PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2015/236

BETWEEN

RE-CREO (GRAYS INN ROAD) LIMITED
(FORMERLY 195-199 GRAYS INN ROAD LIMITED)

Applicant

and

1. **MICHAEL JOHN WILKINSON**
2. **TOTIS KOTSONIS**

Respondents

Property address: 195-199 Gray's Inn Road, London WC1X 8UL
Title numbers: NGL710343 and NGL714206

Before: Judge Hargreaves

ORDER

The Tribunal directs the Chief Land Registrar to cancel the Applicants' application made on 24th November 2014 in Form AP1 dated 21st November 2014.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 3rd FEBRUARY 2017

PROPERTY CHAMBER LAND REGISTRATION

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2015/236

BETWEEN

RE-CREO (GRAYS INN ROAD) LIMITED
(FORMERLY 195-199 GRAYS INN ROAD LIMITED)

Applicant

and

1. **MICHAEL JOHN WILKINSON**
2. **TOTIS KOTSONIS**

Respondents

Property address: 195-199 Gray's Inn Road, London WC1X 8UL
Title numbers: NGL710343 and NGL714206

Before: Judge Hargreaves
Sitting at Alfred Place
10th and 11th January 2017

Applicant representation: Paul Whitley, director of Applicant
Respondent representation: John Leport, Leport & Co, Oxford

DECISION

Keywords

Claim to easement to open a window over Respondents' land – could user give rise to easement – s62 LPA 1925 – Wheeldon v Burrows – prescription (lost modern grant) - Schedule 4 LRA 2002 – exercise of discretion

Cases and authorities cited

Bradley v Heslin [2014] EWHC 3267 (Ch)

Wood v Waddington [2015] EWCA Civ 538

Linvale Investments Limited v Walker [[2016] EWHC B15 (Ch)

Wheeldon v Burrows [1879] LR 12 Ch D 3

Kent v Kavanagh [2006] EWCA Civ 162

Alford v Hannaford [2011] EWCA Civ 1099

Law of Real Property, Megarry & Wade, 8th ed

Easements, Gale, 20th ed

1. For the following reasons I direct the Chief Land Registrar to cancel the Applicant's AP1 application which was made in November 2014. The application itself lacks detail but the dispute was referred to the Tribunal on the basis that the application was claimed as a prescriptive right *"reasonably required for ventilation and other purposes"* (HM Land Registry case summary, as approved by the parties prior to the reference). The Applicant does not claim a right to light. As matters stood by the time of the hearing, the Applicant's claim was presented on three grounds: (i) *s62 LPA 1925*; *Wheeldon v Burrows*; (iii) prescription. In addition the facts are such that it is necessary to decide whether the right claimed is capable of being an easement, and whether even if the Applicant succeeds in making out its case, I should refuse to direct the Chief Land Registrar to give effect to the application.

2. All page references are to those in the trial bundle except where otherwise indicated.

Background: description

3. I had the opportunity of conducting a site visit on the afternoon of 9th January, which was very useful, as it was attended by Mr Whitley and Mr Wilkinson so I was able to inspect the relevant parts of the dominant and servient tenements. The Applicant is a firm of architects. It acquired the former three shops at 195-199 Gray's Inn Road from Mr Hubbard in early 2014. Mr Hubbard had run a second hand furniture business from the property for many years. The shops were built facing the west side of Gray's Inn Road, probably in the original back gardens of

the houses behind in Mecklenburgh Street. 195 backs onto Number 4. It is not claimed that the right asserted extends to the parts of the property formerly known as 197-199. The Gray's Inn Road property is single storey and basically a single room deep, without opening windows to the frontage, which is as one might expect of former shop premises, plate glass. The houses behind are substantial five storey properties. Leading off from what was the shop, now an office at 195, via doorway to the rear, is a small outbuilding. It contains a basin and W.C. and a window (with two openings) which is situated in a wall facing the rear patio garden of the flat at 4A Mecklenburgh Street, which is the ground floor and basement area.

4. There is a useful 3D image at p42: the window coloured yellow is the critical one. As is evident from this image, the outhouse to the rear adjoins an outbuilding which is part of the structure of 4 Mecklenburgh Street, and there is some structural evidence to which Mr Whitley drew my attention, suggesting that it was originally all of one construction. That part attached to No. 4 is the kitchen of 4A: the plan does not show that adjacent to the yellow window is a tiny window in the kitchen wall, and next to that, a glass kitchen door leading to the patio garden created by the Respondents. It is useful to use the image at p42 with that at p52. It shows that each original part of 195-199 (knocked from three shops into one many years ago) has an outbuilding adjoining the rear of the house behind at Mecklenburgh Street. As an aside, the Respondents' bathroom is at basement level under their kitchen, also extending underneath part of the Applicant's outbuilding. Photographs of the (side) window (open) to the rear of 195 taken from inside are at p43. The window is a crittal type, has been in position for decades (since the 30's or 40's according to Mr Whitley), and is frosted. There is part of an old plastic ventilation disc in the top flap window. Mr Hubbard installed the bars on the inside many years ago. The Respondents have produced a photograph taken by Mr Kotsokis' mother at a date to which I refer below, at p74, and it shows, which is of importance factually, a window box on the window sill. The photograph at p76 just about shows the Respondents' kitchen window to the side of the Applicant's and demonstrates how small the patio garden is. The Respondents' bedroom is the rear basement room. It looks into a light well but having been into it, it is possible

to see the Applicant's window from it and note whether it is open or not, as it is also possible from the dining room at ground floor level.

Background: conveyancing

5. The documents produced are limited. The properties at 1-8 Mecklenburgh Street together with 195-199 Gray's Inn Road were owned by LB Camden, Title No LN172267, a copy of which was produced at the hearing. The block was first registered in 1926. Camden has granted numerous 125 year leases pursuant to the right to buy and since sold the freehold of 195-199 and the freehold of no.4. The property register records at entry 3 that it has the benefit of rights reserved in the transfer of 195-199 to Mr Hubbard and Edward Hiam dated 16th August 1993 (the 1993 transfer). The 1993 transfer was not available for the hearing.

6. The freehold title of 195-199 is NGL710343, office copy entries at p94. Entry no. 1 in the charges register records that the land is subject to the rights reserved to Camden in the 1993 transfer, which are stated as follows: *"There is reserved to the Transferor all rights or easements of light and air which would restrict or in any way interfere with the free use and enjoyment of any adjacent or neighbouring land of the Transferor for building or any other purposes."* But if one looks at the file copy, Title NGL710343 comprises the shops without the outbuildings. It appears that the 1993 transfer drew a line in the wrong place. So the Applicant has two registered titles. The toilet and washroom areas behind 195-199 are registered under Title No NGL714206 (p102). They were transferred by Camden to Hubbard/Hiam by a transfer made on 19th January 1994 (p105). It is a straightforward transfer and says nothing about the reservation. No-one noticed or seemed to notice that the toilets and washrooms are therefore registered as having the benefit of the 1993 reservation rather than being subject to it, which might have been the obvious conclusion to make on the realistic and practical basis that omitting the toilets and washrooms from the land transferred in 1993 was an obvious mistake. So, confusingly, the Applicant is seeking an easement from land which benefits from the same reservation relied upon by the Respondents to challenge its claim. At the time of the 1993-4 transfers, Flat 4A was occupied by Mr and Mrs Crowley as tenants of Camden.

7. They exercised their right to buy. On 13th October 1997 Camden granted them a 125 year lease from 25th November 1991, registered under Title No NGL755541 (p110(d)). A copy was produced at the hearing. (The plan attached clearly shows that the basement extends further than the ground floor which explains the part underneath the Applicant's outbuilding.) For what it is worth, the tenants' covenants include at 3.10.2 an obligation to keep the garden in a neat and tidy condition, and not without the landlord's authority to erect any outhouse or greenhouse (etc) in the garden. There is no specific reference to the 1993 rights though the lease reserves to Camden the right to build a fire escape onto the garden (Third Schedule, paragraph 1.2). The 1997 lease was assigned to the Respondents in July 2003.

8. The Respondents acquired the first floor lease and were able to acquire the freehold of no.4 in April 2010. The TP1 was produced at the hearing. The property register (NGL909927, p110g) states at entry no. 2 that the land has the benefit of the 1993 reservation.

Facts and evidence

9. The only other conveyancing history to note is that Mr Hubbard was served with a s25 LTA 1954 notice in February 1982 in respect of 195 and offered a new 6 year lease from March 1982 which was accepted (see from p97). It appears that a similar lease was granted in respect of 199. From this there was some consensus at the hearing that Mr Hubbard probably had a tenancy of 195-199 from the second part of the 70's until purchase of the freehold in 1993-4, and was the owner until the transfer to the Applicant. None of his leases were available.

10. The Applicant is a newcomer to the site and is therefore dependent on Mr Hubbard for evidence of user of the window. He provided a statutory declaration in July 2014 (p9). As usual, this document cannot have been drafted by him because it uses formal words which would not be in Mr Hubbard's vocabulary. See paragraphs 5-8 in particular. Simply put, he says he used the window(s) throughout his period of occupation for the purpose of providing ventilation to the building generally and *"it is for this reason that the windows were regularly kept open."* He made no changes to the mechanism. The Respondents challenge this

account from 2003. His first witness statement repeats much of his statutory declaration (p49) and answers the Respondents' statutory declarations dated January 2015. In particular he added *"I confirm that I have opened the window probably around once a week during my use of the* [shops], *as it was often necessary to open it when I went to the toilet which is in this Outhouse."* His second witness statement provides more detail (p126, particularly paragraphs 9-21), and takes yet more points on the Respondents' assertions. More particularly he describes user for the purposes of purge ventilation (the disc in the top light being inadequate for the purpose of purge ventilation though plainly it has been left in that state for many years) as well as general ventilation, by himself, staff and visitors, during Monday-Friday business hours. In response to the Respondents' case that they had a window box on the window sill for 3 years which prevented user of the larger side opening window, he said he never noticed it, would have noticed such an obstruction over such a period, and carried on using the top window in any event. It is evident that by holding the side window open with the first notch on the window arm, it oversails the Respondents' airspace: see eg the photograph at p110b. I accept Mr Hubbard's evidence that he never maintained or painted the window so that by 2003 it is possible that subject to any evidence that Camden or its tenants painted it (and there is no suggestion of such) the window had not been maintained for 30 years, which explains why the Respondents concluded when they were looking at the flat prior to purchase, that there was nothing to worry about: the window did not give the appearance of one being opened. (They made no further formal inquiries.)

11. Mr Hubbard was cross-examined by Mr Leport. He maintained that the side window would be opened wide when necessary for ventilation, whether air circulation or for purge ventilation: he did not use the window catch as an opening device for these purposes as the window would not then open far enough, but would use the window arm. The toilet behind 195 was the only one serving the entire shop, employees and customers alike. Mr Leport put it to him that Mr Hubbard did not actually know how many times the window was opened, which must be right, but on Mr Hubbard's case the answer "hundreds of times" is not unexpected in a period spanning at least 30 years if he is right (once a week would exceed 1500 times).

12. But Mr Hubbard's evidence encounters a significant difficulty: it is the Respondents' case that the window box on the sill in the photograph (p74) was there for at least 3 years, either 2006-2009 or 2005-2008, dated by reference to how the Respondents looked in (and by the fact that Mr Kotsonis' mother took) the photograph. I accept the Respondents' evidence about this, so have to consider Mr Hubbard's vehement denials that the side hanging window could ever have been blocked for 3 years without him objecting, with some caution. On the balance of probabilities I conclude that Mr Hubbard's recollection is flawed. There is no way the side window could be opened without knocking the window box off the sill. The Respondents, particularly Mr Kotsonis who is the main gardener, would have noticed this more or less immediately, and I accept his evidence that he put the box up, and removed it only after repeated attempts to make the various contents flourish, failed after 3 years. There is a further possible explanation for Mr Hubbard's lapse of memory in that he had to shut 195-199 for business from late 2005/early 2006 due to physical damage. But he could not recall (first) whether this was for two or three weeks or two or three months, and there is a considerable difference. Even though his evidence was that he continued to use 195 for paperwork and storage, the shop was not trading and footfall declined: the business went into liquidation in 2008, prior to which 195-199 had been shut for a period of between 18 months- 2 years, see paragraphs 18-19 of his second witness statement at p128. In any event, it is clear to me that for at least part of the time that the window box was on the sill, Mr Hubbard's trading pattern was disrupted for a period which he then said amounted to roughly 3 years, and from 2008 use of the premises was further reduced because he said the business was not open all the time. The picture is confused on his evidence, but the main finding I make is that for a period of at least 3 years, the side hanging window was not used contrary to his evidence. Thereafter Mr Hubbard was using the property less in any event, though I find that from the time the window box was removed up to December 2013 when the Applicant moved into the premises, the side window would be opened as was the top one, but not as often as before the 2008 liquidation or the closure of the shop for trading. Mr Hubbard's failure to draw attention to the reduction in use of the premises for certain periods was unsatisfactory so far as his

first statutory declaration was concerned, and should have been clarified before he was forced to respond to the Respondents' assertions.

13. I accept that Mr Hubbard had no discussions with Camden as to whether he was entitled to use the window or not pursuant to his lease: there was a window, he used it.

14. Mr Hubbard had no recollection of meeting the Respondent Mr Kotsonis, who described a conversation he had with him in around 2007 when Mr Hubbard was on the roof of 195-199 looking into the garden and asking whether they were responsible for damage to the shop premises. That is a notable conversation (I accept the Respondents' evidence that it happened) and anyone with a sharp memory would have recalled it. He recalled one conversation (paragraph 16, p128) but it must have pre-dated 2003.

15. Mr Whitley called one of his employees, Rebecca Mair to give evidence (p166). She was an evidently truthful witness so I accept the description she gave as to her use of the toilet window: that means since December 2013 she has regularly opened and shut the side hanging window whilst using the W.C. on a daily basis. She did not refer to use of the window for general ventilation. But her evidence does not assist me to decide the application.

16. Mr Whitley himself gave evidence: he is responsible for the production of the documents at pages 30, 34, 78, 86, 88, and 121. Much of the content is taken up with legal submissions; he is an architect and arbitrator but has applied himself to presenting a case on a technical area of property law with considerable assiduity. His actual knowledge of past user of the windows depends on Mr Hubbard, and it is clear that since shortly after the Applicant occupied the premises in December 2013, he has been aware of the Respondents' objection to the windows being opened beyond the brick framework, and sought to accommodate that whilst litigating the question of principle. It is obvious that there are a number of issues between him and the Respondents but the details (concerning the Applicant's desire to obtain planning permission to develop and a dispute about part of the

Respondents' cellar) are not clear to me. He works at weekends, whereas Mr Hubbard did not.

17. Mr Whitley is a careful and truthful man. I take from his evidence that the windows and their opening was not a matter of interest or comment prior to the Applicant's purchase. But he is limited by Mr Hubbard's evidence to which he can add nothing that assists me.

18. Mr Kotsonis is a solicitor but not a property lawyer. But he too, if on occasions demonstrably emotional, is an evidently truthful witness and Mr Whitley's attempts to undermine his credibility (and that of Mr Wilkinson) by focusing on precise wording in their statutory declarations (and in the case of Mr Wilkinson, his professional career), could not persuade me otherwise. He has a strong sense of space and privacy and his garden is important to him. He is clearly very upset by the current dispute and found the hearing a stressful experience. I have already said that I accept his evidence that he met Mr Hubbard once (on the roof) and that the window box was on the sill for a three year period. That undermines Mr Hubbard's credibility overall, or demonstrates an unreliable memory. As to evaluating the fact that the Respondents say they never saw the windows open at all, I have to consider Mr Kotsonis' work patterns. As a junior solicitor in the years from 2003 when they moved into the flat he would work at home only a couple of times a month, now more frequently. But he would work at the dining table which provides a direct view of the window. I accept his evidence that he would have objected to Mr Hubbard's user had it come to his attention, and it would have done if Mr Hubbard's evidence applied to every day. He saw the light on only once in 10 years. He had no reason to be concerned. In cross examination he explained that his conclusion in paragraph 7 of his statutory declaration (p23) that the window was not designed to be opened (which is wrong) was a conclusion he reached when looking at the property for the first time, when the Respondents concluded from its condition that it did not look as though the window was being used. On his evidence, the window never was opened until after December 2013, a period of over ten years. He had no idea there was even a W.C behind the window until the litigation started. The closure of the shop had no impact on what he witnessed. They assumed ventilation to the interior was provided through the

ventilation disc in the top flap window. They proceeded on that basis to erect 2 wire strands across the window for the purpose of growing plants: he accepts that they would not prevent the window being opened, but the point was, they thought nothing about doing it in the first place, and similarly with placing the window box on the sill.

19. Mr Wilkinson is less emotional about the litigation. When he first saw the window it appeared to be in disrepair and stuck shut. He never saw it open before May 2014 when he was shocked by his first confrontation with Mr Whitley. He has no clear recollection of ever seeing the top flap window opened, but recalls no oversail. He met Mr Hubbard only once in 2003 when he went round to introduce himself as a new neighbour. He has an academic medical background and regards an outward opening window as potentially hazardous, apart from the sense of infringement of space. As he said in cross examination, there are numerous alternatives which provide ventilation without oversailing their garden (eg a sash window) which Mr Whitley confirmed to me. As to his work routine, from 2003 he held university positions as well as posts in the Cabinet and the NHS when he would have ordinary office hours except for the 2 – 3 days a month he would work from home, and when he would be at home before and after international travel. For the last three years, he has worked at home and travelled more frequently, as opposed to going to the office, from which I deduce that if Mr Hubbard was correct, Mr Wilkinson would have noticed the window being opened.

20. On the one hand Mr Hubbard says the windows were opened regularly and in full from the late 70s for over 30 years. On the other, there is evidence from the Respondents that this was not the case. Granted, the immediate and ready explanation is that they were not all there at the same time, and that is a factor which I have to take into account in this case. Even so I am struck by the fact that the Respondents did not see the side window open at all until after January 2014, and even more so by the conclusions to be drawn from the evidence relating to the window box. If Mr Hubbard's evidence is to be accepted, the window box would have been knocked off the window sill in a matter of days. It was not. No-one complained about the obstruction. The only conclusion (see above) is that Mr Hubbard's evidence was exaggerated. Prior to placing the window box on the sill,

whether in 2005 or 2006, two or three years after they moved into the flat, the Respondents had no knowledge that the window opened outwards into their property. It follows that on the balance of probabilities that the window if opened, would be closed fairly promptly and that the side hanging window was not used for a period of 3 years. Further, having considered Mr Hubbard's evidence overall, I reject the suggestion that it was left open for lengthy periods of time for general ventilation. As Mr Wilkinson pointed out, he observed Mr Hubbard's general practice was to leave the shop door open if necessary. I return to this below.

Whether right claimed is capable of being an easement

21. Most cases dealing with windows concern rights to light, but not this case. When pressed to describe the easement claimed in closing submissions, Mr Whitley submitted that the Applicant (i) was no longer seeking a right to air because the 1993 reservation prevented him from claiming such but (ii) a (mere) right to open a window because that was not prevented by the 1993 reservation in express terms.

22. In *Bradley v Heslin* at paragraph 69 Norris J held that the right to hang and close a gate is capable of being an easement, and referred for authority to two older cases (1832 and 1864) demonstrating that the right to hang a clothesline or overhang a bowsprit were capable of being easements. See also *Gale* at 1-76. However, merely opening a window for no reason is arguably not capable of being an easement (as it does not accommodate or benefit 195, as Mr Leport submits) and the reality is that this was presented throughout as a case based on opening the window for ventilation or purging foul air. That is clearly capable of being an easement as a matter of principle: see *Megarry & Wade* at 27-008, 27-014, 30-023. See also *Gale* at 1-42: *"It is settled that easements of ... air may be acquired but only for the benefit of particular windows or defined apertures*", being rights between immediate neighbours, and *"the apertures entitled to air will be plain and obvious."*

23. The nature of the right claimed and the facts recited above have an impact on the alleged method of acquisition.

Prescription

24. As to the user, as Norris J held in *Bradley v Heslin* at paragraph 72 *"Regular intermittent use suffices. But such intermittent user has to have such character, degree and frequency as to indicate the assertion of a continuous right and of a right of the measure of that claimed."* The implications of these requirements vary in this case, depending on the mode of acquisition of the easement asserted by the Applicant.

25. The fact that the side window was not opened for three years is therefore fatal to the claim based on prescription ie lost modern grant. In this context therefore, I do not have to reach firm conclusions about the nature of the easement claimed by the Applicant. The Applicant cannot establish user as set out above for a period of twenty years from January 1994 when the title to the outbuilding was severed from the rest of Camden's land for the first time, therefore enabling time to run for the purpose of a prescriptive claim. Even if I concluded the right claimed could be an easement, the claim would fail.

26. At the outset of the case Mr Whitley, who had been unaware of the requirement for separate dominant/tenement owners for a prescriptive claim, had not taken into account the fact that time could only run for a prescriptive claim from January 1994. He therefore amended his case to run alternative arguments based on *s62 LPA 1926* and *Wheeldon v Burrows,* to which I turn now.

Wheeldon v Burrows

27. The basic principle was laid down in the case as follows:- *"On the grant by the owner of a tenement or part of that tenement as it is used and enjoyed, there will pass to the grantee all those continuous and apparent easements (....quaesi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."* See also *Megarry & Wade* 28-020, *Linvale Investments* at paras 36-40, *Wood v Waddington* paras 14 et seq.

28. Two points arise. Again, I do not have to reach a firm conclusion about the nature of the easement claimed. First, in my judgment the right to open the window so that it oversails, without more being involved (as Mr Whitley submitted was his case in closing), is not necessary for the reasonable enjoyment of the land granted. Even if in reality he seeks to be able to open either window in full for either circulating air or for purge ventilation, I find that is not necessary for the reasonable enjoyment of the land granted either. The fact is, as Mr Whitley accepted, there are alternatives which do not involve a side opening window. In closing he said *"I don't need to open a window to get air to come in"*. A window of sorts may be necessary for the reasonable enjoyment of the outbuilding but it is not necessary to have a side opening window extending over the Respondents' air space to achieve purge ventilation or air circulation. The same logic applies to the top flap window so far as it oversails the Respondents' land. Mr Whitley cites paragraph 50 of *Linvale* to support his position on necessity but that paragraph is not directly referable to *Wheeldon v Burrows*, which argument the Judge had already rejected at paragraph 40. However, I reject Mr Whitley's submission that it assists him. Judge Walden-Smith said: *"The issue that the court has to determine is not whether the **land** can be used in some alternative way but whether the **easement** is necessary for the land to be used in the way contemplated by the parties"* (my emphasis). The part of the dominant land which is relevant is the outbuilding which contains the WC: that can be used as a WC as intended without having the windows oversailing the Respondents' land because the issue of ventilation can be addressed by other means. There is no evidence that only with these windows configured and used as Mr Whitley alleges he is entitled to, can the Applicant use the W.C. (In his submissions Mr Whitley urged that for effective purge ventilation, the side window had to be opened wide: this is inconsistent with his submission that the case is not about ventilation, just about opening the window. This inconsistency demonstrates some of the difficulties in finding a solid basis for making the application clear and defined.)

29. The second point was taken by Mr Leport. He says there has to be evidence that the vendor (LB Camden) opened the window before the transfer to Mr Hubbard. He did not expand his submission to clarify whether his proposition applies to the lettings or the sale of the freehold in 1994 and relies on the use of the word

"grantor" in the basic statement of principle, without dealing with the various capacities which a grantor might inhabit eg by employees or tenants. In this case the chronology is not clear. Camden owned the freehold of the houses on Mecklenburgh Street and 195-199 Gray's Inn Road from the 1920's. It is highly unlikely that Camden itself (because Camden itself obviously could not, as submitted was required by Mr Leport), opened the window, though the window in this case was identified by Mr Whitley as being installed in the 30's or 40's. I approach his submission as follows. I have no idea whether *prior* to Mr Hubbard becoming a tenant in the late 70's, whether the window was opened or not, or by whom. There is no evidence of relevant user then to assist the Applicant in the application of the rule in *Wheeldon v Burrows*.

30. Taking the next stage, it is clear that Mr Hubbard opened the window when he was Camden's tenant. In *Kent v Kavanagh* Lord Justice Chadwick said as follows:-

> *"43. The two propositions which, together, comprise the rule (or rules) in Wheeldon v Burrows are confined, in their application, to cases in which, by reason of the conveyance (or lease), land formerly in common ownership ceases to be owned by the same person. It is in cases of that nature that, in order to give effect to what must be taken to be the common intention of the grantor and the grantee, the conveyance (or lease) will operate as a grant (for the benefit of the land conveyed) of such easements over the land retained by the grantor as are necessary to the reasonable enjoyment of the land conveyed. But, because the principle is founded on the common intention of the parties, the easements necessary to the reasonable enjoyment of the land conveyed are those which reflect (and, following separation of ownership, are needed to give effect to) the use and enjoyment of the land conveyed at the time of the conveyance and while that land and the retained land were in the common ownership of the grantor.*
>
> *44. It is necessary to ask how far either of the two propositions which Lord Justice Thesiger identified in Wheeldon v Burrows can have any application in a case* ***where, at the time of the conveyance, the land conveyed and the land retained, although in common ownership, were not in common occupation****. In particular,* ***can either of the two propositions have any application where the land conveyed was occupied by a tenant holding under a lease from the common owner.*** *Assuming, for the moment, that the land is not conveyed to the tenant, there are, of course, two distinct questions: (i) what easements over the retained land pass with the conveyance of the freehold and (ii) what easements are reserved out of the land conveyed for the benefit of the retained land. The rights of the tenant over the land retained; and the rights of the grantor (as owner of the land retained) over the land held under the lease are unaffected by the conveyance. Prima facie, those rights will depend on the terms of the lease – but may include rights which passed*

to the tenant under the first rule in Wheeldon v Burrows when the lease was granted.

45. In the absence of an express grant, ***the answer to the first of those questions - what easements over the retained land pass with the conveyance of the freehold – turns, as it seems to me, not on any application of the first rule in Wheeldon v Burrows but on the operation of section 62 of the Law of Property Act 1925.*** *Under section 62 a conveyance of land operates to convey with the land "all ways, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land . . . or, at the time of conveyance, demised . . . or enjoyed with . . . the land". I can see no reason why those words are not apt to convey, with the freehold, rights of way over the retained land which are, at the time of the conveyance, enjoyed by the tenant in occupation of the land conveyed. For my part, I find that analysis more attractive than one which relies upon the first rule in Wheeldon v Burrows. It seems to me an unnecessary and artificial construct to hold that the grantor, as common owner and the landlord of the land conveyed, is himself using the rights over the retained land which his tenant enjoys under the lease.*

54. The second ground of appeal is that the rule in Wheeldon v Burrows cannot have effect, on a conveyance by a landlord of the freehold to one tenant on enfranchisement, so as to convert into an easement a right enjoyed by that tenant over the land of another tenant of the same landlord in circumstances where (i) there is no evidence that the landlord has consented to the exercise of that right or (ii) where it has not been shown that the right was being exercised at the time when the relevant conveyance was made. .... I accept that proposition. In particular, I accept that the first limb of the rule in Wheeldon v Burrows has no application on the enfranchisement of part of land in common ownership." (My emphasis.)

31. It follows that in the circumstances which applied to the 1994 conveyance, *Wheeldon v Burrows* does not apply, though it might have done (if evidence were available) to the first tenancy. Although the *Kent v Kavanagh* point is not necessarily the precise point being made by Mr Leport (which he did not expand, and he did not cite the authority), it is another reason why *Wheeldon v Burrows* does not apply, in addition to the primary reason I give above in paragraph 28.

S62 LPA 1925

32. Mr Whitley regards this as his strongest case: (i) the "necessary" test required by *Wheeldon v Burrows* does not apply (*Wood v Waddington* paragraph 36); (ii) it would apply on the transfer of the freehold to Mr Hubbard from Camden and (iii) it could include a right exercised by Mr Hubbard permissively during his tenancies as opposed to being granted expressly by the lease agreements (*Alford v*

Hannaford paragraph 35). In brief *s62* provides *"(1) A conveyance of land ... shall be deemed to include and shall ... operate to convey ... all liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses or other buildings conveyed, or any of them, or any part thereof, or, at the time of the conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof. ..... (4) This section applies only if and as far as a contrary intention is not expressed in the conveyance ...."*.

33. In my judgment the starting point is that the evidence of Mr Hubbard as to user prior to 1993 and 1994 demonstrates the required user of the windows to qualify as an easement, right or advantage which at the time of the conveyance was enjoyed with the outbuilding so as to justify the application of *s62*. Compare eg *Linvale Investments* paras 29-33. Something rather less than an easement can qualify under *s62*.

34. Mr Leport for the Respondents submits that *s62* does not apply because a contrary intention was expressed in the relevant conveyance. The 1993 transfer of the main part of 195-199 is not available (and so it is impossible to find that *s62* was disapplied expressly) but it is plain from the register entries that it contained the reservation (*"There is reserved to the Transferor all rights or easements of light and air which would restrict or in any way interfere with the free use and enjoyment of any adjacent or neighbouring land of the Transferor for building or any other purposes"*) described above. The first impression on reading this reservation is that it reads oddly: the normal reservation of rights or easements of light and air might read along the following lines: *There is reserved to the Transferor all rights or easements of light and air [notwithstanding they] would restrict or in any way interfere with the free use and enjoyment [etc] of land of the Transferee for building or other purposes* (my emphasis). The follow up transfer of the outbuildings did not correct the fact that this was a transfer out of the land benefited by the reservation. It contained no express words disapplying *s62* (p105). Further, the outbuildings are registered with the *benefit* rather than the *burden* of the above reservation, as is the freehold of the Respondents' property:

the fact that the outbuildings appear to have the benefit of an oddly worded reservation in circumstances which suggest that this might not have been intended, does not answer the *s62* point.

35. Despite the absence of any express disapplication of *s62*, Mr Leport submits that taken overall the 1993 and 1994 transfers effectively evidence a contrary intention because the reservation in the 1993 transfer (which he submits is sufficient to disapply s62) must also have been intended to apply to the 1994 transfer – except that it clearly did not, and no-one rectified the transfer, thought to clarify it, or amend the property register to remove the reference to the reservation. Where the situation is as confused and jumbled as this, it would be hard to find the clarity required by the authorities to disapply *s62*. The situation appears to be that it was not considered. First, the reservation in the 1993 transfer does not in my judgment disapply *s62*, and secondly, it is impossible to stretch the 1994 transfer to justify that construction. Mr Leport's submissions virtually require a re-writing of both transfers, and that is not open to me on this application and certainly not on the total lack of evidence before me.

36. In the circumstances I conclude that the right to open both windows passed by s62 on the transfer in 1994 of the outbuildings, subject to the reservation in favour of the Respondents' titles – whatever its meaning might be, it is not enough to exclude the right to open the windows, though the Respondents might well be entitled to obstruct the user even if by way of an actionable nuisance: see eg *Gale* at 13-21. Such a right would affect the Respondents' leasehold title by *s70(1)(a) LRA 1925.*

Schedule 4

37. Neither party had considered the provisions of *Schedule 4* prior to the hearing. In my judgment this is a paradigm case for considering whether or not to accede to the application, the Applicant having succeeded on a ground which was not part of his original application, and which during the hearing he sought to justify as a mere right to open a window, without any particular purpose to it. As the decision indicates, I am far from concluding that this would qualify as an easement, and the ground on which the Applicant has succeeded is - narrowly - under *s62*, which is

generous in its concept of rights passing under it in circumstances such as this case. As an alteration of the register, pursuant to *paragraph 5(b)(c), Schedule 4*, I am required to *"approve the application unless there are exceptional circumstances which justify not making the alteration."*

38. Exceptional circumstances exist in this case: they justify refusing to make the alteration. First, I consider Mr Whitley's own withdrawal in submissions of a case based on the need to ventilate (except where he required the contrary case for *Wheeldon v Burrows*), even if an apparent concession which he might not have needed to make, underlines the somewhat pointless or shifting nature of the rights claimed by the Applicant, which in turn questions the reasons behind the application (what is it for?). That is emphasised by the second point, which is that even if in reality this is a case about ventilation (as demonstrated in his *Wheeldon v Burrows* submission), that can be obtained by alternative means, as Mr Whitley freely accepted. Thirdly, I accept the Respondents' evidence that this problem only came to light for them shortly after the Applicant acquired the premises, and therefore the user has, since they acquired their property and up to the time of the acquisition by the Applicant, been such as to be not an issue: that suggests that the user has for the years since 2003 been of little or no impact, as my findings on the facts for the prescription argument suggest. Fourth, the user has a disproportionate impact on the Respondents' ordinary and regular use of their property: it is clear from their evidence that a great deal of upset has been caused, not only by the immediate impact of the window/s opening over their garden, but by what they describe as a significant change in the status quo, which has disturbed their account of their ordinary use of the garden (which I have accepted). Fifth, where the evidence is that they were untroubled by the window opening for over ten years since their acquisition of the flat, it is a real issue as to whether that state of affairs should be susceptible to change by reason of giving effect to an application based on little practical substance.

39. In the circumstances, if the Respondents who have succeeded overall, wish to apply for costs, and the parties cannot agree terms, they should make an application accompanied by a schedule suitable for summary assessment (including grades of fee earners etc, but only from the date of the reference), by

5pm 20th February. The Applicant will have until 5pm 1st March to respond, after which I will deal with costs.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 3rd FEBRUARY 2017