UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 11 (LC)
UTLC Case Number: LRA/32/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – COLLECTIVE ENFRANCHISEMENT – whether nominee freeholder entitled to an easement to park – construction of leases – implication of easements - issue estoppel – jurisdiction of First-tier Tribunal

IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MS PATRICIA ASHFORD

Appellant

And

MILL COURT WALTON LIMITED **Respondent**

Re: Mill Court,
Saville Street,
Walton-on-the-Naze,
Essex,
CO14 8PW

Judge Elizabeth Cooke
14 January 2021 by remote video platform

The appellant in person
Ms Katie Gray for the respondents, instructed by Taylor Haldane Barlex Solicitors LLP

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The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36
Donovan v Rana [2014] EWCA Civ 99
Gleeson v J Wippell & Co [1977] 1 WLR 510
Hemmise v Tower Hamlets LBC [2016] UKUT 109 (LC)
Investors Compensation Scheme Limited v West Bromwich Building Society [1997] UKHL 28
Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 924

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") striking out part of the appellant's case on an application for collective enfranchisement. The appellant, Ms Ashford, is the freeholder of Mill Court, Saville Street in Walton-on-the-Naze, and also the long leaseholder of one of the flats into which the building is divided. The lessees of the other three flats have exercised their right to collective enfranchisement and the respondent to this appeal is the nominee purchaser. It was the appellant's case before the FTT that the respondent is not entitled to acquire, on enfranchisement, an easement to park on the front courtyard, and that was the part of her case that the FTT struck out.

2. The appeal was heard by remote video platform on 14 January 2021. The appellant represented herself, and Ms Katie Gray of counsel represented the respondent; I am grateful to them both.

The factual and legal background

3. Mill Court is a purpose-built block of four flats, Flats 1 and 2 on the ground floor and Flats 3 and 4 on the first floor; there is a garden behind, half of which is demised with each of Flats 1 and 2, and at the front there is a courtyard with six parking spaces, three on either side of the path to the front door. Planning permission for the building, granted in 1985, included a condition:

> "The car parking spaces shown on the Plan … attached hereto … and the means of access therefore, shall be constructed and made available for use prior to the occupation of the dwellings to which they relate."

4. I pause to comment that the planning permission did not require the grant to the lessees of the flat of easements to park. It required only the construction of parking spaces and their being made available for use, and said nothing as to whether that use should be as of right or by permission.

5. The long leases of the four flats were granted in 1986, and Flat 1 was demised by the freeholder, Mr Dennis Spencer, to the appellant's father, Mr Kenneth Ashford. In 1995 Mr Ashford purchased the freehold. The appellant succeeded to his property in 2015.

6. The leases of the other three flats are today held as follows:

Flat 2 Mr Roger Todd and Mrs Sheila Todd (original lessees)

Flat 3 Ms Siobhan Kielty (purchased in 2018)

Flat 4 Mr Trevor Wood and Mrs Carolyn Wood (purchased in 2018)

7. I refer to those three lessees as "the enfranchising lessees".

8. On 5 November 2019 the FTT gave its decision ("the service charges decision") on an application by Ms Kielty and Mr and Mrs Wood for a determination of the reasonableness and payability of service and administration charges. Among the charges they challenged were "administration charges" of £45 imposed every time any of the lessees parked on the courtyard. It was the appellant's position that they were not entitled to do so and that the leases entitled her to make that charge. The FTT in its decision dated 5 November 2019 said at paragraph 43:

> "The tribunal is satisfied that the lessor has no right to impose an administration charge for breaches of covenant other than those incurred in or in contemplation of valid section 146 proceedings, for the grant or authorisation or consent, and for interest on arrears. She cannot therefore impose parking fees for tenants parking in the front courtyard, even if that were unlawful."

9. It went on to say

> " 45 … the tribunal is satisfied that the right to park is a right appurtenant to each demise (save for flat 1, where the right to park in an identified space is expressly included in the demise). It cannot therefore be a breach to park unless undertaken in such a careless manner as to obstruct or inconvenience others."

10. Meanwhile, in December 2018 the respondent and the enfranchising lessees had given initial notice of exercising their right to collective enfranchisement in accordance with section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). The terms of the acquisition were not agreed, and an application was made to the FTT; in its decision of 2 January 2020 the FTT struck out the appellant's case so far as the right to park was concerned. Most of the rest of the terms were settled by consent, and the FTT decided those that remained in dispute.

11. It is common ground between the parties that the leases of the enfranchising lessees did not lease any part of the courtyard to them. But it is also common ground that if their leases gave them an easement to park there, whether in a defined space or otherwise, then the courtyard is, in the words of section 1(3)(b) of the 1993 Act:

> "… 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".

12. That section goes on:

> "(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—

(a) there are granted by the [person who owns the freehold of that property] —

(i) over that property, or

(ii) over any other property,

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease."

13. Therefore if the enfranchising lessees had an easement to park under their leases, then the respondent is entitled to such an easement, in terms that will allow it to grant an easement to each of the enfranchising lessees.

14. The appellant's position before the FTT was that the leases of Flats 2, 3 and 4 did not grant an easement to park – in contrast to the lease of Flat 1 which did. The FTT struck out her case on that point on the basis (paragraph 17) that the matter had already been decided between the same parties in the service charges decision. It added (paragraph 18) that "even if that is not strictly the case", the appellant's case relating to parking spaces should be struck out because "it would prejudice the good administration of justice to expose the parties to the leopard of a decision inconsistent with the findings of 5 November 2019."

15. The appellant has permission to appeal on the grounds that there was no issue estoppel (that being the legal shorthand for a prior decision on the same point between the parties), and that the leases did not grant an easement to park. In the grant of permission - made when the Tribunal had not had sight of all the relevant material - I referred to the possibility that the leases demised the parking spaces to the tenants; it is agreed that they did not, but the issue is whether there was an easement to park,

16. That question was not decided by the FTT, because it simply struck out the appellant's case on the point. Accordingly, it would be open to this Tribunal to determine the appeal on the question whether the FTT should have struck out the appellant's case and, if that appeal succeeded, to reinstate her case and remit the matter to the FTT for a decision. But both parties came to the hearing ready to argue the substantive point and agreed that I should decide it provided that I could do so without having to hear evidence of fact. The Tribunal is able to do so since it has jurisdiction to make any decision that the FTT could have made.

17. I therefore turn first to the appeal against the decision to strike out the appellant's case on parking.

The appeal

18. It is well-established that where an issue has been decided in previous litigation between the same parties, and the determination of that issue was necessary for the decision that the

court or tribunal made, then an issue estoppel is raised and a later tribunal will not go behind it except in exceptional circumstances.

19. In light of that I have to go back to the service charges decision. I summarised above what was in issue in 2019 so far as the administration charges were concerned. The FTT looked at the term of the leases and concluded, as I said, at paragraph 43 that there was no right to levy the administration charge even if the lessees had no right to park.

20. The FTT then went on to conclude that the lessees were entitled to park. It had in mind, at paragraph 44, that on-site was provided in compliance with the planning condition, that Mr Ashford had numbered the parking spaces, that paragraph 14 of Schedule 1 requires the lessees not to park so as to obstruct others, and the freeholder's inability to show that parking had not been permitted (in the context of an application to the local planning authority for a certificate that would, in effect, discharge the planning condition). I note in passing that none of that reasoning goes anywhere near to indicating the presence of an easement to park, rather than a licence. Nevertheless the FTT made its finding at paragraph 45, quoted above.

21. It is agreed that its finding as regards Flat 1 is incorrect, in that the parking space is not demised by that lease but there was an express easement. However, it appears that the FTT intended to find that the leases of Flats 2, 3 and 4 granted easements to park.

22. There are two difficulties in the way of that finding giving rise to an issue estoppel.

23. The first is that the service charges decision was not made in litigation between the parties to the FTT's 2020 decision and the present appeal. The respondent was not involved.

24. Ms Gray relies upon decisions (in particular *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924 and *Gleeson v J Wippell & Co* [1977] 1 WLR 510) where an issue estoppel was held to have arisen because although the parties were not the same they had an identity of interest– for example an individual and a company he controlled, or successive owners of the same lease. In the present case the three enfranchising lessees are in joint control of the respondent. Only two of them were party to the service charges decision because Mr and Mrs Todd did not incur the disputed paring charge. Ms Gray argues that that was not fatal because the appellant, against whom the decision in paragraph 45 of the service charges decision was made, was party to both cases. I am not convinced by that argument, but I do not need to decide the point because the second difficulty is fundamental and would prevent an estoppel arising even if the parties were identical.

25. The second difficulty is that the decision at paragraph 45 of the service charges decision was not necessary for the decision in paragraph 43, which was what the FTT actually had to decide, namely whether or not the administration charge for parking was legitimate. It decided it was not, and explicitly said that that was the case whether or not the parking was lawful. So the FTT said in terms that the decision about whether the lessees were entitled to park made no difference to the point that it actually had to decide.

26. Ms Gray had three answers to that point. One was that the decision at paragraph 43 was incorrect. For the respondent she argues that the FTT misconstrued the lease and that the appellant was entitled to make that parking charge. That is the opposite of what her clients argued in the service charges proceedings, and as she says her client now is not the same person as the lessees who were party to the service charges proceedings. That rather detracts from her argument summarised in paragraph 25 above but in any event it is irrelevant, Paragraph 43 was what the FTT decided and it was not appealed.

27. Her second answer was that the FTT made its decision in paragraph 45 because it was in doubt about its decision in paragraph 43 and so carried on in the usual "in case we are wrong about that" basis. That is not what the FTT said. Its decision in paragraph 43 was made without qualification and, more importantly, it has not been appealed. A decision made on the "in case we are wrong" basis could only give rise to an issue estoppel once the primary decision had been set aside.

28. Third, Ms Gray pointed out that the existence or otherwise of the right to park was an important issue between the parties and so the FTT decided it to avoid future dispute in pursuance of the overriding objective. It may have intended to do that, but the issue before the FTT was the validity of the parking charge. If there had been a right to make that charge in the event of unlawful parking, then of course it would have had jurisdiction to construe the leases and decide whether or not they granted a right to park. But having made a clear decision about the administration charge, it did not have jurisdiction to go further and make an unnecessary decision about construction.

29. Accordingly I find that there is no issue estoppel standing in the way of the appellant being able to argue her case about parking.

30. Had I found that there was an estoppel I would have had to consider whether there were exceptional circumstances that would justify departing from it on the basis set out in *Hemmise v Tower Hamlets LBC* [2016] UKUT 109 (LC). Among those would have been the fact that the decision that the leases granted easements was (as we shall see) incorrect. But regardless of that there can have been no estoppel.

31. The FTT at its paragraph 18 also found that even if it was not strictly the case that the matter was a decided issue between the parties "it would prejudice the good administration of justice to expose the parties to the jeopardy of a decision inconsistent with the findings of 5 November 2019." No explanation or authority was provided for that. If the matter has not already been decided between the same parties, it needs to be resolved, especially as it now arises in the wholly different context of enfranchisement where the answer will determine the parties' rights in land for the foreseeable future.

32. Accordingly I find that the FTT was wrong to strike out the appellant's case and its decision to do so is set aside. I therefore proceed to the determination of the substantive question that the FTT should have decided.

Did the leases of Flats 2, 3 and 4 grant an easement to park on the courtyard?

33. All four leases contain the stipulation (at paragraph 14 of the First Schedule):

> "no car or van or other vehicle shall be parked on the said land so as to obstruct or inconvenience other tenants or tradespeople or other persons making deliveries to or collections from the property."

34. The Second Schedule to all the leases grants rights to the lessees. The Second Schedule to the leases of Flats 2, 3 and 4 contain the following paragraph (3), in identical terms (save that in the lease of Flat 2 there is also mention of the use of the garden):

> "(3) the right to use (in common as aforesaid) the private roads and paths leading to the Building from Saville Street for domestic and recreation purposes only…"

35. The lease of Flat 1 has a different paragraph (3) in the Second Schedule, as follows:

> ""(3) The right to use with or without vehicles the private road on the said land and to park one roadworthy private motor vehicle in the space allocated for that purpose on the said land".

36. Ms Gray for the respondent says that those clauses together should be construed as the grant of an easement to park. She points out that if the lease is ambiguous the Tribunal should look at extrinsic evidence such as topography (here, the fact that the courtyard lends itself to parking by the lessees and no-one else) and other factors that point to the intentions of the original parties to the leases (citing *Investors Compensation Scheme Limited v West Bromwich Building Society* [1997] UKHL 28 and *Arnold v Britton* [2015] UKSC 36).

37. I do not think the leases are ambiguous. They contain no express right to park; so the extrinsic evidence is not needed. But it is also relied upon in support of the further argument that if there is not express easement then one should be implied in order to give effect to the common intention of the original parties.

38. Among the factors to which Ms Gray points are the planning permission, the lessees' evidence that the original developer allowed parking, their evidence that the appellant's father marked out the bays with the flat numbers for the lessees' use, and that there were no objections to parking until five years ago.

39. Ms Gray agrees that the planning permission did not convey a right to park but she regards it as an aid to the construction of the lease because the original parties will have known about it.

40. However, the condition in the planning permission is as consistent with a requirement that the lessees have permission to park as it is with their being granted an easement.

41. The factual evidence of the current lessees has not been tested and no findings have been made upon it. Assuming in their favour that it is true, it is nevertheless of no assistance to

them in the appeal because it cannot demonstrate the grant of an easement. I was particularly urged to consider the evidence of Mr Todd, an original lessee, who said:

> "At the time of our purchase, Dennis Spencer was the freehold owner of Mill Court and he made it clear to all residents parking was available within the forecourt area to the front of the building. The spaces are marked out using concrete and paving slabs, and look the same today as they did in 1986. Mr Spencer did not require us to enter into any separate agreement in relation to the parking, rather we all proceeded on the basis that the right to park was a right that we held by virtue of being lessees of the Property… I cannot think why else parking spaces would have been laid out on the forecourt is it was not intended by everyone that the lessees could park there".

42. It is, of course, obvious from the layout of the forecourt that there was supposed to be parking. But that layout does not assist with the construction of the lease, and cannot indicate an intention on the freeholder's part to grant an easement. It is a matter of general knowledge that many residential blocks have parking spaces that are used by permission rather than as of right. Ms Gray stresses the discussions that Mr Todd says took place at the time, but there is nothing there about the grant of an easement. Something more is needed – not necessarily any of the words "right", "grant", or "easement", but something to take the Tribunal beyond the fact simply that parking was available. And of course if parking was available, that complied with the planning permission, which did not require the grant of easements.

43. Even if the various residents over the years were allowed to park, expressly or impliedly, that goes nowhere towards showing that their leases granted an easement or that the parties intended there should be one. If the appellant's father did number the parking spaces, that shows only that he had no objection to their parking, and even intended them to park; it says nothing about the intentions of his predecessor in title and can be of no assistance in the construction of the lease. Nor does it indicate a common intention that could found the implication of an easement.

44. Ms Gray relies upon *Donovan v Rana* [2014] EWCA Civ 99 in support of her argument for an easement implied by common intention. But in that case it was accepted that an easement was granted, and the issue was its scope.

45. The express words of the leases do not grant an easement to park. The right to use the roads, paths and garden does not even mention the courtyard (labelled as such on the lease plans), and would appear to refer only to the back garden and to the route to the front door from the street, between the parking spaces. Even if it does refer to the whole courtyard it does not confer a right to park. The restriction on parking in Schedule 1 does not confer an easement; it assumes parking, but that is consistent with the intention of the parties that the lessee would have licence to park.

46. Any possibility that the right to use the "roads and paths" confers the right to park is dispelled by the express right to park granted to the lessee of Flat 1, as we saw above. This, alone of the extrinsic evidence, casts light upon the intention of the original parties to the

leases of Flats 2, 3 and 4. Had the lessor intended to grant to the lessees of Flats 2, 3 and 4 an easement to park he would have done so expressly as he did for Flat 1. He did not, and it is clear that he wished to grant that right to Flat 1 and not to any other lessee, although of course there was nothing to prevent him permitting and indeed facilitating parking, as he may well have done.

47. On that basis therefore the respondent is not entitled to acquire an easement to park.

Conclusion

48. Accordingly the appeal succeeds. The respondent is not entitled to an easement to park and the transfer of those parts of the freehold to which it is entitled will take effect without that express easement.

49. I have given directions for the settling of the draft transfer in the terms ordered by the FTT less the right to park.

Judge Elizabeth Cooke

15 January 2021