LRA/111/2005

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – leaseback to freeholder – terms of leaseback – proposed amendment to restrictive covenant against car parking – LVT decision upheld subject to a proviso – Leasehold Reform, Housing and Urban Development Act 1993, Sch. 9

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **MRS BENTE SEHESTED MIDHAGE** **Appellant**

and

60 COOLHURST ROAD LIMITED **Respondent**

Re: 60 Coolhurst Road
London N8 8EU

Before: A J Trott FRICS

Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL
on 21 February 2007

Mr Fred Rodgers, with the permission of the Tribunal, represented the Appellant
Mr Scott Cunningham, with the permission of the Tribunal, represented the Respondent

No cases are referred to in this decision.

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DECISION

Introduction

1. This is an appeal by Mrs Bente Sehested Midhage (the appellant) against the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel made on 25 July 2005 on an application made under sections 24 and 36 of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act).

2. The appellant is the freeholder of 60 Coolhurst Road, London N8 8EU, a residential property divided into three self-contained flats. She is also the lessee of Flat 1. The lessees of Flat 2 (Mr Henry Masterson and Ms Teresa Lampkowski) and Flat 3 (Ms Elaine Lowe) gave notice on 22 March 2004 under section 13 of the 1993 Act of a claim to exercise the right to collective enfranchisement. The company appointed to act as the nominee purchaser was 60 Coolhurst Road Limited (the respondent). In her counter-notice dated 27 May 2004 the appellant required a leaseback of Flat 1 under Part III of Schedule 9 of the 1993 Act upon terms that included the right for her to construct a car parking space within the front garden of the required property. The respondent opposed this term of the new lease. The LVT agreed with the respondent and declined to include the right sought by the appellant in the leaseback. The appeal to this Tribunal is restricted to the single issue of the car parking space, the appellant having accepted the remainder of the LVT's decision.

3. The case was heard under the simplified procedure. The appellant was represented by Mr Fred Rodgers and the respondent by Mr Scott Cunningham, both with the leave of the Tribunal. The parties relied upon their amended statements of case/reply (each of which contained a statement of truth signed by the relevant party) and supporting documents. They did not give or call any oral evidence. I made an unaccompanied site inspection of the appeal property and the surrounding area on 22 February 2007.

Facts

4. From the statement of agreed facts prepared by the parties and from the evidence I find the following facts.

5. 60 Coolhurst Road is a substantial, three-storey, late Victorian house of traditional design and construction. It has been converted into three self-contained flats. The appeal property, Flat 1, comprises the basement, the front porch, the entrance hall, the ground floor rooms, the store room situated between the ground and first floors, the front garden, part of the rear garden, the external store and the side passageway to the south of the house. Flat 2 is on the first floor and comprises four rooms and a kitchen/diner. Flat 3 is on the second floor and comprises four rooms, a kitchen and a loft. The lessees of Flats 2 and 3 each have a designated part of the rear garden demised to them. They also have the right at all times to pass and repass

over and along the pathways shown on the lease plans, namely the pathway leading from Coolhurst Road to the main entrance, the side pathway leading from Coolhurst Road to the rear garden and a pathway connecting the two at the front of the house. The rights of the lessees of Flats 2 and 3 differ slightly in this respect. The rights of Flat 3 are restricted to the pathways shown coloured brown and green on the lease plan. Neither the main path from the front gate to the main entrance nor the cross path leading from the main path to the side passageway are so coloured. However, in respect of the latter the lease plan of Flat 3 is annotated with the words "right of way of lessees of all flats". Finally, the lessees of Flats 2 and 3 are entitled to use the main entrance of the building and the passages, landings and staircases leading to the flats.

6. The front garden is enclosed along the road frontage by a brick and flint wall, approximately 1 metre high with a centrally located gate between two brick piers. A privet hedge is planted behind the wall. The garden has two central areas of paving, either side of the main pathway, with shrubs planted around their perimeter and by the house.

7. Flats 1, 2 and 3 were each demised for a term of 99 years from 24 June 1957 under leases made on 29 October 1958, 27 November 1957 and 23 July 1958 respectively. The lease of Flat 2 was surrendered on 24 June 1989 and a new lease granted contemporaneously for the term of 131 years from 24 June 1957. On 10 November 1992 the appellant entered into a licence and deed of variation with the owner of Flat 3 under which retrospective licence was granted authorising the carrying out of certain works to the loft.

8. It is not disputed by the parties that the lessees of Flats 2 and 3 are qualifying tenants entitled to exercise the right to collective enfranchisement under the 1993 Act. Nor is it disputed that the appellant is entitled to a leaseback of Flat 1 under Part III of Schedule 9 to that Act.

9. The leases of Flats 1, 2 and 3 all contain the following restrictive covenant in the First Schedule:

> "7. No vehicle shall be kept or placed or permitted to be kept or placed in the front garden of the building. "

The leases of Flats 2 and 3 also contained the following positive covenant:

> "4. (ix) [to] cultivate and keep clean and tidy the gardens and paths included in the demised premises and maintain all existing trees."

The equivalent covenant in the lease of Flat 1 is worded slightly differently:

> "4. (ix) [to] cultivate and keep in good repair and in clean and tidy condition the gardens and passageways and pathways included in the demised premises and maintain all existing trees."

10. The first recital to each of the three leases states that the lessor has imposed the restrictions contained in the First Schedule to the intent that any owner or lessee for the time being of any part of 60 Coolhurst Road or any of the flats therein may be able to enforce the observance of such restrictions by the owners or occupiers for the time being of the other flats. Furthermore, on 24 July 1969 the then freeholder, who was also the lessee of Flat 1, mutually agreed to enter into a deed of covenant with the then lessees of Flats 2 and 3:

> "For the purpose of assuring the better performance of the obligations contained in the leases [....] The freeholder hereby covenants with the lessees and each of them that she will when required by any or all of the lessees take all reasonable steps to enforce the performance and observance of the lessee's covenants contained in each of the said leases […]".

The case for the appellant

11. Mr Rodgers stated that the appellant's original request for the right to construct a car parking space within the front garden of Flat 1 as contained in her counter-notice under the 1993 Act, and as considered by the LVT, had been amended. The amended clause was a covenant that the lessee of Flat 1 would not use the front garden for any other purposes than as a garden and for pedestrian access and egress over the two pathways forming part of the said garden. This was subject to the proviso that if the lessee had first obtained the prior written consent of the lessor to the plans and specifications thereof she would be able to construct a car parking space within a defined area on the lease plan and thereafter throughout the remaining term park motor vehicles there subject to keeping and maintaining the surface of such a space in a clean and tidy condition.

12. The lessor was not to unreasonably withhold its consent in the event, firstly, that the lessee of Flat 1 paid compensation, as agreed or determined, to the lessor, on behalf of the lessees of Flats 2 and 3, for any loss in the value of their flats and any increase in the value of Flat 1 resulting from the construction of the car parking space and, secondly, subject to planning permission and any other necessary consent having first been obtained. The appellant also offered to restrict the area used for car parking to that part of the garden that is enclosed by the front wall of property, the pathway from the road to the main entrance, the front of the building and the pathway from the side of the building to the road. A sketch plan (not to scale) showing the proposed car parking arrangement was included as part of the appellant's evidence. In limiting the area of the car parking space Mr Rodgers submitted that none of the rights of way enjoyed by the lessees of Flats 2 and 3 would be affected. Mr Rodgers considered that these amendments and concessions satisfied the respondent's objections to the appellant's leaseback proposals.

13. The central argument of the appeal was that the LVT had failed properly to address its obligations under Part IV of Schedule 9 to the 1993 Act. In particular the appellant claimed that granting the right to park a car would not be a departure from those provisions and that it was a reasonable requirement. In support of this argument Mr Rodgers submitted that circumstances had changed considerably since the lease was granted 50 years ago. Car ownership had increased six-fold over that period. Most of the properties in Coolhurst Road

now had car parking in the front and/or driveways to the rear. It was therefore fair and reasonable to provide for car parking in a 999 year lease.

14. The appellant appended to her statement of case a valuation report that had been prepared by Mr A J Mason MRICS of Masons Associates on 17 July 2006. Mr Mason's instructions were to provide a report on the effect of providing a car park in the front garden. He expressed the opinion that the value of off-street car parking to Flat 1 was in the order of £10,000 to £15,000. The appellant also submitted two letters from local estate agents. The first was from Mr S Herman of Tatlers dated 3 May 2006. He expressed the opinion that the provision of off-street car parking would increase the value of the property. The second was from Messrs Prickett and Ellis dated 21 June 2006 which stated that a car parking space in the front garden should not be detrimental to the value of the flats. Both opinions were qualified by the proviso that the work needed to be done tastefully.

15. Under the appellant's amended proposal the lessees of Flats 2 and 3 would still be able to use the footpaths to the front of the building. The length of road available for car parking would only be reduced by 4 to 5 metres. The respondent's concerns about the aesthetic impact of the new parking space were properly to be considered by the local planning authority. The appellant, as the occupier of Flat 1, would also be concerned about such matters.

16. Mr Rodgers submitted that the main concern of the respondent was the fact that the lessees of Flats 2 and 3 could not enjoy similar car parking rights. Despite the inclusion of the same restrictive covenant in the leases of those flats (which Mr Rodgers considered to be the result of bad drafting), it was only the lessee of Flat 1, to whom the front garden was demised, who would be entitled to park there were the restrictive covenant to be removed. The use of the front garden for car parking was not incompatible with Clause 4(ix) of the lease of Flat 1 since it still imposed an obligation upon the appellant to keep any car parking area clean and tidy in any event.

17. Mr Rodgers said that the LVT's decision to comment specifically on some of the terms of the leaseback but not others was perverse and that the LVT should have either determined all of the terms or none at all.

The case for the respondent

18. Mr Cunningham submitted that the creation of a car parking space would impede (at least in part) the right of the lessees of Flats 2 and 3 to enjoy the direct pedestrian access to the property to which they were entitled under their respective leases. In addition the creation of a car parking space would reduce the availability of on-street parking which currently benefited the lessees of those flats.

19. The appellant had failed to produce a scale drawing showing how it was feasible to provide the requested car parking space without impinging upon the existing rights of the

lessees of Flat 2 and 3. Mr Cunningham contended that the prospects of obtaining planning permission for the proposed use were speculative. He produced a letter dated 16 January 2007 from Mr Matthew Gunning, a senior planner at Haringey Council (the local planning authority) that stated that conservation consent was likely to be resisted for the demolition of part of the front wall due to the loss of an original feature and the loss of mature landscaping. It would also adversely affect the sense of enclosure and have a negative overall impact upon the street scene. Mr Cunningham emphasised that the respondent considered that the proposals would have an adverse impact upon both the amenity and security of Flats 2 and 3.

20. The appellant had suffered no financial loss as a result of the LVT's decision. She did not currently have the right to park a car in the front garden and therefore the position remained unchanged as a result of the LVT's decision to maintain this restriction. Rather the provision of a car parking space would have a detrimental effect upon the value of Flats 2 and 3 due to the loss of amenity and security that it would entail. Only Flat 1 would enjoy any benefits from such a parking space. The respondent referred to a market appraisal of Flat 2 undertaken by Anscombe and Ringland (estate agents) dated 25 January 2007 in which they stated that the guide price should be £600,000 but that:

> "Should the front of the house have parking not belonging to the flat, the demand would be lowered substantially and therefore [you] should expect offers in the region of £575,000".

Mr Cunningham acknowledged that the appellant had made a late concession on compensation in her revised draft clause (this not having been made until shortly before the hearing) but nevertheless he maintained that the LVT's decision was reasonable in the circumstances.

21. Mr Cunningham noted that the appellant considered the wording of the leases of Flats 2 and 3 to be defective insofar as they contained restrictive covenants over land that was not demised in them. He cited a number of other instances where the appellant had relied verbatim upon the wording of those leases and submitted that the appellant could not pick and choose which covenants in the leases she considered to be irrelevant.

22. Mr Cunningham concluded that the appellant was not entitled to a new term in her leaseback allowing her to use the front garden for car parking whether subject to planning permission, the lessor's consent, compensation or otherwise and he submitted that it was not reasonable to depart from the provisions of Part IV of the 1993 Act in the way sought by the appellant.

Conclusions

23. Paragraph 7 of Schedule 9 to the 1993 Act provides that any lease granted to the freeholder shall conform with the provisions of Part IV of that Schedule except to the extent that any departure from those provisions is either agreed to by the nominee purchaser and the freeholder or is directed by an LVT on an application made to it. The LVT shall not direct any such departure unless it appears to the tribunal that it is reasonable in the circumstances. In

this case the parties have not agreed to the removal of the restrictive covenant against parking and the LVT has determined that it should remain in the leaseback.

24. Part IV of Schedule 9 to the 1993 Act includes, at paragraph 13, a term of the lease dealing with covenants affecting demised premises:

> "13. The lease shall include such provisions (if any) as the lessor may require to secure that the lessee is bound by, or to indemnify the lessor against breaches of, restrictive covenants (that is to say, covenants or agreements restrictive of the use of any land or premises) affecting the demised premises immediately before the appropriate time and enforceable for the benefit of other property."

25. In my opinion paragraph 7 of the First Schedule to the lease of Flat 1 is a restrictive covenant, the benefit of which is enjoyed by the lessor and by the lessees of both Flats 2 and 3. By retaining that covenant in the leaseback the LVT gave effect to the requirement of paragraph 13 of Schedule 9 to the 1993 Act.

26. At the hearing the parties said that this point had not been raised before the LVT. Mr Rodgers submitted that the amendments proposed by the appellant, which included provision for the payment of compensation, satisfied the requirements of paragraph 13 by indemnifying the lessor (the nominee purchaser) against breaches of the (amended) restrictive covenant. I do not consider that this is to the point. The indemnity referred to in paragraph 13 is in respect of the restrictive covenant as it existed immediately before the appropriate time and not as subsequently proposed to be amended. In any event the amended covenant does not indemnify the lessor against any breach of the restrictive covenant by the lessee of Flat 1. It compensates the lessees of Flats 2 and 3 upon the lessee of Flat 1 satisfying the preconditions for its release.

27. The appellant has no right to park a car in the front garden under the existing lease of Flat 1 which has just over 49 years before expiry. Under these circumstances any loss that the appellant has suffered by the grant of a new 999 year lease containing the same restrictive covenant will be limited to the loss of any reversionary value to such a right. The present value of the right to park a car is said by the appellant to be between £10,000 to £15,000. However, this amount should be deferred for 49 years at an appropriate discount rate, an exercise that was not undertaken by the appellant.

28. I place no weight upon the evidence of value that was presented on this point at the hearing. Even allowing for the fact that strict rules of evidence do not apply under the simplified procedure I did not find any of the correspondence from the various estate agents to be of assistance and, indeed, it was contradictory. Thus Prickett and Ellis (who admitted to not having seen any of the flats) said a car parking space in the front garden would not, if done tastefully, be detrimental to the value of the flats, whereas Anscombe and Ringland said it would lower the value of the flats that did not have the benefit of such parking by £25,000. Mr Mason, who gave the valuation of £10,000 to £15,000 referred to above, said that:

> "We made enquiries with the managers of two local reputable estate agents, Winkworths and Prickett and Ellis regarding marketing strategy. Both advised that they have applicants of both types, ie those for whom a front garden would be an attraction and are content with street parking and others for whom an off-street car parking place would be desirable and for some purchasers an essential requirement."

He also said that his valuation was:

> ".... very much dependent on the standard of workmanship and design. Very poor paved front garden areas can adversely affect the marketability of a property!"

29. I am not satisfied that the appellant's car parking proposals can be achieved without interference with the right of the lessees of Flats 2 and 3 to use the existing footpaths in the front garden. The sketch plan of the car parking space showed the new paved parking area as extending from the pavement to the planted area immediately in front of the building. It did not show the retention of the existing footpath that connects the front path to the side path. Nor did the appellant produce a scale plan to show how the car parking space could be accommodated. In answer to a question from the Tribunal Mr Rodgers said that the appellant had not got around to doing it.

30. The presumption in paragraph 7(2) of Schedule 9 of the 1993 Act is that the LVT shall not depart from the provisions of Part IV of that Schedule unless to do so is reasonable in the circumstances. I am not persuaded by the appellant's arguments that her requirement is reasonable in the circumstances of this case and I do not accept, as suggested by the appellant, that the LVT acted unreasonably by not agreeing to the proposed lease amendment. In reaching this conclusion I have considered all of the other points submitted by the appellant but, individually or collectively, they do not outweigh the presumption that there should not be a departure from the provisions of Part IV of Schedule 9.

31. The appellant's amended request for the right to use a car parking space, which provides for compensation and which is conditional upon the grant of planning permission, was presented, in effect, as though this appeal was concerned with a discharge of a restrictive covenant under section 84 of the Law of Property Act 1925. Indeed in her evidence the appellant cites a number of matters as being:

> ".... applicable to an application to the Lands Tribunal to vary the terms of the restrictive covenant...."

The respondent too referred in evidence to matters which I would expect to be raised in such an application, such as the effect of the proposal upon the amenity and security of Flats 2 and 3. But this appeal was not heard in substitution for an application under section 84 of the 1925 Act and different considerations apply.

32. I am aware, however, that my decision has an unfortunate consequence for the appellant. Under her existing lease the appellant is able to apply to this Tribunal under section 84 of the

Law of Property Act 1925 for the discharge or modification of the restrictive covenant contained in paragraph 7 of the First Schedule to that lease. This is because section 84(12) of the 1925 Act applies section 84 to leasehold interests in like manner as to freeholds where such a leasehold is for a term of more than forty years of which at least twenty five years have expired. These conditions are satisfied in the case of the existing lease of Flat 1. However, under paragraph 6 of Schedule 9 to the 1993 Act, upon the grant of the new 999 year lease to the freeholder (appellant) she shall deemed to have surrendered her existing lease immediately before the appropriate time, ie the time when the freehold of the flat is acquired by the nominee purchaser. The effect of this is that the qualifying period under section 84(12) is reset and the appellant will not be able to make an application to this Tribunal for the discharge or modification of the restrictive covenant for a further 25 years.

33. In my opinion it reasonable under these circumstances for a further clause to be included within the new lease that will have the effect of preserving the appellant's existing right to apply to this Tribunal under section 84(12) of the 1925 Act. This can be achieved by enabling her to make a reference to the Tribunal as though section 84 applied, by means of a clause in the following terms:

> "PROVIDED ALWAYS and it is agreed that at any time before the twenty fifth anniversary of this lease the lessee may seek the agreement of the lessor to the discharge or modification of the restrictive covenant imposed under [the equivalent provision to paragraph 7 of the First Schedule to the 1958 lease of Flat 1] and if the lessor does not agree to such discharge or modification the lessee may refer the disagreement to the Lands Tribunal and on any such reference the Lands Tribunal shall have the power to discharge or modify the restrictive covenant as though application for that purpose had been made under section 84 of the Law of Property Act 1925 by the lessee and the lessor had objected thereto."

34. I therefore uphold the decision of the LVT to include the restrictive covenant against car parking contained in paragraph 7 of the First Schedule to the 1958 lease in the leaseback of Flat 1 to the appellant. However, this is subject to the inclusion within the leaseback of the proviso set out in the preceding paragraph. The parties shall have 21 days from the date hereof in which to submit comments upon the wording of this proviso before my decision shall become final.

Dated 9 May 2007

A J Trott FRICS