UPPER TRIBUNAL (LANDS CHAMBER)

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Case Number: LRA/129/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – immediate landlord of qualifying tenants was freehold owner of the residential block but leasehold owner of the amenity land over which rights granted under the leases – freeholder of amenity land relying on section 1(4) Leasehold Reform,

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

BETWEEN **DANIEL FLUSS** **Appellant**

and

QUEENSBRIDGE TERRACE RESIDENTS LIMITED **Respondent**

Re: 3-15 Queensbridge Road,
Haggeston,
London E2 8NP
And
1-6 Dunloe Passage,
London E2 8JS

Before: His Honour Judge Nicholas Huskinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 11 July 2011

Henry Webb, instructed by Bude Nathan Iwanier Solicitors, on behalf of the Appellant
The Respondent did not appear and was not represented.

The following cases are referred to in this decision:

Ulterra Limited v Glen Barr (RTE) Co Limited [2008] 1 EGLR 103
McGuckian LRA/85/2006 – Lands Tribunal 3 January 2008
Yorkbrook Investments Limited v Batten [1986] 52 P & CR 51

DECISION

Introduction

1. The Appellant appeals to the Upper Tribunal, with permission, from the interim decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 11 May 2010 whereby the LVT made certain findings as to the nature of a deed of grant which the Appellant (as freeholder of certain land adjoining a block of flats) was to grant to the Respondent (as nominee purchaser of the freehold in this block of flats) over the Appellant's land.

2. Stated shortly the problem which it fell to the LVT to consider arose in the following way. In 1983 Duskwood Limited owned two parcels of land, namely:

(1) a freehold parcel of land on which there was constructed a substantial block of flats known as 1-27 Queensbridge Terrace, and

(2) a leasehold parcel of land which can be referred to hereafter as the Amenity Land, which was held by Duskwood from the freeholder for a term of 99 years from 24 June 1982.

In 1983 Duskwood granted long leases of various flats in the block on terms which granted the respective tenants not merely the long lease of their respective flat but also a right to use the Amenity Land. The terms of the leases are referred to in greater detail in due course.

3. The freehold in the Amenity Land has become vested in the Appellant. The freehold of the block and the lease of the Amenity Land has become vested in Qadron Investments Limited ("Qadron"). Qualifying tenants within the block have served a notice under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 as amended so as to exercise their right of collective enfranchisement. The right has been admitted. The proposed nominee purchaser is the Respondent.

4. In the section 13 notice it was proposed that there should be acquired not merely the freehold of the block but also the freehold of the Amenity Land. However in the counter notice under section 21 Qadron, on behalf of the Appellant (who has subsequently become separately represented), indicated that it was not accepted that the freehold of the Amenity Land should be sold. Instead the counter notice made various counter proposals including the counter proposal that under section 1(4) of the 1993 Act the freehold owner of the Amenity Land (i.e. the Appellant):

> "…. shall grant such permanent rights (with all others now or at any time hereafter having the like right) in particular to use the same for quiet recreational purposes and such facilities (if any) as may from time to time be installed or available for use on the Amenity Land (subject to them making contributions towards the up-keep thereof) so as to ensure

that thereafter the occupiers of the flats in the specified premises have as nearly as may be the same rights as those enjoyed in relation to such land by the qualifying tenants under the terms of their lease on the date on which the initial notice was given."

5. In due course the Respondent made an application to the LVT under the 1993 Act for the determination of certain matters. Before the LVT it was common ground that the above mentioned offer of rights contained in the counter notice defeated the Respondent's initial claim to purchase the freehold of the Amenity Land outright. However it was also common ground that the Respondent as nominee purchaser would acquire Qadron's long leasehold in the Amenity Land. Thus the matter proceeded before the LVT on the basis that section 1(4) operated, that the Respondent would not be entitled to acquire the freehold of the Amenity Land, and that it was necessary for the LVT to decide certain points of principle regarding the nature of the grant to be made by the Appellant to the Respondent of rights over the Amenity Land. There was a substantial dispute between the parties as to the terms which would be appropriate for this grant under section 1(4). The Respondent suggested a very simple document in what was referred to at the hearing as "the Crews' draft" (so called after Mr Crews who was the solicitor representing the Respondent). The Appellant put forward a much more detailed document including substantial covenants both positive and negative on the part of the grantee (i.e. the Respondent) – I will hereafter refer to that document as the "BNI draft" (the Appellant's solicitors who had drafted it being Messrs Bude Nathan Iwanier). In a little more detail the BNI draft proceeded on the following basis. The draftsman examined all the rights and obligations currently enjoyed by the tenants of the flats in respect of the Amenity Land, including the obligations to make payments through the service charge clause in respect of (inter alia) the cost of the administering the Amenity Land. The draftsman also noted certain powers in Qadron (as landlord) to make regulations concerning the use of (inter alia) the Amenity Land and to allow other persons also to use the Amenity Land. The BNI draft then seeks to ensure that the grant to the Respondent of the rights to use the Amenity Land is subject to the full package of obligations which bound the tenants so far as concerns the exercise under their leases of their right to enjoy the Amenity Land. Thus the BNI draft contains negative covenants regarding what the Respondent cannot do on the Amenity Land and positive covenants regarding what the Respondent must do in relation to the Amenity Land, including detailed provision for the payment of monies on the estimate of the Appellant in his absolute discretion whose decision it was provided should be entirely final and binding on the Respondent. The BNI draft also took the opportunity of laying down regulations. It did this on the basis that, although no such regulations have currently been made by the lessor under the leases of the flats, there is power to make such regulations. The BNI draft also provides that it is a condition precedent to the enjoyment of the rights granted by the Appellant that the Respondent shall comply with all of the covenants placed upon it in the document.

6. There was of course an unusual feature so far as concerns this proposed grant of rights under section 1(4), namely that the Respondent is to acquire the leasehold interest (which expires in 2081) in respect of the Amenity Land. Thus until the expiry of this lease by effluxion of time or earlier determination the Respondent would enjoy rights to use the Amenity Land not by virtue of any grant of rights made by the Appellant but instead by virtue of being the leasehold owner of the Amenity Land and therefore having the right to possession thereof. However there would appear to be no legal objection to the grant now of an easements in reversion to take effect upon the determination of the lease, see *Gale on Easements* 18th edition paragraph 3-04 at footnote 26.

7. The LVT in its interim decision reminded itself that the starting point was section 1(4) (a) of the Act. It observed that the BNI draft as proposed by the Appellant contained positive covenants and extended to regulatory matters controlling the use of the Amenity Land. The LVT observed that whilst those are perfectly normal covenants within a lease the issue was whether analogous provisions would be appropriate in the deed of grant, in particular having regard to the fact that although the leases gave a power to make regulations that power had never been used.

8. The LVT appears to have been provisionally disinclined to accept that provisions such as those in the BNI draft were appropriate, but the LVT was concerned as to whether (supposing such provisions were omitted and the Appellant thereby suffered loss) the Appellant would have any right to payment of a price or compensation under the Act. The LVT asked for further submissions in writing after the conclusion of the hearing upon this question of compensation. Both parties put in submissions but, unfortunately, those submitted by the Appellant did not come to hand through some administrative error and the LVT gave its interim decision without taking these into account. In the light of this the LVT acceded to the Appellant's request that permission to appeal to the Upper Tribunal should be granted.

9. In its decision the LVT concluded that under the Sixth Schedule paragraphs 10 and following of the 1993 Act the Appellant would have the right to claim compensation for making the grant that is required of him under section 1(4). The LVT therefore concluded that the appropriate order was that the form of the deed of grant under section 1(4) to be made by the Appellant should be based upon the simple Crews' draft rather than on the BNI draft. The LVT concluded there would be nothing improper in this bearing in mind the potential right for the Appellant to claim compensation.

10. The Respondent on being served with the appeal papers in the present case wrote a letter indicating that it was of the opinion that the LVT's determination would not have been affected by the subsequent written submissions made by the Appellant (i.e. the written submissions which should have been placed before the LVT for consideration) and the Respondent indicated that it did not intend to respond to the appeal. The Respondent therefore neither appeared nor was represented nor did it put forward any submissions in relation to the appeal. However from the letter just mentioned it is clear that the Respondent's position is that the LVT's decision was correct and should be upheld. The mere fact that the present appeal proceeds without opposition does not, of course mean, that the appeal should be allowed – the appeal should only be allowed if the Appellant persuades me that the LVT's decision was wrong. Qadron has played no part in the present appeal.

11. In substance the nature of the Appellant's appeal is to seek an order reversing the LVT's interim decision and ordering that the grant to be made by the Appellant under section 1(4) should be in the terms of, or based upon, the BNI draft rather than the Crews' draft.

12. I was told that the reasons why the Appellant wishes to ensure the retention of the Amenity Land and to ensure that no unnecessary additional rights or burdens relating to such land arise is because he is the owner (through his companies) of certain other land in the immediate vicinity, namely 2-4 Scawfell Street, 6 and 6A Scawfell Street, 14-16 Scawfell Street, 31 Dunloe Street and

237 Hackney Road and also (as I understand it) the immediately adjoining property at 29 Dunloe Street. It is said to be of much importance to him that the rights reserved to the freeholder in the lease of the Amenity Land are preserved and that nothing is included within any deed which could interfere with the Appellant's right to redevelop this other land in due course.

The leases

13. By the lease of the Amenity Land the Appellant's predecessor in title demised the Amenity Land to Qadron's predecessor in title for 99 years from 24 June 1982 at a peppercorn rent. The lease contained a user covenant by the lessee in the following terms:

> "Not without the previous consent in writing of the Lessor such consult not to be unreasonably withheld to use the premises or any part thereof for any purpose whatsoever other than for amenity purposes only in connection with the properties at 3-15 Queensbridge Road and 29 Dunloe Street E2 and site of 18-22 Scawfell Street."

There was a covenant not to permit or suffer anything which would be a nuisance or annoyance to the lessor etc or to the owners etc for the time being of any adjoining or neighbouring premises. There was a covenant in clause 2(7) to permit entry onto the Amenity Land for various purposes including the repairing etc of neighbouring property which could not otherwise conveniently be effected and for cleaning any sewers etc under the Amenity Land which served adjoining or neighbouring property and also

> "…for all reasonable purposes in connection with the development of adjoining sites belonging to the Lessor which cannot otherwise be conveniently effected"

The lease of the Amenity Land also in Part 2 of the Schedule reserved to the lessor various rights over the Amenity Land for the benefit of neighbouring land and there was further reserved:

> "The full right and liberty for the Lessor and its successors in title at any time hereafter and from time to time to execute works and erections or to alter and re-build any of the buildings from time to time erected on its adjoining and neighbouring lands in such manner as they may think fit notwithstanding that interference may thereby be caused to the access of light or air to the demised premises."

14. The form of the leases held by the various qualifying tenants in respect of their flats in the block is shown in the specimen such lease before me, which is a lease of 21 April 1983 between Duskwood Limited and David Edmond Phillips in respect of flat 2. The lease recites that the landlord is the freehold owner of the block containing 26 flats and is the proprietor of the Amenity Land. The lease demised the flat to the tenant for a term of 99 years from 24 June 1982 at a ground rent. The flat was demised with the appurtenant rights set out in the Second Schedule and these included in paragraph 6:

> "The right (with all others now or at any time hereafter having the like right) to use for quiet recreational purposes only the amenity land and such facilities (if any) as may from time to time be installed or available for use on the amenity

land (subject to the tenant making the contributions towards the up-keep thereof hereinafter referred to)."

In the lease the tenant covenanted with the landlord to perform and observe the obligations set out in the Fourth Schedule, which included covenants to the following effect:

(1) In paragraph 10(b) a covenant:

> "To keep the Landlord indemnified against a proportionate part of all costs charges and expenses which the Landlord shall incur in or in connection with the management and/or maintenance and/or improvement of the amenity land and/or the provision of facilities on the amenity land or on any part thereof. Such proportion to be calculated as a ratio of the rateable value of the Flat to the aggregate rateable value of all the flats and units comprised in the Block and the adjoining Block …."

(2) There was also a covenant to pay a proportionate part of the landlord's costs of managing the block and carrying out the obligations in the Sixth Schedule. There was also the provision for the payment of service charge so that the landlord could collect from the tenants the contributions to these expenses of managing the block and the Amenity Land.

(3) In paragraph 15 of the Fourth Schedule the tenant covenanted:

> "Not to do or permit any act or thing to be done on or in respect of the amenity land which would be a breach of any of the tenant's covenants contained in the Lease under which the landlord holds the amenity land."

(4) The Fifth Schedule contained covenants on behalf of the tenant which were made with the landlord and with the tenants of other flats in the block (so that the covenants should be mutually enforceable) including the following covenants.

(5) In paragraph 1 a covenant:

> "Not to do or permit or suffer to be done in the Flat or in the Retained Parts and/or on the amenity land anything which may cause damage or inconvenience or be or become a nuisance or annoyance to the Landlord or to the Lessee or occupier of any other flat or unit or to any person lawfully using the Retained Parts and/or the amenity land or to the neighbourhood generally (and the generality of this paragraph shall not be restricted by the remaining paragraphs of this Schedule)."

(6) In paragraph 5 a covenant:

> "To ensure that all guests and other invitees or licensees of the Tenant while in the Block and/or on the amenity land conform to the stipulations and regulations contained or referred to in this Schedule."

(7) In paragraph 10 a covenant:

"To comply with all regulations which the Landlord may from time to time make and publish for the detailed administration of the Block or for the use of the amenity land or for maintaining the character and amenities thereof whether in relation to the flats and their occupation or to the Retained Parts and their communal use and/or the communal use of the amenity land.

Statutory provisions

15. Part I of the Leasehold Reform, Housing and Urban Development Act 1993 as amended confers a right of collective enfranchisement upon certain tenants of flats. Section 1 provides:

"(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf –

(a) by a person or persons appointed by them for the purpose, and

(b) at a price determined in accordance with this Chapter;

and that right is referred to in this Chapter as "the right to collective enfranchisement".

(2) Where the right to collective enfranchisement is exercised in relation to any such premises ("the relevant premises") –

(a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of sub-section (3); and

(b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of sub-section (1) of that section applies.

(3) Sub-section (2) (a) applies to any property if at the relevant date either –

(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or

(b) it is 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 (whether those premises are contained in the relevant premises or not).

(4) The right of acquisition in respect of the freehold of any such property as is mentioned in sub-section (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; or

(b) there is acquired from the person who owns the freehold of the property the freehold of any other property over which any such permanent rights may be granted.

(5) ….

(6) …..

(7) ….

(8) In this Chapter "the relevant date", in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13"

16. Section 2 deals with the acquisition of leasehold interests and provides, inter alia, as follows:

"(1) Where the right to collective enfranchisement is exercised in relation to any premises to which this Chapter applies ("the relevant premises"), then, subject to and in accordance with this Chapter –

(a) there shall be acquired on behalf of the qualifying tenants by whom the right is exercised every interest to which this paragraph applies by virtue of sub-section (2); and

(b) those tenants shall be entitled to have acquired on their behalf any interest to which this paragraph applies by virtue of sub-section (3);

and any interest so acquired on behalf of those tenants shall be acquired in the manner mentioned in paragraphs (a) and (b) of section 1(1).

(2) ….

(3) Paragraph (b) of sub-section (1) above applies to the interest of the tenant under any lease (not falling within sub-section (2) above) under which the demised premises consist of or include –

(a) any common parts of the relevant premises, or

(b) any property falling within section 1(2)(a) which is to be acquired by virtue of that provision,

where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, or (as the case may be) that property, on behalf of the tenants by whom the right to collective enfranchisement is exercised."

17. Section 13 makes provision for the service of a notice by qualifying tenants of their claim to exercise their right to collective enfranchisement. The notice is required to specify, among other matters, any property of which the freehold is proposed to be acquired by virtue of section 1(2)(a). Section 21 makes provision for the service of a counter notice by the reversioner. Section 21(3)(b) provides that if (in a case where any property specified in the initial notice under section 13(3)(a)(ii) is property falling within section 1(3)(b)) any such counter-proposal relates to the grant of rights or the disposal of any freehold interest in pursuance of section 1(4), then the counter notice must specify-

"(i) the nature of those rights and the property over which it is proposed to grant them, or

(i) the property in respect of which it is proposed to dispose of any such interest, as the case may be"

18. Section 24 makes provision for an application to a leasehold valuation tribunal where there is a dispute regarding the terms of acquisition and on such an application the leasehold valuation tribunal may "determine the matters in dispute". Section 24(8) provides that the expression "the terms of acquisition" means the terms of the proposed acquisition by the nominee purchaser, whether relating to –

"(a) the interests to be acquired,

(b) the extent of the property to which those interests relate or the rights to be granted over any property,

(c) the amounts payable as the purchase price for such interests,

(d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e) the provisions to be contained in any conveyance,

or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of section 1(4) or 21(4)"

19. Schedule 6 to the Act makes provision for the purchase price payable by the nominee purchaser. Paragraphs 10 and following of that Schedule make provision for the price payable for other interests to be acquired. These provisions are introduced by the words of paragraph 10(1) as follows:

"(1) Where the nominee purchaser is to acquire any freehold interest in pursuance of section 1(2)(a) or (4) or section 21(4), then ……. the price payable for that interest shall be the aggregate of –

(a) the value of the interest as determined in accordance with paragraph 11,

(b) any share of the marriage value to which the owner of the interest is entitled under paragraph 12 and

(c) any amount of compensation payable to the owner of the interest in accordance with paragraph 13."

20. Schedule 7 to the Act makes provision for the terms of the conveyance to the nominee purchaser. As regards such land as is to be conveyed, provision is made so that this property is conveyed with and subject to appropriate rights of support and passage of water etc; is made with and subject to appropriate rights of way; and is made with and subject to appropriate restrictive covenants.

Appellant's submissions

21. Mr Webb emphasised that in the present case the appeal came before this Tribunal in the following circumstances, namely it had been expressly agreed before the LVT between the Appellant and the Respondent:

(1) that the reversioner's counter notice was a valid exercise of the Appellant's rights under section 1(4);

(2) that the offer in the counter notice of the grant of the rights over the Amenity Land defeated the Respondent's initial claim for the outright freehold of the Amenity Land;

(3) that there was no problem in applying section 1(4) in the circumstances of the present case – i.e. no problem was raised to the effect that section 1(4) could not operate in circumstances where the relevant rights over the Amenity Land were to be acquired by the nominee purchaser not from a simple grant of rights under section 1(4) from the freeholder but by a combination of the acquisition of the leasehold interest in the Amenity Land (i.e. the lease until 2081) together with the grant by the Appellant as freeholder of rights over the Amenity Land; and

(4) it is open to the parties to apply to the LVT for the LVT to determine the terms of the grant of permanent rights under section 1(4) – in other words it is not for the freeholder to offer such rights in the counter notice, with the function of the LVT being limited to merely deciding as to whether they are sufficient (in which case they will be granted) or are insufficient (in which case the freehold of the relevant land must be conveyed).

22. Bearing in mind that this is how the matter proceeded before the LVT and bearing also in mind that not merely does the Respondent not seek to challenge the LVT's decision but the Respondent has not taken any part in the present appeal, I consider that I must proceed on the same

basis and adopt the position summarised in subparagraphs 21(1)-(4) above. The case was never argued by the Respondent on a basis similar to that in *Ulterra Limited v Glen Barr (RTE) Co Limited* [2008] 1 EGLR 103 to the effect that the rights offered under section 1(4) were insufficient and that therefore the freehold of the Amenity Land should be acquired. It was always agreed between the parties at the LVT hearing (and the LVT proceeded on this basis) that the Amenity Land would not be acquired and that rights would be granted under section 1(4) being rights which, if the parties could not agree them, the LVT would determine. I therefore proceed on the basis of assuming for the purposes of this case that the foregoing is the appropriate way to proceed, but this should not be taken as any decision by this Tribunal upon any of these points.

23. Mr Webb submitted that the LVT's analysis of the ability to claim compensation was wrong. He further submitted that the LVT would not have decided the grant of rights should be based on the Crews' draft if the LVT had not advised itself that the Appellant would be able to claim compensation. Mr Webb reminded me that it was on this point regarding the ability to claim compensation that the LVT had, through mischance, omitted to have regard to the written submissions on behalf of the Appellant.

24. Mr Webb drew attention to the provisions of Part IV of Schedule 6. All of the relevant provisions are based upon the proposition that this is a case –

> "Where the nominee purchaser is to acquire any freehold interest in pursuance of section 1(2)(a) or (4)…"

He submitted that the nominee purchaser (i.e. the Respondent) is not going to acquire any freehold interest in the Amenity Land – instead the right to acquire the freehold is to be satisfied by the grant of appropriate rights under section 1(4) over the Amenity Land. He drew attention to the definition of "freehold" in Stroud's Judicial Dictionary of Words and Phrases 7th edition, which indicated that the word freehold in connection with land imports its amplest and most complete enjoyment and indicates an estate, in possession or remainder, carrying with it actual possession of the land. What was to be acquired by the Respondent under section 1(4) was the grant of rights in the nature of an easement. This was not the acquisition of a freehold interest in the Amenity Land.

25. Mr Webb submitted that the LVT failed to apply the correct test under section 1(4). The test required was as follows:

(1) To analyse the scope of the present rights over the Amenity Land enjoyed by the qualifying tenants under their leases;

(2) To compare those rights with the rights being offered by the Appellant in the BNI draft;

(3) To identify where, if at all, the scope of the rights in (1) and (2) differed; and

(4) To adjust the terms of the BNI draft, if necessary, in order to make the scope of the rights as nearly as may be the same.

Mr Webb submitted that the LVT had not performed this task. He further submitted the LVT had misled itself in considering whether the covenants included in the BNI draft were appropriate in a deed of grant. There being no right to claim compensation for the Appellant, the rights to be granted under section 1(4) should not put the qualifying tenants into a more beneficial position. In any event the proper construction of section 1(4) required that they should not be put into a more beneficial position even if there was some right to claim compensation.

26. Mr Webb submitted that there was jurisdiction in the LVT to require that the deed whereby the rights were granted under section 1(4) by the Appellant was also executed by the grantee (i.e. the Respondent) and contained covenants of a positive and negative nature upon the Respondent. Mr Webb referred to section 24(8) and he submitted that the grant of the rights under section 1(4) was the acquisition of an interest in pursuance of section 1(4) and accordingly the terms of such acquisition were matters which the LVT could determine. He also referred to the wording of section 1(4)(a) which provides that the rights to be granted are such as to ensure that the qualifying tenants have "as nearly as may be the same rights" as those enjoyed in relation to the Amenity Land on the relevant date under the terms of their leases. The expression "as nearly as may be" gives power to impose covenants on the Respondent so as to make the position of the tenants, through the Respondent, as nearly as may be the same as it was under their leases, under which of course they were the subject to various covenants. Mr Webb also submitted that the phraseology used by the President of the Lands Tribunal in *McGuckian* (LRA/85/2006 – a decision dated 3 January 2008) in paragraph 30 showed that the LVT had a wide jurisdiction regarding the terms of acquisition. He also argued that, bearing in mind the Appellant was not entitled to any compensation, there should be power to impose the appropriate covenants on the Respondent.

27. Mr Webb submitted that the BNI draft was founded strictly upon the existing documents. Page 54L of the bundle showed the derivation of each provision in the BNI draft and showed that it could be traced back to the stated source in either the Amenity Land lease or the flat lease. Mr Webb therefore submitted the Respondent (and through the Respondent the qualifying tenants) would be no worse off if they were required to enter into the BNI draft.

28. I asked Mr Webb whether it could not be said that the tenants under the BNI draft would be worse off in the following manner, namely as at the relevant date (the date of service of the section 13 notice) the tenants held their flats under their leases and enjoyed the use of the Amenity Land under these leases and were required to pay service charges, but they had the benefit of all the protections afforded to tenants by statute, including in particular the Landlord and Tenant Act 1985 as amended. The nature of such protection is extensive and is well-known and I need not summarise it here. Under the proposed BNI draft the tenants would enjoy no such protection. Mr Webb in response submitted that when section 1(4)(a) made reference to "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" this was a reference to the contractual rights under the lease not to the contractual rights together with such other statutory rights as the tenant might enjoy under the law of the land. Provided the BNI draft gave the tenants as nearly as may be the same rights as they contractually enjoyed it did not matter if the tenants would be in a worse position for want of the ability to enjoy any statutory protection.

29. I asked a further question of Mr Webb, namely what was to be considered when deciding what were the rights enjoyed in relation to the property on the relevant date by the qualifying tenants under the terms of their leases. The question involves considering whether one should look at the rights which the tenants actually enjoyed on that date under the terms of their leases or whether one should look at the frailties of those rights and the ability of other persons to cut down those rights by the exercise of a power in the future. This was of particular relevance in respect of the imposition of regulations, because as at the relevant date no regulations had ever been made by the landlord so as to govern the use of, inter alia, the Amenity Land by the tenants. Accordingly as at the relevant date the tenants were entitled to use the Amenity Land without being obliged to comply with regulations, although there was the possibility that in due course the landlord might exercise the power to lay down such regulations. Mr Webb submitted that it is necessary for the purpose of section 1(4) to determine the scope of the rights enjoyed as a matter of contract by the tenants under the leases taking into account any potential weakness in such rights in the future rather than taking into account merely the nature of the rights as enjoyed on the ground on the relevant date.

30. I asked Mr Webb, in case this should be of any relevance to the analysis in the case, as to whether there was any particular reason why the Appellant was insisting on retaining the freehold of the Amenity Land and granting rights, rather than selling the Amenity Land. If the latter course was adopted the Appellant would obtain an appropriate price for the Amenity Land and would be clothed with the right to claim compensation, if appropriate, and would be able to require that the conveyance of the Amenity Land should include all appropriate reservations of rights of way and other easements and all appropriate restrictive covenants. Mr Webb did not advance any particular reason on behalf of the Appellant. However the Appellant is, of course, entitled to insist upon such rights as he has under section 1(4).

Conclusions

31. I have already referred to the unusual manner in which the present case comes before this Tribunal and to the assumptions (see paragraph 22 above) which I feel I must make for the purpose of this decision.

32. It is not necessary for my decision to decide whether or not the Appellant would enjoy any right to the payment of a price or compensation on the grant of rights under section 1(4) – I reach the conclusions set out below without these conclusions being affected by the answer to that question. Bearing in mind the forgoing and bearing also in mind that there has only been argument on one side in the present case, that the matter before me concerns only the form of the deed to be granted under section 1(4) and does not involve any present claim for a price or for compensation, and that this point may be one of potentially wide significance, I do not think it right to express any conclusion on the point. I note Mr Webb's argument. On the other hand I note that Schedule 6 paragraph 10 provides:

> "Where the nominee purchaser is to acquire any freehold interest in pursuance of section 1 (2) (a) or (4)…"

The grant of an easement can be the grant of a legal interest in land, see section 1(2) of the Law of Property Act 1925. Also the provisions of section 1(4) of the 1993 Act provide that the right of acquisition in respect of the freehold is "to be taken to be satisfied" if the relevant rights are granted. Also there is the point raised by the LVT to the effect that the LVT thought it would be surprising if a freeholder had to grant rights under section 1(4) over his freehold land without the ability to obtain any price or compensation (as against that of course it could be said that the freeholder has the option of allowing the freehold land to be purchased whereupon the freeholder would be entitled to a price and compensation). The matter is therefore in my judgment not so clear as Mr Webb submitted it was. As the point does not need to be decided I do not seek to do so.

34. The wording of section 1(4)(a) is of central importance. The Respondent enjoys a right of acquisition in respect of the Appellant's freehold of the Amenity Land. The way in which this right can be taken to be satisfied (without the Appellant actually having to transfer this freehold) is if on the acquisition of the relevant premises the freeholder of the Amenity Land (i.e. the Appellant) grants over the Amenity Land –

> "… 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."

35. It is therefore necessary, as submitted by Mr Webb, to analyse what are the rights enjoyed by the qualifying tenants on the relevant date under the terms of their leases in relation to the Amenity Land. These rights are not merely the rights set out in the flat leases, they are instead the rights set out in the flat leases as affected by the laws of England. I reject the suggestion that one merely analyses in a vacuum the contractual rights under the leases and ignores any additional rights which statute adds to these rights enjoyed by the tenants. Accordingly I conclude that the BNI draft fails to grant as nearly as may be the same rights to the tenants as they enjoy under their leases, because the service charge provisions in the BNI draft would not attract the protection of the Landlord and Tenant Act 1985 and are terms which tenants could reasonably be apprehensive about, including provisions that the relevant amounts are to be decided in the absolute discretion of the Appellant whose decision is to be entirely final and binding. Accordingly I conclude that the tenants would be substantially worse off for this reason alone under the BNI draft.

36. I also am unable to accept Mr Webb's argument that, when analysing the rights enjoyed in relation to the Amenity Land on the relevant date by the qualifying tenants under the terms of their leases, it is necessary to have regard not merely to the rights those tenants actually enjoyed on that date but also to the potential lesser or more restrictive rights that they might in the future (by the exercise of some power against them) be restricted to enjoying. The statute in my view requires an enquiry as at the relevant date (i.e. the date of service of the section 13 notice) of what were the rights enjoyed by the qualifying tenants under their leases on that date. The fact that at some future date they might have enjoyed lesser rights is not relevant. The purpose of section 1(4) is to give to the qualifying tenants rights in substitution for the acquisition of the freehold of the Amenity Land. Also they must be "permanent rights" which will "ensure that thereafter" the qualifying tenants have as nearly as may be "the same rights as those enjoyed in relation to that property on the relevant date". It is true that under the terms of the flat lease the landlord had the

right to lay down regulations for the use of inter alia, the Amenity Land. The landlord had not done so by the relevant date and accordingly as at the relevant date the tenants had the right to use the Amenity Land without being restricted by regulations. Mr Webb's argument that the rights should be taken with all their potential future frailties does not in my judgment give effect to the express wording of the statutory provision. Also the matter can be tested in this way. Suppose that at the relevant date tenants enjoyed certain rights but that there was a power at some future date to terminate those rights or greatly to curtail them. It is my view clear that the grant of rights needed to satisfy section 1(4) could not include the reservation of the right to the grantor to exercise these powers of termination or curtailment, because if such powers were included then the rights granted by the freeholder would fail to be "permanent rights" and would fail to "ensure that thereafter" the qualifying tenants enjoyed as nearly as may be the same rights as those enjoyed in relation to the Amenity Land on the relevant date.

37. It follows from the foregoing that the Appellant cannot justify the inclusion in the BNI draft of regulations as proposed by him. There is a further difficulty for the Appellant which is this. Under the flat leases the qualifying tenants enjoyed as at the relevant date the right to use the Amenity Land "with all others now or at any time hereafter having the like right". However if one asks how extensive was the population of persons with whom the tenants had the right to share the use of the Amenity Land as at the relevant date, the answer would appear to be: the other owners or occupiers of the block and (it seems) of the adjoining Block (namely 29 Dunloe Street) and 18-22 Scawfell Street or their invitees. It is true that in theory the landlord under the flat leases may have had the right to grant to other persons (not being tenants of flats in the block or the adjoining block or their invitees) the right to use the Amenity Land, but there is no evidence that this right had been exercised by the landlord. Accordingly the right to use the Amenity Land enjoyed by the tenants as at the relevant date was a right to share such use with a fairly limited population of persons. The BNI draft provides for the right to use the Amenity Land which is granted being a right to use it in common with the grantor "and all others authorised by the Grantor as well as all others now or at any time hereafter within the Perpetuity Period having the like right". By widening in this way the population of persons who may also use the Amenity Land the BNI draft in my judgment fails to comply with section 1(4) because it contemplates the tenants may in due course have to share the enjoyment of the Amenity Land with a far wider population than they were obliged to share with as at the relevant date.

38. The foregoing are objections of principle to the BNI draft. There are also various objections to certain details, including for instance the nature of the regulations which include a prohibition on taking any animal onto the Amenity Land (this could be a substantial adverse development so far as concerns flat owners who have dogs and who may at present be taking their dogs onto the Amenity Land). The covenant against leaving any bicycle etc even temporarily on the Amenity Land is a further example of the BNI draft weighing inappropriately heavily against the tenants – what should a parent do whose child has fallen off their bicycle and needs to be taken urgently back to the flat for first aid? I also consider it inappropriate that it is made a condition precedent to the enjoyment of the rights granted that the Respondent must strictly comply with all of the covenants imposed upon it – see for example *Yorkbrook Investments Limited v Batten* [1986] 52 P&CR 51 for a discussion acknowledging problems which can arise if rights are granted but only subject to compliance with a condition precedent.

39. I therefore decline to accept Mr Webb's invitation to order that the form of the grant to be executed by the Appellant should be in the form of the BNI draft. However I do not consider that the Crews' draft is an adequate document or an appropriate starting point. The question therefore arises as to how this Tribunal should deal with the matter, bearing in mind the appeal comes before this Tribunal by way of appeal from what was an interim decision of the LVT (the LVT contemplating that there would be further representations as to the final terms of the deed of grant) and where there has been no representation by the Respondent. In these circumstances I do not consider it appropriate that I should seek to lay down the precise and final terms for a deed of grant. However I consider that I can and should seek to give guidance as to the basis upon which the deed of grant should be drafted. The parties can then seek to finalise the document by agreement and, if necessary, can refer the matter back to the LVT.

40. I accept Mr Webb's submissions that in circumstances where it is agreed that the matter is to proceed by way of a deed of grant under section 1(4) (rather than by the acquisition of the relevant freehold land outright) the LVT has power under section 24(8) to determine the terms of acquisition which can include the terms to be included in the deed of grant. It is by no means unusual in a deed whereby an easement is granted for the deed to be executed not only by the grantor but also by the grantee and for the grantee to undertake certain obligations or to agree to certain restrictive covenants, see for example the forms suggested in the Encyclopaedia of Forms and Precedents 5th edition Vol. 13(1) (2005 reissue). Accordingly I conclude there is nothing wrong in principle for the deed of grant to be a document which requires the Respondent, as grantee, to undertake certain obligations and to be subject to certain restrictions. However for the reasons already mentioned above I conclude that the BNI draft in its present form is inappropriate and does not comply with section 1(4).

41. Clearly a substantial amount of work has been put into the preparation of the BNI draft. I consider that the document can provide a suitable starting point. I consider amendments to the following effect to be appropriate:

(1) The heading and the parties can remain as drafted.

(2) As regards the definitions in paragraph 1 the definitions of Green Land; Grantee's Covenants; Lease; Perpetuity Period; Plan; Red Land; Rights; Services; and VAT can be retained but the definitions of Contributions; Expenses; Estimated Expenses; and Proportion should be deleted.

(3) As regards clause 2 which is headed "Interpretation" I consider that this can remain as drafted.

(4) As regards clause 3 which is headed "Recitals" I consider this can remain as drafted.

(5) As regards clause 4 which is headed "Grant of Easements" I consider this should be redrafted in the following form:

"Pursuant to section 1(4)(a) of the Act, the Grantor with limited title guarantee and subject to the Lease (and for the avoidance of doubt the Rights will not take effect until the expiry of the Lease) grants the Rights to the Grantee for the the benefit of

the Green Land and each residential flat thereon to hold the Rights to the Grantee in fee simple."

(6) As regards clause 5 which is headed "Perpetuity Period" this can remain as drafted.

(7) As regards clause 6 which is headed "Covenants by the Grantee" this can remain as drafted.

(8) As regards clause 7 entitled "Declarations" I consider clause 7.1 can remain as drafted. The wording of clause 7.2 is to my mind too wide and I propose the following:

> "For the avoidance of doubt the grant of the Rights is not to prevent the Grantor from continuing to enjoy rights which are equally as extensive as the rights he enjoyed as Lessor under clause 2(7) of the Lease and Part 2 of the Schedule to the Lease, the wording of which is reproduced in Schedule 3 hereto."

As regards clause 7.3 this does not recognise the point mentioned in paragraph 37 above. I propose the following words in substitution:

> "The Rights are not granted exclusively and are granted in common with corresponding rights of the Grantor and other persons lawfully entitled to exercise such rights PROVIDED THAT it is agreed and declared that it shall be a wrongful interference by the Grantor with the Rights if the Grantor grants rights to use the Red Land to any substantially wider range of persons beyond the range of persons entitled to use the Red Land at the date of this deed namely the owners and occupiers of the Green Land and each residential flat contained within the Block situated thereon and the owners and occupiers of 29 Dunloe Street and the site of 18-22 Scawfell Street."

(9) As regards clause 8 which is headed "Registration" this can remain as drafted as can clause 9 (Jurisdiction) and clause 10 (Third Party Rights).

(10) As regards schedule 1 which defines the Rights I propose that this should be worded as follows:

> "Full right and liberty for the Grantee and its successors in title as owners or occupiers for the time being of the Green Land or any flat therein or thereon and their lawful visitors, in common with all other persons entitled to the like right, to use the Red Land and such facilities (if any) as may from time to time be installed or available for use thereon solely for quiet recreational purposes incidental to the residential use of the flats contained within the Block situated on the Green Land."

(11) As regards Schedule 2 Part 1, which is headed "Grantee's Positive Covenants", paragraphs 1, 2 and 3 (which are in effect the service charge provisions) should be deleted. Instead there should be inserted a covenant in the following terms:

"To pay on demand to the Grantor a reasonable proportion of the reasonable costs of maintaining the Red Land"

I realise that the Respondent will not enjoy the rights conferred on tenants by the Landlord and Tenant Act 1985 in relation to this obligation to pay. However by making the obligation a simple one which is expressly limited by reasonableness both as to the proportion and as to the costs (which could if necessary be litigated in the county court) the deed will ensure that the rights are "as nearly as may be" the same.

As regards paragraph 4 this is too wide as it imposes an obligation to comply with all by-laws etc and notices etc which effect the "the Red Land" and to pay all costs etc in doing so. Once the lease has expired and the rights granted by the deed have taken effect the Respondent will merely have a right to use the Amenity Land pursuant to the deed – it will no longer be a tenant of the Amenity Land. Accordingly I propose that paragraph 4 can be retained save that in place of the expression "that affects the Red Land" there shall be substituted "that affects the Rights". Paragraph 5 (obligation to comply with regulations) must be deleted. Paragraphs 6 and 7 can be retained.

(12) As regards Part 2 of the Schedule which is entitled "Grantee's Restrictive Covenants" I consider that this can be retained as drafted with the exception of paragraph 7, which seems to me to be too widely drafted because it would appear to prevent the Respondent from, for instance, making what would otherwise be a legitimate objection to the grant of planning permission in respect of the Grantor's neighbouring or adjoining land. The parties should seek to reach some agreement upon a more appropriate wording.

(13) As regards Schedule 3 which is entitled "Regulations in connection with the Red Land" I consider that, for reasons already given above, this should be deleted in its entirety. However a new Schedule 3 needs to be added, see subparagraph (8) above.

42. In the result therefore I allow the Appellant's appeal against the LVT's interim decision to the extent that I conclude the deed of grant to be executed under section 1(4) should not be the Crews' version (as decided by the LVT) but should instead be based upon the BNI draft but with the substantial amendments mentioned above. The parties should endeavour to agree the final draft failing which they must refer the matter back to the LVT for determination .

Dated: 17 August 2011

His Honour Judge Nicholas Huskinson