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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/OOAH/OCE/2013/0081**

Property : **223 Brighton Road, Purley,
Surrey CR8 4HF**

Applicants : **Mr N. Douglas and Ms L. Croissant
(leaseholders and joint nominee
purchasers)**

Representative : **Mr T. Bishop of counsel instructed
by Ms A. Mills solicitor of Streeter
Marshall (solicitors) with valuation
evidence from Mr R. Sumner of
Arnold and Baldwin (chartered
Surveyors)**

Respondent : **Ms L. Anand (landlord)**

Representative : **Mr K. Kumar of Cheal Asset
Management Limited**

Type of Application : **Application for the determination
of the premium payable made
under section 24 Leasehold
Reform, Housing and Urban
Development Act 1993 (the '1993
Act') and for a determination of
costs under section 33 of the 1993
Act and a determination of costs
under Schedule 12 of the
Commonhold and Leasehold
Reform Act 2002 (the '2002 Act')**

Tribunal Members : **Professor James Driscoll, solicitor
(Tribunal Judge) and Mr Charles
Norman FRICS (Valuer Chair
sitting as a Member)**

Date and venue of Hearing : **20 August 2013 at 10 Alfred Place, London WC1E 7LR**

Date of Decision : **4 September 2013**

DECISION

Summary of the decision

1. The premium payable for the acquisition of a new lease of the subject premises is the sum of £10,934 (Ten thousand, nine hundred and thirty four pounds).
2. The nominee purchasers are to pay the sum of £700 (plus VAT if applicable) towards the landlord's costs under section 33 of the 1993 Act.
3. The landlord is to pay the sum of £500 towards the costs of the nominee purchasers under Schedule 12, paragraph 10 of the 2002 Act.
4. The net liability of the nominee purchaser's costs is the sum of £200 (plus VAT if applicable).

Background

5. This is an application under section 24 of the 1993 Act for the determination of the price payable for the acquisition of the freehold of the subject property. At the hearing the tribunal also agreed to determine the costs payable by the nominee purchasers under section 33 of the 1993 Act and to determine whether the landlord should contribute to the nominee purchaser's costs under Schedule 12 of the 2002 Act.
6. The applicants are respectively the leaseholders of Flats 1 and 2 in the subject premises which was originally built as a house but later converted in a block of three flats. Together they are acting as the nominee purchaser to acquire the freehold of the subject premises under section 15 of the 2002 Act. Flat 3 is owned by a Mr K. Anand who is not participating in the enfranchisement claim. Each of the participating leaseholders has a qualifying long lease under section 5 of the Act.
7. The respondent is the owner of the freehold and the landlord under the leases of the three flats.
8. In a notice given under section 13 of the 2002 Act, dated 17 October 2012 , the nominee purchasers claimed the freehold of the subject premises and

proposed to pay the sum of £9,823 for the freehold and an additional sum of £1 for the communal and other areas referred to in clause 3 of the notice.

9. In a counter-notice given under section 21 of the 1993 Act, dated 24 December 2012, the landlord admitted the claim but proposed the sum of £30,500 as the premium. The counter-notice was given by Cheal Asset Management Limited who are the managing agents for the landlord.

The application and the hearing

10. As the parties could not agree on the premium, the extent of the property to be acquired, nor the terms of the transfer, the nominee purchaser applied to the tribunal under section 24 of the 1993 Act 22 April 2013. Standard directions were given by the tribunal on 13 May 2013 with a hearing date arranged for the 21 and 22 August 2013.
11. At the hearing the nominee purchaser was represented by counsel and solicitors whose details are set out above. Also in attendance was their expert witness Mr Sumner and Mr Scarratt his assistant.
12. The landlord was represented by Mr Kumar whose company (Cheal Asset Management Limited) represents the landlord. He told us that he would give evidence on the valuation.
13. We were told that the terms of the transfer had been agreed between the solicitors advising the landlord, Mr Harman a consultant solicitor with Jury O'Shea LLP solicitors, and we were referred to an email Mr Harman sent to Mr Harrington of Streeter Marshall the solicitors for the nominee purchasers. We were also told that the sole issue to be determined was the premium to be paid for the acquisition of the freehold.
14. However, at the beginning of the hearing, Mr Bishop, counsel for the nominee purchaser, handed us a written submission seeking an order for costs under regulation 13 of the Tribunal Procedure (First-tier) (Property Chamber) Rules 2013. He also had submissions to make on the payment of the landlord's costs under section 33 of the 1993 Act. Although this was not included in the application to the tribunal we decided that we would accept jurisdiction and hear argument from both sides on these costs issues. Mr Kumar agreed with this course of action. Mr Bishop also told us that his clients have concerns that the landlord might seek to recover the costs incurred in these tribunal as a future service charge.

Preliminary issue

15. Another concern expressed by Mr Bishop, is that the applicants had been led to believe that the landlord admitted the entitlement to claim the freehold. However, in a letter dated 14 August 2013, Cheal Asset Management Limited challenged the validity of the applicant's section 13 notice arguing that it contained incorrect information about the details of the lease of flat 3 (the flat owned by Mr Anand and they argued that the

proposed premium was incorrect). Mr Bishop, counsel for the applicants, addressed us on this issue and he elaborated on the points made in written submissions dated 20 August 2013 a copy of which he gave us with a copy to Mr Kumar.

16. He accepts that the information on the lease of flat 3 is in some respects inaccurate (in that it states that the lease is for a term of 99 years which should have read 999 years) but he contends that as the landlord had served a counter-notice admitting the claim that she was now estopped from denying the validity of the notice. In any event applying the 'reasonable recipient' test (for which counsel cited the leading case of *Mannai Investment v Eagle Star* [1997] A.C.) that the landlord could not have been misled by this inaccuracy. Moreover, applying paragraph 15 of Schedule 3 to the 1993 Act, the inaccuracy does not invalidate the section 13 notice of claim.
17. Mr Kumar insisted that the notice was invalid as a result of which this tribunal has no jurisdiction to consider the application. In his submission the nominee purchasers would have to serve a fresh notice and restart the claim.
18. We had little hesitation in concluding as a preliminary issue that the notice is valid. The mistaken reference to the term of the lease was an obvious error but not one that invalidates the section 13 notice. Under Schedule 3 of the 1993 Act, it is an inaccuracy that does not invalidate the notice. Further, the landlord admitted the claim in the counter-notice and we think it unfortunate that those advising the landlord left it until less than a week before the hearing to raise this as an issue. We cannot see what possible prejudice the landlord suffered by a mistaken reference to the term of one of the leases. Accordingly we told the parties that we are satisfied that the notice was valid and that we have jurisdiction to hear submissions and evidence over the matters in dispute.
19. Mr Bishop also told us that there has been no exchange of valuation reports as required by the directions. Mr Kumar told us that the landlord had instructed the firm of AG Chartered Surveyors to advise on valuation. However, the landlord had decided not to rely on that valuation, or to call the valuer concerned (Mr C. Smith FRICS) to give evidence. The landlord had also decided not to use her solicitors to represent her at the hearing. These decisions were reached to avoid additional professional costs. As the landlord was not calling Mr Smith to give expert evidence Mr Kumar told us that he considered that he did not have to disclose the report. He had prepared a report on which he would rely later in the hearing.

Mr Sumner's evidence

20. Mr Bishop called Mr Sumner to give his valuation evidence. Mr Sumner spoke to his report and although it was undated he told us that it was completed on 9 August 2013. He told us that he has five years experience in advising on new lease and enfranchisement claims. He has both an undergraduate degree and a Master's degree in real estate and he is studying to become a member of the Royal Institution of Chartered

Surveyors. Mr Sumner gave his evidence and he answered various questions from Mr Kumar and from the tribunal.

21. He has used a 7% capitalisation rate to value the ground rent income that will be lost once the transfer of the freehold takes place. This is based on his experience in negotiating claims and from examining the results of auction sales of freehold reversions.
22. As for the deferment rate he proposes a rate of 5.75% based on his interpretation of the decisions on deferment rates propounded in the *Sportelli v Cadogan* litigation and in a later decision of the Upper Tribunal in *Zuckermann v Calthorpe Estate* [2011] L & TR 12 (UT) case where the Tribunal applied an additional 0.5% to the Sportelli 4.75 basic rate to which he proposes to add 0.5% instead of the 0.25% propounded in Sportelli as there is a lower growth rate in Croydon than in prime central London and an additional 0.5% instead of 0.25% to reflect the greater risks involved in flat management. This results in his conclusion that the deferment rate to be applied to this case is 5.75%.
23. Turning to the relativity rate he used the research report published by the RICS (October 2009) which analyses various graphs of relativity. He excludes the graphs relating to prime central London because of the locality of the subject property and he then takes the average of the other graphs which produces a relativity of 95.08%.
24. As to values, he describes the subject property as a mid-terrace inter-war house with rendered walls under a pitched tiled roof. From a photograph he supplied the appearance was rather shabby. In answer to a question from the tribunal, Mr Sumner did not consider it necessary to make an adjustment in respect of tenants' improvements.
25. The recent history is that one flat was left vacant for over two years and was sold in poor condition at auction in July 2012. He put forward various examples of sales which we comment on below in giving our reasons for our decision.
26. As Flat 3 is held on a very long lease (975.17 years unexpired at the valuation date) he contends that the reversionary value is nil. (The tribunal also records that there can be no marriage or hope value arising from Flat 3 because it is not participating in the enfranchisement and the unexpired term exceeds 80 years).
27. Mr Sumner also stated in his report that the [virtual] freehold vacant possession value of Flat 3 would be in the range of £110,000 - £120,000.
28. During the lunch adjournment Mr Sumner produced a further written analysis of his comparable evidence.
29. In relation to the possibility of Flat 3 generating a future ground rent, Mr Sumner considered that the possibility was too remote to give rise to any current value. We comment on this further below.

Mr Kumar's submissions on the valuation

30. Mr Kumar then addressed us. In answer to our questions he told us that he is not professionally qualified as a surveyor or a valuer. However, he considers that as he has a long experience in property matters that he is in a position to give expert evidence.
31. We examined his report which he describes as an expert valuation report. We were very surprised to see that much of it consists of extracts from a report prepared by Mr Smith (referred to in paragraph 19 above). One such extract relating to the values of the three flats had been altered as Mr Kumar had inserted different figures.
32. Even though he has used sections from a valuer's report he told us that the valuation report prepared by Mr Smith is privileged from production though we insisted on seeing a copy. When he eventually passed us a copy we were able to confirm that a substantial part of the document proffered by Mr Kumar was based on the valuation analysis by Mr Smith (who was not called to give evidence). In these circumstances we decided that we could give no weight to Mr Kumar's evidence (except for a point on the rent payable under the lease for flat 3 which we come back to later in this decision). He is not professionally qualified as a valuer and his purported expert report is based primarily on a report prepared by someone else who was not called to give evidence. It is extremely unfortunate that Mr Kumar presented this as if it was his own work.
33. Nor can we give any weight to Mr Smith's report because he had not been called, his report was not prepared for the purpose of disclosure in these proceedings and consequently did not comply with the formalities required of an experts' report. Nor was he available to answer questions. (None of these comments are to be taken as any criticism of Mr Smith).

Reasons for our decision

34. Turning to the evidence given by Mr Sumner we accept that the capitalisation of the ground rent should be at 7% and we base this on our own professional knowledge and experience. The ground rent income is modest and would not have any particular attractions for an investor.
35. We disagree with Mr Sumner that this is an appropriate case for a departure from the standard *Sportelli* generic rate of 5%. Whilst the Upper Tribunal has stated that a departure may be justified where the evidence supports this (and the property is outside prime central London) we do not agree with Mr Sumner that there is any evidence that justifies such a departure in this case. As we pointed out to him at the hearing the UT has recently ruled that the additional allowance for flat lease management risks should be limited to 0.25% (see: *Voyvoda v Grosvenor West End Properties and 32 Grosvenor Square Limited* [2013] UKHT 0334 (LC)). Nor was there

any other evidence to support any departure from the generic rate. We conclude that the appropriate deferment rate is 5%.

36. For the reasons given in his evidence we accept Mr Sumner's evidence that a relativity of 95.08% should be applied to this case.
37. As to the evidence of the freehold vacant possession values of flats 1 and 2, nine comparables based on sales evidence were put forward by Mr Sumner, of which relied on eight at the hearing as one had not transacted. Many of the comparables were modern purpose built properties dating from the 1980's and 1990s and two related to the modernised and converted former town hall.
38. The tribunal did not find these comparables to be of assistance because their nature was so different from the subject property. In the case of two properties put forward, the lease terms were stated as unknown. The tribunal is not in position to speculate about a matter such as that and was therefore unable to rely on those comparables for that reason.
39. The comparables that the tribunal found helpful are Flat 1 57 Brighton Road in respect of one bed-roomed flats and 71a Stoats Nest Road Coulsden in respect of two bed-roomed flat values.
40. Number 71a Stoats Road Coulsden is a purpose built block, which appears to date from the early 1970s. It was sold on 4 March 2013 for £164,000 including a share of the freehold with 125 years unexpired. This block of flats is in a more attractive and quieter location than the subject property and is more modern. However, the tribunal considers that the flat roof is a significant disadvantage as it will result in higher life cycle maintenance costs. Balancing these factors, the tribunal considers that overall 71a Stoats Road would be worth 5% more than the two bed-roomed flat in 223 Brighton Road Purley.
41. After rounding therefore, the tribunal finds that the virtual freehold vacant possession ("FHVP") values for 233 Brighton Road Purley are as follows: Flat 1 Ground Floor 2 bed-roomed £155,800 say £156,000; Flat 2 First floor 1 bed-roomed - £119,000. We agree with Mr Sumner that the reversionary value for Flat 3 is so remote as to have no value. We also accept the lowest point in his range of FHVP values for Flat 3. Accordingly we find that this was £110,000. (We do not accept Mr Sumner's submission that there should be a differential in value between freehold and virtual freehold values.)
42. We return to the issue of the ground rent for Flat 3. Copies of all three leases were included in the applicant's bundle. The lease for Flat 3 includes an unusual (in our experience) rent review clause which provides for defined increases. It also provides that the rent is reduced to a nominal rent for so long as Mr Anand, his heirs, or his personal representatives (or any company in which he, his heirs or personal representatives hold a minimum of 5% of the share capital). During the hearing Mr Kumar indicated that there should be a payment representing the value a hypothetical purchaser

might place on this, that is the future prospect that Mr Kumar or heir are no longer connected with the property in which case the rent review clauses would take effect.

43. We have considered this and accept that in principle it could have a value in the sense of what we will loosely call a type of 'hope value'. However, Mr Kumar did not adduce any evidence of what it might be worth. In any event we have concluded that the wording of the clause is so wide that the hypothetical purchaser would conclude that the prospects of the ground rents becoming payable are so remote as to have no value. Further, this clause is in our experience highly unusual and we conclude that the hypothetical purchaser would approach the prospect of any future potential ground rental stream with great caution. We therefore accept Mr Sumner's evidence on this point that this does not affect the valuation in this case.
44. We determine that the premium payable is the sum of £10,934. A copy of our valuation is appended to this decision.
45. Finally, we deal with the costs issues.
46. First, we consider the liability of the nominee purchasers for the landlord's professional costs under section 33 of the 1993 Act. The landlord is entitled to the costs of undertaking a valuation in order to respond to the initial notice given under section 13 of the 1993 Act (see section 33(1)(d) of the 1993 Act). There is an important qualification to these costs liabilities in section 33(2) that is that such costs can only be considered reasonable to the extent that the actual costs would have been incurred by the landlord if she was personally responsible for them. We do not think that the landlord would have agreed to pay their valuer's fee of £800 for a fairly simple valuation of, effectively, two flats. Having regard also to our own professional knowledge and experience we consider that the reasonable fee for the initial valuation is the sum of £400 (plus VAT if applicable).
47. As to the legal costs that may have been incurred, we note that the counter-notice was drafted by Cheal Asset Management Limited so no legal costs were incurred under section 33(1)(a), (b) or (c) of the 1993 Act. We note that the landlord has incurred legal costs in agreeing the draft transfer of the freehold. Again, we consider that as the title is registered, this approval is a relatively simple matter which would have taken a reasonably experienced solicitor no more than one hour. We do not think that the landlord would expect to pay more than that. Accordingly, we determine that the nominee purchaser should pay the sum of £300 (plus VAT if applicable) under section 33 (1)(e) of the 1993 Act.
48. Mr Bishop of counsel urged us to make a costs order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 which came into force on 1 July 2013. He submitted a bill amounting to some £8,000. However, as we pointed out to him during the hearing, under the transitional provisions, this new costs rule does not apply to the hearing of an application that takes place during the first six months of the commencement of the new rules as is the case here. During this six month

transitional period the provisions in paragraph 10 of Schedule 12 to the 2002 Act continue to apply. This allows the tribunal to make a costs order against a party who has acted ‘..acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings’ (paragraph 10(2)(b)).

49. We consider that Mr Kumar and his company acted unreasonably in several respects and as follows: failure to serve a valuation report in accordance with the directions, raising a challenge to the section 13 notice less than a week before the hearing (having previously agreed that the applicants are entitled to enfranchise) and submitting a valuation report which was an unauthorised version of a professional surveyors work, amended by Mr Kumar, and presented to the tribunal as if it was his own work.
50. This should have been a relatively straightforward claim where at first it appeared that the only issue to be determined was the premium to be paid. With all of these matters in mind we determine that the landlord pays the sum of £500 in costs to the nominee purchaser.
51. The net result is that the nominee purchaser is to pay section 33 costs totalling £700 (plus VAT if applicable) less the £500 owing from the landlord which produces a net figure of £200 (plus VAT if applicable).
52. As to the applicant’s concerns that the landlord will seek to recover her costs of this application the short answer is that under section 33(5) of the 1993 Act such costs cannot be recovered in connection with these proceedings. In any event the landlord chose not to use her solicitor or the valuer she had appointed to advise her and has not, therefore, incurred any professional costs.

Judge James Driscoll and Charles Norman FRICS
4 September 2013.

APPENDIX III

**IN THE MATTER OF THE COLLECTIVE ENFRANCHISEMENT OF 233 BRIGHTON ROAD PURLEY SURREY CR8 4HF
VALUATION BY THE FIRST TIER TRIBUNAL**

Date of Valuation	17-Oct-2012		
Leases expiry Date	24-Dec-2087		
Unexpired Term	75.19 years		
<i>Virtual Freehold Values of Flats 1 and 2:</i>			
Flat 1	£	156,000	
Flat 2	£	119,000	
Aggregate value			£ 275,000
Value of 75.19 year leases @ 95.08% of virtual freehold value	£	261,470	
Ground rent capitalisation rate	7.00%		
Reversionary deferment Rate	5.00%		
Premium Payable			

Value of Freeholder's Present Interest

Term 1

Ground rent		£	200.00 per annum	
9.19 Years' Purchase	@	7.00%	6.6144	
				£ 1,322.88

Term 2

Ground rent		£	400.00 per annum	
33 Years' Purchase	@	7.00%	12.7538	
PV £1 in 9.19 years	@	7.00%	<u>0.537</u>	
			6.84879	£ 2,739.51

Term 3

Ground rent		£	600.00 per annum	
33 Years' Purchase	@	7.00%	12.7538	
PV £1 in 42.19 years	@	7.00%	<u>0.05758</u>	
			0.73436	£ 440.62

Reversion

value of virtual freehold flats		£	275,000	
Present Value of £1 in 75.19 years time @ 5%			0.02551	
				£ 7,015.25
				£ 8,338.13

Calculation of Marriage Value

Value of Proposed Interests

Leaseholders	
value of virtual freehold flats	£ 275,000.00
Freehold after sale	<u>NIL</u>
Total Value of Proposed Interests	£ 275,000.00

Value of Present Interests

Leaseholders	
Value of the aggregate value of the existing leases see above	£ 261,470.00
Freeholder (see above)	£ <u>8,338.13</u>
Total Value of Present Interests	£ 269,808.13

Hence Marriage Value, Difference Between Proposed and Present Interests £ 5,191.87

Divide Marriage Value equally between the Parties £ 2,595.94

Hence Premium Payable for Collective Enfranchisement is £ 10,934.07

say £10,934