LC1639

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

Case reference	**:**	**LON/OOAK/OCE/2015/0214**
Property	**:**	**15 and 17 Stonard Road, Palmers Green, London N13 4DJ**
Applicant	**:**	**Angela McAuley ("the tenant")**
Representative	**:**	**Boulter & Company, solicitors**
Respondent	**:**	**Hilham Properties Limited ("the landlord")**
Representative	**:**	**Conway & Conway, solicitors**
Type of application	**:**	**An Enfranchisement Claim**
Tribunal members	**:**	**Angus Andrew Helen Bowers BSc (Econ) MSc MRICS**
Date and Venue of Hearing	**:**	**30 January 2018 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**14 February 2018**

DECISION

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Decision

1. The transfer should not include either a right to retain the existing car-port or a right to park on the side passage.

2. The transfer should not include a tenant's covenant "not to prevent" the use of the side passage by the landlord and its tenants and occupiers of the retained land and their respective successors in title.

3. The transfer should include the mutual rights of support, services and service conduits contemplated by paragraph 3 of Schedule 3 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") for the benefit respectively of both the transferred property and the retained land. Such rights do not extend to a right to install and use service conduits of a type that do not currently exist.

4. Save as expressly agreed the transfer should not include general rights of access to and inspection of either the transferred property or the retained land.

Our previous decision and subsequent procedural history

5. On 18 December 2015 we issued a decision on an application by the tenant under section 24(1) of the 1993 Act ("our previous decision"). We determined that the property to be transferred to the tenant did not include the passage to the side and rear of the property. The tenant's application for permission to appeal that decision was refused both by ourselves and by the Deputy President of the Upper Tribunal. Our previous decision sets out the background to this case and we do not propose to repeat it here.

6. In our previous decision we also said that if the parties were unable to agree the rights to be granted over the passage in favour of the tenant they could by 15 January 2016 apply for further directions and in the absence of such an application the tribunal would close its file.

7. Nothing further was heard from the parties until by letter of 8 June 2017 the tenant requested the tribunal to restore the case and determine the form of the transfer deed. At a subsequent case management hearing on 6 September 2017 the landlord agreed to the tenant's request. After the landlord had identified the other long leaseholders within 15 to 61 Stonard Road directions were issued on 25 October 2017. Copies of the directions were sent to the other long leaseholders and they were given the opportunity to apply to be joined in these proceedings in particular if they wished to oppose the claimed right to park and maintain a car-port on the side passage. None of the other long leaseholders applied to be joined.

8. At the hearing on 30 January 2018 the tenant was represented by Stephen Evans and the landlord by Daniel Bromilow, both of whom are barristers.

The side passage

9. At the hearing we heard oral evidence from the tenant and from Martin Ricketts who is director and shareholder of the landlord, which is a family run company that has owned the freehold of 15-61 Stonard Road since 1956. Also included in the hearing bundle were two short statements from Claire Morley and Kirsty Gray who had both lived at 17 Stonard Road. Although they did not appear for cross-examination Mr Bromilow said that the landlord did not contest their evidence. On the basis of this evidence we were able to establish the following relevant facts.

10. At some time after 1979 but before 1982 the then owner of 15 Stonard Road constructed the existing covered car-port. This involved constructing a high fence with a pedestrian gate across the width of the side passage. The fence forms the back of the car-port. Thus from at least 1982 no one including either the landlord or the other long leaseholders have been able to gain vehicular access from Stonard Road to the rear section of the side passage beyond the fence and pedestrian gate.

11. In 1983 the tenant purchased 17 Stonard Road and in 2002 she purchased 15 Stonard Road. She lived in 17 Stonard Road from 1982 to 2002. Since 2002 she has let both flats although she still lives in the vicinity and visits them from time to time.

12. From 1982 to about 2014 the side passage was separated from Stonard Road by wrought iron gates that when open permitted vehicular access to the side passage and the car-port. In about 2014 the gates were removed and the entrance substantially enlarged to permit the resident of flat 17 to park in front of flat 15. Thus since about 2014 the side passage has been open to the highway.

13. It follows from the above that since 1982 it would have been possible for either the landlord or the other long leaseholders to exercise a pedestrian right of way over the side passage by using the pedestrian gate behind the car-port. Although the tenant's evidence cannot for obvious reasons be conclusive we are satisfied and find that since at least 1982 neither the landlord not any of the other long leaseholders have exercised their rights of way over the side passage that have accordingly fallen into disuse. Indeed this finding was not seriously challenged by either Mr Rickets or Mr Bromilow.

14. The reason for this disuse is not entirely clear but the most likely explanation is that the landlord and the other long leaseholders have used the pedestrian passage between the 6th and 7th properties in the terrace to access the 5 foot wide passage that runs along the rear of the terrace.

15. Since 1982 only the residents of flat 15 and more recently the residents of flat 17 have used the side passage from Stonard Road to the fence and pedestrian gate to the rear of the car-port. The residents have used the front part of the passage to access the car-port and the hard standing to the front of flat 15 whilst the residents of flat 15 have used the covered car-port to park their cars.

Issues in dispute

16. Included in the hearing bundle was a draft transfer that had been copiously amended in red ink by the tenant's solicitor. We pointed out to the parties that the terms of acquisition to be determined by this tribunal have been described as "heads of terms" (see for example Lord Justice McCombe in Bolton v Godwin-Austin[2014] EWCA Civ 27) and that it is unreasonable to expect this tribunal to engage in the detailed drafting of the transfer.

17. The car-port and the right to park aside the transfer should be a simple transfer of part. Precedents for such transfers can be found in many standard conveyancing works and are in common use. The inability of the parties and their solicitors to agree even the basic contents of such a transfer is a sad reflection of the intransigent attitude seemingly adopted by both parties during this protracted dispute.

18. That said the essential issues between the parties can be encapsulated under the following headings:-

    a. Whether the transfer should include rights for the tenant to retain the car-port and to park on the side passage.

    b. Whether the transfer should include a tenant's covenant "not to prevent" the use of the side passage by the landlord and its tenants and occupiers of the retained land and their respective successors in title.

    c. The nature and extent of any rights of support, services and service conduits to be included in the transfer and whether any such rights should extend to a right to install and use service conduits of a type that do not currently exist.

    d. Whether the transfer should include general rights of access to and inspection of either the transferred property or the retained land.

Statutory framework

19. In the context of this dispute the relevant statutory provisions are to be found in sections 1 and 34(9), which provides that any transfer of the

freehold interest shall unless otherwise agreed comply with Schedule 7. Section 1 and Schedule 7 are set out in the appendix to this decision.

<u>Reasons for our decisions</u>

<u>Whether the transfer should include rights for the tenant to retain the car-port and to park on the side passage.</u>

20. In asserting these rights on behalf of the tenant Mr Evans accepted that he faced two hurdles. Firstly, these rights were incompatible with the rights of way over the side passage granted by the landlord in favour of the other long leaseholders. Secondly, if the tenant were to succeed she must demonstrate that the rights were enjoyed by her *"under the terms of her lease"* as required by section 1(4) of the 1993 Act.

21. As far as the first hurdle was concerned Mr Evans asserted that the rights had been abandoned. As far as the second hurdle was concerned he asserted that although the rights were not expressly granted by the leases of flats 15 and 17 the rights could be implied. We examine each of these arguments in turn.

22. The abandonment argument essentially rests on 3 facts referred to above. That is the erection of the fence to the rear of the car-port preventing vehicular access, the failure of the other long leaseholders over a period of at least 36 years to use the side passage either for pedestrian or vehicular access and their failure to apply to the tribunal to be joined in the proceedings despite being given the opportunity to do so.

23. As Mr Bromilow pointed out the law on abandonment of rights of way is admirably set out in the judgement of Briggs LJ in Dwyer v Lord Mayor and Citizens of the City of Westminster [2014] 2 EGLR 5. The facts of that case are strikingly similar to the facts of this case. A right of vehicular and pedestrian way over a passage had been blocked for a period of over 40 years by a market trader who had used the passage to store his stalls and other equipment. During that time the passage was blocked at both ends so that the right of way was incapable of being exercised even by pedestrian access. Indeed during that time the trader acquired a registered possessory title to the passage by adverse possession.

24. Having noted with approval the observations in Gale on Easements (19th ed) at para 12-104, Briggs LJ concluded his judgement with these words:-

> *"As I have described the relevant facts, this was a straightforward case of very long non-user of a Passageway as a right of way, during a period when neither the freehold owner of the dominant land, nor anyone else using any part of that land with the freeholder's consent (whether as lessee, tenant, occupier or mere invitee) had any use of the Passageway as a right of way. There was no acquiescence in some*

alteration of the servient land upon which a case of abandonment could be mounted, as indeed the judge held, at para 99."

Having recited the first instance judge's findings of fact he continued:

"On these findings, this was a simple case of mere non-user incapable of supporting a conclusion that the right of way had been abandoned for all time. There had been no abandonment at all."

25. The only distinguishing feature in this case is the failure of the other long leaseholders to apply to be joined in these proceedings. We do not however consider that such failure can be described as "acquiescence", which Briggs LJ considered to be a crucial element of abandonment. Mere silence cannot be taken as consent. In any event the other long leaseholders' failure to apply to be joined is more likely to be a simple and understandable reluctance to become involved in the current protracted dispute.

26. Consequently it follows that the tenant's case falls at the first hurdle. We nevertheless briefly consider her second argument, namely that she enjoyed the disputed rights *"under the terms of her lease"*.

27. In asserting that the two disputed rights could be implied under the terms of the tenant's lease Mr Evans relied on the Scottish House of Lords case of Moncrief and another v Jamieson and others [2007] 1WLR 2620, HL (Sc) that, he helpfully pointed out, had been considered by the Court of Appeal in Waterman v Boyle [2009] EWCA Civ 115, CA.

28. Moncrief certainly established that a right to park was capable of being implied into a right of vehicular access. It is however of no assistance in deciding whether a right to park can be implied in this case. As Chadwick LJ observed in Waterman the facts of Moncrief *"were quite exceptional.........and the case turned on its special facts"*.

29. More assistance can be obtained from the judgement of Chadwick LJ in Waterman when he said at paragraph 29:

"The test to be applied is whether, having regard to the circumstances at the time of the transfer...., it would be a reasonable use, in the sense of a reasonably necessary use, of the green land to use it for stationing vehicles for the duration of the user's visit to the property".

30. It is therefore apparent that one has to look at the intention when the lease was granted in 1977 (see also paragraph 21 of our previous decision). As we concluded in paragraph 22 of our previous decision when the lease was granted the parties must have envisaged that the passage would have provided a means of vehicular access to the rear pedestrian passage for the use of all the long leaseholders and other residents of the terrace. Both the

physical layout of the terrace and the grant of a right of way over the passage *"in common with all persons entitled thereto"* would have alerted the original lessee to the fact that it was not intended that he would have the exclusive use of the passage.

31. One cannot impute an intention to exercise a right to park on the part of the original lessee by the later erection of the car port by a subsequent owner. Certainly that was not the landlord's intention because it continued to grant leases of the other flats with rights of way over the passage.

32. Neither can it be said that, as in Moncrief, the right to park was reasonably necessary for the lessee's enjoyment of the property. These are London street properties and the expectation would have been that occupiers' cars would be parked on Stonard Road.

33. Consequently and for each of the above reasons we conclude that the tenant is not entitled either to a right to retain the car-port or to park on the side-passage.

Whether the transfer should include a tenant's covenant "not to prevent" the use of the side passage by the landlord and its tenants and occupiers of the retained land and their respective successors in title.

34. In asserting the landlord's right to include this covenant in the transfer Mr Bromilow relied on paragraph 5 of Schedule 7 to the 1993 Act that commences: *"As regards restrictive covenants, the conveyance shall include-"*. In his *skeleton* argument he relied on sub-paragraph (1)(b) but during the hearing he shifted his ground and relied on sub-paragraph (1)(c).

35. We make two initial observations. Firstly and in contrast to a covenant not to park on the passage we are far from convinced that that the proposed clause is, on its true construction, a restrictive covenant. Secondly it is not immediately obvious to us that the proposed clause is required either for the protection of the landlord or the other long leaseholders. Mr Ricketts in evidence said that the landlord had no intention of interfering with the tenant's current use of the passage. In answer to Mr Evan's he said: *"Ms McAuley can do as she has always done"*. If the other long leaseholders wish to reassert their rights of way over the passage then they can do so independently of and without the assistance of the landlord. Whether they would succeed in obtaining injunctive relief after such a long period of time is another matter.

36. Those points aside Mr Evans pointed out that sub-clause (1)(c) only permits restrictive covenants that *"restrict the use of the relevant premises"* whereas the proposed clause restricts the use of the passage that is not part of the relevant premises. When we invited Mr Bromilow to respond he accepted that *"it was a good point"*.

37. Whether this amounted to a concession was not entirely clear but we agree with his assessment. The proposed clause is not within the contemplation of paragraph 5 and the landlord cannot insist on its inclusion in the transfer.

The nature and extent of any rights of support, services and service conduits to be included in the transfer and whether any such rights should extend to a right to install and use service conduits of a type that do not currently exist.

38. We have little doubt that the rights that are necessary for the enjoyment of both the property and the retained land would in any event be implied on a transfer of part. Equally we tend to agree with the tenant that the likelihood is that all the service conduits run directly from Stonard Road and that express rights to run service conduits across either the property or the retained land are unnecessary.

39. That aside and in the absence of agreement the rights and reservations to be included in the transfer are clearly set out in paragraph 3 of Schedule 7 and it is difficult to understand why the landlord's solicitor should depart from it in drafting the transfer.

40. To the extent that it may assist the parties we make the following observations:-

   a. The rights envisaged by Schedule 7 are intended to be for the benefit of the transferred property and the retained land. They are not intended to replicate the rights granted and reserved by the existing leases of the flats 15 and 17 that are of little or no assistance in drafting the transfer; and

   b. Schedule 7 clearly envisages that any rights reserved to the landlord should mirror those granted to the tenant. To put it another way, absent some special circumstance there is nothing in the Schedule that would entitle the landlord to reserve rights that are more extensive than those granted to the tenant; and

   c. The use of the words *"before the appropriate time"* indicates that the rights envisaged by Schedule 7 are those that currently exist and neither party can for example insist on the inclusion of rights to install and use service conduits of a type that do not currently exist

Whether the transfer should include general rights of access to and inspection of either the transferred property or the retained land.

41. We accept that it is not unusual in transfers of part to include mutual rights of access for the maintenance of the transferred property and the retained land. The parties are entitled to include such rights if they so wish.

42. However in the absence of agreement there is nothing in Schedule 7 that permits either party to insist on the inclusion of a right of access. As Mr Evans speculated that may well be because Parliament was conscious of the rights granted in the previous year by the Access to Neighbouring Land Act 1992. Again and for the reasons given above the landlord cannot rely on the existing leases in asserting a right of entry onto the property.

In conclusion

43. Apart from consideration of any application for permission to appeal we are satisfied that we have now determined the terms of acquisition in dispute and that in consequence this tribunal's jurisdiction is at an end. If the parties wish to continue their dispute over the transfer terms they should look to section 24(3) of the 1993 Act.

Name: Angus Andrew **Date: 14 February 2018**

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).

Appendix of relevant legislation

Leasehold Reform, Housing and Urban Development Act 1993

Section 1

1. The right to collective enfranchisement.

(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf—

(a) by a person or persons appointed by them for the purpose, and
(b) at a price determined in accordance with this Chapter;

and that right is referred to in this Chapter as "the right to collective enfranchisement".

(2) Where the right to collective enfranchisement is exercised in relation to any such premises ("the relevant premises")—

(a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and
(b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.

(3) Subsection (2)(a) applies to any property if at the relevant date either—

(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or
(b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).

(4)The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—

(a) there are granted by the person who owns the freehold of that property—

(i) over that property, or
(ii) over any other property,

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

(b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted.

(5) A claim by qualifying tenants to exercise the right to collective enfranchisement may be made in relation to any premises to which this Chapter applies despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise that right.

(6) Any right or obligation under this Chapter to acquire any interest in property shall not extend to underlying minerals in which that interest subsists if—

(a) the owner of the interest requires the minerals to be excepted, and
(b) proper provision is made for the support of the property as it is enjoyed on the relevant date.

(7) In this section—

- "appurtenant property", in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;
- "the relevant premises" means any such premises as are referred to in subsection (2).

(8) In this Chapter "the relevant date", in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13.

Schedule 7

CONVEYANCE TO NOMINEE PURCHASER ON ENFRANCHISEMENT

Interpretation

1. In this Schedule—

(a) "the relevant premises" means, in relation to the conveyance of any interest, the premises in which the interest subsists;

(b) "the freeholder" means, in relation to the conveyance of a freehold interest, the person whose interest is to be conveyed;

(c) "other property" means property of which the freehold is not to be acquired by the nominee purchaser under this Chapter; and

(d) "the appropriate time" means, in relation to the conveyance of a freehold interest, the time when the interest is to be conveyed to the nominee purchaser.

General

2. (1) The conveyance shall not exclude or restrict the general words implied in conveyances under section 62 of the Law of Property Act 1925, or the all-estate clause implied under section 63 of that Act, unless—

(a) the exclusion or restriction is made for the purpose of preserving or recognising any existing interest of the freeholder in tenant's incumbrances or any existing right or interest of any other person, or

(b) the nominee purchaser consents to the exclusion or restriction.

(2) The freeholder shall not be bound—

(a) to convey to the nominee purchaser any better title than that which he has or could require to be vested in him, or

(b) to enter into any covenant for title beyond those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee;

and in the absence of agreement to the contrary the freeholder shall be entitled to be indemnified by the nominee purchaser in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(3) In this paragraph "tenant's incumbrances" includes any interest directly or indirectly derived out of a lease, and any incumbrance on a lease or any such interest (whether or not the same matter is an incumbrance also on any interest reversionary on the lease); and "incumbrances" has the same meaning as it has for the purposes of section 34 of this Act.

Rights of support, passage of water etc.

3. (1) This paragraph applies to rights of any of the following descriptions, namely—

(a) rights of support for a building or part of a building;

(b) rights to the access of light and air to a building or part of a building;

(c) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;

(d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions;

and the provisions required to be included in the conveyance by virtue of sub-paragraph (2) are accordingly provisions relating to any such rights.

(2) The conveyance shall include provisions having the effect of—

(a) granting with the relevant premises (so far as the freeholder is capable of granting them)—

(i) all such easements and rights over other property as are necessary to secure as nearly as may be for the benefit of the relevant premises the same rights as exist for the benefit of those premises immediately before the appropriate time, and

(ii) such further easements and rights (if any) as are necessary for the reasonable enjoyment of the relevant premises; and

(b) making the relevant premises subject to the following easements and rights (so far as they are capable of existing in law), namely—

(i) all easements and rights for the benefit of other property to which the relevant premises are subject immediately before the appropriate time, and

(ii) such further easements and rights (if any) as are necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date.

Rights of way

4. Any such conveyance shall include—

(a) such provisions (if any) as the nominee purchaser may require for the purpose of securing to him and the persons deriving title under him rights of way over other property, so far as the freeholder is capable of granting them, being rights of way that are necessary for the reasonable enjoyment of the relevant premises; and

(b) such provisions (if any) as the freeholder may require for the purpose of making the relevant premises subject to rights of way necessary for the reasonable enjoyment of other property, being property in which he is to retain an interest after the acquisition of the relevant premises.

Restrictive covenants

5. (1) As regards restrictive covenants, the conveyance shall include—

(a) such provisions (if any) as the freeholder may require to secure that the nominee purchaser is bound by, or to

indemnify the freeholder against breaches of, restrictive covenants which—

(i) affect the relevant premises otherwise than by virtue of any lease subject to which the relevant premises are to be acquired or any agreement collateral to any such lease, and

(ii) are immediately before the appropriate time enforceable for the benefit of other property; and

(b) such provisions (if any) as the freeholder or the nominee purchaser may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of any such lease or collateral agreement as is mentioned in paragraph (a)(i), being either—

(i) restrictions affecting the relevant premises which are capable of benefiting other property and (if enforceable only by the freeholder) are such as materially to enhance the value of the other property, or

(ii) restrictions affecting other property which are such as materially to enhance the value of the relevant premises; and

(c) such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which—

(i) will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired, but

(ii) will materially enhance the value of other property in which the freeholder has an interest at the relevant date.

(2) In this paragraph "restrictive covenant" means a covenant or agreement restrictive of the user of any land or building.