4145

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AU/OCE/2015/0275
Property	:	61 Rawstorne Street, London EC1V 7JN
Applicant	:	(1) Philippe Jurado (2) Grete Jurado
Representative	:	Harper & Odell, solicitors
Appearances for Applicant:	:	(1) Mr Ben Zurawel, counsel (2) Mr Obiora Chianumba, MRICS (3) Mr Fariz Uraij, solicitor (4) Mr Jurado
Respondents	:	(1) Laliji Naran Patel (2) Keshaben Lalji Patel
Representative	:	Thirsk Winton LLP
Appearances for Tenant:	:	(1) Ms Diane Doliveux, counsel (2) Mr Richard Murphy, MRICS
Type of Application	:	Collective Enfranchisement s.24 Leasehold Reform, Housing and Urban Development Act 1993
Tribunal Members	:	(1) Judge Vance (2) Mrs S Redmond, MRICS
Date and venue of Hearing	:	9 and 10 February 2016 10 Alfred Place, London WC1E 7LR
Date of Decision	:	3 March 2016

DECISION

Decisions of the tribunal

1. The tribunal determines that the premium payable by the Applicants for the acquisition of the freehold of 61 Rawstorne Street, London EC1V 7JN ("the Property") is not to include any sum relating to the development potential of the basement area in the Property.

Background

2. This is an application made under Section 24(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid and the terms of acquisition of the freehold interest in the Property. The Property is located within the London Borough of Islington.

3. The relevant legal provisions are set out in Appendix 1 to this decision.

4. References in bold and in square brackets below refer to pages in the hearing bundles prepared by the Applicants.

5. The Property is a four storey end of terrace Victorian house converted into three self-contained one-bedroom flats and a basement area.

6. Mr Jurado is the long lessee of Flat 1, the ground floor flat. His leasehold interest was registered on 8 July 2009 under title number NGL476833 **[33]**. He has the benefit of the residue of the term of a lease dated 22 May 1983 made between (1) Gordon Stuart Glass and others and (2) Malcolm Alexander Glass **[55]**. This lease was the subject of a Deed of Variation dated 10 October 1988 in which a garden area was demised to the lessee.

7. Ms Jurado is the long lessee of the first floor flat, Flat 2. Her leasehold interest was registered on 12 January 2012 under title number NGL475437 **[44]**.

8. The long lessee of Flat 3, the second floor flat is David Fairfax de Cobain. His leasehold interest was registered on 21 September 1984 under title number NGL475438 **[39]**.

9. The Respondents have the benefit of the freehold reversion of the Property. They were registered as freehold proprietors on 26 January 1994 under title number NGL432106 **[28]**.

10. The registered leasehold proprietor of the basement area is Manjula Lali Patel whose interest was registered on 17 November 1994 under title number NGL723133 **[49]**. At the hearing the Tribunal were provided with a copy of her lease dated 6 April 1994 in which it is recorded that the consideration for the demise by the Respondents was 'natural love and affection'. It was common ground between the parties that since the grant of this lease the basement area has been used by the other lessees in the Property as a storage area and that at no point has it been used by Manjula Lali Patel as residential accommodation.

11. An initial Notice under section 13 of the Act dated 18 February 2015 was sent by the Applicants to the Respondents. Neither Manjula Lali Patel nor Mr de Cobain were identified as participating tenants. The Applicants proposed a price for the freehold in the Property.

12. In the Respondents' counter notice dated 21 April 2015 they admit that the Applicants were, on the date of that Notice, entitled to exercise the right of collective enfranchisement in relation to the Property. They did not accept the price proposed in the initial notice but made counter proposals for the interests to be acquired.

13. On 2 November 2015 the Tribunal issued directions, and, subsequently, a hearing was listed for 9 and 10 February 2016.

Inspection

14. On the first day of the Tribunal hearing the Respondents invited the Tribunal to inspect the Property. The Tribunal declined to do so. Given the helpful photographs in the bundle it did not consider it was necessary or proportionate to inspect the Property in order to determine the issues in dispute.

The Hearing

15. On the day of hearing several areas remained in dispute between the parties. Agreement had not been reached concerning: the freehold value of Flats 2 and 3; relativity; the value of appurtenant land and what value, if any, to be attributed to the basement area.

16. The Tribunal allowed the parties the morning of the hearing in order to see if a compromise could be reached. Agreement was reached in respect of all areas except for one, namely whether or not the premium payable by the Applicants should include a sum relating to the development potential of the basement area. The Applicants' position was that there was no such potential. The Respondents disagreed and argued the value

of such a development potential was £10,000. This was the sole issue that needed to be determined by the Tribunal.

The Respondents' Case

17. The Respondents relied upon Mr Murphy's report dated 26 January 2016 **[124]**. He also gave oral evidence. This report was prepared by Mr Murphy without him having had the benefit of inspecting the Property (although he did inspect a few days before the Tribunal hearing). Instead, he relied upon an inspection by another surveyor in his firm, Robert Clifford, when preparing the report.

18. Mr Murphy suggested that it was *"conceivable"* that the owner of the basement area could, subject to obtaining the necessary consents, convert it to residential use. He acknowledged that it was very small (188 sq. ft. GIA) and that it had a low headroom (1.82m) which meant that any conversion would necessitate excavating the floor to provide acceptable headroom. Nevertheless, in his view, the area could potentially be converted into a 'sleeping pad' for use by someone working in Central London during the week and living outside London at weekends.

19. As the area below the existing floor of the basement was outside of the lessee's demise he considered that the freeholder could command a payment in order to grant consent for such a conversion. He concedes that *"such a development (and therefore the consent and payment) are speculative and difficult to calculate"* but considered a fair figure to be attached to that value to be £10,000.

20. He arrived at that figure by applying the same £ per sq. ft. value he and Mr Chianumba, the Applicant's valuer, had applied to the residential flats in the Property (£1,242 per sq. ft.) and then making certain deductions to the resulting figure of £186,797. He deducted 20% to reflect the fact that the conversion would be into a basement flat with limited natural light and then £500 per sq. ft. for the anticipated costs of the conversion.

21. He calculated these conversion costs by adopting the BCIS rebuilding rate of £150 per sq. ft. which he then increased to £500 per sq. ft. to include all likely costs of the conversion, including the following works: excavation; replacing walls; tanking; plumbing; heating; installing a kitchen area; electrical. The £500 figure includes all costs relating to: applications for planning consent; architect's costs; structural engineer's costs; compliance with Building Regulations and Party Wall Act requirements as well as VAT, where payable.

22. From the resulting figure of £92,797 he then deducted 50% for the risk that planning permission would not be granted and then a further 50%

to reflect the risk that the development potential would not be realised for several years (for example, if the lessee did not seek consent from the freeholders or if the lessee did not accept a proposal from the freeholders to convert the area and share the resulting profit).

23. This calculation resulted in a net development value of £23,199 which Mr Murphy then split 50/50 between the lessee and the freeholder and rounded down to his final figure of £10,000.

24. He acknowledged that the light entering the basement area was not good as the Property was surrounded by high walls on two sides and another property on a third side. However, he argued that there was some natural light entering the area and that this was sufficient for the type of development envisaged.

25. In cross-examination he conceded that he was not aware that the Property was a Grade 2 listed building and that this fact was therefore not specifically taken into account when assessing the 50% deduction for planning permission risk. Nor did he specifically take into account the fact that an Article Four Direction had been made under the Town and Country Planning Acts or that the Property was in a Conservation Area.

26. He also acknowledged that he was not aware of London Borough of Islington's Supplementary Planning Document (January 2016) relating to Basement Developments, a copy of which was provided to the Tribunal on the day of the hearing. Paragraph 9.3 of this document states as follows:

> *"Most of Islington's listed buildings are Georgian or Victorian terraced townhouses or semi-detached houses. Townhouses were designed with a clear hierarchy of floor levels with larger principal rooms at ground and first floor levels with generous floor to ceiling heights and extensive decorative detailing. Upper and basement storeys generally have less generous floor to ceiling heights and minimal decoration. In most cases the front and rear gardens are separate and have clearly defined functions and roles in relation to the building itself. Given this strict hierarchy of spaces, additional storeys beneath a listed building will generally be resisted"*

27. Paragraph 9.7 states:

> *"The lowering of floor levels to existing historic basements can harm the special architectural or historic interest of a listed building by virtue of detrimental impact on the historic fabric, floor hierarchy and plan form. Therefore, the lowering of an*

historic basement will only be considered where all of the following points are met:

- *no underpinning is required i.e. development is retained above footings*
- *no significant harmful impact to fabric of heritage significance is demonstrated*
- *floor to ceiling heights remain sufficiently subservient to principal floor levels".*

28. Mr Murphy did not know if the suggested conversion would require underpinning nor whether it was possible to ensure that floor to ceiling heights would remain sufficiently subservient to the principal floor levels as these were matters outside of his expertise.

29. His position was that whilst he was not aware of the specific planning issues drawn to his attention at the hearing that he was, nevertheless, aware that the Property was located in an area of London where securing planning permission would be difficult to obtain and that the 50% reduction he made for the risk that planning permission would not be granted was sufficient to take into account all of the issues identified by the Applicants.

The Applicant's Case

30. The Applicant relied upon a report from Mr Chianumba dated 21 January 2016 **[74]**. He too provided oral evidence to the Tribunal.

31. In his report he states that the very small size of the basement, the low floor to ceiling height and the limited degree of natural light meant that the area was only capable of being used as a storage space. He also points out in his report that there are no services in the basement except for electricity and that the water stopcock for the whole building is in the basement meaning that unrestricted access was required at all times. In cross-examination he conceded that it might not be impossible to convert the area into a studio flat but he did not consider that this was an attractive or economically viable option, even as a 'sleeping pad'.

32. In his view the fact that the Property is Grade 2 listed and in a Conservation Area together with the restrictions referred to in Islington Council's Supplementary Planning Document meant that the chances of planning permission being secured for a conversion were nil. In addition, he considered that a suggested conversion was likely to be objected to by the other lessees in the Property. He pointed out that the local authority might well seek entry into a Section 106 agreement under the Town and Country Planning Act 1990 before approving any

development and that this would attract additional cost as would the Council's Community Infrastructure Levy.

33. He considered that it was highly unlikely that a conversion and subsequent sale of the basement area would result in a profit given the likely costs but conceded that matters such as the cost of the conversion, the need for underpinning, the difficulties of securing planning permission and the risk of development fell outside of his area of expertise. Nor, however, did he consider Mr Murphy was qualified to give expert evidence in these areas.

Decision and Reasons

34. It was common ground between the parties that as a matter of law, and on the right facts, a freeholder is entitled to recover a sum in respect of hope value when determining the price payable by a nominee purchaser for the freehold of premises in accordance with paragraphs 2 and 3 of Schedule 6 of the Act. This is clear from paragraphs 19-21 of the decision of the Court of Appeal in *Carey-Morgan and Stephenson v Trustees of the Sloane Family* [2012] EWCA Civ 1181.

35. Whilst the more usual scenario concerns the expectation that a purchaser of a freehold would be able to grant voluntary lease extensions to non-participating tenants at a premium, both Ms Doliveux and Mr Zurawel agreed that hope value can extend to a potential development opportunity. This, they agreed, was recognised by the Court of Appeal in *Cravecrest Limited v Trustees of the Will of the Sixth Duke of Westminster* [2013] EWCA Civ 731 in the context of the collective enfranchisement of a house laid out as flats which was worth substantially more if subsequently converted to a single residence by the nominee purchaser following enfranchisement.

36. Ms Doliveux suggested that the relevant test that the Tribunal should apply was to first consider whether, if placed on the open market before a notional third buyer, the lessee's potential to develop the basement area, with the freeholder's permission, could attract value to the freehold title. If so, the second step was what, on the evidence, would be a fair price for such value.

37. In our view that formulation is not quite correct. We agree with Mr Zurawel that the first question is not whether or not the potential to develop attracts value. It is, rather, whether a hypothetical purchaser would increase his or her bid to reflect the potential of unlocking development value *by doing a deal with the lessee* (see paragraph 30 of *Cravecrest*). If there is such potential then the second question is what sum a hypothetical purchaser would pay for the prospect of being able to profit from that development value by doing a deal with the lessee. It

seems to us that the need to address the second question only arises if the evidence indicates that there is genuine potential value in the development being proposed. Clearly, if this is not evidenced then a hypothetical purchaser would not increase his or her bid.

38. We have no hesitation in concluding that on the evidence before us the Respondents' case fails on the first question. We are altogether unsatisfied that the Respondents have established that there is a viable prospect of a hypothetical purchaser being able to unlock development value.

39. We agree with the Leasehold Valuation Tribunal in *Sloane* (referred to at paragraph 30 of the Upper Tribunal (Lands Chamber) decision [2011] UKUT 415 (LC)) that the characteristics to be applied to a hypothetical purchaser are that of a "cautious and prudent investor". In our view such a purchaser is highly unlikely to consider that the suggested conversion of the basement area into a studio flat is feasible or, even if it is feasible, that such a conversion would be economically profitable as the Respondent suggests.

40. The existing basement area is very small and if conversion works took place would be made even smaller by the need to install tanking. There is no evidence before us as to how this would impact on the size of the area. Whilst there is some natural light entering the flat this is clearly very limited and whilst Mr Murphy suggested that this might be improved upon through the use of thinner window mullions it seems to us that this is unlikely to result in a significant improvement.

41. There is no evidence before us as to whether or not the suggested excavation works to get over the problem of restricted head height are feasible nor as to whether or not underpinning would be required to the dividing wall. There is no evidence before us as to how the need to install sanitary installations would be dealt with nor as to how the water installation would be converted and the stopcock located in the basement relocated.

42. No approach had been made to the local authority to seek planning permission and if, as not challenged by the Respondents, the Property is in a Grade 2 listed building, subject to an Article Four Direction and located in a Conservation Area there would appear to be formidable hurdles to overcome to secure such permission given the terms of the Council's Supplementary Planning Document relating to Basement Developments. Given that Mr Murphy, quite frankly, admitted that he had not had specific regard to any of these potential hurdles when making his 50% deduction to reflect planning risk we have no confidence that his deduction is an appropriate one given his acknowledged lack of expertise in planning matters. Nor does his calculation have specific regard to likely objections from the other

lessees in the property given the likely very significant disruption to their quiet enjoyment of their flats.

43. Given the paucity of evidence before us we consider the Respondent has fallen far short of establishing that a conversion of the basement area into a studio flat is practically viable and that there would be any economic value in such a development for a hypothetical purchaser.

44. The situation in this case is far removed from that in *Cravecrest* where it was agreed between the parties that there was potential to develop the roof space above the upper floor flat, so as to provide a fourth floor for the Property and where full planning permission and listed building consent were already in place.

45. It is also far removed from the situation before the Upper Tribunal in *Sloane* where, as well as valuation evidence, the tribunal had the benefit of evidence from a structural engineer, two chartered surveyors, an architect and a witness of fact as to the actual proposal in mind.

46. We are not suggesting that such detailed evidence should have been provided by the Respondents in this case. This would clearly disproportionate given the nature of the suggested development. However, the evidential burden on proving that they are entitled to they payment they seek rests with the Respondents. They should have, but did not, produce satisfactory evidence that there was a reasonable development opportunity here for a hypothetical freeholder. Such evidence could have included one or more of the following: costed proposals for development; a plan of the proposed development; evidence of an approach to the planning department of Islington Council to get an indication as to whether or not planning permission was possible; evidence of any similar conversions in the area; an opinion from an architect or building surveyor even if in outline form; or comparable evidence of similar conversions and evidence of sales of such flats.

47. Instead, what the Tribunal is being asked by the Respondents to assume, without any substantive evidence to support the assumption that simply because there is a basement area present that it must have some development potential. Ms Doliveux suggested that if a hypothetical purchaser was looking to purchase one of two identical properties, one with a basement storage area and one without, then it would obviously choose the one with potential for development. However, on the facts of this case not only is such an assumption *"speculative and difficult to calculate"* as Mr Murphy stated in his report but the assertion that there is genuine potential value in the development being proposed it is simply not supported by the evidence presented to us. Given the very small scale of this development and the small margin of profit, even by Mr Murphy's assessment, the prospect of

unlocking such value is too remote a possibility on the evidence provided.

Rule 13 Costs

48. At the hearing Mr Zurawel stated that he was instructed to make an application under 13(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") for wasted costs under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 Act. This was on the basis of his submission that the reason why the hearing of this application went into a second day was because his opponent, Ms Doliveux, was unable to properly assist the Tribunal, when asked as to the statutory basis on which development hope value can potentially be payable to a freeholder on collective enfranchisement.

49. The Tribunal indicated that the issue with which it asked for assistance was raised quite late in the afternoon on the first day of the hearing and that given that both counsel had yet to conclude their closing submissions that we considered it was likely that the hearing would have proceeded on to a second day in any event. Mr Zurawel's response was that he would relay that indication to his solicitors to see if they wanted to proceed with that suggested application.

50. The Tribunal directs that if, the Applicants wish to seek costs under Rule 13(1)(a) or (b) of the 2013 Rules it should make an application to the Tribunal within the 28-day time limit specified in Rule 13 and the Tribunal will issue further directions for the disposal of any such application.

Name: Amran Vance **Date** 3 March 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Annex 1

Leasehold Reform, Housing and Urban Development Act 1993

24 Applications where terms in dispute or failure to enter contract

(1) Where the reversioner in respect of the specified premises has given the *nominee purchaser* [RTE company]—

(a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 22(3) or section 23(5) or (6),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, the appropriate tribunal may, on the application of either the *nominee purchaser* [RTE company] or the reversioner, determine the matters in dispute.

Schedule 6 Part II

Freehold of Specified Premises

Price payable for freehold of specified premises

2

(1) Subject to the provisions of this paragraph [where the freehold of the whole of the specifies premises is owned by the same person], the price payable by the *nominee purchaser* [RTE company] for the freehold of [those] premises shall be the aggregate of—

(a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3,

(b) the freeholder's share of the marriage value as determined in accordance with paragraph 4, and

(c) any amount of compensation payable to the freeholder under paragraph 5.

(2) Where the amount arrived at in accordance with sub-paragraph (1) is a negative amount, the price payable by the *nominee purchaser* [RTE company] for the freehold shall be nil.

Value of freeholder's interest

3

(1) Subject to the provisions of this paragraph, the value of the freeholder's interest in the specified premises is the amount which at [the relevant date] that interest might be expected to realise if sold on the open market by a willing seller (with [no person who falls with sub-paragraph (1A)] buying or seeking to buy) on the following assumptions—

(a) on the assumption that the vendor is selling for an estate in fee simple—

(i) subject to any leases subject to which the freeholder's interest in the premises is to be acquired by the *nominee purchaser* [RTE company], but

(ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the *nominee purchaser* [RTE company];

(b) on the assumption that this Chapter and Chapter II confer no right to acquire any interest in the specified premises or to acquire any new lease (except that this shall not preclude the taking into account of a notice given under section 42 with respect to a flat contained in the specified premises where it is given by a person other than a *participating tenant* [participating member of the RTE company]);

(c) on the assumption that any increase in the value of any flat held by a *participating tenant* [participating member of the RTE company] which is attributable to an improvement carried out at his own expense by *the tenant* [the member] or by any predecessor in title is to be disregarded; and

(d) on the assumption that (subject to paragraphs (a) and (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the conveyance to the *nominee purchaser* [RTE company] of the freeholder's interest is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to Schedule 7.

[(1A) A person falls within this sub-paragraph if he is—

(a) the *nominee purchaser* [RTE company], or

(b) a tenant of premises contained in the specified premises, or

[(ba) an owner of an interest which the *nominee purchaser* [RTE company] is to acquire in pursuance of section 1(2)(a), or]

(c) an owner of an interest which the *nominee purchaser* [RTE company] is to acquire in pursuance of section 2(1)(b).]

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made as to the matters specified in paragraphs (a) to (d) of

that sub-paragraph does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at [the relevant date] the freeholder's interest in the specified premises might be expected to realise if sold as mentioned in that sub-paragraph.

(3) In determining that amount there shall be made such deduction (if any) in respect of any defect in title as on a sale of the interest on the open market might be expected to be allowed between a willing seller and a willing buyer.

(4) Where a lease of any flat or other unit contained in the specified premises is to be granted to the freeholder in accordance with section 36 and Schedule 9, the value of his interest in those premises at [the relevant date] so far as relating to that flat or other unit shall be taken to be the difference as at that date between—

(a) the value of his freehold interest in it, and

(b) the value of his interest in it under that lease, assuming it to have been granted to him at that date;

and each of those values shall, so far as is appropriate, be determined in like manner as the value of the freeholder's interest in the whole of the specified premises is determined for the purposes of paragraph 2(1)(a).

(5) The value of the freeholder's interest in the specified premises shall not be increased by reason of—

(a) any transaction which—

(i) is entered into on or after the date of the passing of this Act (otherwise than in pursuance of a contract entered into before that date), and

(ii) involves the creation or transfer of an interest superior to (whether or not preceding) any interest held by a qualifying tenant of a flat contained in the specified premises; or

(b) any alteration on or after that date of the terms on which any such superior interest is held.

(6) Sub-paragraph (5) shall not have the effect of preventing an increase in value of the freeholder's interest in the specified premises in a case where the increase is attributable to any such leasehold interest with a negative value as is mentioned in paragraph 14(2).