

2018

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL**

**LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 –
SECTION 24**

REFERENCE: LON/OOAG/ OLR/2009/0492

Property: 17 Downside Crescent, London, NW3 2AN

Applicant: Mr M M Forte

Respondent: London Borough of Camden

Date of hearing: 12 October 2010

Appearances: M N Duckworth of Counsel
Miss E Clarrk, Trainee Solicitor, Alan Jay Paine & Co.
Mr M M Forte
Mr R Forte

For the Applicant

**Mr P Gammie, Paris Smith LLP Solicitors
Mr P F Hewitt, Leasehold Manager, London Borough
of Camden**

For the Respondent

Date of Tribunal's Decision: 3rd November 2010

**Members of the Tribunal: Mrs J S L Goulden JP
Mr W R Shaw FRICS**

REF: LON/OOAG/OLR/2009/0492

PROPERTY: 17 DOWNSIDE CRESCENT, LONDON NW3 2AN

Background

1. The Tribunal was dealing with an application dated 7 September 2009 (and received by the Tribunal on 8 September 2009) under S24 of the Leasehold Reform Housing and Urban Development Act 1993 (hereinafter referred to as "the Act") to determine the price payable and the terms of transfer on a collective enfranchisement in respect of 17 Downside Crescent London NW3 2AN (hereinafter referred to as "the subject property"). The subject property has been converted into three flats, Flats A, B and C.
2. The Applicant Nominee Purchaser is Mr M M Forte by virtue of his long leasehold interest in two of the three flats, Flats A and B, at the subject property. The Nominee Purchaser had purchased the lease of Flat A (a second floor flat) in 2006 and the lease of Flat B (a first floor flat) in 2008. The Respondent landlord is the London Borough of Camden. Flat C (a ground floor flat) is let by the Respondent to a secured tenant.
3. Office Copy Entries on the Register of Title No: LN 16361 showed that the Respondent had been registered as the Proprietor of the subject property with Title Absolute on 5 October 1959. The lease of Flat A had been noted on the freehold title on 6 November 1989 and the lease of Flat B had been noted on the freehold title on 18 March 2005.
4. The Tribunal was advised that the subject property was originally a house in single occupation and had subsequently been converted into three flats. It appears from documentary evidence provided that this was the case from March 1961. From the filed plan and confirmed by the parties, there was a front garden and a rear garden within the curtilage. The rear garden was at present used exclusively by the secure tenant of Flat C and the tenants of Flats A and B had no access thereto. Access to the garden was either via the living room and kitchen of Flat C and also by a side entrance which was at present padlocked to prevent entry.

Inspection

5. The parties did not consider an inspection of the subject property would be of assistance to the Tribunal in respect of the issues raised and would be a disproportionate burden on the public purse.

Hearing

6. The Hearing took place on 12 October 2010. The Applicant, Mr M M Forte attended, provided a witness statement, and was represented by Mr N Duckworth of Counsel, instructed by Alan Jay Paine & Co. Solicitors. Miss E Clark, Trainee Solicitor, also attended on behalf of the Applicant, as did the Applicant's father, Mr R Forte. The Respondent was represented by Mr P Gammie of Paris Smith LLP, Solicitors, assisted by Mr P F Hewitt, Leasehold Manager, London Borough of Camden who also provided a witness statement.
7. The matters which were in issue and which were the subject of the hearing on 12 October 2010 and which required the determination of the Tribunal were limited to the following:-
 - (a) Is the Respondent entitled to have the rear garden included within the demise of the leaseback of Flat C.
 - (b) If the Respondent is not so entitled, is the Respondent entitled to be granted rights in common over the garden in the leaseback of Flat C.
8. The salient parts of the evidence and/or submissions, together with the Tribunal's determination is given under each head.

Is the Respondent entitled to have the rear garden included within the demise of the leaseback of Flat C

9. The parties agreed that there was no dispute in respect of the front garden and the only dispute was in respect of the rear garden.
10. Mr Duckworth, on behalf of the Applicant, provided a skeleton argument and contended that this issue had four sub issues as follows:

"Is it too late for the Respondent to argue that the Applicant does not enjoy rights over the garden under the Flat A and/or Flat B lease having regard to the fact that the Respondent's counter notice admitted the Applicant's right to acquire the garden and, by necessary implication, admitted that the Applicant enjoys rights over the garden under the Flat A and/or Flat B lease".
11. Mr Duckworth referred to the Applicant's Initial Notice under S13 of the Act which was dated 5 January 2009 and the Respondent's Counter Notice which was dated 9 March 2009.
12. The Initial Notice claimed the right, at paragraph 1, and by virtue of S1 (1) of the Act to collective enfranchisement of the freehold of subject property (shown edged red on the plan attached thereto) and also claimed the right, at paragraph 2, and by virtue of S 1(2)(a) of the Act to the right to the area "*shown edged green*

16. Mr Duckworth argued that the Tribunal has no jurisdiction in respect of this issue since the parties had agreed and cannot now resile from that agreement. Once parties agree, the issue is compromised and binding. The Tribunal had no jurisdiction to reopen and *"that is the end of it"*.
17. Mr Gammie confirmed that, in his view, the Counter Notice was correct as drawn and there had been no error therein. He also said that there was no dispute that the Applicant had the right to the enfranchisement of the subject property including the front and rear gardens and did not seek to resile from the agreement made. He was simply seeking to agree the terms of the transfer of the freehold subject to the rights contained in the existing leases of Flats A and B and subject to the leaseback provisions of the secure tenancy of the ground floor flat, Flat C.
18. Although there were extensive submissions from both sides, the Tribunal is of the view that there is no real dispute between the parties and the Tribunal's jurisdiction is not challenged. Mr Gammie accepted the principle that the Applicant had the right to enfranchise the front and rear gardens as well as the property itself.
19. On this particular issue, the Tribunal accepts Mr Duckworth's contention that the ability to enfranchise the gardens could only arise on the basis that Flats A and B have common rights over the gardens (since they are clearly not demised by the relevant leases) and if this aspect were to be disputed, then it should have been made clear in the Counter Notice.
20. Under Part 1, Chapter 1 of the Act, the right to collective enfranchisement provides the qualifying tenant may enfranchise 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).**"
21. Since the Counter Notice accepted the right to enfranchise the gardens, it implies that Flats A and/or B have rights in common with the occupier of Flat C. That being the case, it follows that it cannot be correct to demise such gardens or part thereof in the leaseback of Flat C.
22. In support of the Tribunal's view, it is noted that in the Lease of Flat A, the First Schedule (which sets out the easements rights and privileges included in the demise) grants **"full right and liberty for the Tenant and all persons authorized by him (in common with all other persons entitled to the like right) at all times by day or by night to go pass and repass over and along the main entrance of the building and the common passages landings and staircases thereof and to use the passenger lift (if any) therein and the**

common gardens forecourts roadways pathways (if any) in the curtilage thereof.....". Further, the Third Schedule which relates to service charge expenditure provides for the Tenant to contribute at paragraph 11 to **"the upkeep of the common gardens forecourts roadways pathways (if any) used in connection with the building or adjoining or adjacent thereto"**.


23. The lease of Flat B under "Particulars and Definitions" describes "Common Parts" as **"the entrance porch corridors hallways buildings lifts and staircases (if any) and any other parts within the Building and vehicular and pedestrian ways forecourts or drives refuse bin stores gardens (if any) and any other areas inside or outside the Building which are not intended to remain private and which are to be enjoyed or used by the Tenant and occupiers of the Premises in common with the occupiers of the other flats in the Building"**.
24. Whilst it is accepted that the leases are standard leases, the Tribunal must construe the same as drafted and should not, as Mr Gammie suggested, consider the intentions of the parties behind such drafting. There is clear reference, certainly in the Lease of Flat A, to covenants by the tenant in respect of common rights over the gardens and the Nominee Purchaser does not have to show that this is the case in respect of both Flats A and B.
25. The Tribunal notes that although the Applicant contended that he contributed to the upkeep of the gardens and referred to one service charge account for the 2007, he provided no other evidence, which is somewhat surprising, and the Tribunal prefers the Respondent's contention that this was a one off error and the sum had been refunded. Details of accounts produced after the end of the hearing with the agreement of the Tribunal and Mr Duckworth supports this view. However this makes no difference to the Tribunal's consideration of the lease terms as set out above.
26. S36 of the Act provides that the Nominee Purchaser is required to grant leasebacks to a former freeholder in certain circumstances and it is not disputed that the Respondent is entitled to a leaseback of the flat. The dispute centred on whether the leaseback also included the garden.
27. It was argued that the secure tenant of Flat C has exclusive use of the rear garden and a statutory declaration dated 1 March 2010 was provided. Whilst it may be the case that the tenant of Flat C does, in practice, have exclusive use of the rear garden and indeed has padlocked the side entrance to the rear garden to prevent access, this does not override the rights of the tenant of Flat A or B. The evidence supplied on behalf of the Respondent was sketchy and of little probative value, although it is noted that in a copy of the verification of right to buy Flat C date stamped 15 May 1992 under the question *"does the tenant have sole access to and exclusive use of a defined garden area?"* the answer appears to be no.

28. The Tribunal does not find cogent evidence that the rear garden has been demised within any tenancy agreement to the secure tenant and her exclusive use of the garden at present has not been substantiated by such evidence so as to persuade the Tribunal of the merits of the Respondent's case. The Tribunal rejects the Applicant's contention that the physical configuration should lead the Tribunal to the view that the garden is solely for the use of the tenant of Flat C.
29. Since the garden was not let with the tenancy of Flat C immediately before "**the appropriate time**" the Tribunal rejects the Respondent's assertion that the garden should be included by the wording of Part 1 of Schedule 9 to the Act which states, at paragraph 1(2) "**in this Schedule any reference to a flat or other unit, in the context of the grant of a lease of it, includes any yard, garden, garage, outhouses and appurtenances belonging to or usually enjoyed with it and let with it immediately before the appropriate time**".
30. The Tribunal accepts the Applicant's contention that Part IV of Schedule 9 Paragraph 12 merely gives any tenant rights only and does not act as a further demise. Paragraph 12 states "**the lease shall include, so far as the lessor is capable of granting them, the rights to use in common with others any premises, facilities or services as are enjoyed immediately before the appropriate time by any tenant of the demised premises**". The wording does not and cannot enlarge the entitlement of the Respondent.

Is the Respondent entitled to be granted rights in common over the garden in the leaseback of Flat C

31. In this view of this Tribunal the Respondent is entitled to be granted rights in common over the garden in the leaseback of Flat C. The secure tenant has rights over the rear garden and has clearly exercised those rights for a considerable number of years (the secure tenant says since 1977). In support of this, the Tribunal has taken note of a letter written to the then tenant of Flat A and dated 29 March 1961 from the Housing Manager, Borough of Hampstead which stated, inter alia "*The ground floor tenant is to be responsible for the cultivation and neatness of the garden at the rear and front of the premises, and they can only be used with agreement with the ground floor tenant.*"
32. There is an inconsistency in that there is no dispute that the front garden is common to the subject property and the 1961 letter states that the tenant of Flat C is to be responsible therefor as well as the rear garden. On the basis of this documentary evidence, it is not understood how it can be argued that the front garden is common to the subject property but the rear garden is not. However, it is persuasive in the Tribunal coming to a determination that, as a matter of construction, the secure tenancy of Flat C confers a right in common to use the rear garden as well as a right in common to use the front garden (which was not in dispute).

33. The Tribunal determines that the Respondent is entitled to be granted rights in common over the rear garden in the leaseback of Flat C

CHAIRMAN..........

DATE.....3rd ...November 2010.....