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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/OOBC/OCE/2016/0328**
Property	:	**River Court, River Close, London E11 2LB**
Applicant	:	**River Court Freehold Limited**
Representative	:	**Thirsk Winton LLP**
Respondent	:	**Julex Limited**
Representative	:	**Edwards Duthie**
Type of application	:	**Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	:	**Judge O'Sullivan** **Mrs Flint FRICS** **Judge Brilliant**
Date of determination and venue	:	**3 May 2017** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**6 July 2017**

DECISION

Background

1. This is an application made by the applicant nominee purchaser pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid for the collective enfranchisement and other terms of acquisition which remain in dispute of River Court, River Close, Wanstead, London E11 2LB (the "Property").

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2. By a notice of a claim dated 14 March 2016, served pursuant to section 13 of the Act, the applicant exercised the right for the acquisition of the freehold of the Property. On 18 May 2018, the respondent freeholder served a counter-notice admitting the claim to acquire the collective enfranchisement but not admitting the price to be paid, certain proposals in relation to excluded property and certain leasehold interests.

3. By an application received on 4 November 2016, the applicant applied to the tribunal for a determination of the premium and terms of acquisition.

The hearing

4. The hearing in this matter took place on 3 May 2017. The applicant was represented by Mr Harrison of Counsel, and the respondent by Mr Radevsky of Counsel.

5. River Court was heard to comprise 16 flats in a single block with communal gardens and garages. The garage blocks were heard to comprise 14 garages and an electricity substation/bin area. The garage block is approached by a tarmac road and there is a forecourt in front of the garages.

6. The parties confirmed that the price for the freehold of the specified premises (i.e the block of flats) has been agreed in the sum of £238,003. It is also agreed that no other freehold land is to be acquired and therefore there was no need for any valuation evidence.

7. The parties confirmed that the following matters remain in dispute:

   (a) The extent of the land to be acquired under s.1(2) of the 1993 Act;

   (b) The rights to be granted, if any, under s.1 (4) of the 1993 Act and the terms thereof;

   (c) The other terms of the transfer as marked on the draft transfer provided to the tribunal at the hearing.

The inspection

8. The tribunal inspected the property on the afternoon of 3 May 2017. River Close is a narrow cul de sac close to the A12 trunk road. River Court is located at the end of River Close adjacent to an unmade road leading to private garages; there are allotments opposite. The block comprises 14 flats with communal gardens. Immediately to the left of the block is access to a forecourt, two blocks of garages and an

electricity sub station. The site narrows towards the northern end and at the time of the inspection several cars were parked alongside the fence opposite the garages, there are no formal car parking spaces marked out. There were "no parking" signs on several garage doors.

The extent of the land to be acquired

9. By the initial notice the applicant claimed all of the land edged blue and the respondent disputed the right to acquire the "excluded property" at the same time invoking s.1(4) seeking to offer rights in lieu in relation to the land falling within s.1(2). Issues have since narrowed between the parties with the agreement that the applicant has prima facie the right to acquire the north western tip of the garden and that right will be satisfied by the grant of rights in lieu. It has also been agreed that the applicant will neither acquire the land or rights over the land upon which the garages are built.

10. The remaining dispute relates to the forecourt and access way to the garages.

11. The applicant says that prima facie the applicant has the right to acquire the access way and forecourt which is defeasible only by the grant of the appropriate rights under section 1(4). The respondent says that the lease provisions evidence a contrary intention therefore bringing s.62(4) of the Law of Property Act 1925 ("the LPA 1925") into play, which has the effect that there is no right to acquire under s.1(4).

12. The applicant relies on three witness statements of Peter Hamilton, Stephen Beale and Kenneth Loton. Only Mr Beale attended the hearing to give oral evidence and be cross examined. Their evidence is that the forecourt area and access way has been used since at least 1979 by the occupiers of the flats at River Court and their visitors in common with the occupiers of the garages for passing and repassing and for parking.

13. The applicant relies on s.62 (2) of the LPA 1925.

14. The applicant says that the liberty, privilege, right or advantage of being allowed to pass, repass over the accessway and forecourt and to park on the same appertains or is reputed to appertain to each of the flats. In this regard the applicant also relies on the dicta of Megarry J in the unreported case of *Newman v Jones (1982)* in relation to the acquisition of parking rights by the lessees of a mansion block. It is also noted that of the 16 flats, 12 have leases granted since 2001 and that on the grant of each lease the applicant submits that s.62(2) operated to grant an easement to pass, repass and park over the access way.

15. The applicant says that this is supported by the provisions of the lease which contain the following relevant provisions;

(a) Paragraph 14 of the Second Schedule which is a restriction *"To at all times keep any motor or other vehicle in its allotted place and not to use or permit to be used any other part of the demised premises for the parking of motor cycles or motor cars or other vehicles".*

(b) Requiring a contribution to the cost of keeping the forecourt, drives and carparks in good condition: clause 1(d) and paragraphs 2 and 3 of the Fifth Schedule.

16. The respondent's position is that the landlord has at no times consented to the occupiers of the flats parking on the forecourt area. It relies on the witness statement of Mr Haegar who gave evidence that he often left notes on vehicles parking on the forecourt area.

17. The respondent also asked the tribunal to note that there is no right to drive on the roadway leading to the garages and that the garages are not referred to in the leases and are subject to a separate letting regime.

18. The respondent referred the tribunal to the following provisions of the lease;

(a) Third Schedule, paragraph 1 which provides *"Full right and liberty for the Lessee and all persons authorised by him or her (in common with all other person entitled to the like remains) at all times by day or night and for all purposes by foot through and along the main entrances, corridors and balconies, staircases and passageways leading to the flat".* The respondent asks the tribunal to note that there is no right of way, even on foot, over the roadway leading to the garages.

(b) Paragraph 3 of the Second Schedule which is a restriction *"Not to do or suffer any act or thing whereby any road, forecourt, gardens, carpark, balcony or passageway in or belonging to River Close may be damaged or obstructed or suffer the same to be used in such manner as to cause in the reasonable opinion of the Lessor or to the owner or occupier of any of the other flats in River Close or of any adjoining or neighbouring premises".*

(c) Paragraph 14 of the Second Schedule as referred to above. The respondent asks the tribunal to note that there were at the relevant date no allotted parking spaces and the reference to the "*demised premises*" may be an error given the "*demised premises*" is a flat.

19. The respondent also relies on *Newman v Jones* (unreported 1982), in particular at page 27 where the Judge said that rights cannot arise under section 62(2) if a contrary intention has been expressed in the lease thereby bringing s.62(4) into play. The respondent submits that

the restrictions referred to above are a clear contrary intention sufficient to bring s 62(4) into play.

Extent of the land to be acquired - the tribunal's determination

20. The tribunal first considered the witness evidence before it. We had heard from Mr Beale whose gave evidence of the practice of the occupiers to park on the forecourt without complaint by the landlord. We placed little weight on the evidence of Mr Hamilton and Mr Loton as they did not attend the hearing and thus as they could not be cross examined and questioned by the tribunal their evidence could not be properly tested. Although we accepted Mr Haegar's evidence as to the notes he placed on cars parking on the forecourt, on the evidence before us it appeared that the attempts on the part of the landlord to prevent parking had been very limited and at best sporadic. In addition we also took into account our inspection when we noted that there were 3 cars parked without any signs affixed, no signs were present either on the access way or fenced area to indicate that parking was not allowed and not all of the garages had a no parking sign affixed. Having inspected we are also of the view that given the nature of the surrounding area it is most unlikely that anyone save an occupier and their visitor would park at the site given its positioning tucked away from the access road. We were therefore satisfied that the forecourt and access way had been used by the occupiers since at least 2001.

21. We then went on to consider whether there was a clear contrary intention expressed in the lease which would bring s 62 (4) into play and prevent the right to acquire arising under s 62.

22. We concluded that the lease provisions as a whole were not clear. We did not consider that the restriction in paragraph 3 of the Second Schedule was of assistance as in our view this was a very general restriction provision and the reference to *"obstruct"* was not a clear reference to any parking on the forecourt area. The provision in paragraph 14 of the Second Schedule was also unhelpful in our view. This made reference to allocated spaces when there are none at the Property and a reference to the demised premises was clearly a typographical error. It was unclear to us why this clause was included and in our view its inclusion may well have been an error. We did not therefore consider that either of these two provisions could be relied upon as clear contrary intentions sufficient to bring section 62(4) into play.

23. Both Counsel had relied on *Newman v Jones*. We did not consider any great reliance could be placed on *Newman v Jones* given the very different facts of both cases.

24. We were therefore satisfied that the applicant has a prima facie right to acquire the access way and forecourt which is defeasible only by the grant of appropriate rights under section 1(4).

Rights to be granted under s 1(4)

25. It follows that as we have found that the applicant has a prima facie right to acquire the access way and forecourt area, rights should be granted over this area to the Applicant. Both parties have proposed wording in respect of the proposed rights.

26. The applicant suggests that the rights granted are to pass and a repass over the whole area and a right to park on the whole area *"where appropriate"*. The applicant confirms it would agree to a proviso that the right to park should be limited by a proviso forbidding parking so as to prevent access to the garages. As to the plan produced by the Respondent Mr Harrison confirmed that he was not able to comment in any detail on the extent of the area proposed but would ask whether it could extend further in length if it were limited more in width, otherwise he confirmed that he was content to leave this to the tribunal.

27. The respondent produced a plan which showed its suggested parking area coloured in yellow. The tribunal heard from Mr Woolton who had prepared the plan. He confirmed that he had arrived at that area by considering the maximum number of cars which could be accommodated without causing obstruction. It was thought that the proposed space would accommodate 4 cars and was the width of the garages on site. Mr Radevsky submitted that it was preferable to have the parking area shown clearly on a plan as without a clearly marked area people may park *"willy nilly"*.

Rights to be granted – the tribunal's decision

28. We agreed that it was preferable for the parking space to be specified so that it could be clearly marked. In this way we would hope that future disputes and uncertainty could be avoided. As far as the size of the space was concerned on inspection we saw a car parked at the halfway point to the third garage in the main block (counting from the furthest point from the block of flats). We noted that this was not causing any obstruction to the garages. We therefore consider that the parking area should be extended to this point. We agreed a suitable starting point was as shown on the respondent's proposed plan. We consider that the parking area should be the width of an average car park space. We would suggest that the parties endeavour to agree a joint plan to reflect this decision. Should the parties be unable to reach agreement and the

tribunal's further assistance be required the parties may write to request further directions.

Payment provisions

29. Both parties agree that there must be some form of payment provisions in relation to the gardens and parking areas.

30. The applicant submits that the grant of the right should be subject to the payment of a *"fair and proper proportion according to use of the costs of repairing, renewing, maintaining, inspecting, replacing and cleansing the same"*. The respondent submits that free standing provisions are preferable relating to the gardens and parking areas.

31. Mr Harrison submitted that the applicant's draft making use conditional on payment was in line with the grant of a right (i.e the right to use the area) which is a as *"nearly as may be the same"* as the right enjoyed under the leases. He also submitted that neither s.1(4) nor any provision in Schedule 7 permits the reversioner to impose a positive covenant on the nominee purchaser.

32. Mr Radevsky submits that the applicant's draft suggests only that the right is subject to the payment of a service charge. He submitted that the remedy is the stopping of the exercise of the right but that this would not be practical in this case. By way of example he asked whether on non payment a fence would be erected or the parking area blocked? Given the other users of the forecourt he highlighted the impracticality of taking action. He relied on a previous tribunal decision and a decision in the Upper Tribunal in support of his free standing provisions. He suggested that there could be no real objection to this proposal given that Mr Woolton had drafted service charge obligations and had provided a mechanism for enforcement. Should the nominee purchaser sell the property the method proposed would ensure that any purchase would be under an obligation to pay the service charge.

Payment provisions - the tribunal's decision

33. We considered that free standing provisions are preferable given the nature of the rights in question in this case. We consider free standing provisions to be more appropriate than simply making the grant of the right subject to a payment as they set out a mechanism for enforcement and will be more practical in the event of non payment. We are also satisfied that the service charge obligations drafted by the respondent will be enforceable against future owners. We therefore approve the respondent's draft provisions items in this regard.

Rights to interfere with rights of light

34. The respondent seeks to obtain a right to interfere with rights of light. Mr Radevsky relied on Schedule 7 paragraph 3(2)(a)(ii) which allows the nominee purchaser to claim a right of access of light to the specified premises insofar as it was necessary for the reasonable enjoyment of the same.

35. Mr Harrison objected. He submitted that there was no power to reserve a right to interfere and relied on *Hague 28-16 fn104*.

Rights to interfere with rights of light – the tribunal's decision

36. The tribunal declined to make any provision for a right to interfere with rights of light. We accepted Mr Harrison's submissions and his reliance on *Hague* as above that there is no such power.

Restrictive covenants

37. The respondent also seeks restrictive covenants at 12.4 and 12.5 of the transfer. Mr Radevsky submitted that these simply replicated the restrictions in the lease. He considered it was logical to include restrictive covenants to control the use of the land over which the leaseholders are being granted rights. Mr Harrison questioned over which land these rights were to operate? In these circumstances these would be a registration against the landlord's own title and was surely a nonsense. After some discussion Counsel agreed that as an alternative they could be noted on the register. As the parties agreed this alternative way of dealing with the restrictive covenants the tribunal gave this issue no further consideration.

The draft transfer

38. The tribunal anticipates that given the content of this decision the parties will now be able to draw up a form of transfer reflecting this decision and the parties' agreements. Should the tribunal's further assistance be required the parties may write for further directions within 28 days.

Name: Judge O'Sullivan **Date:** 6 July 2017

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).