UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 20 (LC)
UTLC Case Number: LRA/71/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – PROCEDURE – flat – lease including right of way on foot only to demised garage – whether restriction a defect capable of correction in new lease – ss.48(3), 57(1), Leasehold Reform, Housing and Urban Development Act 1993 – permission to appeal refused on mistaken understanding of facts – request for review treated as application to set aside refusal under rule 54, Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 – whether conditions satisfied – refusal set aside – permission to appeal granted – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MR MIN Y PARK — **Appellant**

and

MR F MORGAN AND MRS C MORGAN — **Respondents**

Re: First Floor Flat,
89 St Luke's Road,
Bournemouth,
Dorset, BH3 7LS

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

17 December 2018

Mr Park represented himself
Daniel Bromilow, instructed by Preston Redman, solicitors, for the respondents

© CROWN COPYRIGHT 2019

The following cases are referred to in this decision:

R (Cart) v Upper Tribunal [2012] 1 AC 663

Gordon v Church Commissioners for England (2007) LRA/110/2006 (Lands Tribunal), [2007] EWLands LRA_110_2006

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896

Shotley Point Marina (1986) Ltd v Spalding [1997] 1 EGLR 232

Tager v HMRC [2015] UKUT 663 (TCC)

Introduction

1. Where the tenant of a flat exercises the right to acquire a new long lease under Chapter 2 of Part I, Leasehold Reform, Housing and Urban Development Act 1993, section 57(1) provides that the new lease is to be on the same terms as the existing lease. Limited exceptions are provided to that principle including by section 57(6)(a) which allows either party to require that any term of the existing lease should be excluded or modified from the new lease in so far as it is necessary to do so in order to remedy a defect in the existing lease.

2. The substantive issue between the parties in this case is whether the lease of the first floor flat at 89 St Luke's Road, Bournemouth contains a defect which Mr and Mrs Morgan, the respondent leaseholders, are entitled to have corrected when they take a new extended lease under the 1993 Act.

3. 89 St Luke's Road is a converted house on two floors which was constructed in the 1930s and divided into two flats in the 1980s. In 1983 the flat on the upper floor was demised to a predecessor in title of the respondents for a term of 99 years.

4. The owner of the freehold of the house is the appellant, Mr Park. The flat on the ground floor has never been the subject of a lease and is held by Mr Park in his capacity as freeholder.

5. The house has a small garden at the front and a larger garden at the rear. A tarmac drive at the side of the building provides access to the rear garden and to a block of two small detached lock-up garages. Because of the proximity of the garage block to the rear wall of the house, access to one of the two garages with a vehicle is difficult. This garage and the driveway leading to it are both within Mr Park's freehold title.

6. The other garage can easily be accessed from the driveway, and is included in the lease of the first floor flat now belonging to Mr and Mrs Morgan.

7. Although the lease of the first floor flat includes one of the lock-up garage, the only right of way granted to the leaseholders over the driveway is a right of way on foot only. Thus the respondents cannot use their garage to park a vehicle, nor does the lease grant them any right to park on the driveway itself. The FTT was satisfied that the restriction of the right of way to access on foot only was a defect within the meaning of section 57(6)(a), and that the respondents were entitled to have the right modified in their new lease to permit access with vehicles. The substantive issue in the appeal is whether the FTT was right to treat the restricted right of way as a defect.

Permission to appeal

8. The FTT refused permission to appeal and when the matter first came before this Tribunal on 2 August 2018 I also refused permission to appeal after considering the matter on paper. That decision was challenged by Mr Park in correspondence which I have treated as an application to set aside the refusal of permission to appeal under Rule 54 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. If that application succeeds, Mr Park's application for permission to appeal will require to be re-determined.

9. With the consent of the parties I held a single "rolled up" hearing at which I considered the application to set aside my own decision of 2 August 2018, the application for permission to appeal and the appeal itself. Mr Park attended the hearing in person and the respondents were represented by Mr Daniel Bromilow. Mr Park asked for the hearing to be adjourned to enable him to obtain professional representation, but having considered the written material Mr Park had supplied in advance of the hearing I refused that request. I was satisfied that Mr Park had been given sufficient notice to enable him to prepare and that the substance of his case had already been made by him in writing.

The procedural history

10. Mr. and Mrs Morgan made their claim to acquire a new lease under section 42 of the 1993 Act on 8 May 2017. They proposed a premium of £13,139 and suggested that the new lease should be on the same terms as the existing lease but with eight amendments. The parties were unable to agree the premium or any of the proposed amendments, and Mr and Mrs Morgan applied to the FTT to have the terms of acquisition determined by it.

11. That application was heard on 25 April 2018. Both parties were represented by counsel. Mr. and Mrs Morgan argued that the right of way giving them access to the garage should be amended to allow vehicular access, and the FTT eventually agreed. The only other modification permitted by the FTT was the inclusion of a reference to the requirements contained in the Council of Mortgage Lenders Handbook in the lessor's insurance covenant. Other changes suggested by the respondents (including a new right to park on the driveway) were rejected. I will refer to the FTT's reasons in more detail later.

12. Mr Park was dissatisfied with the FTT's decision and on 22 May he applied to it for permission to appeal. The application was prepared by Mr Park personally; his first language is not English and his written style is not always easy to follow. Mr Park asserted that the extension of the right of way to include vehicles prejudiced him as owner of the ground floor flat. He also complained that although his counsel had explained why access with vehicles had not been included in the original lease the FTT had omitted to mention that explanation in its decision. Mr Park put his point in these terms:

> "The applicant's counsel, Mr John Jessop/3PB, has explained in the hearing, saying the occupiers of GFF [the ground floor flat] have had almost impossible vehicle access to GFF garage for the faulty design of the two garages in convenient and practical terms for a mutual vehicle accessibility. That is why the lease provisions have been omitted of vehicle access to each garage."

13. The FTT refused permission to appeal on 21 June but did not refer to the point Mr Park had made about "almost impossible vehicle access", nor did it deal with the suggestion that this point had not been mentioned by it in its decision. Mr Park therefore renewed his application directly to this Tribunal on 5 July. His grounds of appeal to this Tribunal were not the same as those he had sent to the FTT, and he did not include a copy of the original grounds with his application. He said that access to the garage for the occupiers of the ground floor flat was impossible with a vehicle due to the "defective design" of the garage, but did not repeat the complaint he had made to the FTT that it had failed to deal with this point or explain why it did not provide a reason for the restriction of the lessees' right of way to pedestrian access only. Instead he asserted that it was clear from the lease that the original parties had agreed in 1983 that access to the garage would be on foot only and that the FTT's decision had, as he put it, "shattered the other flat's rights." The limitation was not in any sense a defect and ought not to have been modified.

14. After considering it on paper I refused Mr Park's application for permission to appeal on 2 August. In explaining my decision I said that in the absence of any obvious reason why access to the garage should have been restricted to a right on foot only the FTT had been entitled to regard the restriction as having been included in error and as not having been intended to prevent the use of the garage in a conventional way. I continued:

> "The applicant now asserts that for reasons connected to the size or design of the garage it is impractical for the garage to be used by both the lessees of the first floor flat and the occupiers of the ground floor flat to park vehicles. The FTT inspected the premises and saw the garage and the access to it. It was not suggested at the hearing, when the applicant was professionally represented, that there was any such difficulty as is now said to exist. It is not open to the applicant to advance a different factual case on an appeal to that which he presented to the FTT, and there has been no explanation of why the suggested difficulties were not explained to the FTT. For that reason there is no prospect of a successful appeal based on the alleged practical difficulties."

It will be apparent that I assumed that the point raised by Mr Park was a new point. That assumption was based on the fact that the point had not been mentioned by the FTT either in its decision or in its refusal of permission to appeal.

15. At 10.29 am on 2 August, the day on which I refused permission to appeal, Mr Park sent an email to the Tribunal with a copy of the grounds of appeal he had submitted to the FTT as an attachment. That email had not yet been brought to my attention when I refused permission to appeal.

16. I first become aware of the contents of Mr Park's application to the FTT for permission to appeal on 30 October 2018. Correspondence between Mr Park and the Tribunal staff had continued and a request he made for a review of the refusal of permission resulted in my further consideration of the Tribunal's file. It was at that point that it became clear to me that the original application for permission to appeal made to the FTT had included the assertion that practical difficulties over access were the reason for the restriction on the right of way, and the complaint that the FTT had not dealt with this point in its decision.

17. My original understanding that the proposed appeal was on the basis an allegation of fact which had not been raised before the FTT was incorrect. Although Mr Park's grounds of appeal are not always easy to understand he clearly raised the contention that there was a reason for the right of way to the garage to be restricted to access on foot only, namely that access to the adjoining garage was impossible for the owner of the ground floor flat (who would therefore be required to park on the driveway itself thus blocking access to the other garage). Had I been aware that that point had been made to the FTT I could not have dismissed the application on the basis I did when refusing permission to appeal on 2 August. Moreover, I would not have proceeded on the assumption that no explanation had been given to the FTT why it might have been thought appropriate to restrict the right of way to one exercisable on foot only. It is apparent from my refusal of permission to appeal that those were critical considerations.

18. When I appreciated that my refusal of permission to appeal had been based on a misconception I caused a letter to be written to the parties drawing that fact to their attention. The parties were informed that the Tribunal would treat Mr Park's request for a review as an application to set aside the refusal of permission to appeal and to remake it under rule 54. The Tribunal has jurisdiction to review its own decisions under rule 57 but can only do so in the circumstances specified in rule 56, which do not apply here. However, the Tribunal has power under rule 58 to treat an application as if made under a different rule. It was suggested, and the parties subsequently agreed, that if the application to set aside the decision was successful the Tribunal should at the same hearing consider whether to grant permission to appeal and, if permission was granted, that it should determine the appeal.

The application to set aside the refusal of permission to appeal

19. Rule 54 of the Tribunal's Rules is in the following terms:

> "54. Setting aside a decision which disposes of proceedings
>
> (1) The Tribunal may set aside a decision which disposes of the proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –
> (a) the Tribunal considers that it is in the interests of justice to do so; and
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are –
> (a) a document relating to the proceedings was not sent or delivered to, or was not received at an appropriate time by a party or a party's representative;
> (b) a document relating to the proceedings was not sent or delivered to the Tribunal at an appropriate time;
> (c) a party or a party's representative, was not present at a hearing related to the proceedings, or
> (d) there has been some other procedural irregularity in the proceedings."

20. A refusal of permission to appeal finally disposes of proceedings. Before the Tribunal may set aside such a decision it must be satisfied that it is in the interests of justice to do so, and that one of the conditions in rule 54(2) applies. I will consider those conditions first.

The rule 54(2) conditions

21. Only paragraphs (b) and (d) of rule 54(2) are potentially relevant to this application. On behalf of the respondents Mr Bromilow submitted that neither (b) nor (d) was applicable.

22. In relation to paragraph (b), the only document not to have been sent or delivered to the Tribunal 'at an appropriate time' was Mr. Park's application for permission to appeal to the FTT, which he did not send with his renewed application for permission to appeal. Rule 21(4)(a)(iv) provides that when a party to proceedings makes an application for permission to appeal they must provide with the application a copy of any document relied on. It had been incumbent on Mr Park to provide a copy of the original application if he wished to rely on its contents, and he had not done so.

23. I agree that it was for Mr Park to supply a copy of any document he wished to rely on, and that his failure to do so within the fourteen days allowed by rule 21 is a relevant factor in deciding whether to set aside the refusal of permission to appeal. But it is clearly not the only relevant factor, and, so far as it went, the original application was compliant with the Rules. While the Tribunal may not be obliged to consider material submitted after the arrival (within time) of an application for permission to appeal, it would in my judgment have to have a good reason for refusing to do so having regard to the overriding objective to deal with cases fairly and justly. Rule 21(4)(a)(iv) does not bar an applicant for permission to appeal from seeking to rely on additional material if he later considers that it may assist his case. I consider that the language of rule 54(2)(b) is wide enough to cover a document which could have been provided by the applicant at an earlier time, but was not, even if the document ought to have been provided and the omission to do so involved a breach of the Rules.

24. Mr Bromilow relied on a decision illustrating the approach taken in the Upper Tribunal (Tax and Chancery) Chamber to applications under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008, which is in identical terms to rule 54 of the Tribunal's Rules.

25. In *Tager v HMRC* [2015] UKUT 0663 (TCC) the Upper Tribunal (TCC) (Judge Bishopp) observed at paragraph 17 that sub-paragraphs (a) and (b) of the rule "do not relate to a document which a party has omitted to produce because he did not then realise its evidential significance, but which he now, belatedly, wishes to introduce, but one which was not available to the tribunal, or to one party, because of a transmission error.' The Tribunal's comment was made in the context of a submission relying only on sub-paragraph (d), and it was expressly accepted by the applicant that sub-paragraph (b) was not engaged (see paragraph 16). The application to set aside was made after a decision had been published and sought to rely, for the first time, on evidence which had not been provided at the original hearing. The Tribunal considered that the rule was not intended to provide an alternative method of enabling new evidence to be admitted after a decision had been made which a party had previously chosen not to rely on.

26. Mr Bromilow also referred to a decision of the First-tier Tribunal (Tax Chamber), in which the same rule was held not to apply to a decision to submit what turned out to be inadequate evidence.

27. I agree that sub-paragraph (b) is not concerned with positive decisions made concerning the evidence to be relied on in support of a case, and that it covers what Judge Bishopp called "transmission errors". But a transmission error is not an inappropriate description of what happened in this case. Unlike the decisions of other tribunals relied on by Mr Bromilow, this is not a case in which a party responded to an adverse decision by seeking to rely on new material. Mr Bromilow acknowledged that Mr Park's counsel had indeed made a submission to the FTT that the restricted right of access was explicable by reference to the practical difficulty of obtaining access to the second garage. The point was thus not a new one when it was relied on in support of the application to the FTT for permission to appeal, or when it was relied on again in support of the renewed application to this Tribunal before the refusal decision was made. The submission did not reach me in time to be taken into account, but it had in all probability (given the timing of Mr Park's email) been sent and received by the Tribunal before my decision was made and certainly before it had been communicated to Mr Park. I therefore consider that sub-paragraph (b) is engaged on the facts of this case.

28. In view of that conclusion it is not strictly necessary to decide whether the facts of this case can alternatively be regarded as disclosing "some other procedural irregularity" to which rule 54(2)(d) would apply. It is enough that my refusal decision was made on an incorrect assumption which could be demonstrated to be incorrect by information already supplied by the applicant before the decision was made but of which I was unaware at the appropriate time. Facts satisfying sub-paragraph (b) cannot additionally satisfy sub-paragraph (d) of the rule which applies only to some other irregularity. If, contrary to the view I have taken, the facts of this case do not engage rule 54(2)(b) there would be a strong case for concluding that they nevertheless amounted to a procedural irregularity.

The interests of justice

29. The next question is whether it is in the interests of justice for the refusal of permission to appeal to be set aside.

30. Mr Bromilow submitted that if the refusal of permission to appeal was set aside considerable prejudice might be caused to Mr. and Mrs Morgan because they had already applied to the County Court for an order under section 48(3) of the 1993 Act that Mr Park execute a new lease in the form directed by the FTT. To explain his submission it is necessary first to refer to certain provisions of the 1993 Act.

31. By section 48(3) an application to compel the execution of a new lease may only be made where a new lease has not been entered into by the end of the "appropriate period" specified in section 48(6); that period is two months from the date on which the decision of the FTT "becomes final'. If that condition is satisfied the tenant has a further two months

after the expiry of the appropriate period within which to make the application under section 48(3).

32. Section 101(9) explains that a decision is to be treated a becoming final when the time for bringing an appeal expires, if no appeal is made, or 'at the time when the appeal and any further appeal is disposed of (i) by the determination of it and the expiry of the time for bringing a further appeal (if any), or (ii) by its being abandoned or otherwise ceasing to have effect.' The occurrence of one of those events fixes the date when the two months "appropriate period" begins to run, during which the tenant may not yet apply for an order under section 48(3).

33. Mr Bromilow submitted that if the refusal of permission to appeal was set aside then the County Court proceedings would have been premature and would be liable to be struck out because the appropriate period would not have ended when the application under section 48(3) was issued and it would have been premature. He acknowledged that there is authority in the County Court (described as controversial by the authors of Hague's Leasehold Enfranchisement, sixth edition, at 30-24, footnote 195) that an application may be made before the expiry of the appropriate period. He suggested that the only safe course would be for Mr. and Mrs Morgan to incur the expense of issuing new proceedings, even if Mr. Park's appeal is unsuccessful or if he is not granted permission to appeal. They would, in effect, be punished for Mr. Park's failure to submit his full grounds of appeal at the appropriate time.

34. I do not accept Mr Bromilow's analysis of the effect of a decision setting aside the refusal of permission to appeal.

35. In the absence of contrary argument I will assume that the making of the application for permission to appeal within the time permitted by the rules should be taken as equivalent to an appeal for the purpose of section 101(9) of the 1993 Act. When that application for permission to appeal was refused the appeal was "disposed of". There is no further right of appeal against a refusal by this Tribunal of permission to appeal. The effect of section 101(9) is therefore that the decision of the FTT is to be treated as becoming final on 2 August 2018, and the "appropriate period" specified in section 48(6) as having ended on 2 October 2018. The application to the County Court was made after that date and therefore was not premature. The alternative construction of section 101(9) would be that the decision became final and the appropriate period began at the earlier date when the time for bringing an appeal expired without permission yet having been granted (although it had been applied for); on that basis the appropriate period ended two months later which, once again, was before the application to the County Court.

36. Mr Bromilow's argument depends on an assumption that the making of an order under rule 54 setting aside a decision refusing permission to appeal has the effect of postponing the time when a valid application may be made under section 48 of the 1993 Act or of retrospectively invalidating an application which was validly made within the period of two months following the expiry of the appropriate period.

37. Whether an application under rule 54 has any effect on the right of a tenant to continue to apply to the court under section 48 is a question of construction of section 48 itself, and section 101(9).

38. Mr Bromilow did not suggest that simply making an application under rule 54 would have adverse consequences for the current County Court proceedings, even if the application was refused. I accept that the status or effect of a decision which had become final for the purpose of section 48(6) by a refusal of permission to appeal will be put in doubt by an application under rule 54, whether it is made before or after the expiry of the appropriate period. I nevertheless agree with Mr Bromilow's implicit assumption that merely making an application cannot have the effect of causing such a decision to cease to be final for that purpose. There is nothing in section 101(9) which would have that effect, and Court of Appeal authority on the analogous section 64(2), Landlord and Tenant Act 1954 also supports that view (see *Shotley Point Marina (1986) Ltd v Spalding* [1997] 1 EGLR 232 which concerned an unsuccessful application for permission to appeal out of time which was held not to have any effect on the date on which proceedings for a new tenancy under the 1954 Act were to be taken to have been "finally disposed of".

39. Section 101(9) provides specifically that, after an appeal, a decision will not become final until the time for making any further appeal has expired. It does not mention any other procedural step or application, or anything other than a further appeal, which is to interfere with the finality of the original decision. No reference is made to the effect of a successful application under rule 54 or an application for judicial review of the Tribunal's refusal of permission to appeal under the High Court's supervisory *Cart* jurisdiction (see *R (Cart) v Upper Tribunal* [2012] 1 AC 663).

40. In the absence of any specific treatment in Section 101(9) of circumstances in which an application for permission to appeal fails and is then followed by further procedures, not themselves appeals, which have the potential to revive the application for permission to appeal and continue the proceedings, Parliament cannot be taken to have intended that such procedures would have any consequence for a subsisting application under section 48.

41. In this case the Tribunal did not direct that Mr Park's request for a review should be treated as an application under rule 54 until 30 October 2018. On 7 November the Tribunal was informed by the respondents' solicitor that an application had already been made to the County Court under section 48 and a hearing date had been obtained. I take it the application was made before 30 October. I can see no basis on which it could be argued that the application would retrospectively be invalidated were the Tribunal to set aside the refusal of permission to appeal. No doubt there would be case management consequences, and the County Court would be likely to delay consideration of the application until after the Tribunal's final determination of the application and any subsequent appeal, but I can see no need for the respondents to issue additional proceedings or to discontinue the current proceedings.

42. The County Court has ample discretion when dealing with the costs of the application already before it to reflect the circumstances and timing of that application (whatever its outcome). The only prejudice which the respondents will experience as a result of the setting aside of the refusal of permission to appeal will therefore be the need to address the appeal, but by directing a single hearing to deal with all remaining issues the Tribunal has done what it can to minimise the inconvenience caused by the procedural course this matter has taken. I do not think the risk to the respondents of losing the beneficial result they achieved before the FTT is a relevant consideration in determining whether it is in the interests of justice to set aside the refusal of permission to appeal that decision. Nor do I consider it is relevant to have regard to the merits of the proposed appeal (although Mr Bromilow suggested that it was and argued that the appeal ought in any event to be dismissed).

43. I am satisfied that it is in the interests of justice to set aside and remake the refusal of permission to appeal. In my judgment it would be unjust to Mr Park if, in the circumstances of this case, he was not able to have his application for permission to appeal considered in the terms in which it was advanced to the FTT and in which he finally presented it to this Tribunal. It is common ground that the point he took about the impracticality of shared access was made to the FTT and Mr Park was not responsible for the omission of any reference to it in the FTT's decision or in its refusal of permission to appeal. I do not criticise the FTT for not dealing with the point more fully: many points were taken on Mr Park's behalf, and this one may have appeared of relatively modest significance and not to require specific treatment in the decision; subsequently Mr Park's prepared his own application for permission to appeal which it is not an easy document to understand. Nevertheless, the omission of the FTT to deal with a point which, when it is focussed on, seems to me to be of considerable significance, was critical to the decision I made to refuse permission to appeal. Partly as a result of that omission I reached my own decision on an incomplete understanding of the facts.

44. I also take into account the fact that Mr Park was unrepresented when he made his application and that he faced the additional difficulties of dealing with legal proceedings in a language which is not his first.

45. Finally, I bear in mind a feature of the Tribunal's Rules which seems to me to justify a relatively benevolent approach to applications to set aside refusals of permission to appeal where one of the conditions in rule 54(2) is satisfied. In other Chambers of the Upper Tribunal, where the relevant procedural rules are the generic Tribunal Procedure (Upper Tribunal) Rules 2008, an applicant for permission to appeal whose application is refused on paper has (with certain limited exceptions) an entitlement to renew the application at an oral hearing (see rule 22(4)). At such a hearing any misunderstanding on the part of the tribunal which may have influenced the decision can be corrected and the application can be addressed on a more complete understanding of the relevant facts. The right to an oral renewal is not available on appeals to this Tribunal from the FTT. That absence seems to me to be relevant to the approach which the Tribunal should take to assessing the interests of justice where it is clear, as in this case, that an adverse decision has been reached on the basis of a misunderstanding of what had been argued below.

46. For these reasons I am satisfied that it is in the interests of justice to set aside my decision of 2 August 2018 by which I refused permission to appeal.

The application for permission to appeal and the appeal

47. Since the appeal was fully argued at the hearing on 17 December it is not necessary for me to say any more about the application for permission to appeal than that I grant permission for the reasons which appear below. I refuse permission to appeal the second point raised by Mr Park, that the new lease should include a reference to the insurance requirements of the Council of Mortgage Lenders. The FTT was entitled to find that the introduction of those standard requirements since the existing lease was a change of circumstances and that it would be unreasonable to omit a reference to them.

48. The respondents' case before the FTT was that the restriction of the right of way to the garage to access on foot only was a defect within the meaning of section 57(6)(a) of the 1993 Act. Paragraph 1 of the Fourth Schedule to the lease of the first floor flat expressed the right in the following terms:

> "The right in common with the lessor and the owners and occupiers of the other flat in the property and all others having the right to pass and repass at all time (on foot only) and for all reasonable purposes in connection with the use and enjoyment of the premises over and along [the] common driveway hatched black on the plan annexed hereto."

49. Section 57(6)(a) permits a modification of the terms of the existing lease only where it is "necessary to do so in order to remedy a defect". The leading authority on the scope of the FTT's power to correct defects is the Lands Tribunal's decision in *Gordon v Church Commissioners for England* (2007) LRA/110/2006. As the FTT in this case remined itself, it is not sufficient that the proposed variation may be convenient or consistent with current practice. It must be necessary to correct a defect, which, as the Lands Tribunal explained in *Gordon,* means:

> "… a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party."

50. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 Lord Hoffmann, with whom the other members of the House of Lords agreed, emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". Any tribunal which is asked to find that a lease contains a defect capable of being remedied under section 57(6) should therefore proceed with caution.

51. If one begins from the standpoint that clause 1 of the Fourth Schedule accurately expresses what the parties intended concerning the extent of the right to be enjoyed by the lessees of the first floor flat it is not difficult to understand what that intention was. The right

granted was a right in common with the lessor and the owners and occupiers of the other flat in the property and all others having the right. It permitted the leaseholder “to pass and repass at all time (on foot only)” for all reasonable purposes in connection with the use and enjoyment of the premises. The route over which it was to be exercisable was over and along the common driveway. The clause contains no ambiguity, inconsistency or other difficulty of interpretation. As a matter of language and meaning there is no reason to suppose that the clause contains any mistake or defect which would enable section 57(6) to be relied on.

52. The only surprising feature of the clause is that it restricts the right of way granted over a driveway leading to a garage to a right of way on foot only. But that feature becomes much more readily understandable when two features of the property are taken into account. The first is that, although there are two garages at the end of the driveway, one of them is relatively inaccessible (as Mr Bromilow acknowledged was the case). The second is that there is insufficient space on the driveway for two vehicles to pass. If the owners of the freehold wished to park on the driveway, or wished to be able to allow tenants or lessees of the ground floor flat to do so, they would face a practical difficulty. Anyone parking on the driveway would obstruct access to and from the garage demised with the first floor flat. Anyone arriving and parking on the driveway would similarly block in any vehicle already parked on the driveway.

53. The physical constraints of the property meant that for the lessee of the first floor flat to be granted a right of way with vehicles over the driveway, or a right to park on the driveway, would make it very difficult for the freeholder or their tenant or lessee of the ground floor flat to make any use of the driveway without risking interfering with that right. That seems to me to provide a perfectly rational explanation why the lessor might have insisted that the only access the lessee of the first-floor flat was to enjoy was access on foot only, as clause 1 of the Fourth Schedule provides.

54. Mr Bromilow argued that, although it made no reference to Mr Park’s suggestion that the garage was ‘defective’, the FTT had been right to give it no weight. As he reminded me, the FTT were able to see the garage and the access to it for themselves on the site view. It is described in the lease and on the lease plan as a garage. It was built as a garage and can realistically have no other purpose than as a garage. It would make no sense to have a garage included within a demise and for the lessee to have no vehicular access to and from it.

55. Mr Bromilow also questioned the suggestion that the garage was defective or that it cannot be used as a garage. Mr. and Mrs Morgan are able to park their vehicle in the garage. I accept that is so, but I think it misses Mr Park’s point, which is that the garage reserved for the use of the landlord is inaccessible because of its proximity to the rear wall of the building. That is not a problem for the garage demised with the first floor flat.

56. Neither Mr Bromilow nor the FTT seem to me to address the point Mr Park makes, as I have explained it above. For that reason I have no difficulty in accepting that the right was granted in deliberately restricted terms, and contains no indication of a mistake or defect.

57. The FTT gave the following reasons for reaching the opposite conclusion and for finding that the restriction of the right to access on foot only was a defect.

58. First, it said that "to restrict access over the driveway to foot only was a defect because there would be no point in having a garage as part of the demise." It said that it took into account the position of the garage which suggested that the parties expected it to be used for vehicles.

59. Secondly, the FTT noted that "owners of the Flat share the same right of way over the common driveway as the lessor and the owners and occupiers of the other Flat". It considered that "it is unlikely that the lessor would have agreed to restricting its right of way to foot only when making the lease".

60. Thirdly the FTT considered that "the connection of the right of way with the enjoyment of the garage and garden reinforces its conclusion that the garage was intended to be used with vehicles."

61. Fourthly, and for these reasons, the FTT concluded that "the insertion of "on foot only" is in all probability intended to qualify the rights of way of "all others" rather than the right of the lessor and the owners and occupiers of the Flats."

62. Mr Bromilow, rightly in my view, did not support the second of the FTT's reasons. The grant of a right of way to a lessee "in common with the lessor … and all others having the right" does not signify any intention on the part of the lessor to restrict the use which they make of their own land except to the extent necessary to enable the lessee to exercise the right granted to it. In particular it does not indicate that the lessor is binding itself to make no greater use of the land than it has granted to the lessee. It follows that the fact the use was to be in common with the lessee does not help in construing the meaning of any limitation placed on the right granted to the lessee.

63. The FTT's first reason, that there would be "no point in having a garage as part of the demise" if it could not be used to park a vehicle, clearly overstates the position. No doubt a person to whom a garage has been demised would ordinarily expect to be able to use it for the purpose for which it was designed, and the imposition of a restriction allowing access on foot only is surprising and, in the absence of some explanation, suggestive that there may have been an error in the drafting. But to suggest that there would be "no point" in demising a garage to the owner of a small flat if it cannot be used for parking overlooks the other storage uses which could be made of it.

64. I am unsure exactly what point the FTT was making in its third reason, but it may have been a reference to the right having been granted "in connection with the use and enjoyment of the premises" which included the garage and the right to use the garden. I do not think those features add much to the general expectation that a person to whom a garage

has been demised would be able to use it for parking a vehicle. If the right had been described specifically as a right to get to a garage the point might have been a little stronger (although it is fair to point out that the garage is referred to as such in the description of the demised premises) but it does not seem to me to contribute to the conclusion that the clause contains a mistake.

65. The fourth reason given by the FTT contradicts its second reason (which was based on the understanding that the lessee was to enjoy the same rights as others entitled to use the driveway) since it tries to explain the restriction as applying only to those others who had rights of way, and not the lessees themselves. Apart from that inconsistency there is no obvious reason why the parties would wish to qualify the rights of others in the suggested way. The purpose of referring to others was to make it clear that the right was not exclusive, but was shared. It was to be shared with all others who enjoyed rights, whatever the extent of their rights; it makes no sense to say that the right is enjoyed in common with those who have rights on foot only. The lease itself confers no rights on others, it simply records the possibility that they exist. The structure of the clause and location of the restrictive words within it are also inconsistent with their suggested purpose. They clearly qualify the right being granted to the lessee and not the rights enjoyed by others with whom access is to be shared.

66. There is the additional point that, if the FTT was satisfied that the reference to a right of way "on foot only" was a deliberate reference to a limited right granted to a third party, then it is hard to see why it considered it to be a defect at all.

67. Discounting its fourth reason the FTT obviously thought that the clause meant what it said, i.e. that the only right granted to the lessees to get to the garage was a right on foot. I agree that that is what the clause means, but I disagree with the FTT's conclusion that the clause must therefore contain a defect. In my judgment the FTT left out of its assessment the explanation given by the appellant for the imposition of the restriction, namely that it was to reserve the use of the driveway with vehicles to the landlord to avoid the landlord's use interfering with the right granted to the lessees. That seems to me to make good sense and to provide a sufficiently coherent explanation of the right to overcome the slight surprise that a right over a driveway leading to a garage would be agreed in such restricted terms.

Disposal

68. For these reasons I allow the appeal and determine that the new lease is to be granted on the same terms concerning access as are contained in the existing lease.

69. As a result of this conclusion the premium of £16,436 determined by the FTT will need to be adjusted. If that adjustment is capable of being agreed there will be no need for further consideration by the Tribunal. If the appropriate figure cannot be agreed the parties may submit their alternative valuations within 14 days and the Tribunal will determine the matter on paper.

Martin Rodger QC

Deputy Chamber President

24 January 2019