LEASEHOLD VALUATION TRIBUNAL **CAM/22UH/OCE/2004/0001**

Address of Property :	**The Pines, Ongar Road, Abridge, Essex RM4 1UP**
Applicant Tenants :	**Ronald Thomas Fearon & Debbie Jean Fearon, Flat 1, The Pines, Ongar Road, Abridge, Essex RM4 1UP**
Applicants' agent :	**Attwater & Liell, solicitors, Rothwell House, West Square, The High, Harlow, Essex CM20 1LQ**
Respondent Reversioner :	**Tamish Christopher Dilchand, Tudor Lodge, Ongar Road, Abridge, Essex RM4 1UP**
Respondent's agent :	**Alan Winter, Peace & Co, 365 Eastern Avenue, Gants Hill, Ilford, Essex IG6 2NE**

By application dated 4th February 2004, pursuant to section 24 of the Leasehold Reform, Housing & Urban Development Act 1993, the Applicants as Nominee Purchaser applied to the Leasehold Valuation Tribunal for a determination of the purchase price to be paid and the terms of acquisition of the freehold interest in the Property remaining in dispute.

Tribunal :	**Mr G K Sinclair (Chairman), Mr J R Humphrys FRICS, & Mr R W Marshall FRICS FAAV**
For the Applicants :	**Mrs Debbie Jean Fearon, in person**
For the Respondent :	**Mr David Lonsdale, counsel, instructed by Alan Winter, Peace & Co, solicitors**
Hearing date :	**Thursday 22nd April 2004**

THE DECISION OF THE TRIBUNAL

Handed down 10th May 2004

Preliminary

1. The subject property, The Pines, 12 Ongar Road, Abridge, Essex, comprises a house converted into a ground floor and first floor flat, the long leases of which are both now in the ownership of the Applicants, who reside in the upper flat and have renovated parts of the lower one. The leases, dated 25th November 1985 (flat 1, on the first floor) and 11th April 1986 (flat 2, on the ground floor) are each for a term of 99 years from 1st June 1985. At the relevant date, therefore, the unexpired term exceeds 80 years.

2. With each flat is demised the use of two parking spaces (one of each comprising half of an open-fronted garage or car port, and the other an open space) for *"a private motor car only"* and the exclusive use of a section of garden. That for the ground floor flat is at the front; that for the first floor flat appears to be a modest flower bed between the two bay windows by the driveway. Each flat also has the shared use of the large back garden, a right to enter upon the landlord's retained land for the purpose of carrying out emergency repairs to the demised premises *"and the services connected therewith"* (but seemingly not for the purpose of regular decoration or maintenance), and a right of way *"at all times and for all purposes connected with the use of the demised premises over and along the driveways footpaths and yard forming part of the lessor's premises... to gain access to and egress from the demised premises... including a vehicular right of way over the said driveways and yard"*. Each flat may place one dustbin in an area of the yard close to the rear of the premises. With many local authorities now moving to a "two wheelie bin" policy, with collection in alternate weeks of general household rubbish and recyclable waste, this limitation could prove restrictive.

3. By clause 2(ii) each lessee covenants *"to contribute and pay to the lessor on demand one half of any expenses incurred by the lessor in complying with the obligations under clause 3(c), (d), (e), (f) and (h) and one quarter of any expenses in respect of [the driveway and yard]"*. The lessor's covenants appear in clause 3, those to which cost the lessees must contribute being the keeping in repair of the main structure, insurance of the lessor's premises in the joint names of the lessor and lessees, the maintenance and repair of the sewers, drains and watercourse, cables, wires and pipes in or under the lessor's premises and the land belonging thereto, to decorate the exterior of the building every

third year, and to maintain and keep in good repair and condition the garden and the driveways footpaths and yard.

4. As each lessee must contribute and pay one half of the cost for some of the above and one quarter of the cost incurred for the driveway and yard it is implicit from the leases that the lessor must not only perform these duties but also absorb a proportion of the expense.

5. Although the right of way in each lease is silent on the issue, it is in fact a right shared with the owner of the adjoining property to the west, Pine Cottage, which has a garage and a back door accessed from the rear yard. The front section of driveway also provides access to the landlord's new home, Tudor Lodge, built since the leases were granted, in about 1987, on the eastern half of the original Pines plot.

6. On 25th July 2003 the Applicants served upon the Respondent landlord an initial notice under section 13 of the Leasehold Reform, Housing & Urban Development Act 1993. The premises the freehold of which was intended to be acquired by virtue of section 1(1) of the Act ("the specified premises") was shown edged red on the accompanying plan. Outlined in red was the building only. The property the freehold of which was proposed to be acquired under section 1(2)(a) of the Act was outlined in green on the plan. This included the gardens, parking spaces, driveway and rear yard. The proposed purchase price was declared to be £2,000 for the freehold interest in the specified premises and £850 for the other property shown edged green on the plan.

7. In his counter-notice Mr Dilchand, the Respondent lessor, admitted the lessees' right to purchase the freehold but stated that he wished to retain ownership of the access land coloured blue on his annexed plan, instead granting the Applicants a *"right of way at all times for the transferee and all persons authorised by him and his successors entitled (sic) to pass and repass over the access way coloured [blank] on the plan attached hereto"*. The area coloured blue is the driveway immediately to the east of the property, extending from the public highway to the entrance of the double garage used by the two flats. The lessor did not seek in his counter-notice to preserve his ownership of any other land,

including the rear yard, or to offer any other rights. The purchase price proposed by the lessor was £10,950.

Inspection, hearing and evidence

8. The Tribunal attended the subject property with a view to inspecting it at 10:00 on the morning of the hearing. Also present were Mrs Fearon and Dr V F Heylen, a friend and neighbour, for moral support. There was no attendance by or on behalf of the lessor. Instead, the Tribunal received a message from their Cambridge office to the effect that the lessor's solicitors had telephoned that morning, asking that the Tribunal be informed that a site inspection was no longer neccessary as both parties had agreed a price, but that they (the lessor's solicitors) still wanted the hearing to go ahead. Fortunately, in view of what would later transpire at the hearing, the Tribunal begged to differ. It is Tribunal practice to inspect the subject property of an application, and this was duly undertaken.

9. Looking at the site from the road it comprises a rough rectangle, approximately 2¼ times deeper than it is wide. The house itself is slightly wider than it is deep, with two bay windows to the front and two to the left hand side. On the right, physically connected to the property, is what appears to be a very narrow house – Pine Cottage. In fact this property is very long and narrow with a back door, kitchen windows and adjacent garage all facing into a yard lying to the rear of the subject property. The house and the driveway on the left side take up the full width. The house is set back behind a front garden. The driveway leads straight to an open-fronted double garage, beyond the entrance to the widening, roughly triangular, rear yard. One of the car parking spaces lies within this yard. The far end of the yard (ie on the extreme right) in fact falls within the curtilage of Pine Cottage. The exact boundary is unclear, as the present shape of Pine Cottage differs from that shown on the lease plans. To the rear of the yard, and at high level, lies a squarish garden, laid mostly to lawn. To its right, at a slightly lower level, is the rear garden of Pine Cottage.

10. To the left of the driveway is Tudor Lodge, a new house – built in about 1987 – owned by the Respondent lessor. This house has a broad frontage, incorporating a built-in

garage, but has no direct access to the street. Instead, both vehicular and pedestrian access is obtained via the front part of the driveway over which the Applicants have their right of way. Between Tudor Lodge and its boundary with the driveway lies a concrete path running along the side of the building. Whether there is a similar access to the rear of the property on the other end of the building the Tribunal was unable to determine. The boundary between Tudor Lodge and the Applicants' driveway comprises a low brick wall and, from the rear corner of the house, a 6 foot high close-panelled fence.

11. The Tribunal inspected the two flats. The upper flat is approached through the front door, up a straight flight of stairs. The accommodation comprises a living room giving access to a small, unmodernised kitchen to the rear, a double bedroom which (because of the location of two bay windows and the door) had little usable space and a cramped appearance, a long, generous-sized single bedroom behind, a small WC and a separate bathroom. The existence of a hidden valley in the roof provides two usable attic storage spaces, but it also increases the difficulty in maintenance, and there was evidence of water leakage through the roof. Central heating throughout was provided by large, old-fashioned radiators in each room.

12. The ground-floor flat is approached from the rear yard. The Applicants had made a start on renovating this flat, both the kitchen and bathroom being refurbished to a high standard throughout – a marked improvement on those upstairs. Other rooms in the flat were of similar sizes to those upstairs, albeit with a slightly different floor plan, but were currently being used for the storage of furniture. The room below the large bedroom in the upper flat (front left, when viewed from the street) had a dark, heavy appearance, with a lot of fake timbers affixed to walls and ceiling. Heating is as for the upper flat. This flat has a large cellar which requires constant pumping. On the morning of the hearing the Tribunal could go no further than the bottom step due to the cellar floor being about 2 or 3 inches deep in water.

13. The hearing began at 11:20 that morning. On behalf of the Applicants Mrs Fearon appeared alone and unrepresented, accompanied only by Dr Heylen. She relied upon the evidence and written submissions filed in support of the application. This included

written valuation evidence fro Mr C J N Gibson FRICS and, more to the point, correspondence in January and April 1996 from Paisner & Co, solicitors acting for the owner of Pine Cottage, to the Respondent, Mr Dilchand, and to his then solicitors concerning attempts by him to interfere with the right of way to that property through the yard, including a threat to fence off the yard. In Mr Fearon's written submission to the Tribunal he stated that when Tudor Lodge was being built he and his wife were promised that it would have its own vehicular access to the street, that Mr Dilchand should never have been able to acquire the freehold of the property, as the then freeholder had sold it in breach of the sitting tenants' statutory right of first refusal, and that Mr Dilchand had "caused a lot of stress through the years". He stated that Mr Dilchand had trespassed and cut down a cherry tree on the demised premises, and that Mr Fearon had "numerous correspondence to solicitors, Epping Forest District Council and the police on many of the things he has done".

14. Despite his non-attendance at the inspection, failure to file a written submission of his case, or disclosure of any evidence - indeed his total non-compliance with the directions issued by the Tribunal – the Respondent chose to be represented at the hearing by counsel attending alone. Mr Lonsdale began by stating that he had only recently been instructed, that no valuation evidence had been obtained on behalf of the lessor, and that the Applicants' proposed purchase price of £2,850 was therefore accepted. He stated that the figure of £10,950 mentioned in the Counter-notice had not simply been plucked from the air by the Respondent but was based upon a purported written valuation by an unqualified person, which Mr Lonsdale described as "useless".

15. However, the sole argument which Mr Lonsdale was instructed to advance – taking everyone by surprise – was that the Respondent was prepared to sell only that which he was legally obliged to sell, and that provided he offered similar easements to those in the leases he was entitled and wished to retain ownership not only of the driveway (the blue land mentioned in his counter-notice) but also the rear yard, which had not been mentioned in the counter-notice, even though he had no practical need to retain it. The Tribunal could not, he submitted, include the driveway and yard in the land to be purchased by the Applicants under the Act.

16. Mr Lonsdale referred the Tribunal in particular to section 1(4) of the Act and to passages in *Hague on Leasehold Enfranchisement* (4th ed – 2003) at paragraphs 20-05 and 20-06. He neither challenged the evidence adduced by the Applicants nor sought to adduce any of his own.

The relevant law

17. The relevant law on this aspect – which is the only point on which the application turns – is to be found in section 1 of the Leasehold Reform, Housing & Urban Development Act 1993, as amended. The material parts read as follows :

1 The right to collective enfranchisement

(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 subsection (3); and

(b) ...

(3) Subsection (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 subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either-

(a) there are granted by the person who owns the freehold of that property-

(i) over that property, or

(ii) over any other property,

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

(b) there is acquired from the person who owns the freehold of that property the

freehold of any other property over which any such permanent rights may be granted.

According to section 1(7) :

"appurtenant property", in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat.

18. The Tribunal also considered certain passages in *Hague on Leasehold Enfranchisement* (4th ed – 2003). Amongst the footnotes to paragraph 20-05 is a reference to the unreported Lands Tribunal decision in *Lynari Properties Ltd v Shortdean Place (Eastbourne) Residents Association Ltd* (P H Clarke FRICS, 29th May 2003), which the Tribunal has considered. In his decision the Vice President considered the relevant statutory provisions, under the separate heads : the right to enfranchise, the procedure for enfranchising, and the determination of disputes. In paragraph 51 of the decision he discusses the contents necessary in a claimant's initial notice, set out in section 13(1). In paragraph 52 he then turns to the reversioner's counter-notice under section 21(1). Where it admits the right to enfranchisement then, under sub-section (3) :

...it **must** in addition-
(a) state which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which (if any) of those proposals are not so accepted, and **specify-**
(i) in relation to any proposal which is not so accepted, the reversioner's counter-proposal, and
(ii) any additional leaseback proposals by the reversioner;
(b) **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), specify-**
(i) the nature of those rights and the property over which it is proposed to grant them, or
(ii) the property in respect of which it is proposed to dispose of any such interest,
as the case may be;... [emphasis added]

19. *Hague on Leasehold Enfranchisement* (4th ed), at paragraph 26-06, has this to say on the care needed when preparing the counter-notice :

A counter-notice admitting the claim... must, in addition, state various matters. Although no form of counter-notice is prescribed, it is desirable to use a printed form sold by legal stationers, so that none of the particulars is omitted by mistake... Since the counter-notice contains no "particulars" to show that the tenants qualify under the Act, there is no need for any saving provision to the effect that any inaccuracy in such particulars will not invalidate it. It seems likely, therefore, that the failure to specify any

of the mandatory requirements of a counter-notice will invalidate it, with potentially serious consequences. **The 1993 Act does not make provision for amendment of a counter-notice, so that the reversioner only has one opportunity to state his requirements...** [emphasis added]

20. At paragraph 59 of his decision in *Lynari* the Vice President discusses the collective enfranchisement jurisdiction given to the Leasehold Valuation Tribunal by the Act. "Terms of acquisition" include "the interests to be acquired" and also "the extent of the property to which those interests relate or the rights granted over any property". However, section 1(4) places a restriction on the grant of the freehold of property used in common, and the word "shall" is all-important. At paragraph 63 he says this :

"I agree with Mr Radevsky although I express myself a little differently. The LVT were required to determine the matters in dispute, that is to say the disputed terms of acquisition. The dispute concerned the effect of section 1(4)(a)(i) : whether the right of acquisition in respect of the freehold of property used in common was taken to be satisfied and that was dependent upon whether the permanent rights offered by Lynari in their counter-notices were such as to ensure that the occupiers of the flats would have nearly as may be the same rights as those enjoyed by the tenants under their leases. In my judgment, if the permanent rights offered satisfy the test under section 1(4)(a)(i) then the LVT had no power to determine that the freehold of te common use property should be transferred to the nominee purchaser. Section 1(4) is in mandatory terms : the right of acquisition of the freehold "shall, however, be taken to be satisfied" if the permanent rights to satisfy the subsection are granted by the freeholder. An LVT is not bound to accept the proposals in a landlord's counter-notice with regard to property used in common. If the permanent rights offered do not satisfy the test in section 1(4)(a)(i) then the tribunal have a discretion. If, however, the rights offered do satisfy the test then section 1(4) requires that the right of acquisition of the freehold *shall* be satisfied by the grant of the permanent rights and the LVT have no power or discretion to order the transfer of the freehold of the land. They have determined the matters in dispute and the right of acquisition must be taken to be satisfied in accordance with the section 1(4) of the 1993 Act."

Findings and decision

21. The Tribunal finds the following facts :

a. The Respondent's counter-notice sought to except from the transfer only the land coloured blue, viz the driveway, and to grant the transferees a right of way over that land

b. The counter-notice did not seek to exclude the rear yard, nor did it specify any rights (whether rights of way required to access the car parking space or rights

to place dustbins) that he was willing to grant instead

c. No hint was given by the Respondent until the hearing began that he wished to exclude additional land from the transfer, thereby taking both the Applicants and the Tribunal by surprise

d. The Respondent's attitude to the proceedings is not such as to dissuade the Tribunal from accepting at face value the Applicants' evidence that he has in the past been the source of persistent trouble both to the Applicant lessees and to the adjoining freeholder in Pine Cottage

e. The Respondent does not seek to retain the freehold interest in the driveway and yard because it is of any practical use to his retained land – access to the front of his house is obtained from the front part of the driveway only, and the rear yard serves only The Pines and Pine Cottage – nor because it preserves the future development potential of any adjacent land which he might own (there is none). The Tribunal is satisfied that he is motivated only by a desire to annoy his neighbours, and perhaps to cause future trouble by seeking to control and disrupt their activities and the reasonable enjoyment of their properties

f. Under the covenants in the leases the lessor is contractually obliged to carry out works of maintenance, decoration and repair to the exterior of the building, seeking reimbursement from the lessees (although on inspection there was no evidence that decoration or maintenance had been undertaken in recent years). Without this contractual relationship, and with no suitable rights being offered, the Applicant transferees will be unable to maintain or decorate the side and rear of the building, as this would involve the placing of ladders or scaffolding on the driveway and yard – for which permission is unlikely to be freely given, thus requiring repeated applications to the court under the Access to Neighbouring Land Act 1992

g. Under the covenants in the leases the lessor is also contractually obliged to maintain and keep in good repair and condition the yard and driveway, seeking only a part-contribution towards the cost from the lessees. With a positive covenant the Applicants could compel the Respondent lessor to carry out such work, and to meet part of the cost of so doing. However, no such covenant is offered, and even if it were it would not (under the present state of the law) be

binding upon any of the lessor's successors in title.

h. One of the lease plans disclosed was a builder's plan, presumably used in the course of converting the property into flats. From that plan, and from the Tribunal's inspection, it is clear that drains run under the yard and driveways. There is also an essential drainage pipe emerging from a cellar airbrick and leading along above the surface of the driveway to a gulley in the rear yard. It is required for pumping out the cellar. As the Respondent has not chosen to provide the Tribunal with any evidence at all it is unknown whether the drains serving Tudor Lodge, constructed since the date of the leases, connect into the drains under the driveway maintainable at the lessees' expense. No drainage rights are proposed, nor any contribution to the cost of maintaining them.

22. In *Duke of Westminster v Guild* [1985] QB 688 the issue was who was liable to pay for the repair of drains owned by the Duke of Westminster but through which Mr Guild had an easement of drainage. The relevant principles were clearly expressed by Slade J, giving the judgment of the court in these terms :

"The subject of the dispute, that is the landlords' part of the green drain, is property in respect of which the tenant enjoys an easement of drainage governed by the general law of easements. It is well settled that the grant of an easement ordinarily carries with it the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment: *Jones v Pritchard* [1908] 1 Ch.630,638, per Parker J. In our opinion, therefore, it is plain that the tenant would have the right, when reasonably necessary, to enter the landlord's property for the purpose of repairing that drain and to do the necessary repairs. In contrast, however, it is an equally well settled principle of the law of easements that, apart from any special local custom or express contract, the owner of a servient tenement is not under any obligation to the owner of the dominant tenement to execute any repairs necessary to ensure the enjoyment of the easement by the dominant owner; apart from special local custom or express contract, the law will ordinarily leave the dominant owner to look after himself: see *Gale on Easements*, 14th ed. (1972), p47 and *Holden v White* [1982] QB 679,683-684 per Oliver LJ."

23. Later, at page 703 Slade LJ added :

"The general law of easements applies and, as we have already pointed out, clearly imposes no such obligation on the landlord. On the contrary, the defendant himself, though theoretically under no obligation to repair the plaintiffs' part of the green drain, could find himself in practice obliged to do so, in order to avoid committing a trespass against the landlords by the escape of water through that part..."

24. Whether the issue be the repair of drains or of a jointly used right of way the principle remains the same. While it may be possible contractually to bind the Respondent lessor, his successors in title cannot be compelled either to carry out works or to pay their fair share towards them. As such, any rights (were they to be proposed) would neither be permanent nor would they be "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".

25. In argument Mr Lonsdale suggested that the Applicants' initial notice was defective (but not fatally so) because the car parking spaces were included in the green land under section 1(2)(a) instead of in the red land (the section 1(1) land). As the car parking spaces fall within the definition of "appurtenant property" in section 1(2)(a), (3)(b) and (7) the Tribunal respectfully disagrees. The only party in apparent error in expressing his true wishes is the Respondent.

26. For these reasons, and applying the law as expressed in *Lynari*, the Tribunal finds :

a. That the Respondent is bound by the terms of his counter-notice and that the only land which he can seek to exclude is the driveway coloured blue on the plan

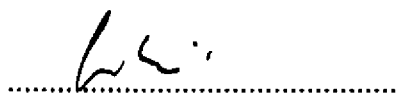
b. The permanent rights offered do not satisfy the test in section 1(4)(a)(i)

c. The Respondent reversioner will be adequately protected by the grant to him and his assigns, licensees and lawful visitors, at all times and for the purpose of gaining access to and egress from the freehold property at Tudor Lodge, on contribution and payment by him to the transferees and their successors in title upon demand one half of the reasonable cost of maintaining and repairing the surface of the same, a pedestrian and vehicular right of way over the adjacent driveway from the point where it meets the public highway at Ongar Road to a point level with and perpendicular to the furthest of his two existing gateposts

d. Subject to the grant by the Applicants of the above right of way (and, on proof that the same is reasonably necessary, any rights required to regularise any existing supplies of water, sewerage, electricity, gas, digital services provided by underground cable, etc) the Applicants may acquire the freehold interest in the land shown edged in red together with that shown edged green on the plan

annexed to their initial notice at the agreed price of £2,850.

Dated 10th May 2004



Graham K Sinclair, Chairman

for the Leasehold Valuation Tribunal