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**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



**Residential
Property
TRIBUNAL SERVICE**

S.24, 33 & 34 Leasehold Reform, Housing & Urban Development Act
1993

DECISION

Case Number: CHI/21UD/OCE/2006/0012

Property: 79 High Street
Hastings
East Sussex
TN34 3EL

Applicant: High Street No. 79 Ltd

Represented by Mr T O'Keefe, Buy Your Freehold Ltd

Respondent: Mr M P Breacker

Represented by Mr Kalland, Bailey & Cogger Solicitors

Expert Witnesses: Mr J C Williams FRICS, Sussex Surveys Ltd, for the Respondent

In Attendance: Mr M P Breacker

Date of Application: 27 January 2006

Date of Hearing: 18 July 2006

Date of Decision: 28 July 2006

Tribunal Members: Mr B H R Simms FRICS MCI Arb (Chairman)
Mr J N Cleverton FRICS (Valuer Member)
Ms J Talbot MA (Cantab) (Legal Member)

DECISION

The nominee purchaser is to pay the sum of **£13,254** for the freehold interest in the specified premises.

BACKGROUND

1. On 27 January 2006 Mr O'Keefe applied, on behalf of the nominee purchaser, to the Southern Rent Assessment Panel for a determination of the price to be paid for the freehold interest in the property in accordance with Schedule 6 of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act), together with a determination of the freeholder's reasonable costs in accordance with S.33 of the Act and the terms of the transfer in accordance with S.34 of the Act. Valuations and calculations had been produced and the valuers had had an opportunity to meet.
2. The nominee purchaser is a company set up to purchase the freehold controlled by the lessees of the four residential flats.
3. Prior to the hearing and during the lunch adjournment the parties and their representatives had continued discussions and had been able to agree a substantial number of the issues in dispute, including most of the elements of the valuation.
4. There remained in dispute the price to be placed on the lower ground floor of the property which was occupied on a commercial basis and the lessees were not participating in the purchase of the freehold.

INSPECTION

5. Members of the Tribunal inspected the property prior to the hearing and were accompanied by Ms G A Broughton, the owner of flat 4. Ms Broughton was able to allow the Tribunal members access to the other flats.
6. The Tribunal members were also able to inspect the ground floor commercial premises.
7. The property comprises an inner terrace house constructed about 200 years ago, with accommodation arranged on lower ground, ground and four upper floors. Some while ago it was converted into three self-contained flats and a self-contained maisonette on the top two floors, all approached from a communal entrance hall and staircase. On the lower ground floor there are commercial premises approached from external stairs at the front of the building. There is a small rear courtyard with steps leading to a higher level but this upper area is not included in the freehold to be acquired.
8. The building has a cement rendered front elevation, a brick rear elevation and a pitched roof believed to be covered with tiles and containing several dormer windows.
9. The accommodation is listed in detail in the report by Mr Williams.

FACTS

10. There is no dispute over the terms of the leases, the values of the individual flats and other elements of the substantive valuation.

11. Although they are able to agree the value of the ground rent income and deferred reversion, the parties are unable to agree the additional value (if any) to be placed on the commercial element comprising the lower ground floor of the premises to reflect the restrictive use permitted by the lease.
12. The Tribunal was provided with a photocopy of the lease of the lower ground floor dated 10 November 1975 between Kathleen Ivy Breacker and Brian John Wooller. It is for a term of 99 years from 10 November 1975 at a ground rent of £15 per annum for the first 33 years, £25 per annum for the second 33 years, and £40 per annum for the last 33 years of the term.
13. The accommodation which is approached from an external staircase comprises an entrance lobby and hallway, two consulting rooms, a separate WC with wash basin and a kitchen. In addition there is a small rear courtyard demised as part of the lease in addition to communal use of the rear yard area.
14. Part II of the fourth schedule to the lease which contains covenants by the lessee with the lessor includes as one of the restrictions imposed in respect of the premises: *"1. Not to carry on or permit or suffer to be carried on upon the Premises or any part thereof any noisy offensive or dangerous trade business manufacture or occupation nor to do or to permit or suffer to be done thereon anything which may be or become a nuisance to the Lessor or the Lessees or occupiers of the flats comprised in the Property but to use and occupy the Premises as professional offices and for no other purpose."*

EVIDENCE

15. Mr Williams gave evidence on behalf of the Applicant. He is a Fellow of the Royal Institution of Chartered Surveyors and for the last 34 years has been engaged in undertaking residential surveys and valuations throughout East Sussex and West Kent. Until 10 years ago he had an estate agents at 72 High Street, Hastings which was sold to John Bray. He has continued to regularly undertake survey work in Hastings and he is familiar with the local market.
16. He emphasised the restrictive covenant in favour of the landlord in respect of the use of the lower ground floor. The covenant states that the premises shall be used for professional offices and for no other purpose. In order to allow the current use by osteopaths, a licence had been granted initially for 1 year in 1995 then for a period of 5 years in 2000 and then the current licence granted in November 2005 at a premium of £2,000 for a further period of 1 year from 1 November 2005. The licence grants permission for the lessees, Ms June Leach and Ms Miriam Eastaugh, a personal permission to carry on the practice of an osteopathy clinic at the premises. In addition there is a restriction of opening hours and a requirement to put in place insurance for the specific use.
17. Mr Williams told the Tribunal that the restrictive covenant was put in place by the landlord to protect the interests of his mother, who at the time lived in the ground floor flat and the other residents to ensure that they would not suffer any disturbance from an unsuitable use. Mr Breacker is reported to have accepted a reduced purchase price to reflect the effect of the covenant.

18. Planning permission exists for the present use but not for residential use. In addition the covenant only allows the premises to be used for professional offices and not any other commercial use.
19. Mr Williams confirmed that there was no planning permission for residential use, although in his view it could be obtained perhaps on appeal.
20. Mr Williams was of the opinion that the lower ground floor premises were worth £50,000 for commercial use without the restrictive covenant. This value reflected an element of hope value for residential use. If there was planning permission for residential use, he believed that the premises would have a value of £70,000. With the covenant in place the use is so restrictive that the premises are worth no more than £20,000. On a simple calculation, this identifies the value of £30,000 as being the value of the restrictive covenant, which figure should be added to the value of the freehold. The freeholder would be paid this amount for removal of the restrictive covenant.
21. Mr O'Keefe gave evidence for the Respondent. He states that he is not a member of the Royal Institution of Chartered Surveyors but he puts himself forward as being competent in the relevant areas of Leasehold Reform Law and knowledgeable of the LVT and Lands Tribunal cases pursuant to the 1993 and 2002 Acts.
22. He was surprised that the reversioner had not required a leaseback of the commercial part of the property which in his experience was the usual method by which a freeholder retained the right to any future hope value.
23. Mr O'Keefe was not aware of the licence granted to the current occupier when he prepared his initial valuation. He reported that he believed the lessees felt they had been bullied into paying for the grant of the licence and they would not be renewing it in November as they felt it was not necessary. Mr O'Keefe produced no evidence in support of this opinion.
24. The value of the freehold is therefore restricted to the traditional ground rent income and value of reversion which has been agreed to be calculated on a value of £50,000.
25. In his view there should be no additional payment to take account of the value for removal of the restrictive covenant. The premises are capable of many different uses even with the restrictive use covenant.

MATTERS AGREED

26. The parties' valuers had met and had been able to agree several matters which are recorded here for information. The form of transfer is also agreed.
27. Property to be acquired: Freehold premises with title number HT11961.
Valuation date: 31 August 2005.

Unimproved values of the flats at the valuation date:

Ground Floor Flat (Flat 1)	£76,667
First Floor Flat (Flat 2)	£76,667
Second Floor Flat (Flat 3)	£76,667
Top Floor Maisonette (Flat 4)	£141,500

Unimproved values of the flats with the benefit of long leases:

Flats 1, 2 and 3 each	£79,812
Flat 4	£144,810

Capitalisation yield: 7%

Reversion yield: 7%

Value of the loss of ground rent income: £2,466

Value of the reversion: £2,279

Value of lower ground floor commercial premises:

Loss of ground rent	£352
Reversion to £50,000	£469
Marriage value residential	£8,000

Agreed values excluding any value for removal of restrictive covenant:

Residential part, loss of ground rent	£2,466
Residential part, reversion	£2,279
50% share of marriage value	£4,000
Commercial part, loss of ground rent	£352
Commercial part, reversion	<u>£469</u>
Total	£9,566

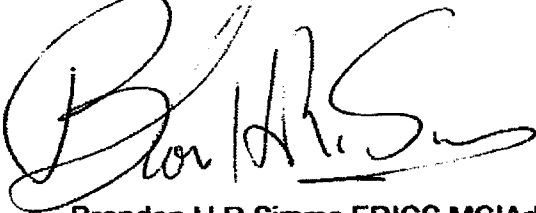
Costs of the enfranchisement under S.33 of the Act

£2,000 including VAT and disbursements, of which an amount of £487.50 plus VAT is allocated to conveyancing costs.

CONSIDERATION

28. There is no doubt that the covenant in the lease restricts the use of the premises to professional offices. This use does, however, allow many professions to occupy the premises and Mr Williams told us that it was originally occupied by a surveyor. Other professions, for example, accountants, solicitors, mortgage brokers, etc., might be willing to acquire the lease. The present occupiers, be they osteopaths, naturopaths or some other quasi medical use, would require a release of the covenant. This had occurred, in that the tenants had been willing, in the past, to pay a premium for this release unusually on a time limited basis under the licence agreement. Mr O'Keefe suggested that this was not necessary, but no evidence was produced in support of this assertion. Mr Williams was of the view that as soon the transfer to the nominee purchaser had taken place, a premium of £30,000 would be paid by the lessee for the release of the covenant. There was no evidence produced to say that this was the case.
29. Mr Williams produced no evidence to support his valuation and relied instead on the conversations he had had with the local estate agents. Mention was made of a floor area of 450 ft² but neither valuer attempted to place a proper valuation on the premises, for example, by way of an amount per ft² capitalised over the period of the lease.
30. Mr O'Keefe did not challenge Mr Williams' valuation and concentrated instead on the licence payment. This amounts to the same thing in that Mr O'Keefe felt that there should be no value attributed to the restrictive covenant.
31. We accept that at some time it might be reasonable to assume that a premium would be paid to the landlord for the release of the restrictive covenant. The likelihood of this occurring is uncertain and the time when it might occur is equally uncertain. All we can say is that there is no evidence that it would be immediate on transfer so Mr Williams' assumption in that regard is not accepted.
32. Where hope value has been allowed as part of the value of the freeholder's interest in some other Tribunal and Lands Tribunal decisions where there are non-participating tenants, it has been calculated as a percentage of the likely marriage value that would occur on the grant of the new long lease. In this case the enhanced value would arise on the release of the restrictive use covenant or development. From our own knowledge and experience we consider that a similar calculation would be appropriate in this case. We accept that residential development may be the likely result and we have used Mr Williams' figure of £70,000 as the value of the new long lease without a restrictive covenant. The marriage value arising is £49,179 (See calculation attached). In this case, in view of the restrictive use covenant as well as the grant of a longer lease, we consider that 15% of the landlord's share of marriage value should be allowed. This gives rise to an additional value of £3,688 for the commercial element of the property.
33. Taking into account the agreed value of the remainder of the property of £9,566, this produces a price payable of £13,254.

Dated 28 July 2006



Brandon H R Simms FRICS MCI Arb
Chairman

CALCULATION

	Agreed total values of remainder	£9,566
	Plus	
	<u>Landlord's hope value on lower ground floor commercial premises</u>	
Capital value of lease without restricted use	£70,000	
Value of landlord's interest after purchase	nil	£70,000
	Less	
Capital value of existing lease with restricted use	£20,000	
Value of landlord's interest lost	£821	<u>£20,821</u>
	Marriage value	£49,179
Landlord's share of marriage value at 50%	£24,590	
	Hope value at 15%	£3,688
	Compensation	nil
	Price payable	<u>£13,254</u>