L4606

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AZ/OCE/2017/0213**
Property	:	**1-11 LLOYDS VILLAS, LEWISHAM WAY, LONDON SE4 1US**
Applicant	:	**1-11 LLOYDS VILLAS LIMITED**
Representative	:	**BEVERLEY MORRIS, Solicitor**
Respondent	:	**LONDON AND QUADRANT HOUSING TRUST**
Representative	:	**BEN MALTZ, Counsel**
Type of application	:	**Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	:	**Judge T Cowen** **M Krisko FRICS**
Date of determination and venue	:	**30th January 2018 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**1st February 2018**

DECISION

Summary of the tribunal's decision

(1) The initial notice under section 13 of the Leasehold Reform Housing and Urban Development Act 1993 did not include a claim by the Applicant to be entitled to acquire or be granted the benefit of the Respondent's right to park on the two Disputed Parking Spaces (as defined below) and cannot be read as including such a claim.

(2) This means that no such claim can be pursued by the Applicant in these proceedings before this Tribunal.

(3) The Tribunal has therefore determined the disputed issue on the terms of acquisition, which is the subject of the Applicant's section 24 application, in accordance with the wording of the draft TP1 as drafted by the Respondent, without the Applicant's handwritten amendments on page 6 of the draft TP1.

REASONS FOR DECISION

1. We communicated the substance of our decision, as set out in the preceding three paragraphs, orally to the parties at the hearing. We told the parties that our reasons would follow in writing. We now set out our reasons in the remainder of this decision.

2. This is a collective enfranchisement case under the 1993 Act. The premium has been agreed, subject to the issue we have to decide. The only issue before us relates to the terms of acquisition. In particular, we are deciding whether the terms of acquisition should include a transfer or grant to the Applicant of a right to park cars on two Disputed Parking Spaces which are allegedly used by visitors to the Property.

3. The Disputed Parking Spaces lie outside the Respondent's freehold title, in land owned by a separate third party, Purelake Investments Limited ("Purelake"). The Respondent's freehold title to the Property includes a registered right to park on five parking spaces located in Purelake's land. That is to be found registered in the property register of the Respondent's title (number TGL127485) as one of the benefits of rights granted by a transfer dated 22 November 1996 of which number (v) is: "the right to park on the five parking spaces tinted blue on the plan".

4. Two of those five spaces are the Disputed Parking Spaces. The three others are in a different part of Purelake's freehold title on the other side of Property. At the start of the hearing there was some doubt on the part of the Applicant as to the identity of the freehold owner of title to the Disputed Parking Spaces. This is surprising since it is a matter of public record at HM Land Registry. During the course of the hearing, the Respondent showed Office Copy Entries for the relevant titles to the Applicant's solicitor, who conceded that the title position is as described at the start of this paragraph.

5. That is relevant, because the issue which we have to decide seems to have stemmed from a mistaken assumption made by the Applicant that the Disputed Parking Spaces are part of the Respondent's freehold title.

6. The Property is a self-contained building comprising 11 flats with common parts. The Respondent is the registered freehold proprietor of the Property under title number TGL127485. Seven of the eight qualifying tenants are participating tenants. The Applicant is the nominee purchaser.

7. The Applicant served an Initial Notice dated 17 January 2017 under section 13 of the 1993 Act. The Respondent served a counter-notice dated 14 March 2017. There are no challenges to the service or validity of those notices. On 11 September 2017, the Applicant made this application to the Tribunal for a determination under section 24(1) of the 1993 Act of:

   i. The premium to be paid; and

   ii. The other terms of acquisition which remain in dispute.

8. In Box 8 of the Application notice, the Applicant stated that the details of the disputed terms of acquisition were:

   > "The use of visitors' car parking spaces on the respondent's adjoining land"

9. As stated above, it is now agreed by the parties that the car parking spaces in question are not (and were not then) on the Respondent's land.

10. The premium to be paid is no longer before us as a dispute, because on 26 January 2018, the parties' respective valuers agreed the relevant premiums for the Premises and the Appurtenant Parts (a total of £46,504.00) and recorded them in a signed Statement of Agreed Facts. In the same statement, the valuers agreed an additional value of £10,000 for the inclusion of the two Disputed Parking Spaces "if and only if...the two car parking spaces are to be included as part of the claim".

11. It therefore remains to us only to decide whether the two Disputed Parking Spaces should be included. There are two limbs to this issue in the submissions made by the respective parties:

    i. "The S13 Notice Issue" – whether the benefit of a right to park on the Disputed Parking Spaces was claimed by the Applicant in the initial section 13 notice at all, and if not whether that prevented the Applicant from pursuing a claim to that alleged right in these proceedings.

ii. "The Substantive Easement Issue" – whether the Applicant was entitled to a right to park on the Disputed Parking Spaces to the extent necessary to found a claim to have any such rights included in the enfranchisement claim.

12. We were told by the Applicant that the basis of the Substantive Easement Issue was that (some or all of) the leaseholders of the Property had acquired an easement by prescriptive rights over the Disputed Parking Spaces for use by visitors' cars. Neither the Tribunal nor the Respondent had any advance notice of the legal basis of this contention nor of any of the evidence in support of it. In fact, the Applicant's solicitor showed a draft witness statement to the Respondent's counsel on the morning of the hearing for the first time. At 10:45 am on the morning of the hearing, a Mr Jenkinson arrived at the Tribunal, signed the witness statement and stated that he had brought a number of previously unseen documents which supported the factual basis of the Applicant's claim for prescriptive rights. Mr Jenkinson is one of the participating tenants and appeared to be at least one of those giving instructions to the Applicant's solicitor. The Respondent's counsel objected to the admission of Mr Jenkinson's evidence (written or oral) and to the admission into evidence of the documents he had brought, on the grounds that the Respondent had no opportunity properly to take instructions on the facts alleged by Mr Jenkinson and to prepare legal arguments on the proposed prescriptive rights claim. In the circumstances we decided, with the agreement of the parties' representatives, to hear the S13 Notice Issue as a preliminary point, on the basis that it may dispose of the entire dispute and determine the terms of acquisition.

13. As indicated at the outset of this decision, we have decided the S13 Notice Issue in a way which disposes of the entire dispute and we have determined the terms of acquisition accordingly. There was therefore no need for us to consider whether the evidence and documents of Mr Jenkinson should be admitted and no need for us to consider the Substantive Easement Issue.

14. The reasons for our decision on the S13 Notice Issue are as follows. These are the relevant features of the Initial Notice dated 17 January 2017:

i. The "Premises" are defined in the notice as "1-11 Lloyd Villas, Lewisham Way, London SE4 1US as shown edged red on the attached plan".

ii. There are three plans attached to the notice. None of them include anything edged red. The only plan which includes anything edged in colour shows the building, the communal garden area and some parking spaces edged in green on one of two plans labelled "Plan A Extract". That cannot be the

"Premises" because it includes areas other than a "self-contained building or part of a building" contrary to section 3(1) of the 1993 Act. Mr Maltz for the Respondent told us that the notice was invalid because of the lack of a proper plan, but that the Respondent had taken a pragmatic approach to the process and had waived the invalidity of the notice. The important feature to notice about this plan is that the green line does not include the two Disputed Parking Spaces.

iii. Clause 3 of the Notice states that "The Tenants also claim to exercise the right to acquire, pursuant to section 1(2)(a) of the Act, the freehold interest in the land described below in the Schedule of Additional Freehold Property."

iv. The "Schedule of Additional Freehold Property" contains the following words: "Main structure of the building, common parts of the building. Communal gardens including **parking spaces** and dustbin stores." (our emphasis). At this point, it is necessary to point out that the Respondent's freehold title includes 11 parking spaces. It was never in dispute that the Applicant was entitled to purchase those 11 spaces as part of its claim and they have been included in the agreed premium and in the agreed parts of the draft TP1. The phrase "parking spaces" in the Schedule of Additional Freehold Property does not of itself indicate whether the tenants were claiming the two Disputed Parking Spaces. What is now, however, clear is that the Applicant cannot acquire the freehold title to the two Disputed Parking Spaces under this Schedule at all, because the Respondent does not have freehold title to those spaces itself. Even if the Applicant was entitled to claim the freehold to those spaces, no notice has been served on the freehold owner of them, Purelake, who is not a party to these proceedings.

v. Clause 4 of the Notice states that "The Tenants propose that the rights specified below in the Schedule of Required Rights should be granted over the land specified in that schedule by the freehold owner of that land".

vi. The "Schedule of Require Rights" contains references to rights of way and rights of free passage of services, but does not contain any rights to park vehicles.

15. It is now clear, from reading the Section 13 Initial Notice and the Section 24(1) Application Form and from listening to the submissions of Miss Morris (whose firm drafted the notice and the application), that the Initial Notice was drafted in the incorrect belief that the Disputed Parking Spaces were within the freehold ownership of the Respondent.

16. In its counter-notice dated 14 March 2017, the Respondent accepted all of the proposals contained in clauses 2, 3 and 4 of the Initial Notice "SUBJECT TO the PROVISOS set out in clause 4 of this Counternotice". Clause 4.2(ii) of the counter-notice read as follows:

> "For the avoidance of doubt the benefit of the Landlord's rights to park on the five parking spaces shown edged blue on the title plan to the Landlord's freehold title number TGL127485 (specified in entry A: 2 (v) ...) is hereby excluded by the Landlord from the rights to be acquired by the Tenants pursuant to their claim to collective enfranchisement of the Specified Premises and Appurtenant Property and this Counternotice is served on this basis."

17. Clause 10(ii) of the counter-notice contained a similar exemption.

18. Pursuant to the Tribunal's directions, the Respondent prepared a draft TP1 transfer form. Subject to the insertion of the correct agreed premium, all of the terms of the draft TP1 are agreed, save for the section dealing with the Disputed Parking Spaces. The Respondent's draft of clause 12.4(4) of the TP1 transfers to the Applicant the benefit of various defined rights of way currently enjoyed by the Respondent and ends with the following phrase:

> "and excluding the benefit of the Transferor's right to park set out in entry A:2(v) of the Property register of the Transferor's freehold title TGL127485"

19. The Applicant has added a handwritten amendment to that clause. The Applicant wants to delete the section quoted and insert the following in its place:

> "and including the benefit of the Transferor's right to park on the two car parking spaces shown edged blue coloured green set out in entry A:2(v) of the Property Register of the Transferor's freehold title TGL127485 but excluding the benefit of the Transferor's right to park on the three car parking spaces shown edged blue coloured pink set out in entry A:2(v) of the Property Register of the Transferor's freehold title TGL127485."

20. That essentially defines the dispute between the Applicant and the Respondent which is before us.

21. The Respondent's submission on the S13 Notice Issue is straightforward. The rights claimed in the handwritten amendments to the TP1 are not claimed in the Initial Notice. The only mention of parking spaces is in the Schedule to clause 3 of the Initial Notice ("Additional Freehold Property"). It is now common ground between

the parties (and we find as a fact) that the freehold title to the Disputed Parking Spaces is owned by Purelake and that they cannot therefore be acquired under this Initial Notice. The appropriate part of the Initial Notice for the tenants to claim a transfer or grant of the benefit of a right to park (rather than the freehold title to the space itself) is in clause 4 and its Schedule ("Required Rights"). There is no mention of parking spaces or of a right to park in that part of the Notice. The Respondent therefore submits that there is no claim in the Initial Notice for the rights which are now claimed by the Applicant.

22. The Applicant seeks to meet this contention in two alternative ways:

    i. A claim for the benefit of a right to park can be inferred from the Notice, even if the express words are not there; or

    ii. If the absence of such a claim is the result of an error on the notice, then by application of the principle in *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749, the notice ought to be read as if corrected.

23. The Applicant's point on inference is based on the wording of the Respondent's counter-notice - in particular clause 4.2(ii) of the counter-notice quoted above. The Applicant submits that the only reason why the Respondent would have felt the need to exclude the parking rights over the Disputed Parking Spaces in the counter-notice is because the Respondent must have understood that the Initial Notice was claiming them. Mr Maltz for the Respondent rightly pointed out that one cannot use a subsequent document as an aid to construction of an earlier document. However, the Applicant's point could be considered as using the counter-notice as an illustration of what a reasonable person would have understood the language of the Initial Notice to mean. Therefore, it is argued, a reasonable person would, like the Respondent, have realised that the Applicant was claiming parking rights over the Disputed Parking Spaces.

24. There are two principal problems with the Applicant's argument on this point. Firstly, in order to derive inferences from the wording of the Initial Notice, there needs to be some wording there from which inferences can be drawn. There is nothing at all in the Schedule of Required Rights which could even be ambiguously referring to parking spaces. One cannot infer from the claim in clause 3 to acquire the freehold of the parking spaces that in fact the Applicant is claiming the benefit of a right of way, because those words simply cannot bear that meaning. Secondly, the reasonable person trying to understand the language used in the Notice would do so "having all the background knowledge which would have been available to the parties" (see Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 - para 14). The relevant background knowledge here is that:

i. The Applicant mistakenly believed that the freehold title to the Disputed Parking Spaces was owned by the Respondent. The Applicant therefore cannot in fact have intended to be claiming the benefit of a right to park.

ii. The Respondent did not realise that the Applicant was operating under that mistaken belief.

iii. There are eleven parking spaces which are included within the Respondent's freehold title and there are an additional five spaces outside the Respondent's freehold title over which the Respondent has rights to park. The two Disputed Parking Spaces are immediately adjacent to a section of the parking spaces which are in the Respondent's freehold title. The unqualified phrase "parking spaces" in the Schedule to clause 3 of the Initial Notice is therefore highly ambiguous and uncertain. We find that it was for that reason that the Respondent felt compelled specifically to exclude the Disputed Parking Spaces from the enfranchisement claim, not because they made an inference that those spaces were being claimed. The fact that clause 4.2(ii) of the counter-notice starts with the words "for the avoidance of doubt" strengthens and supports our finding on this issue.

25. We therefore find that on a true construction of the Initial Notice, it did not include a claim for the benefit of a right to park on the Disputed Parking Spaces and it cannot be read to include any such claim.

26. Is that omission a mistake which can be corrected under the *Mannai* principle? The mistake here which needs correcting is that instead of claiming the benefit of the right to park on the Disputed Parking Spaces, the Initial Notice claims a right to acquire the freehold title to "parking spaces". An erroneous notice is still valid if it is "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt" as to what is really meant. (see *Mannai* at p768). In our judgment, for the reasons stated above, there is nothing in the notice which clearly indicates that there is a claim relating to the Disputed Parking Spaces at all. This is not an obvious error easily corrected, but a mistake arising from a complex misunderstanding of the title status of various pieces of land. It does not satisfy the *Mannai* principle, in our judgment.

27. It is therefore our concluded judgment that the Initial Notice does not include a claim for the property rights which are now sought in this application through the Applicant's handwritten amendments to the TP1.

28. No submissions were made to us on the issue whether the Applicant could pursue the claim for the benefit of a right to park despite the claim not appearing in the Initial Notice.

29. The Tribunal referred the parties to the decision of Neuberger J (as he then was) in the case of *Malekshad v Howard de Walden Estates Ltd (No.2)* [2004] 1 W.L.R. 862, that the inclusion of property which ought not to have been included invalidated the notice unless the notice was appropriately amended by application to the county court under Schedule 3 para 15(2) of the 1993 Act. We are not concerned in this case with the validity of the notice, but by extension of reasoning with the *Malekshad* case, it cannot be that tenants can acquire under the Act property rights which are not included in the notice. We are of the view that for this purpose the *Malekshad* reasoning works the other way around from the facts in that case - ie where (as here) property which ought to have been included is omitted.

30. It follows that our decision on the S13 Notice Issue has finally determined and disposed of the application and there is therefore no need for us to consider the Substantive Easement Issue.

31. We therefore make the determination set out at the beginning of this decision.

32. Although we communicated the substance of our decision orally to the parties at the hearing, the date of this written decision with reasons (31 January 2018) is the date of our determination for the all purposes, including the statutory procedures under the 1993 Act.

Dated this 1st day of February 2018

JUDGE TIMOTHY COWEN

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).