UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 226 (LC)
LC Case Number: LRA/38/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – enfranchisement of house – missing landlord and missing 400 year lease – appropriate sum under section 27(5) Leasehold Reform Act 1967 – whether property landlocked – whether new right of way had arisen over separate freehold property owned by the enfranchising tenants.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE RESIDENTIAL PROPERTY TRIBUNAL FOR THE EASTERN REGION

BY

TIMOTHY CLARKE AND ROSEALIND CAROLINE CLARKE Appellants

(No Respondent)

Re: Ballinger Hill House
Great Missenden
Buckinghamshire
HP16 ORR

Before: His Honour Judge Nicholas Huskinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 4 July 2012

Nicola Muir, instructed by D C Kaye & Co, for the appellants

The following cases are referred to in this decision:

Wheeldon v Burrows (1879) 12 Ch. D. 31
Lester v Ridd [1990] 2 QB 430
Earl Cadogan v 2 Herbert Crescent LRA/41/2007
Kutchukian v Trustees of John Lyon's Charity [2012] UKUT 53 (LC)
Benn v Hardinge (1993) 66 P&CR 246

DECISION

Introduction

1. This is an appeal from the decision of the leasehold valuation tribunal for the Eastern Region Residential Property Tribunal ("the LVT") dated 22 February 2011 whereby the LVT decided that the price to be paid by the appellants for the acquisition by them under the Leasehold Reform Act 1967 of the freehold of Ballinger Hill House, Great Missenden, Bucks ("the Property") was £70,620.

2. The Property is subject to a 400 year lease granted in 1641. The freeholder is missing. The appellants applied to the County Court which made an order under section 27 of the 1967 Act to the effect that the appellants should obtain a certificate of valuation pursuant to section 27 (5) from the LVT and should pay the appropriate sum into court and that thereafter the court would execute a transfer of the freehold in favour of the appellants.

3. In summary the case concerns the question of whether, when assessing under section 9 the price payable for the Property on the statutory assumptions, it should be assumed that the Property was landlocked or at least was without any proper vehicular access to a highway. The LVT decided that it should value the Property on the basis that there existed a right of way over some freehold land to the south of the Property (being freehold land which was in fact owned by the appellants themselves). It is against this decision that the present appeal is brought.

Facts

4. The facts regarding the previous history of the Property and its surrounding land are only known to a limited extent, principally from the conveyancing documents. Neither the Property nor the land to the south is registered land. So far as it is possible to extract the facts from the evidence available, the position is as follows:

5.1 On 9 April in the 17th year of the reign of King Charles I (which it is agreed was therefore 9 April 1641) William Elwes granted a lease to Thomas Elwes and Thomas Fountain of certain lands (which included the Property) for a term of 400 years at a peppercorn rent. It is unclear how much land was included within this lease, but at the least it included not merely the Property but also the northerly green land referred to below.

5.2 Soon thereafter some buildings were erected on the land -- there is evidence that some part of the Property was constructed in the 17th century. There have been various further additions since then with the result that the Property is now a substantial building.

5.3 There is an abstract of title in the papers. The earliest conveyance abstracted is a document of 1 October 1910 with attached plan. This shows that prior to October 1910 the Property together with

further land to the north (the northerly green land), all of which were coloured green on the plan and all of which were the subject of the lease, had become vested for the remainder of the term in a Mr Hart. The abstract also shows that Mr Hart owned the freehold of a parcel of land coloured pink on the plan which lay to the south of the Property and fronted onto a public highway. The pink land was crossed diagonally by a track (coloured brown on the plan and hereafter referred to as the brown track) which it appears was not in the ownership of Mr Hart.

5.4 It is not entirely clear how the Property was accessed as at 1910. However the plan attached to the 1910 conveyance showed a track running north from the Property across the northerly green land and effectively making a T-junction with another track running east-west along the northern boundary of this northerly green land. This east-west track appears eventually, anyhow so far as the westerly part of the track is concerned, to have reached a highway after crossing certain other lands. The plan does not show any track running across any part of the pink land -- thus no connection between the Property and the brown track (which crosses the pink land) is shown and in fact no access to the south from the Property is shown at all. It therefore appears that as at 1910 the access to the Property was obtained along the tracks to the north -- i.e. northwards from the Property across the northerly green land to the T-junction and then either east or west leading eventually to a highway.

5.5 By a lease dated 20 August 1931 Mr Hart demised to ET Hibbert the Property together with the pink land for a term of 21 years. In 1940 this lease became assigned to Squadron Leader Carslaw.

5.6 By a conveyance and assignment dated 12 April 1946 Mrs EE Hart (in whom had previously become vested various properties of her deceased husband including the lease and the pink land) conveyed the pink land to Group Capt Carslaw in fee simple and assigned to him the residue of the 400 year term in respect of the Property. The plan attached to the conveyance shows a track (which is labelled FP for footpath) running north from the northern boundary of Property to the T-junction with the east-west track previously mentioned. It is unclear whether at this date Mrs Hart still possessed the long lease of the northerly green land (i.e. over which these tracks ran) or whether she had already assigned this away. The 1946 conveyance and assignment did not grant any right of way over any of these tracks. The conveyance and assignment did however, in that part of the document dealing with the conveyance of the freehold pink land, grant a right of way over the brown track in the following terms:

"TOGETHER with full and free right and liberty so far as the Vendor can lawfully grant the same for the Purchaser his servants and all others authorised by him and with or without horses carts and vehicles of all kinds in common with other persons entitled to the like right at all times and for all purposes to pass and repass over across and along the road or drive between the Public Road approximately at the point marked "A" on the said plan drawn hereon and the point marked "B" on the said plan."

Thus this conveyance and assignment conveyed the pink land (which was in two parts, one part on each side of the brown track over which the right of way was granted) but it did not convey the

brown track itself -- Mrs Hart and her predecessor did not own the soil of the brown track. It appears that the brown track is in fact now a public bridleway and it continues on beyond point B. It is not known who owns the brown track.

5.7 It appears that by 1946 the situation on the ground was that access to the Property was obtained by going south from the Property across the pink land to the brown track and then along the brown track to the highway at point A. It is not known when this access arrangement commenced. It appears in 1946 there was still a track to the north to a T-junction with an east-west track, see the markings on the 1946 plan, although this track was now marked FP.

5.8 By a conveyance and assignment dated 18 December 1961 the successor in title to Group Capt Carslaw conveyed the pink land together with the above-mentioned right of way over the brown track to Mr Clarke (one of the present appellants) in fee simple and also assigned to him the residue of the 400 year lease in respect of the Property. By 1961 the position to the north of the Property was that there was no visible path or track in existence -- in effect whatever track had existed had been ploughed over or had grown over. This remains the position. There does at present remain the east-west track across the north of the northerly green land (i.e. the east-west track with which the track which used to run north from the Property made a T-junction) but it is not known whether the easterly limb of this track reaches any highway without impediment. The westerly limb of the track runs not to a highway but into the gardens of properties lying between the track and any highway.

The LVT's decision

6. There is attached hereto marked Appendix 1 a copy of the LVT's calculation of the price to be paid. It will be seen that the value of the rent for the unexpired term was £nil, because only a peppercorn rent was payable; that the LVT took the value of the Property at £1,250,000; it took the site value at 30% of this; the LVT calculated a section 15 rent which it appropriately deferred; and it then valued the freehold reversion at a value of £1,250,000 deferred for 80.5 years at 5%. The total was £70,620.

7. Originally Mr Michael Carr FRICS, who appeared as the expert witness on behalf of the appellants before the LVT, argued that as the Property enjoyed no right of way to the highway and was therefore landlocked the appropriate value to attribute to the Property for the purpose of calculating the price to be paid was £nil. The LVT rejected that argument and it has not been suggested before this Tribunal that the LVT was wrong to do so. The LVT concluded (see paragraph 42 of its decision) that if no access to the Property existed then an adjoining owner would be willing to grant a right of access for no more than half of the value of the Property, namely £625,000. The LVT therefore stated that, had it not reached the conclusion it did in relation to the access issue (i.e. a conclusion to the effect that there existed an access to the Property to the south) it would have assessed the value of the freehold at £625,000. As it was the LVT concluded this access to the south existed and the LVT therefore calculated the price to be paid on the basis that the value of the Property was the full £1,250,000. The appellants do not seek to argue that a value lower than £625,000 should be adopted as the value of the Property when calculating the price. However the appellants argue that the LVT was wrong in concluding that there existed an access to the south over

the pink land and the brown track and that in consequence the LVT should have adopted the value which it said it would have adopted in the absence of an access to the south, namely £625,000.

8. The question in the present appeal therefore is whether the LVT was correct in concluding that there existed a right of way giving access to the Property over the pink land (and also the brown track) to the south so as to join a highway.

9. In paragraph 30 of its decision the LVT concluded that there were three possibilities to be considered namely:

> (A) that the Property was landlocked,
>
> (B) that the original rear access over the fields to the north had not been abandoned, and
>
> (C) that the original access (i.e. over the fields to the north) was replaced with the current access (i.e. over the pink land and the brown track to the south) by a former tenant of the property with the intention that the current access should be permanent.

10. In paragraph 43 of its decision the LVT observed it was not persuaded that the right of access at the rear (i.e. to the north) had been abandoned by cessation of user. However in paragraph 45 the LVT concluded:

> "Whether or not the rear right of access has been abandoned so as to leave the Property landlocked is a complex legal question which cannot properly be determined in these proceedings. In view of our finding on the third proposition the question can remain unanswered."

11. The LVT observed that there was no rear (i.e. northerly) access now. The LVT stated that it must consider what was in the mind of the leaseholder when the division of the leasehold interest was effected. The LVT examined the terms of the 1946 conveyance and assignment and concluded on the balance of probabilities that it was Mrs Hart's intention to replace the rear access with the existing access through the front land (i.e. the pink land and the brown track) as a permanent arrangement. The LVT observed that the creation of this new access was an alteration unauthorised by the landlord but one which did not adversely affect the use of the Property or the value of the reversion. Accordingly the LVT concluded it could be assumed that the landlord had accepted this permanent change by the adoption of the new front access in place of the rear access.

12. Part of the LVT's analysis which led it to this conclusion involved a consideration of the terms of the 1946 conveyance. The LVT asked itself why it was necessary for the right of way to be granted over the diagonal track (i.e. the brown track). The LVT stated in paragraph 49 of its decision:

> "That right is granted with the front land but why was it necessary? If the purpose was to give access to the parcels of the front land on either side of the roadway, the rights need only have been granted over the western part of the roadway, not all the way up to point B. The two likely explanations are that either at some time before 1946 the front access had been created and was the only access being used by then or that it was intended to create the front

access on completion of the conveyance. Either way, we find that this illustrates an intention by the tenant at the time that the access to the Property would from 1946 (if not before) be through the front land. The plan attached to that conveyance indicates that the rear track had become a footpath and so it is a reasonable assumption that the intention was that the original rear access was replaced by the front access."

13. The LVT also considered that the original lease was subject to an implied (if not express) covenant that the tenant should not do anything that would render the Property unusable and should not make any alterations which would adversely affect the landlord's reversion. The LVT also considered that the removal of all rights of access to the Property would amount to waste. The LVT concluded that Mrs Hart would not have wished to put herself in a position of breaking such a covenant or committing waste and that in consequence this confirms the conclusion that she must have intended to substitute permanently the access to the south in place of the previous access to the north. The LVT also considered there was a real possibility that the current right of access (i.e. to the south) could be enforced through the doctrine of necessity; and also that it would offend against equity if a tenant could make an alteration to a property which resulted in a substantial decrease in its value and if then he or his successor could enfranchise at a reduced price because of this alteration.

Statutory provisions

14. The present valuation falls to be made under section 9 of the Leasehold Reform Act 1967 as amended. This provides that the price payable for a house and premises is to be the amount which at the relevant time the house and premises "if sold in the open market by a willing seller (with the tenant and members of his family not buying or seeking to buy) might be expected to realise" on certain assumptions. One of these assumptions is that the vendor was selling with and subject to the rights and burdens with and subject to which the conveyance to the tenant is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to section 10.

15. Section 10 (3) provides that the conveyance shall include:

> "(a) such provisions (if any) as the tenant may require for the purpose of securing to him rights of way over property and not conveyed, ***so far as the landlord is capable of granting them***, being rights of way which are necessary for the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy and in accordance with its provisions" (Counsel's emphasis)

The hearing

16. The grant of permission to appeal to the Tribunal stated that the appeal would proceed by way of review, with a view to a re-hearing if it was concluded at the review stage that the LVT's decision could not stand. At the hearing the appellants were represented by Ms Muir who advanced the legal submissions as summarised below. She then called Mr Carr to give brief evidence upon which the appellants relied in so far as the ultimate decision was that the LVT's decision could not stand.

17. Mr Carr gave evidence confirming the contents of his written report. He agreed that the only point in the LVT's decision with which he now disagreed was the conclusion that the Property should be valued on the basis that there existed an entirely secure access for vehicles to the south.

18. Mr Carr said that, even if at the valuation date there still existed as a matter of law a right of way northwards from the Property so as to meet the east-west track at the T-junction, a hypothetical purchaser would not conclude that this right of way was adequate or that it added any value the Property. Instead the hypothetical purchaser would treat the Property as effectively landlocked. This is because as a matter of fact, as at the valuation date, there existed on the ground no trace of any track running northwards from the property, nor does there exist any clear and obviously unobstructed access along the east-west track either to the east or to the west to a highway. Even assuming that as a matter of law the right of way to the north still existed, the hypothetical purchaser would note that he would face litigation in seeking to enforce this right of way, involving the construction on the ground of a track over a third party's land where none at present exists and involving the obtaining (which might well be problematic in this area of green belt and area of outstanding natural beauty) of the relevant planning permission for the construction of a hard surfaced and properly engineered access way.

19. Ms Muir produced a helpful written skeleton argument which she developed further in oral submissions. In summary she advanced the following arguments:

(1) Ms Muir submitted that the LVT's analysis in paragraph 49 of its decision was wrong in two particular respect, namely:

(A) it was wrong to reason that the granting a right of way up to point B was indicative of an intention to create a right of way to the Property across the pink land -- this was wrong because a right of way over the entirety of the brown track, right up to point B, was needed so as to enable the transferee to get from one part of the pink land across the brown track to the other part; and

(B) it was wrong to proceed (as it apparently did) on the assumption that Mrs Hart was the freehold owner of the brown track and had power to grant a right of way over it.

(2) Ms Muir submitted that the hypothetical purchaser would be advised that it was extremely unlikely that a right of way permitting access via the pink land could be established because:

(A) the conveyances of the pink land contain a legal easement over a roadway (namely the brown track) but this bypasses the Property;

(B) prior to 1910 (and perhaps later) there was no need of an access over the pink land because there was access from the north;

(C) since 1910 there has been no reason to grant or imply a right of way because the pink land and the green land have been in single ownership; and

(D) there is no documentation whatsoever indicating the existence of a right of way over the pink land.

(3) Ms Muir submitted that such right of way as had ever existed to the north over the northerly green land either no longer existed (through abandonment) or, if it did still exist, was not such as to be of any significant value in the mind of a hypothetical purchaser who would treat the Property as effectively landlocked unless it was established that there existed a secure right of way to the south -- and in connection with this submission she relied upon Mr Carr's evidence.

(4) Ms Muir drew attention to the highlighted wording in section 10 (3) as set out in paragraph 15 above which makes reference to the conveyance including such provisions as may be required for the purpose of securing rights of way over property not conveyed "so far as the landlord is capable of granting them". The absent landlord in the present case is not capable of granting any right of way over the pink land or the brown track.

Conclusions

20. This is an unusual and difficult case. I have ultimately come to the conclusion that the LVT's decision was wrong. However before giving my conclusions I wish to express respect for the careful and detailed way in which the LVT has analysed the case.

21. I conclude from the plan attached to the 1910 conveyance that as at 1910 there existed no right of way to the Property to the south. As at 1910 the Property was accessed by a track running north over the northerly green land to a T-junction with the east-west track. I assume that ultimately this east-west track, either in its westerly or its easterly limb or both, gave access to a highway. It seems that this was no more than an agricultural track.

22. The LVT appear to have concluded that what was important was to consider "what was in the mind of the leaseholder when the division of the leasehold interest was affected", see paragraph 46 of the decision. It is not entirely clear when this division was effected, but the LVT appear to have proceeded on the basis, for the purposes of its analysis, that this division occurred on the occasion of the conveyance and assignment in 1946. I agree that as a matter of fact it was no doubt in the mind of Mrs Hart as transferor and Group Capt Carslaw as transferee that the access to the Property would indeed be to the south across the pink land and the brown track rather than to the north. This intention in their minds is not however sufficient of itself to give rise to the creation of an easement of way in fee simple across the pink land and the brown track in favour of the Property. It is necessary to ask whether what was intended was (A) merely an arrangement which suited Mrs Hart and her successors being an arrangement to use their own front land to access the property for so long as was convenient (e.g. until the end of the 400 year lease) or (B) something which could amount in law to the creation of an easement in fee simple burdening the pink land and the brown track in favour of the Property.

23. Bearing in mind that what is being considered is whether an easement in the nature of a right of way has been created over the pink land and the brown track in favour of Property, it is appropriate

to have regard to the ways recognised by the law in which an easement can be created. An easement can be created by statute or by express grant, but clearly no such consideration arises here. An easement can also be created by implication under a grant if an intention to grant the easement can properly be inferred. *Gale on Easements* 17th edition paragraph 3-17 summarises the circumstances in which such an intention may be inferred:

> "1. Where the grant contains particular words of description. Alternatively, in such a case, the easement may be created by estoppel.
>
> 2. Where the circumstances indicate that it was contemplated that the land would be used in some particular manner. The easement may be implied by the necessity of the case.
>
> 3. Under the doctrine of non-derogation from grant, by virtue of which, as already noticed, there may be acquired not only easements but also immunities of a special kind not recognised as easements.
>
> 4. Under the rule in *Wheeldon v Burrows*, which is a branch of the general rule against derogation from grant, but which is commonly considered under a separate head.
>
> 5. Where without a means of access or other right, the land granted or retained would be rendered completely inaccessible or unusable."

Easements can also be established by prescription.

24. In the present case there cannot have become established by prescription any right of way over the pink land in favour of the Property because the pink land has been in the same ownership as the Property and any use for access purposes of the pink land will have been use with the permission of the owner of the pink land.

25. The question arises as to whether upon the occasion of the 1946 conveyance and assignment an easement was created by inference over the pink land and brown track in favour of the Property. In my judgement no such creation of an easement can be inferred for the following reasons:

(1) The 1946 document expressly grants (so far as the transferor lawfully could grant) a right of way over the brown track between points A and B in favour of the pink land. Thus the draftsman of the document has dealt expressly with such grant of a right of way as the parties intended to effect. The document conspicuously does not grant any right of way in favour of Property. The right of way which is granted extends only to point B and does not connect to the Property.

(2) The plan attached to the 1946 document does not mark any track running to the Property across the pink land -- but the plan does still mark a track (labelled FP) to the north of the Property.

(3) Mrs Hart did not own the brown track and would appear to have had no right to grant a right of way over the brown track to the Property.

(4) The effect of the 1946 document was to transfer simultaneously to the transferee both the Property and the pink land. There was no need to grant a right of way to the

transferee over the pink land because the pink land was by that same document to be the transferee's own freehold property.

26. I do not see any basis on which it could be contended that either the rule in *Wheeldon v Burrows* or section 62 of the Law of Property Act 1925 operated in relation to the 1946 conveyance and assignment to grant some right of way over the pink land and the brown track in favour of the Property.

27. There is no scope for some inference on the basis of necessity of a grant of a right of way over the pink land and brown track in favour of the Property. An adequate access to the Property was available for the transferee over the pink land by reason of the transferee's freehold ownership thereof.

28. The LVT did not decide the question of whether a right of way to the north continued to exist, but the LVT appears to have reached its conclusion (namely that a permanent right of way was created to the south) partly on the basis that the right of way to the north was lost, through abandonment or otherwise, and that the access to the south was created in substitution.

29. In so far as it is necessary, for the purpose of analysing whether some easement has arisen over pink land and the brown track in favour of the Property, to decide whether the right of way to the north has ceased, I conclude that it has not ceased. My reasons for so concluding are these:

(1) It is not known in what order the lease of the Property became separated from the lease of the northerly green lands. If as at the date that Mrs Hart assigned the residue of the lease in respect of the Property she still retained the lease of the northerly green land, the grant of a right of way in favour of the Property over the track (marked FP on the plan attached to the 1946 document) would in my judgement have been inferred under the rule in *Wheeldon v Burrows*.

(2) If Mrs Hart had assigned away the residue of the lease in respect of the northerly green land before she assigned the lease of the Property, then we do not know the terms of any such assignment. However even if no right of way was reserved across the northerly green land in favour of the Property the following point arises. We are here concerned with the assignment of part of some demised premises, because the northerly green land and the Property were all originally demised under the same 400 year lease. So far as the landlord was concerned when he granted this lease all parts of the demised property could be accessed from other parts of the demised property. *Woodfall Landlord and Tenant* at paragraph 16. 135 states in relation to the effect of the severance of the term:

> "Severance of a leasehold interest by assignment of parts of the demised premises to several assignees does not without more create, as against the landlord, two or more separate holdings with separate tenants for each holding."

The Court of Appeal decision in *Lester v Ridd* [1990] 2 QB 430 is cited which decides (see per Dillon LJ at page 439) that there would be an injustice if by a transaction to

which he was not a party a landlord had thrust upon him two separate tenancies. Accordingly I conclude that, so far as concerns the freeholder who is the landlord of the Property and of the northerly green land, the fact that they have been assigned separately should not operate to allow the holder of the residue of the term in respect of the northerly green land to argue as against the freeholder that the freeholder has no right of access from the Property over the northerly green land.

(3) In so far as cases concerning abandonment of easements are relevant I conclude that the fact that the access to the north over the northerly green land has not been used for over 50 years is insufficient to constitute an abandonment of that right of way bearing in mind that the tenant of the Property has not had occasion to use this northerly right of way there being an alternative means of access over his own freehold land to the south, see *Gale* at paragraph 12-64 and *Benn v Hardinge* (1993) 66 P&CR 246.

30. For the reasons set out above I have concluded that no right of way arose in favour of the Property over the pink land or the brown track by virtue of the 1946 conveyance and assignment. Also I do not see how any such right of way can have arisen from the conveyancing documentation or the conduct of the relevant persons at any other time since 1910 (at which date I have concluded that no such right of way existed).

31. Returning to the question of the value of the freehold of the Property on a hypothetical sale under section 9 (1) of the 1967 Act, I conclude that the Property should be valued on the basis that it enjoyed no right of way to the south over the pink land and the brown track. I have concluded that, as a matter of law, a right of access still existed to the north. However despite this conclusion of law, the position as a matter of fact as at the valuation date was that no trace of a road or track to the north existed. Thus the hypothetical purchaser who was minded to rely upon the access to the north would realise he faced problems including:

(1) prospective litigation against the leaseholder of the northerly green land to establish and (assuming established as a matter of right) to secure the construction of an adequate access way to the north;

(2) prospective litigation against the owner(s) of property across which the east-west track ran to establish and (assuming established as a matter of right) to secure the construction of an adequate access way to a highway; and

(3) difficulties in obtaining planning permission for the construction of this access in what is an area of outstanding natural beauty and greenbelt.

32. In these circumstances I accept the evidence given by Mr Carr, summarised in paragraph 18 above, to the effect that the hypothetical purchaser of the Property would not consider that the right of way to the north (even assuming it existed as a matter of law) added value to the Property and he would treat the Property as effectively land locked and would cast his bid upon that basis.

33. There was discussion at the hearing as to whether, having regard to the Lands Tibunal's decision in *Earl Cadogan v 2 Herbert Crescent* LRA/91/2007 and to this Tribunal's decision in *Kutchukian v Trustees of John Lyon's Charity* [2012] UKUT 53 (LC), it was necessary for the Tribunal to decide whether the Property enjoyed a right of way either to the south or to the north, or whether instead the Tribunal should merely examine how a prudent and properly advised hypothetical purchaser would assess the value of the Property in the light of the potential disputes and uncertainties. I conclude that in the present case it is necessary to reach a decision as to whether these rights of way exist. For the reasons set out above I have decided that no right of way exists over the pink land and the brown track so as to give access from the south, but I conclude that as a matter of law a right of way does still exist to the north. However this northerly right of way is so problematic as to bring no value to the Property as explained in Mr Carr's evidence.

34. I do not consider that the conclusion I have reached would "offend against equity" as the LVT was concerned it might. There is no evidence that the freeholder ever provided any better access to the Property than an apparently lengthy access by agricultural track. I see nothing inequitable in a conclusion that this freeholder should not be entitled to the benefit of a shorter and properly constructed access which the tenant of the Property has created at his own expense for his own convenience over his own freehold land to the south.

35. I do not consider that the appellants or their predecessors can be shown to have committed waste or to have broken some covenant to be implied in the (lost) 400 year lease.

36. In the result therefore I allow the appellants' appeal and I determine that the price payable in accordance with section 9 (and hence the appropriate sum for the purposes of section 27(5)) is £35,300 as calculated in appendix 2 hereto, which is a calculation provided by Mr Carr.

Dated 10 July 2012

His Honour Judge Nicholas Huskinson

APPENDIX 1

Unexpired Term		
30.5 years at a peppercorn		£ nil
Statutory Term		
Entirety Value	£1,250,000	
Site value 30%	£ 375,000	
S.15 Ground Rent @ 7%	£ 26,250 pa	
For 50 years @ 7%	x 13,8007	
Deferred 30.5 years @ 7%	x 0.1270	£46,008
Freehold Reversion		
Freehold value	£1,250,000	
Deferred 80.5 years at 5%	x 0.01969	
		£24,612
		£70,620