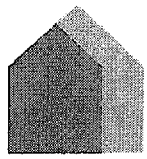


Residential
Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 24 AND 33 OF THE LEASEHOLD REFORM HOUSING AND URBAN DEVELOPMENT ACT 1993

Reference number:	LON/00BK/OCE/2007/0379
Property:	2 Leinster Square, London W2 4PL
Applicant:	Leinster Square No. 2 Limited
Respondent:	Goldblock Investments Co. Limited
Appearances:	For the Applicant: Mr T O'Keefe, a director of Buy Your Freehold Limited For the Respondent: Ms V Osler, a barrister instructed by A Nicolaou & Co, solicitors (1st day) Mr A Nicolaou, solicitor (2nd day)
Tribunal members:	Mr A J Andrew Mr C Norman BSc, MRICS Mr N Gerald
Application dated:	20 November 2007
Directions:	14 December 2007
Hearing:	1 and 2 April 2008
Decision:	23 April 2008

DECISION

1. The price would be £91,710.

2. Of the costs claimed by the Respondent the following were payable by the Applicant:-
   a. Legal cost of A Nicolaou & Co. in the sum of £4,367.53
   b. Valuation fees of Boston Radford in the sum of £2,350
   c. Fees of Brown & Co, incurred in connection with the preparation of the leaseback plan, in the sum of £258.50.

3. In respect of the proposed leaseback of the rear basement and ground floor maisonette:-
   a. The vaults, staircase and yard in front of the basement flat and the small room on the landing between the ground and first floors should not be included in the demise.
   b. The insurance premium percentage should be 15.56%.
   c. The insurance premium contribution should be reserved as rent.
   d. The restrictive obligations should be consistent with those found in the existing leases.
   e. The dispute resolution provision contained in the existing leases should be excluded.
   f. The landlord should not be required to make good any deficit in the insurance monies.

BACKGROUND

4. The Respondent owns the freehold interest in the Property which is divided into six flats or maisonettes, five of which have been sold on long leases. The sixth flat or maisonette on the rear basement and ground floors has been retained by the Respondent and forms part of the freehold reversion: it is let on a short term tenancy.

5. By an initial notice dated 30 March 2007 *"The Participating Qualifying Tenants, set out in the Schedule hereto"* claimed the freehold interest in the Property. The notice proposed a total price of the £347,977. Although the Respondent disputed the validity of the initial notice its solicitors served a counter-notice dated 19 June 2007 which admitted the claim. The price proposed in the initial notice was not agreed and in substitution the Respondent proposed a price of £230,000 on the basis of a leaseback of various parts of the Property including the rear basement and first floor maisonette: the terms of that leaseback are considered in more detail below.

6. On 20 November 2007 the Applicant applied to the Tribunal to determine the terms of acquisition remaining in dispute pursuant to section 14 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

MATTERS AGREED

7. Mr O'Keefe on behalf of the Applicant and Mr B Maunder Taylor FRICS, on behalf of the Respondent had signed a short statement of agreed facts and issues. They agreed that if there were *"three participating flats"* the price would be £91,710 whereas if there were "five participating flats" it would be £109,126. Both prices were agreed on the basis *"that the landlord's retained flat will be leased back for 999 years at a pepercorn ground rent"*.

MATTERS IN DISPUTE

8. The matters in dispute can be summarised as follows:-
    a. the number of participating tenants (rather than the *"participating flats"* referred to the statement of agreed facts and issues); and
    b. the cost payable pursuant to section 33 of the Act; and
    c. the terms of the proposed leaseback of the rear basement and ground floor maisonette.

PRELIMINARY ISSUE

9. Ms V Osler had prepared a skeleton argument from which it was apparent that she intended to put in issue the validity of the initial notice on the basis of a perceived ambiguity. At the hearing however she accepted that the issue was not within our jurisdiction but was a matter for the county court. Consequently she requested us to postpone the hearing until after a determination by the county court. Having heard both Ms Osler and Mr O'Keefe we declined that request for each of the following reasons.

10. The Respondent had had one year to apply to the county court for declaratory relief but had failed to do so. It was unreasonable to burden the Applicant with the further delay and additional cost that would result from a postponement.

11. Alternative prices having been agreed we simply had to decide, as matter of fact, whether there were three or five participating tenants. Our finding would not impinge upon the jurisdiction of the county court which would be concerned with the validity of the initial notice and any waiver. If the county court found the notice invalid then our decision would effectively fall away; if not then there should be no further delay in the completion of the transfer and leaseback, all the relevant terms having either been agreed or determined by us.

12. Ms Osler subsequently requested an adjournment of the hearing in so far as it related to the disputed terms of the leaseback on the basis that Mr O'Keefe had not returned the draft leaseback with his proposed amendment shown in red. We agreed to adjourn that issue to the following day to enable the parties to continue their negotiations and to

produce a copy of the leaseback showing the disputed amendments in red.

13. We rejected a further application by Ms Osler for a longer adjournment on the basis that she was unavailable on the following day. We did so for each of three reasons. Firstly because the application had been listed for hearing on both the 1st and 2nd April 2008 in accordance with the tribunal's block booking arrangements. The Respondent had known since 14 February 2008 that the applications would be heard on both 1st and 2nd April 2008. Secondly because the Respondent's solicitor, Mr A Nicolaou was present and would be able to present the Respondent's case in respect of the leaseback. Indeed he was ideally placed to present that case in that, in addition to being the Respondent's solicitor, he was also one of its directors. Thirdly because the cause of Mr O'Keefe's delay was the late service of the initial draft leaseback by the Respondent.

REASONS FOR OUR DECISION ON THE NUMBER OF PARTICIPATING TENANTS

14. In the context of this case the *"participating tenants"* are defined by sub-section 14(1) of the Act as *"the following persons, namely:-*

a. *in relation to the relevant date, the qualifying tenants by whom the initial notice is given; and*
b. *in relation to any time falling after that date, such of those qualifying tenants as for the time being remain qualifying tenants of flats contained in the specified premises".*

15. Ms Osler relied entirely on the perceived ambiguity in the initial notice, in asserting that there were five participating tenants. However she offered no evidence to support that assertion.

16. It was not disputed that the existing lessees of the five flats or maisonettes were all qualifying tenants. Consequently the participating tenants were such or all of them that had *"given"* the initial notice.

17. Prior to the service of the initial notice Mr R B Bashford (second floor flat), Mr D Silcock (third floor flat) and Ms S Boggio-Pasqua (fourth floor flat) had signed a participation agreement committing themselves to the acquisition of the freehold interest in the Property and each of them had signed the initial notice. Neither of the other two qualifying tenants had either entered into the participation agreement or signed the initial notice. Mr O'Keefe's proof of evidence, which included a statement of truth, confirmed that these three tenants were the participating tenants. On the basis of that evidence we had no hesitation in concluding that the notice had been given by the three named qualifying tenants only and that there were therefore three participating tenants. Consequently the premium would be £91,710.

REASONS FOR OUR DECISION ON COSTS

18. In response to a request from Mr O'Keefe for the Respondent's section 33 costs A Nicolaou & Co submitted an account dated 25 March 2008 in the sum of £7,628.12 comprising the following:-
    a. Legal costs: £4,700
    b. Vat: £822.50
    c. Brown & Co plan costs: £596.87
    d. Mr Maunder Taylor Valuation Fee: £1,468.75
    e. Land Registry Fee: £40.00

19. At the hearing (and ignoring an apparent double claim for Vat) the Respondent sought to recover section 33 costs in the sum of £10,823.87 comprising the following:-
    a. Legal costs: £5,420.00
    b. Vat: £948.25
    c. Brown & Co plan costs: £596.87
    d. Mr Maunder Taylor Valuation Fee: £1,468.75
    e. Land Registry Fee:£40.00
    f. Boston Radford Valuation Fee:£2,350

Legal costs and vat

20. A Nicolaou & Co produced a statement of costs describing the work done, the time spent and the hourly rates applied. The statement indicated that Mr A Nicolaou's time had been costed at £240 per hour and his trainee solicitor's time at £100 per hour: all letters sent and received and telephone calls made had been charged at £25 each. It was however apparent from this statement that all time had been charged at a rate of £240 per hour and in answer to our questions Mr A Nicolaou confirmed that he had undertaken all the work himself.

21. Mr Nicolaou gave two explanations for the increase in the cost claimed since 25 March 2008. The first was that in preparing the solicitor and own client account he had assessed the costs in the round whereas in preparing the statement of costs for the hearing he had undertaken a more thorough investigation of his file. Secondly he had added the sum of £360 to reflect the one and half hours taken in completing that investigation.

22. Mr O'Keefe said that we should allow only £2,060 calculated at a rate of £230 per hour (plus Vat and the £40 Land Registry fee). However he offered little evidence to support this submission other than his own estimate that the work could have been completed within just under nine hours. Although we did not disregard his submission we considered that a more realistic starting point was the time and costs actually claimed by Mr Nicolaou.

23. The fact that a certain amount of time has been spent on a particular task does not necessarily guarantee that the time was either justified or that the

cost of that time is recoverable. In a normal solicitor/client relationship the client's natural desire to pay no more than is absolutely necessary acts as a check on the solicitor's costs. Where the costs are to be paid by a third party that check is lost and there is always a risk that both the time spent and the costs claimed will increase unreasonably. Sub-section 33(2) of the 1993 Act mitigates that risk by providing that: *"any costs incurred by the reversioner or any other relevant landlord in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs".*

24. Bearing this in mind we considered it appropriate to disallow the following costs:-

    a. £222 in obtaining official copy entries, preparing stamp land transaction form and applying for registration of the leaseback. These were purely administrative tasks that did not require the time of an experienced partner and should have been undertaken by a trainee solicitor.

    b. £380 in respect of work undertaken on 10 March 2008 relating to Mr Maunder Taylor's report. For the reasons set out below we considered that this was work was undertaken in connection with proceedings before the tribunal for the purpose of subsection 33(5) of the 1993 Act.

    c. £775 in respect of letters received. Generally it is only reasonable to charge for incoming letters where they require detailed consideration. Such of the correspondence as was included in the hearing bundle and in particular that from Mr O'Keefe, was brief. The letters received were such that they would normally be considered along with other incoming post at the start of the day and would not justify a separate item charge.

    d. £360 in respect of the preparation of the Respondent's statement of costs. This sum had not been included in the solicitor and own client account of 25 March 2008 that, we considered, limited the recoverable costs. The costs had clearly been incurred in connection with the proceeding before the tribunal for the purpose of subsection 33(5) of the Act. In any event we did not consider it reasonable that the Applicant should have to pay for a manual exercise that would have been unnecessary if the Respondent's solicitors had had even the most rudimentary computerised time recording system.

25. Although we had some reservations about the time spent by Mr Nicolaou in particular in connection with the preparation of the counter-notice (2 hours 35 minutes: £620), which some might consider irrecoverable under section 33, nevertheless landlords are generally entitled to recover section

33 costs on an indemnity basis and considering the costs in the round a charge of just over £3,500 plus Vat was of the order that we would expect in a transaction of this nature where there are five qualifying tenants and a leaseback of a retained flat. The above deductions resulted in legal costs of £3,683 plus Vat of £644.53 and a land registry fee of £40: £4,367.53 in total.

Valuation fees

26. Mr O'Keefe conceded Boston Radford's fees in the sum of £2,300 which had not originally been claimed in the account of 25 March 2008. Their invoice was dated 19 June 2007 and it was clear from the narrative that the cost had been incurred in providing an appropriate valuation in accordance with sub-section 33(1)(d) of the Act.

27. We agreed however with Mr O'Keefe's objection to the account of Maunder Taylor. The invoice was dated 30 January 2008 and the narrative reads:
"Receiving your instructions to prepare a report in style of an expert valuation witness statement in connection with the above property pursuant to the Leasehold Reform, Housing and Urban Development Act 1993".

It was clear from both the timing of the work and the narrative recited above that Maunder Taylor's costs were incurred not in valuing the enfranchisement price but in connection with the proceedings before the tribunal and in the negotiations that resulted in the statement of agreed facts and issues referred to above and that consequently they were not recoverable.

Plan preparation costs

28. Brown and Co had charged £596.87 for the preparation of a plan for the leaseback. Mr O'Keefe objected to this cost on the basis that his company regularly instructed Blueprint Floor Design Ltd to produce lease plans at a cost of between £180 and £220 plus Vat. He also attributed the higher cost to the difficulties that the draughtsman had encountered in gaining access to the Respondent's retained flat, and attribution that was not disputed by Mr Nicolaou.

29. Mr O'Keefe's submissions, as to a typical cost of a lease plan, were consistent with our own experience both in practice and at the tribunal. Furthermore not only was the plan extremely simple in design but, as Mr Nicolaou acknowledged, it was inaccurate in that it did not delineate the full extent of the Property in that the front basement vaults had been omitted and as will be seen they were of some significance. Taking each of these factors into account we would allow section 33 costs of £220 plus Vat.

REASONS FOR OUR DECISIONS RELATING TO THE LEASEBACK

30. Although the tribunal directed the Respondent to submit a draft leaseback to the Applicant by 28 December 2007 we were satisfied that this was not in fact submitted until 25 March 2008. Nevertheless during the course of the hearing the parties were able to agree most of the leaseback provisions and ultimately only those referred to below were in dispute.

31. The statutory provisions relating to any leaseback are to be found in section 36 of and schedule 9 to the 1993 Act. Mr Nicolaou agreed that the proposed leaseback came within Part III of Schedule 9 that is headed. *"Right of Freeholder to Require Leaseback of Certain Units"*. Subparagraph 7(1) provides that any leaseback shall conform with the provisions of Part IV of schedule 9 save to the extent that any departure from those provisions is agreed by the parties or directed by the tribunal on the application of either party. Sub paragraph 7(4) concludes by providing that *"subject to the preceding provisions of this paragraph, any lease or agreement as is mentioned in sub paragraph (1) may include such terms as are reasonable in the circumstances"*.

32. Where relevant we considered that in accordance with good estate management and conveyancing practice it was reasonable that the terms of the leaseback should be consistent with the leases of the five flats or maisonettes already granted unless there had been, since the grant of those leases, a change in circumstances that would justify a departure from their terms.

The extent of the demise

33. It was common ground that the demise should include the maisonette on the rear basement and ground floors together with the rear garden. Mr Nicolaou however submitted that the demise should also include *"(iv) the vaults and staircase and yard in the front of the basement flat; and (v) the small room on the landing between the ground floor and the first floor"*. Mr O'Keefe objected to the inclusion of these areas in the demise.

34. The staircase and yard provided access to the front basement flat and the vault contained a bin store that in practice has only been used by the lessee of that flat although all the existing five leases grant a right to place a dustbin *"in the position allocated for that purpose by the lessor"* and there appeared to be no other place.

35. As for the small room on the landing between the ground and first floors Mr Nicolaou said that it had been used for many years as a broom cupboard by the cleaner of the common parts. He also suggested that it may have been used for storage purposes by the tenant of the retained flat but his evidence in that respect was contradictory.

36. Mr Nicolaou's argument in favour of including these parts in the demise stemmed from his assertion that the Respondent was entitled to a

leaseback of all parts of the Property not already demised by the existing leases.

37. His argument was not sustainable. Taken to its logical conclusion the Respondent would be entitled to a leaseback of the common parts and roof of the Property and that would largely negate the right to collective enfranchisement granted by chapter I of the 1993 Act. It was clear from the wording of schedule 9 that a landlord is entitled to a leaseback of a *"unit"*. That term unit is defined in section 38 of the Act in these terms:-
"Unit means –
    a. *a flat;*
    b. *any other separate premises which is constructed or adapted for the purpose of a dwelling;*
    c. *or a separate set of premises let, or intended for letting, on a business lease"*.

38. The disputed areas did not fall within this definition and were not within the contemplation of part III of Schedule 9. Furthermore it was clear from the agreement between the parties' valuers, reflected in paragraph 7 above, that the alternative prices were agreed on the basis that only the retained flat would be leased back.

39. Consequently and for each of the above reasons we concluded that the disputed part should not be included in the demise.

The building insurance premium percentage

40. The parties had agreed the service charge percentage at 15.56%. Mr Nicolaou said that that percentage should also apply to the building insurance premium whereas Mr O'Keefe contended for a percentage calculated by reference to the gross internal areas of all six flats.

41. In the existing five leases the building insurance premium was included in the expenditure to be taken into account in calculating the service charge so that the same percentage contribution would apply to all expenditure. There was no logical reason for taking a different approach with regard to the leaseback of the retained flat. Indeed if a different approach were adopted there would not be a 100% recovery of the insurance premium. Adopting the approach set out at paragraph 32 above we considered that the service charge percentage should be 15.56%.

Insurance rent

42. Mr Nicolaou objected to the insurance premium being reserved as rent on the grounds that it formed part of the service charge. He had clearly confused this issue with that referred to in the preceding section. In contrast to the existing leases the insurance premium does not form part of the service charge expenditure but is treated separately. Consequently to obtain recovery of the appropriate proportion of the insurance premium

both the insurance premium and the service charge must be reserved as rent.

Restrictive obligations

43. In a rider to the draft leaseback Mr O'Keefe had included a number of restrictions taken from the existing leases. Although most were agreed the following were in dispute:-
    a. Four of the five existing leases prohibited the fixing of aerials or apparatus to the outside walls or roofs of the flat or building. Mr Nicolaou wanted to relax this restriction: firstly by limiting it to the front wall and the main roof and secondly by qualifying the restriction so that aerials or apparatus could be fixed with the landlord's consent, such consent not to be reasonably withheld.
    b. A restriction in the existing leases relating to animals etc provided that where consent was given it could be withdrawn *"at anytime in the Landlord's absolute discretion"*. Mr Nicolaou submitted that the word *"absolute"* should be substituted by the word *"reasonable"*.
    c. The existing leases prohibited the fixing of blinds, window boxes etc to the outside windows. Mr Nicolaou sought to limit the restriction so that it would only apply to the front windows.

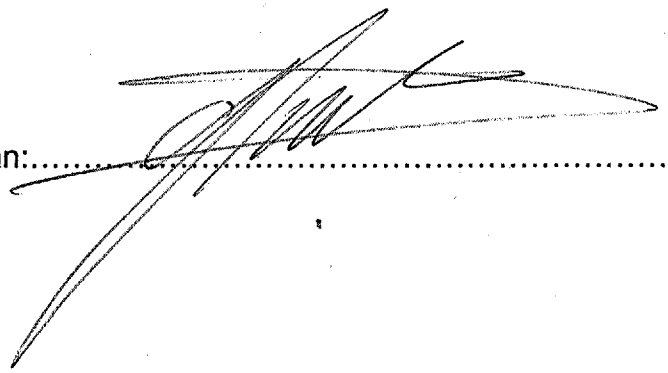
44. For the reasons set out in paragraph 32 above we considered that it was appropriate that the restrictions should be in consistent with the existing leases. Additionally in respect of a. above a restrictive approach was consistent with modern estate management practice and in respect of b. above we agreed with Mr O'Keefe that introducing a reasonableness test would make the practical enforcement of the restriction difficult.

Dispute resolution

45. Mr O'Keefe wished to include a provision, contained in the existing leases, that *"any complaints which may arise between the lessee and any other lessees"* should be submitted to the landlord for a determination which would be binding on both parties. At first sight and applying the reasoning contained in paragraph 32 above this provision should be included in the proposed leaseback. We considered however that there had been a significant change in the circumstances that warranted a departure from the general principle. When the original leases had been granted there was an independent landlord who was in a position to act as *"an honest broker"* between the individual lessees. After enfranchisement the landlord would be under the control of three of six lessees and could no longer act in that capacity in a dispute between one of its members and another lessee. A sensible compromise may have been to limit the operation of the clause to lessees of the same class but that option was not put to us. Given the potential for discrimination against the lessee of the rear basement and ground floor flat, following enfranchisement, in any dispute with a member of the Respondent we concluded that this provision should be omitted from the leaseback.

Deficit in insurance monies

46. Finally we were requested to consider a provision in the draft leaseback that required the landlord, in the event of damage or destruction by an insured risk, to make up any difference between the insurance money received and actual cost of rebuilding or reinstating the property. We disagreed with Mr Nicolaou that it was usual to find such a provision in modern leases and agreed with Mr O'Keefe that such provisions were generally resisted not least because they made it difficult for a landlord to recover the insurance excess from the tenants. This provision was not included in any of the existing leases and adopting principle set out in paragraph 32 above we agreed with Mr O'Keefe that the provision contained in the draft leaseback should be deleted.



Chairman:.....(A J Andrew)