UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UTLC 186 (LC)
UTLC Case Number: LRX/58/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – common parts – valuation – parking as a potential incidental to vehicular rights of way – right to stop and load as a potential incidental to vehicular rights of way – valuation taking account of this – appeal dismissed – Leasehold Reform, Housing and Urban Development Act 1993 s 1(3), Sched 6

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

BETWEEN:

SINCLAIR GARDEN INVESTMENTS LIMITED

Appellant

and

2 MEDINA VILLAS LIMITED

Respondent

Re:2 Medina Villas
Hove
East Sussex
BN3 2RJ

Before: Her Honour Judge Walden-Smith

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
9 May 2012

Oliver Radley-Gardner instructed by Paul Chevalier and Co for the appellant
Simon Sinatt instructed by Woolley Bevis Diplock ofor the Respondent

© CROWN COPYRIGHT 2012

The following cases are referred to in this decision:

Earl of Cadogan v Sportelli [2007] EWCA Civ 1042
Gayford v Moffatt (1868) 4 Ch App 133
Gillett v Holt [2001] Ch 210
Moncrieff & Anr v Jamieson & Ors [2007] 1 WLR 2620

DECISION

Introduction

1. This is an appeal by way of review from the decision of the Leasehold Valuation Tribunal ("LVT") for the Southern Rent Assessment Panel dated 14 March 2011. The decision of the LVT arises out of the enfranchisement of premises known as 2 Medina Villas, Hove, East Sussex ("2 Medina Villas").

2. 2 Medina Villas comprises a three-storey semi-detached house constructed in or about 1890, subsequently converted to form six self-contained flats in or about 1973 with two flats on each floor. To the rear and side of the house is a surfaced area and at the rear there are three un-numbered but clearly marked parking spaces. I have had the benefit of having placed before me photographs of the house and the surrounding surfaced area. There is no evidence as to how, why or when those parking spaces were marked out.

3. Access to the six flats is either by way of a door to the side of the house or up the iron staircase to the rear of the house. The parties are agreed that access and egress to the house is not across the parking spaces.

4. The reserved property, which includes the three parking spaces, is set out in the Second Schedule to the Leases and the rights included in the demise are set out in the Fourth Schedule to the Leases.

5. Permission was granted by the LVT with respect to the decision to give the parking land a value of £1150.15 pursuant to the provisions of Schedule 6 to the of the Leasehold Reform, Housing & Urban Development Act 1993 ("the 1993 Act").
.

6. The appellant, Sinclair Gardens Investments (Kensington) Limited, contends that the LVT wrongly interpreted and/or applied the relevant law and further that the LVT took into consideration irrelevant considerations and/or failed to take account of relevant considerations and evidence. The appellant no longer seeks to contend that the point at issue is of potentially wide importance or that there was a procedural defect.

7. The respondent, 2 Medina Villas (Hove) Limited, contends that the LVT correctly interpreted and applied the relevant law and that the LVT took into account all relevant considerations and evidence presented to the LVT.

8. The issue for determination is whether the LVT erred in its determination that an area of retained land, which has not been demised to any of the leasehold owners of the flats at 2 Medina Villas, did not have an immediate value on the basis that it could not be sold to a third party for the purposes of parking.

The Proceedings

9. The respondent (as applicant to the LVT) served an Initial Notice on 16 March 2010 and Counter Notices were served by the appellant (as respondent to the application) upon the leasehold owners of the six flats on 24 May 2010. An application to determine the price was then made to the LVT by the respondent on 22 October 2010.

10. An application for determination of the terms of acquisition remaining in dispute was made by the respondent on 22 October 2010. Evidence was filed by an expert instructed by the appellant (Mr Thomson BSc (Hons) MRICS) and by an expert instructed by the respondent (Mr Holden FRICS).

11. The experts instructed by the appellant and respondent met together on 10 January 2011. As a result, agreement was reached with respect to capitalisation of ground rent, the flat values and that a relativity of 87.15 per cent should be adopted. A joint experts report dated 11 January 2011 was placed before the LVT.

12. The deferment rate and the value of the additional land remained in dispute.

The Decision of the LVT

13. At the time of the application to the LVT all 6 flats were participating. I was informed that one or two had fallen away by the time the matter came before the LVT on 10 February 2011. A site visit took place on the same day. Counsel who appeared before me , Mr Radley Gardner for the appellant and Mr Sinnatt for the respondent, also appeared before the LVT.

14. The decision of the LVT was promulgated on 14 March 2011.

15. Much of the decision was concerned with the appropriate deferment rate in light of the decision in *Earl of Cadogan v Sportelli* [2007] EWCA Civ 1042 and whether it was appropriate to part from the *Sportelli* deferment rate of 5%. This is not a matter which is subject to appeal and I do not concern myself with it.

16. The issue which is being appealed is the decision of the LVT with respect to the value given to the reserved property, that is the parking land at the rear of the house.

17. It was the respondent's contention before the LVT that the parking land, being the additional freehold land of three parking spaces, should attract a nil or minimal additional value. The respondent contended that the parking spaces at the rear of the property were in fact used by the leasehold owners of the flats on a "first come first served basis", albeit such use was contrary to the terms of their leases, and the respondent contended that they could not be sold to a third party and that is why they should not attract a value.

18. The appellant contended that the three parking spaces are capable of being sold with immediate effect so that they should be given a substantial immediate value.

19. The appellant and respondent agree that, subject to the argument as to whether the value should be deferred, the value of the parking land is £24,000 (£8,000 per parking space).

20. The LVT concluded that the value of £24,000 for the reserved property should be deferred for the remainder of the unexpired term at a rate of 5% to provide a valuation of £1,150.15.

21. The basis of that conclusion appears to be contained within paragraphs 22 to 24 and 30 of the decision which is (in summary) that, despite the provisions of the lease prohibiting any vehicle being left on the reserved property and the lease only providing for rights of access and egress over the reserved property and the right of common use with the tenants and occupiers of all the flats in the building:

> "Although the Tribunal heard no specific evidence on the point, it did not accept [counsel]'s submission that the tenants had no legal right to park on the reserved property and that the Respondent[appellant] could prevent this from continuing as being prima facie correct. It is highly arguable that the tenants may have acquired a prescriptive right to park on the reserved property given the long usage over time and, possibly, the Respondent [appellant] would be estopped from asserting that they had no right to do so under the terms of their leases. It follows from this that the entitlement of the Respondent [appellant] to grant rights to park to other third parties would be limited or non-existent. The additional value, therefore, of the ability to park on the reserved property accrues to the tenants."

As a consequence of that conclusion, the LVT determined that the value of £24,000 ought to be deferred for the remainder of the unexpired term at a rate of 5% to provide a valuation of £1,150.15.

The Contentions of the Parties with respect to the LVT Decision

22. The appellant contends that the LVT was wrong to defer the value of the parking land as it did.

23. The basis upon which the LVT came to the conclusion that the tenants had a legal right to park was that it was "highly arguable" that a prescriptive right had arisen, alternatively that the appellant would be estopped from asserting that the tenants had no right to do so under the terms of their leases and therefore "it follows" that the right to park during the lease term had already accrued to the tenants. The appellant contends that the LVT was wrong to come to such a conclusion and that it relied upon the principles of prescriptive rights and/or estoppel without having any consideration or analysis of what is required for such a right to accrue.

24. The Lease itself expressly provides, amongst other things, that the lessee has "the right in common with the Lessor the tenants and occupiers of all other Flats and all others having the like right to use for purpose only of access to and egress from the Premises (but not further or otherwise) all such parts of the Reserved Property as afford access thereto" (paragraph 1 of the Fourth Schedule); and "the right to use in common with the tenants and occupiers of all other flats and their visitors the grounds paths and forecourts forming part of the Reserved Property subject to such reasonable rules and regulations for the common enjoyment thereof as may from time to time be prescribed by the Lessor" (paragraph 5 of the Fourth Schedule); but that, pursuant to the provisions of paragraph 2(15) and paragraph 11 of the Sixth Schedule, each lessee covenanted that "no vehicles shall be left upon any part of the reserved property".

25. The leases thereby prohibit any right to park and paragraph 11 of Schedule 6 expressly prohibits the right to leave cars on the reserved property. The respondent accepts that the terms of the leases prohibits the right to park on the reserved land but disputes the narrow construction given by the appellant to the prohibition that "no vehicles shall be left"; I will come to this point in due course.

26. The respondent contends that the LVT did not find that the tenants had a right to park or that such a right to park arose by virtue of either an estoppel or by prescription.

27. I do not accept that the respondent's contention is correct on this point. In paragraph 24 of the decision, the LVT clearly stated that it did not accept the submissions put forward by counsel for the appellant that the tenants had no legal right to park on the reserved property and nor did it accept as correct that the appellant could prevent from continuing the parking that had been allowed to take place. The LVT, having raised the issue that the tenants "may have acquired a

prescriptive right" and that the appellant "possibly" would be estopped from asserting that the tenants had no right to park, then went on to say that "it follows from this". As I raised with counsel for the respondent in the course of oral submissions, the only matters that the LVT could be referring to when stating "it follows from this" were prescription and estoppel.

28. The respondent does not seek to contend that a right to park could have arisen by reason of prescription or estoppel. The respondent is correct to do so as the conclusions reached by the LVT were expressly without "specific evidence" to support such conclusion and were wrong in law.

29. The lack of evidence to support such findings is fatal to reaching such a conclusion and the parties were given no opportunity to consider or test any evidence that the LVT may have thought was potentially available.

30. Further, as a matter of law a tenant cannot prescribe against his own landlord: *Gayford v Moffatt* (1868) 4 Ch App 133, per Lord Cairns LC; and in order for there to be an estoppel it is necessary for there to be a representation that is relied upon to the detriment of the party seeking the estoppel: *Gillett v Holt* [2001] Ch 210 per Robert Walker LJ (as he then was). In this matter, not only was there a lack of any evidence of a representation by the appellant relied upon by the respondent but, even if there were such a representation, there could be no estoppel as contrary to there being a detriment, the provision of parking spaces when parking was expressly prohibited by the terms of the leases, was a benefit not a detriment.

31. The decision of the LVT cannot, therefore, be upheld on the basis of what is set out in paragraph 24 of the decision.

32. The respondent contends that there are other grounds for upholding the decision of the LVT from a construction of the lease itself and that the grant of parking rights by the appellant to third parties would interfere with the rights of the respondent under the terms of the lease so that the reserved property does not have an immediate value.

The Rights under the Lease

33. The respondent contends that the appellant is not able to achieve any value from the reserved property as a result of the rights already conferred upon the tenants by virtue of the terms of the leases.

34. The respondent accepts that by virtue of the express prohibition contained in paragraph 11 of the Sixth Schedule to the Lease that "*no vehicles shall be left on any*

part of the reserved property" the tenants have no right to park and the respondent does not seek to contend that the right of access and egress conferred by paragraph 1 of the Fourth Schedule to the Lease, a right granted *"in common with the Lessor the tenants and occupiers of all other Flats and all others having the like right…"*creates a right to park.

35. The respondent's case is that the only potential value of the reserved property is if it were let as parking spaces, it having no development value, and that the terms of the lease mean that if the reserved property were sold or let as parking spaces that would interfere with the rights conferred to the tenant by virtue of the provisions of the lease. The respondent contends that, as a consequence, the reserved property has no immediate value and would have no value until such time (in a no Act world) the lease comes to an end.

36. It is the respondent's submission that the right of access and egress conferred by paragraph 1 of the Fourth Schedule is not limited to pedestrian access and includes vehicular access and gives the tenants a right of way over all the reserved property including the parking spaces which have, as a matter of fact, allowed three cars to be parked at the rear of the house. Selling, or letting, the parking spaces to a third party would, it is said by the respondent, interfere with the rights of access and egress which includes a right to stop to load and unload. The respondent further contends that the right conferred by paragraph 5 of the Fourth Schedule is a right to "use in common with the tenants and occupiers of all other Flats and their visitors the grounds paths and forecourts forming part of the Reserved Property subject to such reasonable rules and regulations for the common enjoyment therefore as may from time to time be prescribed by the Lessor". This provision, it is said by the Respondent, does not restrict the right of use to "access and egress" so that the lessees are entitled to use the parking spaces which cannot be sold or let to third parties.

37. In *Gale on Easements* (18th Ed.) at paragraph 9-106, the authors state as follows:

> "The grant of a right to "pass and repass" does not per se include a right to park; neither does a "right of access". It was, however, held in *Bulstrode v Lambert* [1953] 1 WLR 1064 that a right to pass and repass over a cul-de-sac for the purpose of obtaining access to an auction mart implied the further right to halt vehicles in the cul-de-sac for so long as might be necessary for the purpose of loading or unloading, because such a right was necessary for the enjoyment of the right reserved. It has been argued that this principle would entitle the tenants of a block of flats to park overnight on the basis that the tenants could not substantially enjoy their tenancies without the right to park, but that seems unsustainable. A right to stop to load and unload would not be implied where there is no necessity to do so to enjoy the right of access granted, as where, for example there is an adequate loading or parking area on the dominant land."

38. In *Moncrieff & Anr v Jamieson & Ors* [2007] 1 WLR 2620, the House of Lords held that in "the particular and unusual circumstances" of that particular case, and in view of the great inconvenience that would be suffered if there was no parking on the servient tenement" an ancillary right to park vehicles, so far as reasonably incident to the enjoyment of the dominant tenement was established. *Moncrieff* is an exceptional case. The dominant tenement consisted of land with a dwelling house lying on the seashore from which it rose steeply with a stairway to a boundary fence. The gate in that boundary fence provided the only landward access to the property and vehicles could not be driven on to any part of it but a grant of a right of way, both vehicular and pedestrian, had been made in 1973 along a strip of land which was wide enough, where it abutted the dominant tenement, to turn and park. Lord Neuberger set out the exceptional features of the case, including that it must have been known when granting the pedestrian and vehicular right of way over the servient tenement that it would not have been physically possible for vehicles to obtain access to, let alone stop turn or park, on the dominant land itself and that, given the narrowness of the way, if there was no right to park then the vehicular right of way would be illusory as access would have to be achieved by foot. Consequently, he held that the right of way could not be enjoyed without there being a right to park and so, in the exceptional circumstances of that case, a right to park was included as a necessary ancillary of the right of way.

39. The argument the respondent runs is that the parking spaces are necessary for the purpose of enabling the tenants to stop, load and unload their vehicles. The right to access and egress is not limited to pedestrian access and includes vehicular access and that if that vehicular access is to have any meaning then it is a necessary incident of the right granted to access and egress over the reserved property with, or without, vehicles that it must be possible to stop the vehicle and then load or unload the vehicle, with goods or passengers, before moving off. The prohibition in the lease is that the vehicle is not to be "left"; there is no prohibition that the vehicle cannot ever stop on the reserved property.

40. The respondent contends that if correct on that submission, and that it is a necessary incident of the right to access and egress the property over the reserved property by vehicles that those vehicles can stop for the purpose of being loaded and unloaded (albeit not left) that the sale or letting of the parking spaces for the purpose of parking would result in an interference with the rights already granted to the leaseholders as that land could no longer be used for stopping and unloading and loading or used as a turning circle for vehicles. The respondent also points to the right contained in paragraph 5 of the Fourth Schedule as establishing that there is a wider right to use the area in common with others. The respondent accepts that the parking that currently takes place on those spaces, on a "first come first served" basis, is not a right pursuant to the terms of the lease and that it is tolerated both by the leaseholder and the other lessees.

41. The appellant responds to that argument, which is not an argument upon which the LVT reached its decision, by setting out that the lease expressly prohibits the tenants from having a right to leave cars on the reserved property and that the

sale of the parking spaces on the reserved land would not lead to any interference with the rights of the lessees under the terms of the leases as the right of access and egress is to the premises *"(but not further or otherwise")* and is restricted to such parts of the *"Reserved Property as afford access thereto"*. The appellant further responds to the argument that paragraph 5 of the Fourth Schedule gives the lessee further and greater rights to use the parking spaces, by setting out that the rights in common are subject to "reasonable rules and regulations".

42. I do not have before me any evidence from the respondent to support the contention that use of the parking spaces interferes with the right to access and egress to the premises. There is no evidence that a car using the surfaced area comprising the reserved premises would need to back out onto the highway in order to exit if the car parking spaces were occupied and there is no evidence that any tenant needs to travel over the parking spaces to have access to or egress from their premises. On the contrary, the evidence available (namely the photographs in the bundle) show that the parking spaces are not needed to access or egress the premises and that there is sufficient room at the rear of the house for cars to turn even with vehicles parked. The tenants of the premises have tolerated the parking spaces being used for parking without complaining that their rights of access and egress have been interfered with. The appellant has also not provided any witness evidence with respect to the use of the parking space and how that can interfere with the right of access and egress (paragraph 1 of the Fourth Schedule) and the right to use in common the grounds paths and forecourts forming part of the reserved property (paragraph 5 of the Fourth Schedule).

Conclusion

43. The determination of the LVT contained in paragraph 24 of the decision that the tenants "may have" acquired a prescriptive right or that the landlord "would be estopped" is not a conclusion that the LVT could properly have reached in law or on the basis of the evidence before them. The LVT acknowledged that it had heard "no specific evidence" on these points and it is clear that the law does not support the contention that there could either be a prescriptive right or an estoppel.

44. In my judgment, the decision of the LVT that the parking spaces did not have an immediate value was correct by implication from the rights granted to the lessees pursuant to the Fourth Schedule of the Lease, in particular paragraphs 1 and 5. There is no implied right to park both because of the express prohibition contained in paragraph 11 of the Sixth Schedule to the Lease but also because this case does not have any of the exceptional features of a case such as *Moncrieff.* However, the right of access and egress includes a vehicular right of way and by paragraph 5 of the Fourth Schedule every tenant has the right to use "in common" with the tenants and occupiers of the other flats "the grounds paths and forecourts forming part of the Reserved Property subject to such reasonable rules and regulations for the common enjoyment thereof as may from time to time be prescribed by the Lessor". There are

no prescribed "rules and regulations" and, in my judgment, the right to have vehicular access and egress to the premises carries with it the necessary incidental right to stop in order to unload or load passengers and goods, without leaving the vehicle. That necessary incidental right, in order to ensure that the vehicular right of way is more than merely illusory, includes the area which has been demarcated as parking spaces at the rear of the house. If those parking spaces were to be sold to a third party then the rights of the tenants would be interred with.

45. In the circumstances, I find that the LVT were correct to find that the value of £24,000 for the reserved property should be deferred for the remainder of the unexpired term at a rate of 5% to provide a valuation of £1,150.15 but on different grounds to those given by the LVT; namely that there is an implied right to stop, load and unload and therefore to make use of that part of the reserved premises laid out as parking spaces.

46. The appeal is therefore dismissed.

Dated 29 May 2012

Her Honour Judge Karen Walden-Smith