



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

Case Reference : LON/00AJ/OCE/2014/0077

Property : 103 The Grove, Ealing, London W5
3SL

Applicant : 103 The Grove Limited

Representative : Mr Robert Salis Counsel

Respondent : Mr Barry Williams

Representative : Mr James Harris Counsel

Type of Application : Section 24(1) Leasehold Reform,
Housing and Urban Development
Act 1993 – to determine terms of
acquisition in dispute

Tribunal Members : Judge John Hewitt Chairman
Mr Richard Shaw FRICS

**Date and venue of
Hearing** : 8 July 2014
10 Alfred Place, London WC1E 7LR

Date of Decision : 18 August 2014

DECISION

Decision

1. The decisions of the tribunal are that:
 - 1.1 Title to the forecourt and driveway (together shown edged blue on the plan attached to this decision (the Plan) shall remain with the respondent but the applicant shall, have unfettered rights of access without the need to give prior notice over the whole of the forecourt and down part of the driveway to the point marked with a red dotted line on the plan annexed to this decision, which point is 4.29 metres from the north-east corner of the main building known as 103 The Grove (the Building);
 - 1.2 The said right of access is for the purposes of access to and egress from the Property (and the flats within the Building) and for purposes of maintenance and repair of the Property;
 - 1.3 A right of support for the benefit of the land retained by the respondent to which he is entitled shall be expressed in clause 12.4.3 of the form TP1 in the following terms:

The right to lateral and subjacent support and protection of the Retained Land from the Property so far as lies within the power of the Transferee to grant the same.

- 1.4 Insofar as the terms of the right of entry to be recorded in clause 12.4.2 of the form TP1 were not agreed between the parties at the hearing the terms of that right shall be expressed in the following terms:

The right for the Transferor and all persons authorised by him to enter any part of the garden land comprised within the Property (but not the main building on the Property) at all reasonable times after giving reasonable notice in writing (save in case of emergency) for the purpose of repairing, maintaining and renewing the Retained Property.

Background

1. The property comprises a semi-detached Victorian building originally constructed as a house but subsequently adapted to comprise four self-contained flats. The flats have been sold off on long leases.

Part of the rear garden had been divided into two and those parts have been demised with two of the long leases. Further to the rear of the gardens a self-contained building has been erected and it is known as The Studio.

2. A number of long lessees of flats within the property exercised the right to collective enfranchisement. The applicant is the nominee purchaser. The respondent is the reversioner.

3. The parties were not able to agree all of the terms of acquisition. An application was made to the tribunal for the determination of those terms of acquisition that were in dispute.
4. The hearing of the application came on before us on 8 July 2014. Mr Salis of counsel represented the applicant and Mr Harris of counsel represented the respondent.
5. During the course of the hearing of the application the parties were able to reach a consensus on some of the terms in dispute. However there remained some issues on which the tribunal was required to make a determination. In order to do so some further information and representations were required and further directions were issued on 8 July 2014. In response to those directions the tribunal has received:

Applicant's submissions dated 17 July 2014

Respondent's submissions dated undated

Applicant's further submissions dated 1 August 2014

A plan – undated - but bearing the heading: “**Agreed Qualification for Access**” and then the words: “*Access is granted without prior notice to 103 The Grove Ltd, up to the red dotted line shown on the plan, which is 4.29 metres beyond the north-east corner of 103, The Grove, W5 3SL.*”

The extent of access over the forecourt and driveway

6. It was not in dispute that the respondent was entitled to retain title to The Studio. The studio is accessed over a forecourt adjacent to the public highway and then down a driveway which runs down beside the Building.
7. Consensus was achieved on the principle that title to the forecourt and driveway would remain with the respondent, but that the applicant shall have access rights over the forecourt and part of the driveway for maintenance and repair purposes and for access to and egress from the flats within the Building.
8. The parties were not able to agree the extent of the driveway over which those access rights should attach. The tribunal preferred the submission of the applicant on this point and determined that the rights should extend to the end of the first fence panel after the dogleg along the left hand side of the driveway. A clear agreed plan was required to identify this point. This has now been provided by the parties. A copy is attached to this decision. The parties are agreed that the applicant shall have the right of access over the forecourt at the front of the building and down the driveway to the point marked with a red dotted line on the plan, which point is 4.29 metres from the north-east corner of the main building known as 103 The Grove. The parties are also agreed that the applicant shall enjoy such access without the need to give prior notice to the respondent.

Right of support

7. It was not in dispute that the respondent was entitled to a right of support to benefit the land to be retained by him.

8. It was also not in dispute that the material statutory provision is Schedule 7 paragraph 3. This paragraph is in the following terms:

Leasehold Reform, Housing and Urban Development Act 1993 c. 28

Schedule 7 CONVEYANCE TO NOMINEE PURCHASER ON ENFRANCHISEMENT

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.*

(Emphasis added)

8. Mr Harris, for the respondent, contended that the right should not be qualified in any way and should be expressed as set out in clause 12.4.3 of the draft form TP1 at page 75 of the trial bundle, namely:

“12.4.3 The right to subjacent support shelter and protection of the Retained Land from the Property”

9. Mr Salis, for the applicant, contended that the right should be qualified in some way which might entail the grant of a restrictive covenant in favour of the respondent but he did not have the relevant drafting to hand.

10. In his written submissions Mr Salis offered three alternatives, one of which was a restrictive covenant, the other two were modifications of the clause 12.4.3 included in the TP1.

The three alternatives were:

“(1) Not to carry out any digging, excavation, construction or similar work within the property which may undermine the lateral and/or subjacent support and protection of the Retained Land;

(2) The right to lateral and subjacent support and protection of the Retained Land from the Property so far as lies within the power of the Transferee to grant the same;

(3) The right to lateral and subjacent support of the Retained Land from the Property, provided that the Transferee shall not be held liable in respect of any loss and damage caused to the Retained Land through the withdrawal of the right of such support and protection where the withdrawal is not the fault of the Transferee.”

Mr Salis reminded us that his alternative (2) is the wording adopted in paragraph 2(a) of the First Schedule to the long leases by which the freeholder granted certain rights to the long lessees.

11. In his answer Mr James rejected all three alternatives. His preferred drafting is now:

“The right of subjacent and lateral support and protection from [the nominee purchaser’s land] including any party walls or structures to support uphold and maintain the land and buildings.”

12. In his reply Mr Salis rejected that drafting and maintained his position that his three alternatives were consistent with the wording of paragraph 3(2) of the Seventh Schedule which he emphasised was to grant such easements ‘so far as the freeholder is capable of granting them’.

13. Mr Salis also relied upon and cited *Bond v Nottingham Corporation* [1940] Ch 429, which held at 438 to 439 that the effect of an easement of support was to impose negative obligations on the servient land: the owner of the servient land was not under any obligation to carry out positive steps to ensure that the right of support of the dominant land was maintained, but at the same time was not entitled to take deliberate action which undermined the right of support of the dominant land.

14. We reject the drafting put forward by Mr James because we find that it goes above and beyond a simple right of support and appears to impose or may arguably impose a more positive obligation. We note that in

Bond v Nottingham Corporation. We note the passage of Sir Wilfred Greene MR at 438 in which he says:

“The nature of the right of support is not open to dispute. The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If it does so, and support is removed, the owner of the dominant tenement has no cause for complaint.”

We consider it preferable that the clause to be inserted into the form TP 1 should be free of ambiguity in order to eliminate the possibility of future litigation on the proper construction of the right granted.

15. Of Mr Salis’ three alternatives, we reject (1) because we consider it to be outside the scope of paragraph 3(2) which is concerned with the grant of rights and easements and not the grant of restrictive covenants. Even if in general the terms the effect of a negative covenant and the grant of a positive right might be broadly similar in practice we find that we should focus on what the statute provided; and that is the grant of a right.
16. Of the remaining two alternatives we prefer (2) because it mirrors the right granted by the freeholder to the long lessees and is thus consistent and fair as between those parties and because it is a formulation which in the experience of the members of the tribunal is commonly adopted in circumstances and transactions such as those presently before the tribunal.

The right of entry

17. It is the understanding of the members of the tribunal that during the course of the hearing on 8 July 2014 the parties had agreed the terms of the right of entry in clause 12.4.2 of the form TP1 and that such agreement was to the effect that the right of entry shall be restricted to the garden land and not extend to a right to enter the Building.
18. In the light of this understanding the further directions dated 8 July 2014 did not expressly deal with or invite written submissions on the terms of this right.
19. If the terms of acquisition on this right have been agreed this tribunal does not have jurisdiction to determine the extent of the right. If, however, the terms of the right were not agreed during the course of the hearing it is open to this tribunal to determine any dispute relating to it.
20. We note that in paragraph 4 of his submissions dated 17 July 2014, Mr Salis made reference to clause 12.4.2 of the form TP1 and reasserted the view that the right of entry should be restricted to the garden land and not extend to a right to enter the Building.
21. In paragraph (f) of his submissions in answer Mr Harris observed that:

“As regards the right of support, that right is often accompanied by a specific right of entry and it is convenient to leave the existing right of entry in place for that purpose.”

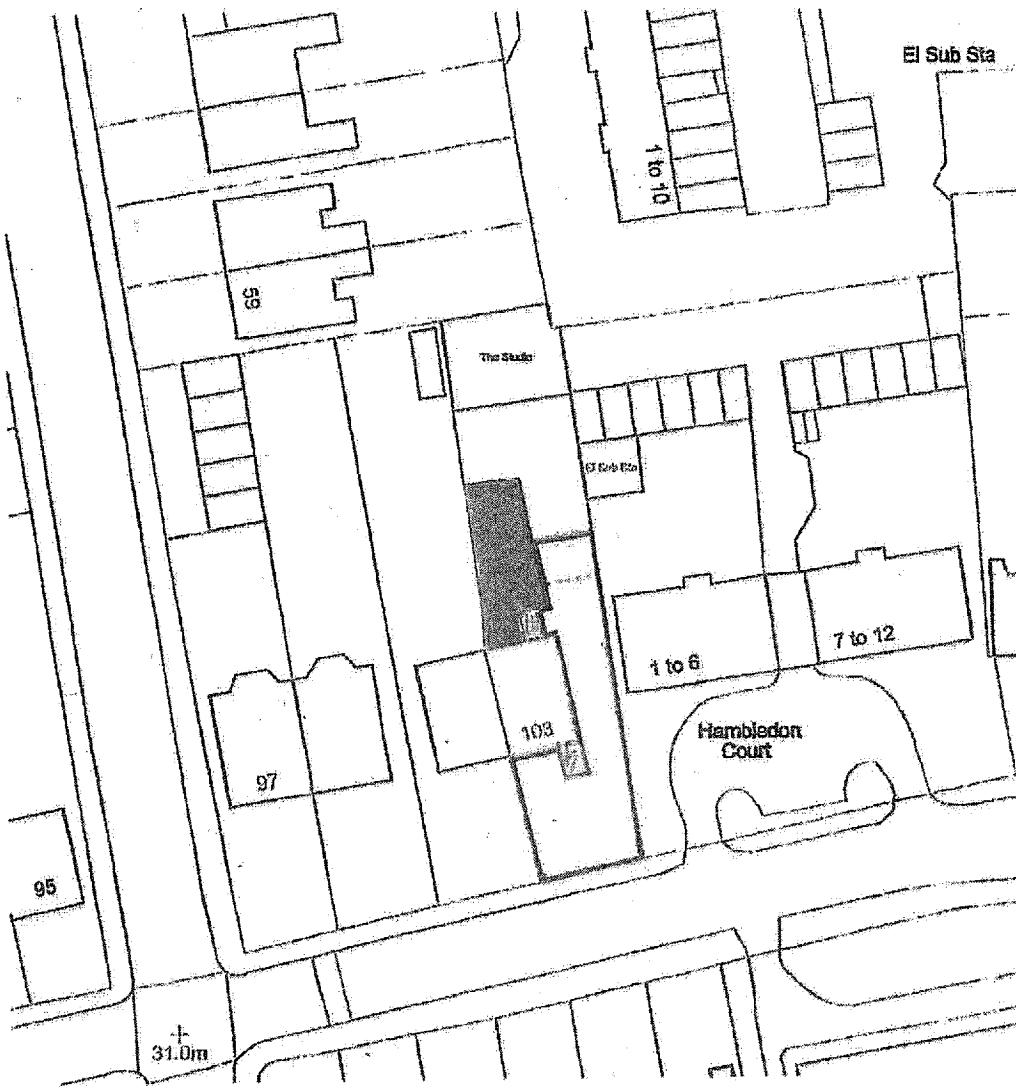
It is not immediately clear to us what is meant by the expression ‘the existing right of entry’. It may mean that Mr Harris is contending for the wording in the original draft of form TP1 or it may be a reference to the terms of the right as agreed during the course of the hearing or it may bear some other meaning.

22. In his reply Mr Salis is critical of the reference of convenience to retain the right, and that such convenience of its own is insufficient. He submits that to be entitled to a right to enter the Building the respondent must show that such a right is necessary. He says it is not.
23. Insofar as we have jurisdiction to determine the issue we prefer the submissions of Mr Salis for the following reasons. The Studio is some distance from the Building and there is garden land of the Building and garden land of The Studio lying in between. The only part of the retained land which abuts the Building is part of the forecourt and part of the driveway. The respondent has not made out to us any convincing case that it would or might be necessary to enter into the Building in order to maintain, repair or renew those parts of the forecourt or driveway which abut the Building.

Judge John Hewitt
18 August 2014

Agreed Qualification for Access

Access is granted without prior notice to 103 The Grove Ltd,
up to the red dotted line shown on the plan, which is
4.29 metres beyond the north-east corner of 103, The Grove, W5 3SL.



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103 The Grove, Ealing, W5 3SL

Existing OS Plan 1:500 @ A4

