FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAN/OLR/2022/ 0355**
Property	:	**2 Broadway Mansions, Effie Road, London SW61EL**
Applicant	:	**Peter Hensher(1) Stephanie Hensher (2)**
Representative	:	**Ms Gray**
Respondent	:	**Lambert Pressland Limited**
Representative	:	**Mr Alford**
Type of Application	:	**Lease extension terms**
Tribunal Members	:	**Judge Shepherd** **Evelyn Flint FRICS**

Date and venue of Hearing	:	**8th ~~and 9th~~ November 2022**
Date of Decision	:	**13 January 2023**

DECISION

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1. This is an application for determination of premium or other terms of acquisition remaining in dispute made pursuant to s.48(1) Leasehold Reform Housing and Urban Development Act 1993 (“The Act”). The case concerns a lease renewal of premises at Flat 2, Broadway mansions, Effie Road, London, SW6 1ATL (“The premises”). The Applicants are Peter Henshire and Stephanie Henshire, the current leaseholders of the premises. The Respondents are Lambert Pressland Limited the freeholder of the premises.

2. When the matter came before the tribunal for a two day hearing the sole remaining issue between the parties was the form of the lease. The premium had been agreed. The applicants sought to include an additional clause in the lease adding to the schedule of the extension deed :

“the demise of the property referenced at clause one of the lease shall include the surface area of the balcony on the first floor serving the flat to which the lessee has use and access and which is shown shaded.. on the attached plan”.

3. This variation was opposed by the Respondents and this formed the basis of the dispute dealt with by the tribunal. The chronology of relevant events runs as follows:

4. The Applicants served a notice of claim pursuant to the act on the 22nd of November 2021. With reference to the terms of a new lease the Applicants sought the same terms as the existing lease save for the following modifications under section 57 of the Act:

3.1 a new lease plan to include the demise of the current balcony area within the flats demised to reflect the current layout and the exclusive use of the balcony area appurtenant to the flat.

5. The Respondents served a counter notice on the 25th of January 2022 in which the variation of the lease in relation to the balcony area was disputed. thereafter the parties made some progress in resolving the premium but the issue in relation to the balcony area remained live and as already indicated this was the sole matter before the Tribunal.

Evidence of fact

6. Mr Henshire the First Applicant made a detailed witness statement before the tribunal which he confirmed at the hearing. He said that the balcony area had been considered appurtenant to the premises for nearly 40 years. He said that he and his wife purchased the premises on the 15th of October 2012. At the time

of purchase the flat had a sliding door access to the small terraced - area. Flats 3 and 4 also had similar sliding doors accessing their terraces. He said that when he purchased the flat it was assumed the terrace belonged to the flat and the sales particulars of the flat showed that the flat had the benefit of the area. He said that as far as he was aware the sliding door was installed by the previous owner Paul Nolan in 1990 with the landlord's consent and knowledge. He said that Mr Nolan confirmed this to him in 1998 and was able to sign a short statement dated the 18th of July 2022.

7. In fact the witness statement by Mr Nolan was a letter because there was no statement of truth. In the letter Mr Nolan states that he installed the sliding door in 1990 *the landlord at this time had no objections to its installation and at no time after made any objection. I was leaseholder at this time. I confirmed there were two other sliding doors in position prior to my installation at flat 3 (next door). I'm not aware the landlord had any objection to the their installation at flat 3 I had plants and table and chairs in place sight plain sight on the balcony, no objection by any landlord was raised. This was for the total length of time of my leasehold. I was never questioned about the use of the balcony by any landlord whilst I was a leaseholder*. As already indicated Mr Nolan who lives in Australia did not provide a witness statement in proper form and neither did he attend the hearing as he was said to be unwell. In essence therefore the letter was hearsay.

8. Mr Henshire said that the lease granted the lessee a right to pass and repass over the balcony relying on the first schedule, paragraph 1 of the lease. He also said that the service charge provisions cover the balcony area. In addition, he said that the leaseholder of flat 3 had also installed sliding doors and used the adjoining balcony in an identical manner.

9. The Tribunal were provided with the sales particulars for the premises listed on Right Move in August 2007. These showed a picture of the balcony area with an

umbrella on it and the key features of the property said that it had a private balcony.

10. The Tribunal were also provided with a deed of surrender and lease in relation to 5 Broadway Mansions which it is understood is also owned by the Respondents. In that case the lease plan demised to the leaseholder the balcony area referred to as the terrace.

11. On behalf of the Respondents, Oliver Lambert their director provided evidence to the Tribunal. He said that the flat roof area running along the front of flats one to five formed the roof to the commercial premises below. He said the balcony area was not suitable for use as a terrace and the application was opposed for a number of reasons:

a) It does not have the benefit of planning permission for such use;
b) It does not comply with building regulation requirements;
c) It does not comply with health and safety requirements;
d) The wall to the front is too low to be safe.
e) It does not comply with insurers requirements.
f) The surface is not of the type sufficient for use as a terrace.
g) Access to the balcony was regularly required to carry out winter inspections of the surface and cleaning. The entire balcony area was cleared on the 8th of November 2013. No consent to carry out this work had been obtained from the leaseholders. Access was obtained using a ladder from Effie Road.
h) No erections separated one part of the balcony from another in such a way as to prevent one walking across the entire front of the building so as to be able to undertake repair functions such as that above.
i) The Respondents had not consented to the use the balcony by the Applicants. In they had taken action to prevent such use engaging solicitors to correspond

with the Applicants over time in response to which they desisted in use of the area in connection with their flat. He quoted an e-mail from the second Applicant dated the 20th of March 2018 where she confirmed that the majority of plants had now been removed.

j) The element of the balcony claimed by the Applicants to be included with their demise was not enclosed.

k) The installation of the sliding door took place prior to the Respondents' period of ownership. Mr Nolan's letter of the 18th of July 2018 did not state that written consent from the landlord at the time was obtained.

l) The lease does not grant a right of access or otherwise in respect of the balcony. The relevant clause 1 of the first schedule *is for the lessee in common with other persons and title to the like right... to pass and repass over ... the passages landings common areas balcony and staircase leading to the flat*. The common access balcony is that which leads off the internal common part stairway to the front door of the flat. It does not speak to the balcony the Applicants sought to include as part of their demise. Pausing here the Tribunal finds in favour of the Respondents in terms of this interpretation of the lease and indeed the Applicants' counsel did not pursue the line of argument which suggested that the reference in the lease to the common access balcony was referring to the balcony in question.

The hearing

12. The tribunal were assisted considerably in their task by intelligent and clear submissions on behalf of both the Applicants and the Respondents. Katie Gray of counsel appeared on behalf of the Applicants and Richard Alford of Counsel appeared on behalf of the Respondents. Both counsel provided skeleton arguments and a number of authorities for the Tribunal to consider.

13. Mr Henshire gave oral evidence. He said that he had known Mr Nolan for many years. He said he had written the letter for Mr Nolan and Mr Nolan had signed it when he had been in the country. He said Mr Nolan was elderly and not well

at the moment. Mr Alford cross examined Mr Henshire and asked what the sales particulars had been in 2012 when the Applicants purchased the premises and confirmed they were the same. He said that the premises were their flat in London and he and his wife used it when they were in London approximately once a week or once a month. It was let out for over six months and the last tenants were still in occupation. They had been in occupation for a year. Before that the premises were used as an Airbnb. Mr Alford asked how many days a year the Applicants had spent at the premises prior to the property being tenanted the answer was around 60 days.

14. It was put to Mr Hensher that the Respondents had been cleaning the drain area of the balcony since 2013. Mr Hensher said he was not there much and therefore could not really have a clear knowledge of how the balcony was being cleaned but he and his wife did clean it. He agreed that that there had been leaks into the commercial units in 2013. He said that flats 3 and 4 do not use their balconies. He agreed in 2018 there had been a dispute about the use of the balcony and there was an acknowledgement to remove some plants but he said the plants were not moved. He said in re - examination that their tenant had use of the balcony and the Airbnb occupiers also had used the balcony.

15. Mr Lambert gave evidence on behalf of the Respondents. He accepted in cross examination that he could not say when the sliding door had been installed and he could not say whether the balcony was used prior to that date. He said that you could access the balcony via a ladder. The Respondents had a flat above and were able to see the balcony from there. He said that the surface was not suitable for a balcony. He disagreed that the balcony was private because it was not screened and said that the sales particulars were inaccurate. He said that he looked at the particulars briefly in 2012 but he did not believe that they represented the property properly. In any event he said because of the planning and building regulations the balcony should not be used. He said that the balconies outside flats 3 and 4 had never been used as far as he was aware. He said that flats 1 and 5 always used the balcony as a rear terrace. He accepted the

flat 1 had the balcony demised as did flat 5 following at lease extension in 2014. He said those flats had pitched roof areas and the lease extensions had taken place before his time. He said that the balcony in this case was not suitable for the reasons given. He said that they balconies were the result of the building being built as five bays and they were the top of the lintels. He said that he assumed that when the Second Applicant said she would remove the plants from the balcony she would do so. He said the surface of the terrace was asphalt and it was untreated and unsuitable for walking on and there had to be compliance with insurance requirements. The balcony walls were too low.

Legal arguments

16. Ms Gray said the balcony area was included within the Applicants' demise either by the terms of the lease as they applied at the date of grant or by way of a later accretion thereto. She relied on section 56 of the act which states the following-

(1) Where a qualifying tenant to the flat has under this chapter a right to acquire a new lease of the flat and gives notice of this claim in accordance with Section 42 then except as provided by this chapter the landlord shall be bound to grant to the tenant and the tenant shall be bound to accept-
(a) In substitution for the existing lease, and
(b) on payment of the premium payable under section 13 in respect of the grant,a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

17. By section 57(1) of the 1993 Act:

subject to the provisions of this chapter and in particular to the provisions as to rent and duration contained in section 56(1) the new lease to be granted to

a tenant under section 56 shall be on the same terms have as those of the existing lease as they apply on the relevant date but with such modifications as may be required or appropriate to take account of-

alterations made to the property demised since the grant of the existing lease.

18. By section 57(6) of the Act:

Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified insofar as-

(a) it is necessary to do so in order to remedy a defect in the existing lease; or
(b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

19. By section 62 of the 1993 Act references in chapter II to a flat:

Include any garage outhouse garden yard and appurtenances belonging to or usually enjoyed with the flat and let to the tenant with the flat on the relevant date.

20. In order to be an appurtenance the area sought to be included in the new lease must belong to or be usually enjoyed with the flat and be contained within the premises of which the flat forms part or is situate within the curtilage of the premises: *Cadogan v McGirk* [1996] 4 AllER 643 at [651].

21. So long as land is very close to the demised land and occupied together with the demise encroachment by a tenant onto the landlords retained land will usually

be presumed to amount to an accretion to the lease. The additional land forms part of the demised premises during the term and will be included in the surrender to the landlord when the tenancy ends: *Smirk v Lydale Developments Limited* [1974] 3 WLR 91.

22. In Woodfall at paragraph 19.008 it states the following-

Where the tenant encroaches upon adjoining land of the landlord, and occupies it for more than 12 years the land encroached on cannot be recovered by the landlord during the tenancy. Normally the proper inference is that the additional land has been occupied by the tenant as part of the holding, so as to be recoverable by the landlord at the end of the term.

23. Ms Gray argued that encroachments of this type although similar to the principles of adverse possession were a separate and independent doctrine. She said that this is because unlike adverse possession a tenant is deemed to be encroaching on land for the benefit of his landlord not himself and the landlord's title is not extinguished by the tenant's actions. She relied on the case of *Perrott(JF) & Co v Cohen* [1951] 1 KB 705 which suggested that encroachment was akin to an estoppel.

24. Ms Gray argued without much vehemence that no part of the external structure was reserved under the terms of the lease and on this basis the parties intended that the structure should be demised. She said the demise included the external walls of the building of which the terrace/ balcony was part. Alternatively, she said that the balcony was a projection from those external parts and was demised on that basis. She said that although the lease plan did not extend to the terrace/ balcony area the plan was for identification only and was only intended to show the position and area of the flat. She said that all of the flats had individual terraces and the sliding door in the flat and the planting and garden furniture had been in place since 1990 without demur. Alternatively she

said that the terrace / balcony had been acquired by way of encroachment and was an increase to the demise. The Applicants and their predecessors had effectively treated the balcony as an adjunct to their own land having opened up a door to the area. Since then the rear terrace/ balcony has been used as a garden area with garden furniture and other items. She said the nature of the terrace does not lend itself to any other use and no enclosure was required as the boundaries of the terraced areas between each flat were already defined by the low brick wall seen on the photographs.

25. On the basis of these arguments Ms Gray said that at the date of the Section 42 notice the balcony terraced area was let to the Applicants. Alternatively, she said that a modification to the lease plan was required under section 57(1)(b) of the Act to take account of alterations made to the property demised since the date of grant of the lease. It would be unreasonable for the applicants to be granted a new lease without the modified lease plan proposed by them and the determination to that effect ought to be made under section 57(6)(b) of the 1993 Act.

26. She relied on the letter from Mr Nolan and the fact that he said he installed the door in 1990. She said that he had *no skin in the game* and therefore we ought to give way to his statement. The fact that Mr Hensher had let the flat to longer term tenants and Airbnb tenants with use of the balcony demonstrated possession.

27. Unsurprisingly Mr Alford adopted a contrary view to Ms Gray. He said that there was no reasonable basis for the new lease to be amended because the demise under the original lease did not include the terrace or rights to use the terrace, the Tribunal's powers to depart from the terms of the original lease were limited by sections 56 and 57 of the Act. The Applicants did not have sufficient evidence to prove that on their predecessors in title obtained title to the terrace by adverse possession before the 13th of October 2003 when the Land Registration Act 2002 came into force. This meant that the leasehold title

to the terrace had not been acquired. In the absence of the Applicants being able to show they are the legal owners of the terrace the Tribunal should not conclude that they are entitled to an extended lease of the same.

28. Mr Alford said that where the lease refers to the right to pass and repass over the balcony area this is in relation to the common access balcony and staircase leading to the flat and not the area in question (as already found by the Tribunal). He said that the demise of the original lease does not include the terrace or any rights for the tenant to use or access the same.

29. Mr Alford said there was little distinction to be drawn between the principles of encroachment and adverse possession. He relied on the case of Smirk v Lindale Developments limited [1975] Ch.317 in which Lawton LJ stated the following:

on the law as entangled if the plaintiff had established a possessory title to the land at the back of number 191 Victoria Rd the effect of such a title would have been the landlords could not have evicted him from that land but the plaintiffs title would not have extended beyond the period of his tenancy. In other words he could not sell that land or otherwise dispose of it; he held it because it was part of his tenancy when his tenancy came to an end he would have to give it up

30. Mr Alford said therefore that encroachment against the landlord is dependent on the tenant establishing possessory title

31. Mr Alford explained that prior to coming into force of the Land Registration Act 2002 on the 13th of October 2003 adverse possession was a question of the paper title holder's title becoming extinguished by the expiry of the limitation period in section 15 of the Limitation Act but section 96(1) and section 96(3) of the 2002 Act provided that no period of limitation under section 15 ran against

a person other than a charge in relation to an estate in land therefore section 17 of the Limitation Act did not operate to extinguish the title of any person. Accordingly, since the 2002 Act came into force the tenant who seeks adverse possession must apply to be registered as the legal owner of the land pursuant to section 97 and schedule six of the 2002 Act. Under schedule six of the new act the adverse possessor is entitled to make an application to be registered if he's been in adverse possession of the estate for the period of 10 years ending on the date of the application. When an application is made the paper title holder is told of this and he or she has the opportunity to object. These issues are resolved by a different tribunal – The Land Registration Tribunal. Accordingly said Mr Alford the provisions of schedule six of Land Registration Act 2002 do not arise and cannot be decided by the Tribunal in the present context.

32. Mr Alford conceded that the Applicants could establish title to the terrace under paragraph 18 of scheduled 12 of the 2002 Act which preserves the old law under the Limitation Act 1980 in circumstances where the applicant was able to establish at least 12 years adverse possession before the 13th of October 2003. He said that the Applicants had no real prospect of establishing this. In any event he said in the case of registered land the extinction of the paper holders title only results in the paper title holder holding the land on trust for the adverse possessor pursuant to section 75 of the Land Registration Act 1925.

33. Mr Alford said the Applicants could not give direct evidence of Mr Nolan’s use or intention. The letter from him made no reference to anything that would go beyond making use of the roof. Therefore, he said on the evidence before the Tribunal the Applicants had no prospect of discharging the burden of proof because their evidence did not establish the necessary elements of factual possession and an intent to possess the terrace area. The Applicants were only able to give direct evidence for a period of nine years.

34. Mr Alford dealt with the definition of flat under section 62(2) of the Act as outlined by Ms Gray above. He said that although the terrace might be considered something usually enjoyed with the flat in order for the terrace to come within the statutory definition it must be let with the flat on the relevant date in other words the tenant must establish the leasehold title to any appurtenance that it seeks to include within the flat.

35. Mr Alford also rejected the argument that the lease could be altered. As a matter of plain language the addition of the balcony can only be considered an alteration to the property demised in the existing lease if the Applicants had acquired leasehold title otherwise there's been no alteration to the property demised.

36. Mr Alford also rejected a third potential route which relied on subsections 57(6)(a) or (b). He said that subsection (a) was not relevant as there was no defect in the original lease or intention to demise or grant any rights over the terrace and use of and access to the same only began during the term. Further subsection (b) did not assist the Applicants because on a true construction it refers to modifying the terms of the existing lease rather than the extent of the flat to which the tenant has a right to a new lease. Further in circumstances where the Applicants have not established title to the terrace by the route provided by schedule 6 of the 2002 act it cannot be said that it would be unreasonable in the circumstances to include the original lease plan without modification. Finally for completeness Mr Alford said that even if the old regime and the Land Registration Act 1925 and the Limitation Act 1980 were applicable the Applicants' case should also fail as there was not sufficient evidence before the Tribunal that all the requisite elements of adverse possession were present for the requisite limitation period of 12 years.

37. The tribunal invited written submissions on the question of whether successive occupiers could effectively combine their periods of encroachment. Miss Gray said that there was a combined period of 31 years of user in relation to balcony.

The rights acquired by encroachment were not personal to the lessee only. She said the balcony area was an inherent part of the lease when the Applicants took an assignment and this must have included all the land including the balcony. Interestingly, Ms Gray relied on the judgement of LJ Neurberger in *Tower Hamlets v Barrett* [2005]EWCA Civ 923 Where he said the following:

central point in this connection is what stopped the paper owner from claiming possession in a continuous. 12 years dispossession-see section 15(1) of and paragraph one of schedule one to the 1980 Act. Accordingly unless there's a hiatus between the periods of possession of successive squatters (in which case paragraph 8(2) would prevent the second squatter being able to rely on the period of adverse possession by the 1st) the second squatter whether he has purchased from the first squatter or dispossessed him in some other way can only rely on the first squatters period of adverse possession.

38. Mr Alford took advantage of the opportunity to make further submissions in order to point out that none of the cases provided by either party suggested that encroachment was a separate doctrine from adverse possession. In the alternative he said that if the Applicants based their argument on promissory estoppel it can only provide a personal right as a defence. Further if the doctrine was based on propriety estoppel a successor in title to the landlord is also likely to be bound as the benefit of the estoppel would be a mere equity capable of being an overriding interest but a person with the benefit of a proprietary estoppel claim does not acquire proprietary rights until they take action to vindicate those rights.

Determination

39. The Tribunal enjoyed the benefit of experienced counsel who assisted us in what is a complex area of law. Although the case has been set out in some detail the determination which is clear to us can be dealt with in short order.

40. We do not consider that it is within our power or remit to allow the application sought. The power of the Tribunal under section 57(6)(a) or (b) is not unlimited. Subsection (a) only applies if there's a defect in the original lease and here it could not be argued that there was a common intention to grant rights over the disputed balcony area and therefore the lease was in some way defective, indeed the Respondents vehemently dispute there being any such intention. As for subsection (b) Mr Alford is correct to say that this subsection really deals with modifying the terms of the existing lease rather than modifying the demise. In reality although the application is based on a variation of the lease plan the Applicants were really seeking to have the demise modified. Ms Gray had the unenviable task of arguing that the original lease plan was not determinative but nonetheless sought to change it. The Applicants were seeking confirmation from the Tribunal that they owned the balcony. It is not for this tribunal within our jurisdiction to make such a finding. Any application would need to be made to the Land Registration Tribunal and that has not happened.
41. We did not accept the argument that the balcony was included as part of a lease pursuant to section 62(2) and the extended definition of *flat*. It remains the case that the balcony was not let with the flat at the relevant date the date of the Section 42 notice) and the only way in which it could be argued such would be if the Applicants could establish leasehold title to the balcony which again relies on the encroachment/ proprietary estoppel promissory estoppel /adverse possession arguments which are not for us to determine.

42. Accordingly the Tribunal concluded that it does not have the power nor jurisdiction under the Act to confirm the balcony as part of the Applicants' demise.

43. If we are wrong about jurisdiction we would in any event conclude that the facts and circumstances of the case do not sufficiently support the argument put forward by the Applicants. The fact that the limited authorities on encroachment as against adverse possession refer to a requirement of 12 years possession cannot be a coincidence and strongly suggests that encroachment is

a branch of adverse possession and therefore the strict requirements of that doctrine are required. Even Ms Gray appeared to have softened in her argument that there was a distinction in her further submissions.

44. The evidence of adverse possession by Mr Nolan was at best limited. There was evidence of use but not exclusion of others, the previous landlord's attitude to Mr Nolan's use of the balcony was unclear because there was nothing in writing confirming it. In any event we are not prepared to make findings of fact on a case in which the landlord would effectively be deprived of part of its own demise where the principal witness for the Applicants had not attended the hearing in order to be cross examined and his witness statement was not supported by a statement of truth, was drafted by the Applicants and potentially at least was self - serving for their purpose. In addition the Applicants' own occupation of the balcony was not in any way conclusive. Again there appeared to be use but not exclusion and the landlord had demonstrated a right to access of the balcony by way of a ladder. Moreover the Second Applicant had clearly agreed to clear the balcony when asked to do so. Whether she did or didn't do what she said she would do does not defeat the fact that she was acknowledging the Respondents' title.

45. We have some sympathy for the Applicants however. They were clearly led to believe by the sales particulars and the installation of the patio doors that they had the use of the balcony. Regrettably estate agents who sell properties will present a property in its best light without making relevant checks as to the provenance of the statements they make. The Respondents have clearly allowed at least one other leaseholder to have the balcony demised but objected in the present case. Ideally the parties should have sought a resolution possibly by allowing the Applicants to carry out works and obtain approvals to the satisfaction of the Respondents but this can be no more than a comment in the context of the present application.

46. In summary the Application to vary the lease plan is dismissed.

Judge Shepherd

12th January 2023

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
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 state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.