant Property, in particular the value of the Parking Spaces.
27. Contemporaneously with the present Application in respect of the Property, an Application was made in respect of the Block of Flats numbered 50-72 Howton Place. As with this Application the price of the Specific Premises was agreed but the outstanding issue was the Freehold Value of the Appurtenant Property, in particular the value of the Parking Spaces. The spaces are marked out with 9 situated to the rear of flats 2-48 and 9 to the rear of flats 50-72. The legal and valuation submissions apply the same to each set of 9 spaces.
28. The approach taken by both Valuers in assessing a price for the Parking Spaces was to consider all 18 spaces together and then divide the cost equally between Flats 2-48 and Flats 50-72. However, notwithstanding that the Nominee Purchaser is the same for both Blocks of Flats as separate Applications have been made for each the Tribunal has made two separate Decisions. There is always the possibility that one may proceed and the other not.

The Applicant's Valuation

29. The Applicant's Valuer Mr Andrew Orme BSc (Hons) PGDip (Law), provided a valuation as follows:

Instructions: to value freehold of relevant and Appurtenant Property and any development value under 1993 Act.

Date of Valuation: 18th May 2020.

Description of the Property: similar to as set out above.

Leases: all for a term of 999 years from 31st December 1966 at a rent of £15.15s.od.

Capitalisation Rate: 6%.

Development Value: a report was attached from an expert planning adviser retained by the Nominee Purchaser which concludes that planning consent would not be expected to be forthcoming on the grounds of overlooking, massing, the Conservation Area status withing the vicinity and the lack of parking provision.

Calculation:

Date of Notice: 19th May 2020

Term of each flat: 999 years from 31st December 1966

Ground Rent: £15.75 per annum

Ground Rents @ 6%
24 flats at a rent of 15.75 per annum total £378.00 per annum in perpetuity @ 6%
Freehold Value £6,300.00

Respondent's Valuation

30. The Respondent's Valuer, Mr William Robert Samuel Bradley BSc (Hons) MRICS, provided a valuation as follows:

Instructions: to value freehold of relevant and Appurtenant Property and any development value under 1993 Act.

Date of Valuation: 18th May 2020.

Description of the Property: similar to as set out above.

Leases: The Leases are for a term of 999 years from 31st December 1966, expiring 30th December 2965.

The ground rent payable throughout the term is £15.75 per annum.

The demise is described as the maisonette and a single garage. The Lessee is to keep the demise in good repair and is to pay a maintenance contribution of 1/36th to the managing agent to cover the maintenance of the main structure including the roofs, foundations, the exterior and interior wall of the main building. The Lessor is to insure the building and garage. The Lessee has rights to use the garden areas around the block for recreational purposes, use the paths for access/egress purposes, use the bin stores and has a vehicular access to the garage. There is no mention that the Lessees have a right to park on the site. Paragraph 11 in the First Schedule prohibits parking on the access roads to the building and garages or any other access road.

The Respondent's Valuer considered three areas of Value.

1. Development Value: Deborah Setterfield of Benton Setterfield Partnership (Structural Engineer) on behalf of the Respondent, inspected the site and some of the flats on 14th October 2020 and her initial view was that the foundations would likely have spare loadbearing capacity for an additional floor of flats. Pascal Madoc Jones of Bridges Associates (Architect) was appointed to design a suitable scheme and Craig Noel of Strutt & Parker (Planning Consultant) to advise on the feasibility of the proposed schemes in terms of planning. Based on the proposals provided by the Architect Deborah Setterfield undertook detailed calculations and her findings concluded that foundations were not adequate and would need to be underpinned if the schemes to proceed. Based on the detailed findings of the Structural Engineer and the additional cost of underpinning my conclusion on building an additional storey of flats on the flat roofs has nominal value.

2. Capitalised Ground Rents: The ground rent received in respect of each flat is £15.75 per annum and adopting a cap rate of 6% which has been agreed with the Applicant's valuer, the value of the capitalised ground rents for Flats 2 – 48 Howton Place is **£6,300.00**
3. Car Parking Spaces: There are 9 parking spaces to the rear of Flats 2-48. The Lessees have access on foot to the demised garages but there is no right to park vehicles within the parking areas. It was assumed that the main reason for not permitting parking in the spaces that had been created was that the Landlord could grant yearly licences to residents to park in the bays and charge an annual fee or lease the spaces on a longer term at a premium.

To assess the value of the parking spaces the Respondent's valuer researched residential parking charges in the locality. He said he was unable to find sales of open parking spaces but was able to find a number of sales of garages by auction which he took as a guide. These achieved between £14,000.00 and £22,500.00 as set out below. The closest sale to the Property was Cherry Hill which sold at £14,000.00. All were said to be in good condition with flat roofs, except Cherry Hill which had a pitched roof.

	Address	Price	Date
1	Cherry Hill	£22,000	30/05/2019
2	13 Fernside Avenue	£20,000	03/12/2019
2	Bassett Way	£20,000	11/02/2021
4	12 Winchstone Close	£15,000	29/07/2020
5	11 Winchstone Close	£17,000	29/07/2020
6	2 The Firs	£16,000	24/02/2021
7	3 The Firs	£14,000	24/02/2021
8	St Lukes Close	£22,500	29/10/2020
9	Whernside Close	£16,000	15/10/2020

The Property adjoins Bushey Heath which has limited street parking. The restrictions are that no parking is permitted between the hours of 10.00 – 11.00 a.m. and 2.00 – 3.00 p.m. The High Road (A4140) is predominantly double yellow lines with a few marked out parking bays for residents parking or pay and display. Howton Place is not within the Council's residents' parking scheme. The only other available option is to park in a public car park at £5.20 per day.

The Valuer took the standard value of a garage as £18,000 and made a deduction of £6,000 for the structure which equates to £12,000 as the value of a parking space. He said he had cross checked the approach by taking the daily cost of parking of £5.20 per day which equates to £1,898 per annum which at a cap of 6% equates to £31,600. The rate of £12,000 per space appeared reasonable for a resident to pay to have an exclusive use car parking space immediately outside the block.

He valued 9 spaces at £12,000 each totalling £108,000.00.

Agreed Facts

31. In addition to the Valuations the Valuers each provided their own version of what was agreed which were the same in that the matter in dispute was the price of the Freehold Value of the Appurtenant Property, in particular the value of the Parking Spaces.

The Parking Spaces

32. The Tribunal was satisfied that the Freehold Value of the Relevant or Specified Premises together with the Appurtenant Property excluding the Parking Spaces was agreed at £6,300.00.
33. The Tribunal identified two issues for it to determine:
Firstly, whether or not the Parking Spaces are subject to any encumbrance, such as easement, in favour of the Tenants. The Applicant submits they are and the Respondent submits they are not.
Secondly, the value of the Parking Spaces. The Applicant submits they only have a nominal value and the Respondent submits their value is £108,000.00.

Issue 1 – Written Submissions as to whether or not the Parking Spaces are Encumbered

Applicant's Case

34. The Applicant submitted that the extent of use of the express rights that appear in the lease(s) by the dominant owners falls short of the *de facto* use on the ground. The use of the Appurtenant Property is different from that envisaged in the leases by the original promoter and architect.
35. Shortly after the Development was completed and the grant of the Leases in December 1967, it was decided to mark out nine uncovered parking spaces on the Appurtenant Property. The presence of the uncovered parking spaces at this time is confirmed by the witness statement of Ms. Claude Jacqueline Tobias. The uncovered car parking spaces are marked by edging to the gardens, marking paint, and a tarmacadam covering. This use is visible from the Google public satellite view attached. The spaces are used by the occupiers of the flats. No space is considered to belong to any one flat. The residents might respect each other's routines, however. The spaces are fully accommodated. The leases appear to make no mention of the spaces, only gardens and access roads are mentioned.
36. Another change at the Appurtenant Property includes parking of private motor vehicles and small commercial vehicles in the access roads. The lease includes a provision that the leaseholders must "not park a car or other vehicle in the access roads" (Schedule 1, clause 11). *De facto* this is not enforced. Also, the 1960's garages are too

small for modern day cars, and probably became so around the 1990's. They have asbestos roofs which today is accepted as a health hazard. Therefore, residents park motor vehicles across the front of the garage. This situation has persisted for about 10 years. Reference was made to the witness statements of Mr. Sharad Raniga, Tenant of Flat 18 and Garage 9, dated 22 April 2021 regarding the factual position regarding the *de facto* use of the Appurtenant Property since October 1998. He said he had been resident since October 1998 and occupied the Flat as his main principal residence. He said he had acted as a Tenant representative in communications with the Landlord and their appointed managing agents. He said that between 10 - 15 years ago, there had been instances whereby local shoppers occasionally parked their cars in the parking spaces. To discourage this behaviour and for security reasons, it was agreed with the managing agents that signs should be put up by the managing agents on the behalf of the Leaseholders which read: Howton Place, Private Road, Parking for Residents and Visitors Only” and as a further deterrent: Permit Holders Only, even though there was not really a Permit System.

37. Mr Raniga also confirmed that the 18 car parking spaces were present and laid out with lines and a suitable tarmac surface and with kerb stones to the closed edges, around the time Howton Place was constructed in the late 1960's. They have been in continual use as parking spaces since then. They are not marked as allocated to any flat and are also used by visitors of residents. He said that the view of residents had always been that the 18 car parking spaces were created for the benefit of the residents of the flats when first constructed, and as such the residents have made use of them since then. No charge has ever been made to the residents for the use of the eighteen parking spaces, at least not since he had been a resident for over 22 years.
38. The Applicant submitted that the Nominee Purchaser has acquired a right to use the uncovered parking spaces to park vehicles as described above by implication with section 62 of the Law of Property Act 1925 and/or secondly via the Prescription Act 1832 and the existence of those rights diminishes the value of the parking spaces alone to a nominal amount.

Re section 62 Law of Property Act 1925

39. The Respondent who is the current freeholder acquired both the “relevant premises” and the “Appurtenant Property”, as a single title and transaction, on 13 July 1970 from the Developer.
40. The Applicant referred to section 62 of the 1925 Act:

“A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all...rights...appertaining or reputed to appertain to the land, or any part thereof...” (*emphasis added*)
41. Ms. Claude Jacqueline Tobias for Flat 30 stated in her witness statement that she had

been a resident since 1969 and can recall the parking spaces being present when she bought the flat in 1969.

42. It was submitted that if there was a *right* to park in the nine spaces on the freehold servient land (the Appurtenant Property) granted to the occupiers of the neighbouring dominant land (the relevant premises), then s.62 means the purchaser will take subject to that right. If such *right* is implied from the circumstances, the right cannot then be withdrawn by the successor like it could have been by the grantor because it is assumed the *conveyance* to the successor operates as the deed to formalize the *right*. There is no evidence of any agreement by *parol* with the predecessor in title to the Respondent permitting the residents or visitors to use the nine spaces. However, this has been the *de facto* case as far back as the witness statements recount.
43. It was added that for any parties wishing to avoid the auspice of s.62, a transfer of land can include a clause that states “The property is transferred without the benefit of any existing easements” (Land Registry Practice Guide 62: easements, under sub heading 10.3 “Preventing both the creation and passing of easements”). In this case the register will state that the transfer “contains a provision relating to the creation or passing of easements”. No such reference appears on the freehold title of the landlords which was last transferred on 13 July 1970 (copy provided).

Re Prescription Act 1832

53. The Applicant submitted that the leaseholders have a right under the Prescription Act 1832 against the servient fee simple under section 5 of the PA 1832 which states-
“it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement...and without claiming in the name or right of the owner of the fee, as is now usually done”
And Section 2 of the PA 1832 which states-
“No claim...shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated”
44. A claim could be defeated at common law prior to 1832 if it could be shown that the grant existed before twenty years, but after *time immemorial* in 1189. To show the grant of the easement must have happened sometime after 1189 was a low bar for any servient landowner wishing to resist claimed rights. Therefore, the courts invented a fiction, the doctrine of *lost modern grant* to protect such rights with 20 years use, and section 2 of the PA 1832 above makes sense on this basis. An important point that appears in s.2 is that the common law rules of prescription will apply.
45. Also, in section 2 of the 1832 Act where a dominant owner can show-
“[where] such way or other matter...shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible,

unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing”

Which appears to remove the *nec vi*, *nec precario* elements from the qualification criteria to prove a prescriptive right but not *nec clam*. The witness statement from Ms. Claudia Jacqueline Tobias attests the parking spaces were present some forty years previously.

46. An easement cannot grant exclusive possession. The Applicant referred to the following cases to demonstrate that the granting of a parking space did not necessarily grant exclusive possession:

Viridi v Chana [2008] EWHC 2901 in which it was held that there could be a right to park in an undefined space and the right to park in part of one parking space was established because the other part of the parking space could still be used.

Batchelor v Marlow [2001] EWCA 1051 it was held that the use of grass verges to park motor vehicles awaiting repair at a commercial workshop operating on working days amounted to exclusive possession and so could not be an easement by prescription.

Moncrieff v Jamieson [2007] UKHL 42 The test is one of degree. In this case the use of the Appurtenant Property for parking occupies less than 5%.

47. It was also submitted that the qualifying tenants have occupied the nine spaces *nec vi* (without force) *nec clam* (without secrecy) *nec precario* (without permission) for a period more than the common law minimum term of twenty years.

48. The following cases were referred to:

Welford and others v Graham [2017] UKUT 297: in a claim regarding a right of way by lost modern grant it was stated that where there is evidence of the use of the land by a dominant owner for parking, they will benefit from an evidential presumption that they had enjoyed the easement *as of right*. It is up to the servient owner to disprove the use was something other than *as of right*, such as by way of licence, or tenancy at will etc. This view was supported by section 5 of the Prescription Act 1832 which requires a servient owner wishing to defeat a claim to prescription to prove the use of the land was not *as of right*.

“In all actions...it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement...for and during such periods... as may be applicable to the case...” (Section 5, PA 1982)

Beresford v Sunderland City Council [2004] 1 AC 889: it was said by Lord Walker “It has often been pointed out that “as of right” does not mean “of right”. It has sometimes been suggested that its meaning is closer to “as if of right”.”

Bennett v Winterburn [2015] UKUT 0059 (TCC) notices displayed in a car park that read “Private car park. For the use of club patrons only” was sufficient to negate

the creation of an easement by prescription. It was decided that the notices were sufficient to mean the *nec vi* requirement was not satisfied. In this case there are two signs erected at the vehicles accessway onto the Appurtenant Property. The main sign says “Howton Place, Private Road, Parking for Residents and Visitors Only” and there is a further smaller sign, “Permit Holders Only”. (A photograph was provided) Reference was made to a witness statement from Mr. Sharad Raniga that gives an account of the history of the two signs.

49. The Applicant referred to 4 service charge statements from 30 June 2014, 31 December 2014, 30 June 2018 and 31 December 2018 in which it was said that there is no reference to parking. No point is made out other than proof of something being absent, such as landlord works of resurfacing.
50. It was submitted that the rights that express and/or implied over the Appurtenant Property are so extensive as to render its use incapable of delivering any meaningful rent. However, the land remains suitable for planting, light storage, and keeping animals or bees. The Appurtenant Property was valued in the section 42 notice at £1,800.00.

Respondent’s case

51. Counsel for the Respondent referred the Tribunal to the Photographs of the Development on page 69 and 113 of the Bundle and to the Appurtenant Property, which included the garages let with the flats, the garden area, the accessways to and from the highway and the 18 uncovered car parking spaces which he stated were undemised.
52. Counsel also referred to the sample leases at pp.41 to 48. In particular reference was made to paragraph 1 of the Third Schedule which stated that the demise is together with the “rights mentioned in the Third Schedule but except and reserved”. He stated that the Third Schedule does not include the right to park in the uncovered parking spaces [p.47].
53. Counsel noted that the Applicant has denied that there is any more than nominal value in the uncovered parking spaces because “the leaseholders have acquired a right in rem to park in the nine [18 in total over both blocks] spaces” because:
 - i. The Applicant or leaseholders has acquired a right to park vehicles in the car parking spaces under s.62, Law of Property Act 1925; or
 - ii. By prescription under the Prescription Act 1832 [p.106].

Re section 62 Law of Property Act 1925

54. Counsel for the Respondent noted that the Applicant’s case, was that
 - (1) in 1970 the car parking spaces were already in existence and
 - (2) the effect of transfer of the freehold of Howton Place to the Respondent by the developer was to convert the lessee’s right to park in the parking spaces into an easement by virtue of s.62, Law of Property Act 1925.

55. It was stated that Section 62 has the potential to grant easements over neighbouring land that is in the same ownership of the vendor to the land in fact conveyed.
- (1) It does not operate to create incumbrances on the land actually conveyed. The land conveyed is the dominant land and has enjoyed prior to conveyance the right over the servient land which must comply with the general principles of easements.
 - (2) It is not possible for an easement to be granted where at the date of grant the dominant and servient land is in common ownership.

Re Prescription Act 1832

56. With regard to the claim that the rights to park have been acquired by prescription Counsel for the Respondent said that it is well established, despite judicial and academic criticism, that the acquirement of an easement (other than light) by prescription (whether by lost modern grant or under s.2, Prescription Act 1832) can only ever be by one freehold owner against another. A tenant can therefore only acquire a right by prescription in the name of his landlord. Given that a freehold owner cannot acquire a right against himself (the dominant and servient tenements must be held by different freehold owners) it is impossible for a tenant to acquire a right in prescription over land held by his landlord as stated in Woodfall 14-015, Megary and Wade Law of Real Property 27-086 and 27-087.

Issue 2 – Written Submissions as to the Value of the Parking Spaces

57. The Applicant's Valuer made no written submissions as to the value of the parking spaces other than to state that as in his view they were encumbered they only had a nominal value.
58. The Respondent's Valuer provided written submission as to the value of the parking spaces in his valuation as set out above.

The Hearing

59. The Hearing was held on 22nd June 2021 and attended by Mr Andrew Orme, the Applicant's Valuer, Mr William Bradley, the Respondent's Valuer and Mr Sam Madge-Wylde, Counsel for the Respondent.

Issue 1 – Oral Submissions as to whether or not the Parking Spaces are Encumbered

Applicant's Submissions

Re section 62 Law of Property Act 1925

60. In answer to the Tribunal's questions the Applicant's Valuer appeared to doubt his reliance upon an easement created by virtue of section 62 Law of Property Act 1925. Instead, he submitted that right to park was granted in the same way as other rights expressed in the Lease. The Tenants were expressly entitled to use the grounds and that as the Parking Spaces were included in those grounds there was an implied right for the Tenants to use the Parking Spaces. To attempt to take away that right was a derogation of grant.

Re Prescription Act 1832

61. The Applicant's Valuer conceded the point made in written submissions by Respondent's Counsel that the Prescription Act 1832 was not applicable.

Respondent's Submissions

62. Counsel for the Respondent objected to the introduction of a new argument by the Applicant that there was an implied right for the Tenants to use the Parking Spaces.

Tribunal's Decision on Issue 1 – Whether or not the Car Parking Spaces are Encumbered

Re section 62 Law of Property Act 1925

63. The Tribunal considered the written submissions by the parties regarding the applicability of section 62 of the Law of Property Act 1925. The Tribunal was of the opinion that the Applicant's Valuer had misapplied the law to the current situation. A number of past cases relating to the application of section 62 in creating easements have involved landlords and tenants. They are where initially the landlord has the freehold to adjoining plots one of which is retained by the landlord and the other is let to the tenant. The landlord allows the tenant to pass from the let land across the retained land by a permission that may be withdrawn at any time. Subsequently the landlord sells (conveys) the freehold of the let land to the tenant. By virtue of section 62 (unless excluded) the land sold includes the right to pass over the retained land and becomes an easement.
64. Here, the Landlord holds the freehold of the common parts including the Car Parking Spaces (the retained land) and has leased the Building (the let land). The Landlord has also allowed the Tenants to use the Car Parking spaces. This appears only to be a permission which can be withdrawn at any time. There has

been a sale (conveyance) of the freehold, but that was of the whole, Building and Common Parts. The freehold remains with one person. The rights and permissions remain the same. Section 62 might only have the effect relied upon by the Applicant on the conveyance of the freehold to the Building by the Respondent.

Re Prescription Act 1832

65. The Tribunal accepted that the Applicant's Valuer conceded the point made in written submissions by Respondent's Counsel that the Prescription Act 1832 was not applicable.

Implied Easement and derogation of the grant.

66. The Applicant referred to the use of the Parking Spaces as an implied easement which if not permitted would derogate from the grant of the lease. This point was only raised at the hearing and a full argument was not put forward by the Applicant and Counsel for the Respondent was not in a position to reply although submitted that this would raise the issue of necessity.
67. The Tribunal was of the opinion that the point was raised too late to be considered as part of these proceedings and was of the opinion it was not an effective argument. Derogation of the grant is a principle which means that a person must not transfer land to another on terms which effectively negate the utility of the transfer. An easement of a right of way in these circumstances may be implied if it is necessary for the transferee to obtain access to the land transferred. This is not the case here. The Tenants are able to access all the parts of the Property that are demised to them. They are also able to take advantage of all the common parts under the terms of the Lease. The Lease neither grants nor prohibits the use of the bays but as the bays are within the land retained by the Landlord and over which the right is only "to pass and repass over" the Tribunal's opinion is that the right to park in the Car parking Spaces is permissive and not as of right.

Summary

68. The Tribunal finds that for the purposes of valuation the Car Parking Spaces are unencumbered.

Issue 2 – Oral Submissions as to the Value of the Parking Spaces

69. The Applicant's Valuer submitted that the value of the Car Parking Spaces would be significantly affected by the difficulty a purchaser would have in protecting the Car parking Spaces from unlawful use by others. The area generally and the site in particular is at capacity. If the Car Parking Space was left unattended it would be open to unauthorised use. Security such as cameras and bollards would be

required to maintain it as a viable asset. This would be exacerbated by the level of conflict that would be likely between Tenants and those who were not residents.

70. The Respondent's Valuer provided written submission as to the value of the parking spaces in his valuation as set out above.
71. Counsel for the Respondent stated that the starting point for the valuation was that the Car Parking Spaces were unencumbered land owned by the freeholder. The Access Road is also owned by the Respondent freeholder who can grant a right of way along it as there is nothing in the Lease to restrict this. He said that it was not essential for the Landlord to place an obligation on the purchaser to contribute to the maintenance of the Access Road.
72. Counsel added that car parking enforcement is very unpopular but is no impediment to the sale of the Car Parking Spaces. Car parking enforcement is a business and investors employ companies to operate a variety of systems including permits, cameras, barriers etc.
73. The Respondent's Valuer said that in his experience investors are not put off by car park management. Car Park enforcement companies make their money by fines which they share with the car park owner taking 2/3^{rds} and paying the owner 1/3rd. He added that the maintenance of the road would only amount to a contribution amounting to £100.00 or so and so was not a significant cost which would affect the purchase value.
74. The Tribunal expressed the view that £12,000 was too high and that a parking space would be considerably less than a garage taking into account its advantages with regard to storage and security. The Respondent's Valuer said that he had taken this into account in reducing the cost from £18,000 to £12,000.
75. In response to the Tribunal's questions the Respondent's Valuer said that he had used the car parking charges of £5.20 per day which equates to £1,898 per annum which at a cap of 6% equates to £31,600 as a check to his calculation of £12,000. He said if the cost had been less, then his calculation would have been too high as parking in the area could be obtained more cheaply.
76. It was stated that it was common ground that there was considerable demand for spaces generally and amongst the residents in particular since the garages were said to be too small for modern days cars. However, Mr Ragina said that some Tenants with small to medium cars were able to park in the garages. It was noted that it was said that others parked across the garage entrances.
77. The ground and aerial photographs showed all the marked spaces were full with some cars parked on the Access Roads and others across the garage entrances. Taking into account that the garages were too narrow for many modern cars it followed that not all tenants would be able parallel park in front of the entrance to their garage.

Tribunal's Decision on Issue 2 –the Value of the Parking Spaces

78. The Tribunal considered all the written and oral evidence and submissions.
79. The Tribunal was of the opinion that because there were two separate Notices, Counter Notices and Applications, it should consider the value of the Appurtenant Property relating to the Property together with the 9 spaces separately from Appurtenant Property relating to the adjacent Block of Flats numbered 50 - 72. It was common ground that the Parking Spaces accounted for the value of that land and the price of the Appurtenant Property as described in the Notices was the price of the Parking Spaces. The Valuers appeared to agree that whether the Parking Spaces for each Block were valued together and the assessment split in half or whether they were valued separately, the two sets of 9 Parking Spaces were the same value.
80. The Tribunal was of the opinion that it should not consider whether or not 18 spaces would be more attractive to a purchaser than 9 but merely to determine the market value of 9 spaces for each Block as per the respective Notices, Counter Notices and Applications.
81. The Tribunal then considered whether the valuation should be based on an individual basis or collectively as all 9 Parking Spaces.
82. Firstly, the Tribunal considered the value of the Parking Spaces if they were to be purchased individually.
83. The Respondent's Valuer had in effect taken this approach by reference to the sale of individual garages as he was unable to find sales of open parking spaces in the locality. Garages he said achieved between £14,000.00 and £22,500.00 and, taking into account the advantages of a garage with regard to storage and security which an open space would not have, he settled on a figure of £12,000 per Parking Space.
84. The Applicant's Valuer objected to the figure of £12,000.00 stating that the value of the Parking Spaces would be significantly affected by the difficulty a purchaser would have in protecting the Parking Space from unlawful use by others which was likely given the site is at capacity.
85. The Tribunal was of the opinion that the market for garages is different from that of single open parking spaces. In the present circumstance the Parking Spaces could only be used as such, and the difficulties of making the space secure, which would be necessary taking into account the current capacity, would reduce the price. These factors are probably the reason for the dearth of single open parking spaces appearing on the market as compared with garages.

86. Secondly, the Tribunal considered the value of the 9 Parking Spaces sold together. The Tribunal was of the opinion that this would be a more viable proposition. The parties did not adduce any direct evidence to support this but Counsel for the Respondent and the Respondent's Valuer referred the Tribunal to the companies that manage car parks in a range of venues including retail parks, service areas and standalone car parks, to show there was a market. The Tribunal agrees that there would be a market for multiple car parking spaces as the income generated would over time justify the expenditure that the Applicant's Valuer submitted would be required to make the Parking Spaces secure and productive. This expenditure might include the installation of cameras and security equipment, high-speed internet and a power source, bollards, a permit or ticketing system and staff to enforce the system. These costs would have an impact on the initial purchase price of the land.
87. Counsel for the Respondent submitted that the Freeholder would be able to make whatever arrangement it liked with regard to access to and maintenance of the Parking Space and access to it. The Tribunal was not convinced that the freeholder would be as unconstrained as Counsel suggested and that any sale would have a requirement to contribute to the maintenance of the access road which would have an impact on the sale value.
88. The Respondent's Valuer referred to the capitalisation of income from the letting of the spaces. The Respondent at the time of the Valuation Date had not undertaken the letting of the Parking Spaces and under Schedule 6 the value of the freeholder's interest is what might be expected to be realised if sold on the open market by a willing seller for an estate in fee simple. The Respondent's Valuer did not suggest that this should be the method of valuation and the Tribunal took his point to be that the Parking Spaces had significant value.
89. Whereas the market for the sale of an individual garage is a different market to the sale of an open parking space, nevertheless, it gives a starting point for calculating the price. Looking at the list of sales provided by the Respondent's Valuer, the price of 5 of the 9 garages identified was below the £18,000.00 the Valuer said was the standard price. The Tribunal considered the sales supported a lower figure of £16,000.00. The Tribunal also considered that the Respondent's Valuer underestimated the value of the advantages of an enclosed structure and its potential for uses other than keeping a vehicle. The Tribunal considered the differential would be closer to 50% giving an equivalent value of £8,000.00 per Parking Space. However, this does not take account of the need to keep the space secure either for personal use or for investment or the reflection in the price of a requirement to contribute to the maintenance of the access. The Tribunal was of the opinion that a purchaser of the 9 spaces would make an allowance of about £3,000.00 per Parking Space to take account of these considerations giving a unit price of £5,000.00.
90. The Tribunal has initially approached this on the basis of a unit price because the only evidence provided was that of single garage sales. However, it doubted that

an individual, other than a Leaseholder at the property would purchase a single Parking Space at that price, and a sale to a Leaseholder is to be disregarded in the valuation. A sale of a single Parking Space is likely to be lower than the £5,000.00. However, the Tribunal was of the opinion that an investor, having factored in the expenditure needed to make the Parking Spaces secure and productive, would purchase the 9 at a cost of £45,000.00.

91. The Tribunal determines that the premium payable for the Appurtenant Property as £45,000.00.

Judge JR Morris

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.