4192

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AF/OCE/2015/0317**
Property	:	**1-6 Benjamin Court, St Hugh's Road, Anerley, London SE20 8PJ**
Applicants	:	**Alessandro de Gregorio and others**
Representative	:	**Mr F Ng of Counsel instructed by Pro-Leagle Solicitors**
Respondent	:	**Ronald Stacey (1)** **Richard J Hicken (as Trustee in Bankruptcy of Keith Paul Morris) (2)**
Representative	:	**Ms L McCormick of Counsel instructed by PHJ Solicitors**
Type of application	:	**Correction Certificate**
Tribunal members	:	**Judge N Hawkes** **Miss M Krisko BSc(EstMan) BA FRICS**
Venue	:	**Alfred Place, London WC1E 7LR**
Date	:	**3rd June 2016**

DECISION

As Chairman of the Tribunal, which decided the above-mentioned case, I hereby correct the errors and clarify the decision dated 1st June 2016 as follows:[1]

The total premium is £60,936.

A copy of the corrected decision is attached.

Name: Judge N Hawkes **Date:** 3rd June 2015

[1] Regulation 50 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

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Representative	:	**Mr F Ng of Counsel instructed by Pro-Leagle Solicitors**
Respondent	:	**Ronald Stacey (1) Richard J Hicken (as Trustee in Bankruptcy of Keith Paul Morris) (2)**
Representative of the First Respondent	:	**Ms L McCormick of Counsel instructed by PHJ Solicitors**
Type of application	:	**Application under sections 26 and 27 of the Leasehold Reform Housing and Urban Development Act 1993**
Tribunal members	:	**Judge N Hawkes Miss M Krisko BSc(EstMan) BA FRICS**
Date and venue	:	**Hearing 19th & 20th April 2016 at 10 Alfred Place, London WC1E 7LR, inspection 12th May 2015**
Date of decision	:	**1st June 2016**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that the price to be paid by the applicants for the freehold interest in the Property is £60,936.

(2) The terms of the draft transfer are approved subject to the inclusion in box 8 of a statement that the relevant sum has been paid into Court.

The background

1. This is an application pursuant to a vesting order made by District Judge Bishop at the County Court at Croydon on 17th November 2015 under section 26 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act").

2. Section 26(1) of the 1993 Act concerns claims for collective enfranchisement where the relevant landlord cannot be found. It enables the Court to make a vesting order in respect of any interests of the landlord which are liable to acquisition.

3. Under section 27 of the 1993 Act, the role of the Tribunal is to determine the appropriate sum to be paid into court in respect of the landlord's interests and also to approve the form and terms of the proposed transfer.

4. The applicants in this matter are the lessees of four flats at 1-6 Benjamin Court, St Hugh's Road, Anerley, London SE20 8PJ ("the Property") and, by virtue of the order of District Judge Bishop, they became the nominee purchasers of the freehold interest in the Property for the purposes of the 1993 Act.

5. All of the applicants hold their flats on 99 year leases commencing on 25th March 1987. Mr Keith Morris and Mr Ronald Stacey hold the freehold as legal joint tenants. Mr Stacey is a party to these proceedings but Mr Morris is missing and cannot be found.

6. On 4th January 2015, the applicants issued a Part 8 Claim at the County Court at Croydon for an order pursuant to section 26 of the 1993 Act. The matter came before District Judge Bishop on 9th September 2015 when she gave the applicants permission to amend the Claim Form and also permission to withdraw an application notice which had accompanied the Claim Form.

7. The matter again came before District Judge Bishop on 17th November 2016. Both parties were legally represented at the hearing. The Tribunal has been informed that District Judge Bishop held that Mr

Morris and Mr Stacey together constitute a single landlord within the meaning of section 9(1) of the 1993 Act. Since Mr Morris was missing, the 'landlord' was found to be missing. District Judge Bishop therefore held that section 26(1)(a) of the 1993 Act was satisfied; found that she had jurisdiction to make a vesting order; exercised her discretion to do so; and transferred the proceedings to this Tribunal to make a determination as to the terms and price of the necessary transfer.

The hearing and inspection

8. The applicants were represented by Mr F Ng of Counsel at the hearing and the first respondent was represented by Ms L McCormick of Counsel. As stated above, the second respondent is missing.

9. During the course of the hearing, the first respondent handed up copies of certain documents relating to the County Court proceedings and copies of these documents were also provided to the applicants. No objection was taken to the late admission in evidence of this material.

10. The applicants seek to rely upon the written valuation evidence of Mr Jonathan F Dean MA (Cantab) MRICS dated 18th April 2016 and upon an updated report from Mr Dean dated 20th April 2016. The first respondent seeks to rely upon the written valuation evidence of Mr John Anthony Naylor MRICS dated 18th April 2016 and upon an updated report from Mr Naylor dated 19th April 2016.

11. On 12th May 2015, the Tribunal inspected the exterior of the Property and the interior of flats 2, 4 and 6. The Tribunal also viewed the exterior of the comparable properties which were referred to during the course of the hearing.

The issues to be determined

12. At the commencement of the hearing, the Tribunal was informed that the following issues are currently in dispute:

    (i) the premium (with a preliminary issue concerning the valuation date); and

    (ii) whether the ground rent is due.

13. The Tribunal was informed that the first respondent had no submissions to make on the issue of whether Form TR1 should be in the form provided by applicants or in an alternative form which has been provided by the first respondent.

14. The applicants state that the issue of whether or not the Form TR1 which has been supplied by the applicants should be approved turns on whether these proceedings are properly brought under section 26 of the 1993 Act, as opposed to under section 13. The applicants submit that because that the order of District Judge Bishop was made under section 26, the applicant's draft is clearly in the correct form.

15. The Tribunal accepts this submission and approves the draft transfer which has been submitted by the applicants, subject to the inclusion in box 8 of a statement that the relevant sum has been paid into Court.

The valuation date

16. Section 27(1) of the 1993 Act provides (emphasis added):

27.— Supplementary provisions relating to vesting orders under section 26(1).

(1) A vesting order under section 26(1) is an order providing for the vesting of any such interests as are referred to in paragraph (i) or (ii) of that provision—

(a) in such person or persons as may be appointed for the purpose by the applicants for the order, and

(b) on such terms as may be determined by the appropriate tribunal to be appropriate with a view to the interests being vested in that person or those persons in like manner (so far as the circumstances permit) as if the applicants had, ***at the date of their application,*** *given notice under section 13 of their claim to exercise the right to collective enfranchisement in relation to the premises with respect to which the order is made.*

17. The applicants submit that an application is made at the date of issue notwithstanding any later radical amendments. They state that the words "claim" and "application" are used interchangeably in the statute and mean effectively the same thing. For example, at section 26 (1) of the 1993 Act, reference is made to "a claim to exercise the right to collective enfranchisement" and to the powers of the court "on application of the qualifying tenants".

18. The applicants argue there is only one potential order which comes from the making of a Part 8 Claim of the type which is the subject of this dispute and that is a vesting order. The application for a vesting order is made by Part 8 Claim Form. The wording of the order of District Judge Bishop of 9th September 2016 which refers to permission to "withdraw the application" cannot alter the meaning of the statute. This order also grants permission to "amend" the Claim Form and

amendments take effect retrospectively. The applicants question what the Part 8 Claim Form is if not an application under section 26 of the 1993 Act.

19. The first respondent submits that the Part 8 Claim Form was a nullity when it was issued and that the date of the application must be the date of a valid application. The first respondent drew the Tribunal's attention to various ways in which the application as issued was defective, which are not in dispute.

20. The first respondent further submits that it is the Form N244 application notice which accompanies the Part 8 Claim which is the application, rather than the Claim Form itself, and that the order gives permission to the applicants to withdraw the application notice as originally drafted.

21. The first respondent argues that the issue of the Part 8 Claim Form is merely a procedural step which needs to be taken before an application is made, akin to paying an issue fee. Further, the first respondent contends that the application notice has been treated by the applicants as the "application" and that the doctrine of waiver applies. The first respondent states that, in a rising market, it cannot be right that the applicants can be better off financially as a result of the delays caused by the fact that their application as issued contained defects.

22. In reply, the applicants argue that the claim was not a legal nullity; that the amendments take effect retrospectively (the Tribunal was referred to Rule 17.4 of the Civil Procedure Rules); and that the doctrine of waiver requires both a conscious election and prejudice, neither of which have been established in this instance. Further, as regards the movement of the market, property prices could go down as well as up so this is a neutral point.

23. The Tribunal accepts the applicants' submission that an application for a vesting order is made by Part 8 Claim Form. The only order which potentially comes from the making of a Part 8 claim of the type made in these proceedings is a vesting order. The Tribunal does not accept that the issue of the Part 8 claim is merely a procedural step akin to paying an issue fee. The Part 8 Claim Form includes Details of Claim and a signed statement of truth. The Tribunal accepts that the amendments to the Part 8 Claim Form operate retrospectively. The Tribunal is not satisfied on the basis of the evidence before it that the elements of waiver have been established. No witness specifically addressed this issue.

24. Accordingly, the Tribunal finds that the valuation date is the date of issue of the Part 8 Claim, namely 4th January 2015.

25. The Tribunal informed the parties orally of this preliminary determination at the hearing and then released the experts for half a day in order to enable them to prepare revised valuations based on the valuation date of 4th January 2015 consequent upon its finding. The Tribunal also requested further comments on the hope value and the development value (as set out in the original reports) and a plan of the estate.

The ground rent

26. The applicants contend that, in order to be added to the "appropriate sum" under section 27 of the 1993 Act, the ground rent must come within section 27(5) which requires that it is "due to the transferor from any tenants of his premises comprised in the premises in which that interest subsists".

27. The applicants submit, firstly, that the ground rent is not "due" because the requirements of section 166(2)(c) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") have not been complied with.

28. Secondly, and more fundamentally, the applicants submit that unless and until Mr Morris joins in serving such notices (or in appointing an agent to serve them), no valid notice can be served. This is because, as joint tenants at law, the freeholders must act unanimously to bind the estate. The giving of a notice therefore requires both of them to participate (the Tribunal was referred to Harpum et al., Megarry and Wade: The Law of Real Property 8th ed. At [13-006] and to Newman v Keedwell (1978) 35 P & CR 393).

29. It is common ground that Mr Morris has not authorised the notices which have been served in relation to ground rent and that he has no knowledge of them. Under section 166 of the 2002 Act, it is the landlord who is to give the notice and one person who has a beneficial interest in the freehold is not "the landlord". One joint tenant cannot unilaterally extinguish a debt owed to the landlord. To hold otherwise would potentially enable one joint tenant to "take the money and run". The applicants state that first respondent could potentially have applied for an order for sale under the Trusts of Land and Appointment of Trustees Act 1996.

30. The first respondent submits that it is fundamentally unfair that he should be out of pocket simply because the other joint tenant has absconded that that the word "due" should be given a broad interpretation.

31. The Tribunal accepts that the interest of each joint tenant is the same in extent, nature and duration because, in theory of law, they hold just one

estate. This has the consequence that the giving of a notice requires the participation of all the joint tenants. It cannot be effected by one joint tenant alone because he does not by himself have the whole estate.

32. Accordingly, the Tribunal finds that the notices headed "notice to long leaseholders of rent due" which have been served by the first respondent alone are not valid and that the ground rent is not an amount "due to the transferor" under section 27(5)(b) of the 1993 Act.

The premium

The freehold value

33. On inspection, the Tribunal found that the Property was extremely poorly maintained presenting a very unattractive external appearance, with neglected internal common parts. For example, the stair carpet was held together by tape which was dangerous as well as unsightly; stepping stones had been roughly placed to step over standing water near to the front entrance door; and the path to rear "garden" was slippery and uneven. The carpark was a rough area with no attempt to surface it; to maintain it; or to mark out any parking spaces.

34. The Tribunal accepts the applicants' case that the presence of a tree close to the southern elevation of the Property is a minor matter because the tree can potentially be pollarded.

35. On inspecting the properties which were the subject of the comparable sales evidence, the Tribunal found the properties at Orchard Grove, Tovil Close and Lullington Road the most similar to the subject Property. The other properties were in better locations; were considerably better maintained; and were generally much more attractive externally than the subject Property.

36. The average price per square metre at the valuation date of the properties at Orchard Grove, Tovil Close and Lullington Road is within the range which has been relied upon by Mr Dean. Mr Dean has used a higher price per square metre for the smaller flat, Flat 1, and a slightly lower price per square metre for Flats 2, 3 and 6, and, again, a slightly lower price per square metre for the largest flats, Flats 4 and 5.

37. The Tribunal accepts Mr Dean's evidence in this regard and agrees with his calculations of the freehold value.

Hope value

38. The remaining term of the leases is 71.21 years. The Tribunal finds that it is therefore likely on the balance of probabilities that, within the next

few years, the non-participating tenants will want to extend their leases. The Tribunal accepts Mr Naylor's evidence that the hope value is 10%.

Development value

39. The first respondent states that the applicant has chosen not to put forward an alternative case regarding the development value of the site and invites the Tribunal to rely upon the both the evidence of Mr Naylor and the Tribunal's own expertise.

40. As indicated above, after making a preliminary finding as to the valuation date, the Tribunal asked the experts to prepare revised valuations based on the valuation date of 4th January 2015. The Tribunal also requested further comments on the hope value and the development value (as set out in the original reports) and a plan of the estate.

41. In his report dated 18th April 2016, Mr Naylor put forward a development value of £48,428. However, during the period in which the experts were released, he reassessed the development value and put forward an increased figure of £120,360 in his report dated 20th April 2016.

42. The Tribunal accepts Mr Naylor's explanation that he had been instructed at short notice and had not had sufficient time in which to fully consider the development value when preparing his initial report. However, the Tribunal also accepts the applicants' contention that permission had not been given to the first respondent to submit new evidence relating to the development value of the site.

43. The applicants state that the new report has "changed the game" and that this is unfair because the applicants would have approached a claim with a potential value of £120,000 in a different manner from a claim worth up to around £48,000. The Tribunal considers that there is force in this argument but, in any event, having considered all of the available evidence and its own general knowledge and experience, as set out below, the Tribunal finds that the potential development value of the site is substantially less than £48,000.

44. In his initial valuation, Mr Naylor put forward an estimated sale price for the new build flats of £242,000 per flat. In his second report, he put forward an estimated sales price for the new build flats of £325,000 per flat.

45. The Tribunal has valued the existing larger flats in the subject Property at £160,000 each and does not consider it to be likely that the newly built adjacent flats, which are slightly larger than Flats 2, 3 and 6,

would be worth more than the estimate provided by Mr Naylor, in his first report, of £242,000 each. Having regard to the location adjacent to the railway line and to the subject Property as well as the local authority flats next door, they are unlikely to command a particularly high price.

46. The building cost in both valuations was £1,157 per square metre, but in the second valuation, the building cost was split with a lower cost being given to the "ground floor" over the car park.

47. The applicants argued that the building cost is too low and should be £1,500 per square metre. The Tribunal agrees with the applicants that, in view of the London location; the complications attached to the proposed elevated structure; and the restricted site, the building cost is likely to be in the region of £1,500 per square metre.

48. The applicants also argued that a developer would be unlikely to take on this small and difficult site and accept a profit of 15%, that an estimate of 20% profit was more realistic. The Tribunal accepts this submission.

49. Further, it is common ground that the tenants have a right to park and the Tribunal finds that it is likely that there would need to be some suspension of the parking rights during the development process (and therefore the need to reach an agreement with the tenants on this issue). Further, the Tribunal considers that the planning process, if successful, will take some time and this has not been allowed for. In all the circumstances, the Tribunal finds that 50% should be allowed for risk.

50. The Tribunal finds that the development value of the site is £12,058. The Tribunal's valuation of the development value is attached to this decision marked "Appendix B".

Conclusion

51. The Tribunal has prepared a valuation which shows the values of the individual flats (£48,878 in total). A copy of the Tribunal's valuation is attached to this decision marked "Appendix A". To this must be added the development value of £12,058.

52. Accordingly, the Tribunal determines that the premium to be paid in respect of the collective enfranchisement of 1-6 Benjamin Court, St Hugh's Road, Anerley, London SE20 8PJ is £60,936.

53. This matter should now be returned to the County Court at Croydon under Claim Number B01CR263 in order for the final procedures to take place.

Judge N Hawkes

1st June 2016

Appendix A

TRIBUNAL VALUATION-Benjamin Court, St. Hughes Road, London, SE20 8PJ

Matters Agreed
Date of valuation 4th January 2015
Remaining term 71.21 years
Value of term £10,965 (£1,828 per flat)
Yield term 7%
Reversion 5%
Relativity 93.16%

Determined by Tribunal

Freehold value	£160,000 Flats 2-6	£140,000 Flat 1
Leasehold value	£149,056 Flats 2-6	£130,424 Flat 1
Hope value for non-participants 10%		
Development value of the car park	£12,058	

Flat 1		
Term agreed	£1,828	
Reversion £140,000		
PV 71.21 years 5% 0.0310	£4,340	
Landlord's interest		£6,168
Marriage value		
Freehold value	£140,000	
Less existing lease	£130,424	
Less landlord's interest	£ 6,168	
	£ 3,408	
50%		£1,704
Premium		£7,872
Flats 3 (4 and 6)		
Term agreed	£ 1,828	
Reversion £160,000		
PV 71.21 years 5% 0.0310	£ 4,960	
Landlord's interest		£6,788
Marriage value		
Freehold value	£160,000	
Less existing lease	£149,056	
Less landlord's interest	£ 6,788	
	£ 4,156	
50%		£2,078
Premium per flat		£8,866

Non-participating Flats 2 and 5

Term agreed	£ 1,828	
Reversion £160,000		
PV 71.21 years 5% 0.0310	£ 4,960	
Landlord's interest		£6,788
Marriage value		
Freehold value	£160,000	
Less existing lease	£149,056	
Less landlord's interest	£ 6,788	
	£ 4,156	
10%		£ 416
Premium per flat		£7,204

Appendix B

TRIBUNAL VALUATION-Benjamin Court, St. Hughes Road, London, SE20 8PJ

Development potential	
Proposed development, 2 flats at £242,000	£484,000
Less	
Build cost 122.18 sq.m @ £1500 per sqm	£183,270
Build cost 61.09 sq.m @ £750 per sqm	£ 45,817
Developer's profit 20%	£ 96,800
Cost (as per respondent's valuation)	£133,997
Value of land	£ 24,116
50% allowance for risk	£ 12,058