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MAN/00DA/OCE/2010/0004

LEASEHOLD VALUATION TRIBUNAL.

LEASEHOLD REFORM, HOUSING and URBAN DEVELOPMENT ACT 1993

SECTION 24(1)

RE: Flats 1 & 3-5 Oakfield and Flats 1-5 Eltonhurst.

(being property known as Eltonhurst and Oakfield. St Mary's Road. Leeds LS7 3JX)

Applicant Eltonhurst Residents Ltd

Respondent Touchstone Investments (GB) Ltd.

Tribunal Members: Mrs C Hackett. Mr P Swift. Mr M J Simpson.

25th November 2010.

DECISION

The price payable for the freehold of the specified property is:-

1.	**Term and Reversion (Agreed)**	**£8426.50**
2.	**Side garden development value**	**nil**
3.	**Mr. Scadden's garage**	**£500**
4.	**North west Corner garage plot**	**£1750**
5.	**Basement conversion**	**nil**

The Application.

By an Application lodged at the Tribunal offices on 1 September 2010, the named leaseholders of the flats applied to the Tribunal for a determination of the price payable, under Section 32 and Schedule 6 of the above Act, for the freehold reversion of the property

.A Section 13 Notice dated 11th January 2010 had been served on the freehold Reversioner, Touchstone Investments (GB) Ltd, nominating the Applicant Company as Nominee Purchaser and proposing a price of £7666 for the freehold interest. The extent of the Freehold interest sought to be transferred was identified on a plan attached to the Notice.

Touchstone, through its solicitors, served a counter notice dated 11th march 2010 accepting the participating tenants' right to exercise collective enfranchisement and proposing a purchase price of £70,737 for the freehold reversion, plus legal and valuation fees in accordance with the Act.

A Procedural Chairman gave Directions on15th September 2010

The Leases.

Of the 9 flats 8 have identical leases in respect of rent (£25 p.a. ground rent), term, (125 years from 1 November 2002) and covenants and conditions (which include an obligation to pay the 'insurance rent' and service charges).

Mr Scaddan holds flat 1 on a lease dated 20th July 2001 for a term of 99 Years from that date at a ground rent of £10 p.a. and also with covenants and conditions not materially dissimilar to the other leases.

There was no rent review provision in any if the Leases.

Each Lease demised only the flat in question, but granted, in the Second Schedule:-

1. Rights of way water air drainage passage of gas and electricity and support and also rights to use and maintain sewers drains pipes wires and cables for those services

2.The right to use the communal gardens subject to observing any reasonable regulations about the time they are available and the way in which they are to be used which the landlord makes from time to time.

The Issues.

The parties' Valuers, had purported to settle the issue of the price for what they described as the 'Term and Reversion' in the sum of £8,426.50. That is a proper compromise of the figures put forward in correspondence and negotiations by the Valuers, Mr Nabarro for the Nominee purchaser and Mr Collinson for the Freeholder. The Tribunal takes this to be the Schedule 6 Part II paragraph 3 issue.

Both parties accept that, having regard to the remaining terms of the Leases, there is no marriage value to be paid or determined under Paragraph 4 of Part II.

In an email valuation dated 25th March 2010, (disclosed in the Trial Bundle but never otherwise served on the Tribunal) Mr Collinson claimed Development value in respect of 'The garages', 'The Basement' and 'Side Garden'

Mr Nabarro resisted these claims on the basis of either the unrealistic and speculative nature of the proposals, or the costings making some of the proposals not financially viable or at least challenging the valuations.

Both sides seem to have assumed that such valuations could, in law, be part of the Schedule 6 valuations. Despite both being, either then or since, legally advised, neither party has ever articulated the basis upon which such items should be included in the purchase price.

The reference to 'Development' tends to direct one's attention to paragraph 5 of Part II of Schedule 6. That relates primarily to the diminution in value of any interest of the freeholder in *other property.* On the basis of the Section 13 Notice and the Counter Notice, the freeholder does not have any interest in any other Property. It is difficult to see how any paragraph 5 Compensation can be taken into account.

It may be that the parties have assumed that sub paragraph (3) of paragraph 5, when read in conjunction with paragraph 3 (2), allows the development value (if any) to be taken into account. The Tribunal do not find that to be the case.

It may be that the parties are not relying at all on paragraph 5, but are relying only on paragraph 3 (2), which provides that the statutory assumptions in paragraph 3(1) do not preclude the making of assumptions as to other matters, where appropriate, for determining the amount which the freeholders interest in the specified premises might be expected to realise if sold as mentioned in sub paragraph (1) of paragraph 3 of Part II of Schedule 6.

At the hearing neither Valuer had any representations to make on these issues. Both had proceeded on the basis that this was a valuation exercise only, without knowing the statutory basis upon which it proceeded.

Given that neither party had taken issue, at the time of service of the Notices, with the extent of the specified premises the Tribunal held that it was appropriate to proceed on the basis of Paragraph 3 (even though it appeared the Valuers had purported to finalise that head of valuation). We accepted the agreed figure for Term and Reversion' and went on to consider the 'Development' issues raised on behalf of the freeholder.

The Applicants' written evidence.

This comprises the valuation report of Nabarro McAllister dated 02/07/2010, Mr Scadden's witness statement (addressing the background and particularly the issue

of his garage), Chapeltown Conservation Area Appraisal, the copy Leases and a skeleton argument filed with the Trial bundle. The email valuation of 25/03/2010 from Mr Collinson, referred to above, was also included. All of these documents were put before the Tribunal on 16th November 2010.

The Respondents' written evidence

This comprised Mr Rose's statement of 24th November and Mr Collinsons Valuation Report (undated) handed to the Tribunal at the hearing and apparently submitted by email to the Tribunal offices at 16.20 on the 24th November 2010. It was in this document that the freeholders claim in respect of four development issues (side garden, double garage, Mr Scadden's garage and the basement) were amplified.

The inspection

The Tribunal inspected the premises in the presence of both Valuers and Mr Rose of the Respondents, at 10.00 am on Thursday 25th November 2010. We took careful note of the boundaries and immediate environs. We noted the garden area with particular reference to the side garden development building plot and the apparent extent of usage by the leaseholders. We closely inspected the cellars of the former houses, in respect of which development potential for conversion into a one bedroom basement flat was proposed. We considered the premises from a Town Planner's likely point of view in respect of the proposed developments

The Hearing

This was held at Phoenix House Tribunal Hearing Centre, Thornbury Bradford at 11.30 am following the inspection. It was attended by Mr Scadden and Mr Nabarro for the applicant Nominee Purchaser and Mr Rose and Mr. Collinson for Touchstone.

In view of the agreement re 'Term and Reversion' it was agreed that Mr Collinson should present his clients' case with Mr Nabarro responding on an item by item basis.

After hearing the Valuers evidence and representations we heard Mr Scadden and Mr Rose, whose evidence was in accordance with their previously served statements, as amplified and clarified by questions from other parties and ourselves.

<u>Side Garden</u>

Mr. Collinson argued for an addition to the purchase price of £23,500 based on a conservative value of £30,000 for each of 2 potential building plots (for a pair of semi detached house), with a 75% chance of obtaining planning permission within 5 years, with a deferment rate of 5% and allowing a one third payment of the resulting £32,250 to the credit of the Leaseholders.

His professional opinion as to the likelihood of obtaining planning consent is supported by Mr Rose's evidence that he spoke to the planners in 2008 and was told that whilst the location within a Conservation Area may inhibit approval, there were no problems with access, and a suitably sympathetic proposal would be given consideration.

In the Applicants skeleton argument, developed by Mr. Nabarro, the unavailability of the land, because of the Leaseholders' rights over it, is emphasised and all the planning issues, which militate against the likelihood of planning consent being granted, are highlighted.

Mr Scadden's evidence was that the garden, especially the lower side garden, is frequently and extensively used by the Leaseholders in exercise of their rights under their Leases. The side garden is well maintained by the Leaseholders and in part is used as a vegetable garden.

Mr Collinson reminded the Tribunal that the terms of the Leases allowed the landlord to make regulations governing the tenants' use of the garden and that that could extend to prohibiting use of the area that the landlord proposed to develop as building plots.

Mr Scadden's Garage.

Title to this is disputed. Mr Rose claims that the arrangements when the freehold was bought from Mr. Scadden in 2001was to licence the use of the garage to Mr Scadden only for so long as he owned the flat. Mr Scadden claims that he always understood the garage to have been included in his lease title, and it had come as a shock to him, in these proceedings, to see a copy of his lease omitting the garage.

The dispute is unresolved.

On the basis that Mr Rose is correct, Mr. Collinsons contends for a current value of £5000, deferred, with regard to Mr Scadden's actuarial life expectancy for 24.4 years, at a rate of 5% to give an addition to the purchase price of £1550.

Mr Nabarro contends for a nil value if the garage belongs to Mr. Scadden and an almost nil value, but no more than £250 (£500 at the most) for the deferred interest.

The Garage Plots

It is conceded by Mr. Nabarro that the Leaseholders have no ownership of, or rights over, the corner site of a former wooden garage and the adjoining stone built out house. The likely value of the garage site as a parking space is conceded in the sum of £1750.

Mr Collinson contends for the potential to construct a pair of garages by utilising the former garage site, demolishing the outhouse (a cost neutral activity because of the value of the stone salvage). His out turn valuation based on finished value of £6000

each and construction costs of £4000 each, with a short deferment period to allow for construction, is £3500. On the basis of Mr. Rose's enquiries, planning difficulties are minimal.

Basement Conversion

Mr Collinson contends for an addition to the purchase price of £30,000 arising from the potential development of the basement. The cellars of the two former large semi detached houses, currently accessed via and external stone staircase to the rear of Oakfield, have a footprint of 533 sq. ft.

Mr Collinson avers on behalf of Touchstone, that a flat with a value of £100,000 can be created by tanking, excavation of floor (to give head room), creation of light wells, relocation of the Leaseholders services and meters, relocation of the sump pump, air extraction from the 'wet side' of any tanking, underpinning or buttressing of the foundation as necessary etc at a cost of £60,000. He relies upon Mr rose's instructions that Leeds City Planning Department have , in 2008, confirmed that conversion of any existing basement into a dwelling would not 'ordinarily' require planning permission, but only Building Regulation approval.

With a 3 year deferment for the development period and a rounding down to reflect what he describes as a 'real world' position, Mr Collinson arrives at his £30,000.

Mr Nabarro points to the lack of any evidence to support these contentions. He highlights the likelihood of the development cost being significantly more than £60,000. He avers that planning consent for the creation of an entirely new dwelling (as opposed to the habitation of the basement as an extension of an existing dwelling) is required, and that the prospect of it being obtained is speculative, at best.

He adduced some, not directly comparable nor very recent, evidence to suggest a value of a completed basement flat would not exceed £80,000, thus rendering the cost benefit of any proposed development nugatory.

The Decision.

Side Garden

We regard the prospects of obtaining planning consent as unlikely, and not better than 50%. The development would be unsympathetic, by its very existence, with the other large, well situated, houses within this Conservation Area. It would substantially detract from the amenity of the flats in Eltonhurst and Oakfield. A planning application is likely to be met with strenuous objections, not least from the flat owners. The climate has changed, since the time of Mr. Rose's informal enquiry of the Planners, regarding garden development.

In any event, regardless of any valuation exercise to take account of the above, we find that the site is not available to the freeholder to develop because of the rights of the leaseholders over it, in accordance with their Leases. Those rights are obviously exercised. The removal of them is not possible without the consent of all of them. It is not open to the freeholder to arbitrarily ascribe a level of compensation to the leaseholders in the expectation that they will abandon their rights, especially to facilitate a development of which they are unlikely to approve.

The power of the landlord to make 'Regulations' does not extend to a power to vary the leases and remove, entirely, the rights granted in respect of a large tract of the garden. 'Regulatons' deal with such things as noise, hanging out washing, bonfires, non disturbance of neighbours, not using the garden for barbeques late in an evening, etc.

Mr Collinson conceded, rightly in our view, that if the freeholder had to wait until the expiry of the leases to have a chance to develop, then the value was negligible, and would not be pursued.

Mr Scadden's Garage.

On the evidence presently before us, we proceed on the basis that Mr Scadden has only a licence to use the garage. It is not registered as in his ownership. That may change if, in the light of what he now knows, if he seeks to contest the position through his solicitors.

We are fortified in that by the acceptance of both Valuers that a garage would fetch, easily, £10per week.

The prospect of vacant possession is, however, long distant into the future. At best the garage can only be looked at on the basis of an investment valuation. There are likely to be significant management and even repair and maintenance costs. Some void period could well be anticipated even when the garage was let commercially. On the basis of a net annual rent, after management, repairs and voids of £350 pa, and applying the same 'years purchase' adopted by Mr Collinson the current value would be £3500. Applying the same deferment rate as that adopted by Mr Collinson, we would value the garage today, subject to those rights of Mr Scadden as are conceded by Mr. Rose at £1100

The title is however in dispute and, on the evidence produced by Mr. Rose (or more accurately the lack of it) we think it unlikely that a definitive position and clean title could be offered to a prospective purchaser. The absence of documentation as to the terms of Mr Scadden's actual occupation is a defect in the title which the freeholder could currently market. We are obliged to take defects in title into account. Schedule 6 Part II paragraph3(3).

With that dispute unresolved (as it is at this time, and was unresolved when the Notices were served – the relevant time for our valuations), we doubt that it would be possible to find a willing buyer at any price. It is however difficult to go to the extreme of saying that even a deferred interest in a garage to which title is disputed and not accurately documented (at least, on the evidence before us) is worth nothing. The evidence available might change with the passage of time and greater research of the documentation, but we can only deal with the evidence that is, or is not, put to us to determine the value as at the date of the S13 Notice.

We therefore determine that the amount that the garage might be expected to realise between a willing seller and a willing buyer if sold on the open market would be £500, which is the maximum amount conceded by Mr. Nabarro on behalf of the Applicants

The Garage Plots

Each Valuer values one plot at £1750, whether as a garage after taking in to account the costs of construction, or as a parking space.

The only issue is whether one or two plots are available. We find that only one is available. The additional land to the house side of the outhouse is not available to the freeholder to the exclusion of the Leaseholders and the rights of way and over the garden as have been granted to them.

The value of the outhouse is neutral, the cost of demolition being the same as the value of the stone salvage. It could do no more than afford an easier access to the parking space if it was demolished.

Basement Conversion

For such a significant aspect of the freeholders case we had very little evidence. Not even the most basic and inexpensive scheme plans and costing have been adduced.

We have insufficient evidence of costings, practicability, planning/Buliding Regs. requirements, out turn valuation, demand (even for periodic tenancy) or how the rights of the Leaseholders for the routing of services and sewers through the cellars will be accommodated.

Mr Collinson urged us to take a view based on the proportionality of the expense of such evidence. That is an indication of the marginal nature of the postulated conversion.

The fact that Mr Collinson has tried to inject some realism into Mr Rose's £30,000 'turnkey' costings, by doubling them, indicates the difficult task faced by Mr Collinson, with the material supplied to him by and on behalf of the freeholder, in persuading us that there is any development value that could be exploited and

therefore should be taken into account when determining the price to be paid to the freeholder by the Nominee.

We find that it is more likely than not that planning consent would be required. The very non committal and conditional nature of the response of the planners, as reported to us by Mr Rose, is not sufficient evidence that permission is not needed.

Neither party produced robust evidence of out turn value. The apparent gap between cost of conversion and out turn value appears to us to be very fragile and somewhat speculative.

Both Valuers agreed that the likely rental value of a one bed/studio basement flat would be in the region of £450 pcm. Allowing for the usual deduction for management etc and even considering 12 years purchase the investment value struggled to get above £50-£60,000. We recognise that that basis of valuation is not of the type put forward by the Valuers. They opined as to long leasehold capital values. We considers both methods as a cross check to our view, based on Mr Nabarro's evidence, that the conversion of the basement, even if practically and legally possible was financially a non starter, and added nothing to the value of the freehold.

Generally

Mr Rose explained the lack of any progress with any preparations for any of the 'development' projects in terms of being distracted with other business issues and the changes in the market. Most of any preparatory work would have been administrative rather than constructional and the property has been in the control of his business since 2001, during which time the market was once very buoyant for a significant period.

The Leases are unsatisfactorily drafted and lack clarity as to, for example, the tenants' rights. In the event of a dispute, however, it will have to be accepted that the Leases were prepared by Mr Rose's advisors for him in his capacity as landlord and that, as his documents, the construction of them could not be presumed to be resolved in his favour.

Conclusion

The price payable for the freehold of the specified property is:-

6. Term and Reversion (Agreed) £8426.50
7. Side garden development value nil
8. Mr. Scaddens garage £500

9.	North west Corner garage plot	£1750
10.	Basement conversion	nil

.Costs

The nominee is additionally liable to pay the costs of the freeholder in respect of the Conveyance, deducing title and the valuation, as set out in Section 33 of the Act. Those costs are limited to the Section 33 items and do not extend to the cost of valuations for, or representation at the Tribunal, or preparations therefore. If any party wishes to assert that they have a claim for the cost in relation to the Tribunal process they should make representations to the Tribunal in writing (copy to all other parties) within 21 days of receipt of this Decision.

Martin J Simpson

Chairman