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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	PJ/LON/00AW/OCE/2013/0201
Property	:	75 Eardley Crescent, London SW5 9JT
Applicant	:	Crescent Enterprises (London) Limited
Representative	:	Thackray Williams
Respondent	:	Sinclair Gardens Investments (Kensington) Ltd
Representative	:	W.H.Matthews & Co
Type of Application	:	Enfranchisement
Tribunal Members	:	Robert Latham Luis Jarero BSc FRICS
Date and venue of Hearing	:	25 and 26 February 2014 10 Alfred Place, London WC1E 7LR
Appearance for Applicant	:	Nathanial Duckworth, Counsel
Appearance for Respondent	:	Gary Cowen, Counsel
Date of Decision	:	14 April 2014

DECISION

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1. The Tribunal determines that as a matter of principle no additional marriage value is payable arsing from the works executed by the lessees of Flats A, E and G.

2. If the Tribunal is wrong on this, the Respondent has failed to prove, on the evidence before the Tribunal, that any sum is payable on the facts of this case.

3. The Tribunal declines to make any costs order against the Respondent on grounds of their unreasonable conduct in their conduct of these proceedings.

Introduction

1. This is an application pursuant to Section 24(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"), of the terms of acquisition of the Applicant's collective enfranchisement claim. Counsel appeared for both parties, Mr Nathanial Duckworth instructed by Thackray Williams for the Applicant and Mr Gary Cowen instructed by W.H.Mathews & Co for the Respondent. Both parties provided Skeleton Arguments. Mr Duckworth also provided written Outline Closing Submissions. The Tribunal are grateful for the assistance provided by both Counsel.

2. The only substantive issue between the parties is whether the Respondent is entitled to recover an additional component of marriage value associated with various works which have been undertaken to three of the participating tenants' flats which the Respondent asserts were undertaken without its consent and/or involve some element of trespass.

3. The parties are agreed that a premium of £138,616 is payable in respect of the enfranchisement. The Respondent contends that the marriage value should be increased by £82,500 as a result of these unauthorised works. The basis of the argument is as follows. It is suggested that, for example, the unauthorised works to Flat A has increased the value of the flat by £50,000. The lessee seeking retrospective consent for the works faces two options: (i) to reinstate the flat to the layout as originally demised; or (ii) pay the sum demanded by the landlord. The landlord is in such a strong bargaining position, that the tenant would pay a premium equivalent to the full enhancement in the value of the flat, thus obtaining the consent that he needs and thereby avoiding the cost and delay in litigation.

4. The Applicant makes two submissions in response:

   (i) As a matter of principle, it is not open to the Respondent to claim additional marriage value in these circumstances;

   (ii) If it is payable, the Respondent has failed to prove, on the evidence before the tribunal, that any sum is payable on the facts of this case.

   The Applicant contends that the reversioner is seeking no more than an unjustified windfall.

5. There have been three procedural issues to be determined:

   (i) The Respondent applied for an adjournment so that the Tribunal could give further directions for the determination of this issue. We refused this application.

(ii) On the second day of the hearing, the Respondent applied to reopen its case and call further evidence. We refused this application

(iii) At the end of the hearing, the Applicant indicated that it intended to make an application for costs on the grounds of the unreasonable manner in which the Respondent has conducted these proceedings pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "Tribunal Procedure Rules"). We agreed to determine this on the basis of written representations. The Applicant submitted their written submission on 5 March; the Respondent replied on 11 March. We refuse this application.

6. We annexe the relevant statutory provisions to this decision.

The Application

7. On 2 April 2013, the Applicant served its Section 13 Initial Notice by qualifying tenants of its claim to exercise the right to collective enfranchisement of the specified premises at 75 Eardley Crescent (at p.1). On 13 May, the Respondent, reversioner, served its Section 21 Counter-notice (p.10). The Respondent admitted the participating tenants' right to exercise the right of collective enfranchisement. It disputed the purchase price. The Respondent did not dispute the right of the lessees of Flats A, E and G to be participating tenants. Neither did it suggest that it was contemplating any legal proceedings against these lessees for either forfeiture or injunctive relief. On 19 September, the Applicant issued its application to this Tribunal (at p.11).

8. On 2 October, the Tribunal issued its standard directions without a hearing (at p.22). These Directions are sufficient for most enfranchisement applications. However, if additional directions are required, it is for the party requiring such directions to make the appropriate application. The critical direction in this case is paragraph 3:

> "The parties' valuers must by 15th November have exchanged valuations and met to narrow the issues in dispute".

9. On 25 October, the parties agreed the terms of the draft transfer (see p.215). The only outstanding issue was the premium payable. The Applicant instructed Andrew Pridell FRICS; whilst the Respondent instructed Mr Geof Holden FRICS. References to their reports are prefixed by "AP" and "GH". Both experts know each other and are experienced expert witnesses. They met formally on 3 December and discussed the case informally when they met at a social gathering on 19 December. Mr Pridell had been instructed relatively late in the day and had worked to the lease plans. Mr Pridell explained that when they

met, they had discovered that whilst he had valued Flat A as a one bedroom flat, Mr Holden had valued it as having two bedrooms. Mr Holden responded that it was apparent that alterations had been made to at least one of the flats and that he would need to take instructions as to the consequences of this. The lessee of Flat A had no knowledge of there being any breach.

10. On 18 December, the Tribunal had set the matter down for hearing on 25 and 26 February. On 5 February, Mr Holden sent Mr Pridell a draft statement of the issues in dispute. This specified the current layout of the flats compared with the original lease plans. It was no more than a factual comparison. It did not seek to set out the legal case that the Respondent proposed to raise or the valuation issues arising from this.

11. On 11 February, the Thackray Williams belatedly sought to prepare the matter for trial. This is the date on which an Agreed Bundle of Documents should have been filed. The Solicitor wrote to the Tribunal seeking an extension until 14 February (see p.277). On 13 February, the Solicitor sent two letters to W.H.Mathews. The first enclosed a copy of the letter to the Tribunal and asked for the Respondent's expert report and Summary of Agreed Issues in Dispute (p.276). The second letter sought confirmation that the premium had been agreed at £139,110 (p.278). Both letters were faxed to the wrong offices of W.H.Matthews and may not have been received in the right office until the Monday (17 February).

12. On 17 February, W.H.Matthews sent Thackray Williams a letter stating that the Valuers were close to agreeing a Statement of Agreed Facts. The final paragraph read: "Indeed your client's Valuer has proposed a Case Management Conference by Consent on 25th February to give directions as to the matters remaining in issue" (p.279). This letter was sent by DX and was received next day.

13. On 18 February, W.H.Matthews wrote that the Valuers had agreed a premium, subject to "any increase in the marriage value by reason of the ability of the tenants to (i) grant new leases which will extend their demises to include parts of the land onto which they have trespassed and/or (ii) waive existing breaches of covenant in respect of which retrospective Licences to Alter are required". The Solicitor proposed a CMC by consent on 25 February. The letter enclosed a Notice to Admit (at p.281) which contained allegations that three flats had carried out works without consent; that Flat G's works additionally involve a trespass; that the Respondent retained a subsisting right to forfeit all three leases and set out figures which are said to represent (a) the increase in value of the flat consequential on the works and (b) the cost of reinstatement. This was again sent by DX and was received on 19 February, six days before the date fixed for the hearing.

14. On 20 February, three events occurred. The experts agreed their Joint Statement of Agreed Facts (Flat Alterations) (at p.270q). Thackray Williams faxed a draft Index to the Bundle of Documents (p.285). Mr Pridell finalised his report. On 21 February (Friday), Mr Pridell prepared the Statement of Agreed Facts. Thackray Williams wrote stating that they were ready to exchange their Expert's Report (p.284). They requested sight of the Respondent's Report as they were in a difficult position without sight of their evidence. In a second letter, Thackray Williams responded to the Respondent's letter of 18 February. The Applicant was surprised at the suggestion that there should be a CMC. They stated that the issue of the premium that was payable was suitable for determination on that date. They could see no justification for referring the matter to the Upper Tribunal.

15. On 24 February, the experts agreed the Statement of Facts (at p.270ae). This included agreement on the unimproved freehold vacant possession values of the seven flats and the premium payable of £138,616 ignoring any increase in respect of unauthorised alterations. The experts exchanged their reports. The outstanding issue to be determined was stated to be:

> "Additional payment to the freeholder to reflect retrospective loss of licence fees in regard to alleged unauthorised alterations to Flats A, E and G. AP contends that there is a question of law which he is not competent to argue or resolve that in principle it is permissible to have regard to these matters when assessing the Respondent's premium under the 1993 Act's provisions. GH contends for additional elements in either the marriage value or as compensation."

The Application for the Adjournment

16. Mr Cowen, for the Respondent, applied for an adjournment to properly formulate his case on the marriage value that it now contended was payable. He did not advance his argument that the matter should be advanced to the Upper Tribunal. He accepted that the Respondent had not notified the Tribunal that an adjournment would be sought. When asked by the Tribunal, he stated that he had no instructions to pay the costs thrown away by the adjournment. He recognised that the outstanding issue raised mixed issues of fact, law and valuation. The factual issues extended to whether the works had been carried out without consent, whether any trespass had been caused, whether there had been any waiver or acquiescence, whether the landlord could reasonably refuse consent if retrospective consent was sought, whether it was open to the landlord to forfeit and if so whether relief would be granted and whether the landlord could obtain injunctive relief in respect of any trespass. The valuation issue would potentially be affected by all these factors.

17. The only fact which the experts had addressed, and agreed, was the extent of the alterations which had been made to the three flats. However, the Respondent's argument on the increase in marriage value was extreme. This would reflect the increased value of the three flats of the unauthorised works, or the reinstatement vale where this was greater, namely £100,000 (Flat G); £50,000 (Flat A); £15,000 (Flat E), the landlords share being £82,500.

18. Mr Cowen accepted that were an adjournment to be granted, further directions would be required: (i) each party to sequentially serve their respective statements of case on the new issue; (ii) disclosure and inspection; (iii) service of statements of witnesses of fact; (iv) the possibility for Notices to Admit Facts; (v) reports of experts and for experts to meet; (vi) skeleton arguments and authorities. The Tribunal suggested that this could delay the application by at least three months.

19. Mr Duckworth opposed the application. He did not suggest that the Respondent should be precluded from raising the issue or that the issue was unarguable. He rather asked the Tribunal to proceed to determine the issue on the evidence before the Tribunal. He highlighted three matters:

(i) The Reason for the Application: The landlord was not ready to advance the case that it would now like to bring. The landlord had failed to comply with the directions in failing to identify the legal point that it wished to advance, identifying its case on the assessment of the premium and ensuring that the necessary evidence was available. There was no good reason to grant the adjournment; rather, a bad one.

(ii) Fairness: The Applicant was ready to proceed. Enfranchisement would be delayed by at least 3 months. The Applicant would lose out on being the landlord. The Tribunal had no power to award additional compensation. The Applicant would incur additional costs. There was no offer to pay the costs thrown away.

(iii) The impact on the resources of the Tribunal. The Respondent had not alerted the Tribunal that the application would be made. Two days of judicial time would be lost.

20. Recognising the impact that our decision would have on the parties, we gave them a short adjournment to consider their submissions in the light of recent authorities. We notified the parties that we were refusing the adjournment prior to the lunch adjournment and gave our reasons when we resumed.

21. We had regard to the Overriding Objectives in Rule 3 of the Tribunal Procedure Rules, and in particular the following provisions:

"(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
.....

(e) avoiding delay, so far as compatible with proper consideration of the issues."

22. In refusing the application, we had regard to the following factors:

(i) Reason for the Adjournment: We were satisfied that there was no good reason for the adjournment, save for the failure of the landlord to identify the issue that it wished to raise at the appropriate time. The current issue raised mixed matters of fact, law and valuation in respect of which specific directions should have been sought as soon as the Respondent took an informed decision to argue this point.

(ii) The impact on the parties:

(a) The Landlord would be prejudiced. It would have difficulty in proving its claim for a substantial increase in marriage value. However, it was the author of its misfortunes.

(b) The Tenants would also be prejudiced for the reasons stated by Mr Duckworth. We noted that the landlord was making no offer to pay the costs thrown away. These would be significant given that this was an enfranchisement case requiring counsel, solicitors and valuers. Substantial delay and additional cost would be required if the matter were to be adjourned with appropriate directions.

(iii) The impact on the resources of the Tribunal and the parties. This had been set down for a two day hearing. The Tribunal had not been alerted to the fact that an adjournment was to be sought. In these days of financial stringency, there is a particular need for parties to minimise costs, particularly in a "no costs" jurisdiction.

The Evidence of Unauthorised Works

23. Mr Pridell and Mr Holden have agreed a "Joint Statement of Agreed Facts (Flat Alterations)" (at p.270q). The Applicant has not responded to the Notice to Admit Facts and we are satisfied that it was not obliged to do so. We heard evidence from the two experts. Neither party had served any statement of any witnesses of fact. We must therefore make factual findings on the limited evidence before us.

24. The Tribunal heard all the evidence on the first day of the hearing, Mr Cowen presenting his case first. Expert witnesses were released. Next

morning, Mr Cowen asked for a short adjournment to take instructions and we granted this. When we resumed, he applied to reopen his case and to call Mr Kelly, from the managing agents, to give evidence on the issues of breach and waiver. He had no statement from this witness. Mr Duckworth opposed the application. He stated that he had had no prior indication that this application was to be made. No proper reason had been given for the late application. The Applicant would be severely prejudiced. Mr Pridell had been released. Mr Honeyben, the tenant of Flat A had been present on the first day but had not considered it necessary to return. Having regard to the overriding Objectives, we refused this application. It would have been impossible to receive evidence from Mr Kelly without giving the Applicant the opportunity to adduce evidence in response. It would have meant adjourning the case to another date which we had already refused to do.

Flat A (Front Basement Flat)

25. The lessees are Matthew and James Honeyben. It is agreed that the following alterations have been made: removal of internal staircase, removal of some internal partition walls, construction of some internal walls, re-siting of the kitchen and bathroom, replacing the original lounge/kitchen windows. These alteration are apparent by comparing the original lease plan (26 March 1986) with the selling agents particular (January 2009) (see "GH4" at p.270w-x). The windows at the rear of the property were moved, apparently to create a window for a second bedroom. This would have involved trespass, the rear structural wall being within the demise of the landlord. Mr Holden, for the landlord, contends that the works have increased the value of the flat by £50,000. Mr Pridell gave no evidence on this.

26. The current lessees registered their leasehold interest on 12 January 2009 (see p.29). It is common ground that the works had been executed by a predecessor in title. There is no evidence as to whether these works were carried out with or without consent or whether the landlord acquiesced to the trespass. It is apparent that planning permission and building regulation would be required. There is an issue as to the accuracy of the plans. The works to the windows would have been visible externally, albeit that it is difficult to obtain access to the external area. There is no evidence as to when the landlord acquired notice of the works. The landlord has taken no action in response to the alleged breach.

Flat E (First Floor Rear Studio; also known as Flat C)

27. The lessee is Kyriaki Oudatzi. It is agreed that the following alterations have been made: removal of internal partition walls, provision of new internal partitions, re-siting of the kitchen and bathroom. There is no trespass. Mr Holden contends that the works have increased the value of the flat by £15,000; the cost of reinstatement would be similar.

28. The current lessee registered his leasehold interest on 26 October 2012 (p.46). Mr Oudatzi admits that the works were carried out without the landlord's consent. There is no evidence as to when these works were executed or when the landlord acquired notice of the works. The landlord has taken no action in response to the alleged breach.

29. The lease has been extended, a new lease of 162 years running from 9 February 2012 (see p.262). It is accepted that no marriage value is payable as the lease now has an excess of 80 years unexpired (paragraph 4(2A) of Schedule 6 of the 1993 Act). Mr Holden argued in his report that it would be "inequitable" for the tenant not to pay a sum, which he assesses at £7,500 to the landlord. Mr Cowen now concedes that this argument is hopeless and has abandoned it.

Flat G ("Third Floor" or "Roof Space" Flat, also described as "Flat 5")

30. The lessee is Nanik Daswani. It is agreed that the following alterations have been made: infill roof void to match existing; construction of roof access hatch, construction of four roof lights, provision of solar panel on roof, removal and relocation of the majority of the internal partition walls, resiting of the kitchen and bathroom. Plans showing the alterations are at "GH7" at p.270ad. The works involve a significant trespass to parts of the building retained by the landlord as the roof has been significantly altered by roofing over the original open terrace, cutting holes for the provision of skylights and the installation of a solar panel. Mr Holden contends that the works have increased the value of the flat by £75,000 and that reinstatement would cost a similar sum. He suggested that the landlord's professional fees would add to this cost. Mr Pridell gave no evidence on this.

31. Mr Daswani registered his leasehold interest on 27 April 2011 (see p.52). It is accepted that he carried out the works and did not obtain the prior consent to do so. Mr Duckworth asserted that the works started in November 2011 and were completed in February 2012. This was not accepted by Mr Cowen and we can make no finding on this point. We are, however, satisfied that a neighbour complained to the landlord about the execution of these works on 1 December 2011 (see p.292). On 12 December 2011, the Respondent wrote to the lessee about these works (p.293). The lessee provided the landlord with plans (at GH7). The Respondent required access for their Party Wall Surveyor, Andrew Westgate, to inspect the works. Mr Westgate eventually obtained access on 7 June 2012 (see p.296). The Respondent subsequently required access for a structural engineer to inspect the works. On 19 October 2012, this inspection took place (p.300). On 2 April 2013, the Applicants submitted their Initial Section 13 Notice (at p.1). There has been no suggestion that this application was motivated by a desire on the part of Mr Daswani to avoid forfeiture. The Tribunal is satisfied that there was no such purpose.

The Right to Claim Additional Marriage Value

32. As the editors of "Hague on Leasehold Enfranchisement" (5th Ed) note (at [27-09]) "the definition of marriage value wins no prizes for clarity and has caused as much controversy as any provision in the 1993 Act". Schedule 6 deals with the purchase price payable by the nominee purchaser. Paragraph 3 values the freeholder's interest; whilst paragraph 4 provides for the freeholder to have a 50% share in any marriage value. As a matter of statutory construction, it is necessary to apply the same assumptions throughout the marriage value calculation as in valuing the freehold interest (see *McHale v Cadogan (Ekram intervening)* [2010] EWCA Civ 1471; [2011] 1 EGLR 36 per Arden LJ at [32]).

33. Mr Cowen argues that the landlord is entitled to recover an additional component of marriage value associated with these works which the Respondent asserts were undertaken without its consent. It is accepted that the works to Flat G were carried out without prior consent and involved a significant element of trespass. As we understand it, Mr Cowen now concedes that as a result of paragraph 4(2A), no additional component would be payable by a lessee who has an excess of 80 years unexpired, even had those works been carried out without consent and even had they involved an element of trespass.

34. Mr Cowen argues that in considering marriage value under paragraph 4(2), all incidents associated with the control by the participating tenants of the freehold interest should be taken into account provided that they arise from the potential ability to obtain new leases without restriction as to term or any premium being paid. He relies on *Maryland Estates Ltd v Abbathure Flat Management Co Ltd* (Anthony Dykes QC and Peter Clarke FRICS) [1999] 1 EGLR 100. The Land's Tribunal accepted the argument of Mr Fancourt, who appeared for the landlord, that the following seven advantages or benefits would be enjoyed following enfranchisement and were to be taken into account, namely: (i) extend their leases at no premium, (ii) vary the terms of the leases, (iii) effectively extinguish the ground rent, (iv) manage the property themselves and control management charges, (v) carry out repairs at their own choosing and control costs, (vi) eliminate possible disputes with the landlord, and (vii) grant themselves new rights over the property.

35. Mr Cowen argues that additional marriage value is payable by the nominee purchaser in respect of the lessees of Flats E and G to reflect the ability of the nominee purchaser to "buy off" potential enforcement action by the landlord in relation to any unlawful alterations and trespass. The landlord has the power to bring enforcement proceedings (either by way of forfeiture proceedings or for injunction relief or damages) against these lessees.

36. Mr Duckworth disputes this. He argues that that, both as a matter of statutory language and authority, tenants' improvements (whether authorised or unauthorised) fall to be disregarded at all stages of the assessment of the freeholder's premium, including marriage value, and that the landlord's attempt to recover marriage value associated with these tenants' ability to hang onto their unauthorised improvements offends the statutory disregard and is wrong in principle. It is no more than a last minute attempt to extract an unjustified windfall.

37. Mr Duckworth further relies paragraph 3(1)(c) which provides that the freeholder's interest must be valued on the assumption that "any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense or by a predecessor in title is to be disregarded". He argues, in our view correctly, that this disregard applies regardless of whether the improvements have been carried out with or without consent. Consistent assumptions must be applied under paragraphs 3 and 4.

38. Mr Duckworth further highlights a number of practical consequences were the landlord's argument to be correct:

(i) The landlord would be able to strip tenants of half the value of works which they had undertaken at their own expense in circumstances where the landlord had failed to restrain them carrying the works out and had taken no steps to enforce the breach;

(ii) The Tribunal would have to undertake the process of establishing whether or not the right to compel reinstatement still exists. This process would be highly time consuming and expensive.

(iii) Cases where this issue arose would inevitable end up before the Tribunal. Until there had been an assessment of the risk of successful enforcement, the parties' valuers (as in this case) would be unable to offer any informed opinion as to the appropriate marriage value.

39. Both parties made submission on the following passage which is to be found at [9.36] of Hague:

> "It is now considered that it is immaterial that an improvement was made either in breach of covenant or otherwise without consent of the landlord, if the landlord has waived the breach. However, if the landlord has a right of action in respect of the breach, then the works cannot have increased the value of the house where the landlord can forfeit or require re-instatement."

We do not find this passage assists us in determining this issue. It relates to how improvements are to be valued under the Act. It seems to us to do no more than to suggest that there is no need for the statute to make express provision for works carried out in breach of covenant as

these would not increase the value of the flat because of the risk of forfeiture.

40. Before considering whether it is open in principle for a landlord to claim additional marriage value in these circumstances, it is instructive to consider the effect that it may have in valuing the premium. In *Maryland Estates v Abbathure*, the Lands Tribunal concluded that having regard to the evidence before it, an uplift of 5% above the value of the existing leases was appropriate to reflect all the advantages and benefits to the leaseholders arising from enfranchisement (apart from the separate ground rent issue). The experts were agreed that the value of the 16 existing leases with 78 years to run was £656,000. The Lands Tribunal increased this by 5% to value the virtual freehold of the leases (at p.105F). The Tribunal noted that whilst it had accepted the landlord's submissions on the law, it rejected the principal evidential basis relied upon by both experts (at p.106D). Mr Nesbitt, for the landlord, had argued that the value of the existing leases with 78 years to run was 93% of the virtual freehold value at 102L). Mr Rule, for the tenant, had argued that the market did not distinguish in valuation terms between leases of, say, 70 years and 999 years (p.104A). He suggested that any uplift as a result of enfranchisement would be no more that 1.5% (p.104E).

41. In the opinion of this Tribunal, in making the adjustment from the value of a 78 year lease to a virtual freehold, two adjustments would need to be made: (a) the adjustment to be made to achieve a long leasehold value of 999 years – there would be some discount for the length of any lease under, say, 125 years; and (b) the further adjustment to be made to convert from a long leasehold to a virtual freehold value. It is only at stage (b) that the adjustment is made to compute the virtual freehold value which does reflect the advantages of enfranchisement. In the experience of this Tribunal, an adjustment of 1% is normally made, though occasionally somewhat higher. It is this adjustment that reflects the seven factors identified by Mr Fancourt.

42. In assessing the agreed element of the marriage value in the current case, the leases of Flats A and G had 71.22 years to run, The short lease values were assessed at £405,000 for both flats and the long lease values at £450,000 based on 90% relativity (see Statement of Agreed Facts at p.270ah). This has then been taken as the virtual freehold value (see "GH5" at p.270y and "GH6" at p.270ab). Thus the experts have decided not to make any further adjustment to reflect all the advantages and benefits to the leaseholders arising from enfranchisement in moving from the long lease to the virtual freehold values.

43. Mr Cowen contends that a further adjustment should be made in respect of the unauthorised works in respect of Flats A and G. In respect of Flat A, Mr Holden assesses that the works have increased the

value of the flat by £50,000. He suggests that because of the trespass, the tenant has no ability to reinstate the flat to its original condition. The landlord is therefore in a strong bargaining position and it is suggested that the tenant would be willing to pay a premium equivalent to the full enhancement value thus obtaining the landlord's consent and avoiding the need for litigation. In computing the additional marriage value, Mr Holden has reduced the value of the existing leasehold interest from the agreed figure of £405,000 to one of £355,000 (see "GH5" at p.270z). The value of the virtual freehold remains unaltered at £450,000. The Tribunal find it extremely difficult to follow this analysis. The experts have agreed the existing leasehold value at £405,000. As required by the Act (paragraph 3(1)(c), this ignores the improvements carried out by the tenant. We accept Mr Duckworth's argument that £355,000 is "a wholly artificial value". If a deduction of £50,000 is to be made, then surely it is to be made from the improved value of flat, namely £455,000?

44. Our starting point is to ask the question: What right did the landlord have to bring enforcement proceedings on 2 April 2013, when the Respondent received the Applicant's Initial Notice to exercise its right to collective enfranchisement? The answer is to be found in Paragraph 7 of Schedule 3 of the Act ("The Initial Notice: Supplementary Provisions").

> "7. Restriction on proceedings against participating tenant to enforce right of re-entry or forfeiture
>
> (1) Where a relevant notice of claim is given, then during the currency of the claim—
>
> > (a) no proceedings to enforce any right of re-entry or forfeiture terminating the lease of any flat held by a participating tenant shall be brought in any court without the leave of that court; and
> >
> > (b) leave shall only be granted if the court is satisfied that the tenant is participating in the making of the claim solely or mainly for the purpose of avoiding the consequences of the breach of the terms of his lease in respect of which proceedings are proposed to be brought.
>
> (2) If leave is granted under sub-paragraph (1), the tenant shall cease to be entitled to participate in the making of the claim by virtue of being a qualifying tenant of the flat referred to in that sub-paragraph, and shall accordingly cease to be a participating tenant in respect of the flat."

45. We are satisfied that that the tenants of Flats A and Flat G did not participate in the collective enfranchisement for the purpose of avoiding the consequences of the breach of the terms of their leases. There is no evidence that the Respondent had taken any action to bring enforcement proceedings, whether by way of forfeiture proceedings or

for an injunction. Having received the Initial Notice, the Respondent has taken no steps to seek the permission of the County Court to do so. Whilst the Act only makes specific provision in respect of forfeiture, we accept Mr Duckworth's argument that any injunctive relief is an equitable remedy which is discretionary. Once the initial Notice has been served and the application is pending, there would be a heavy onus on the landlord to establish that it had suffered prejudice as a result of the trespass. Otherwise, such proceedings would be seen to be no more than a devise to extract what Mr Duckworth has described as "an unjustified windfall" through the enfranchisement premium.

46. The manner in which these proceedings have proceeded illustrate this point. When the landlord served its Section 21 counter-notice, there was no suggestion that these lessees were not entitled to participate in the enfranchisement application. The issue of the alleged unauthorised works only arose when the experts compared the lease plans against the current lay-out of the flats. The Respondent thereafter saw the opportunity to argue for an additional element of to the premium.

47. It is also constructive to consider the position of Flat E. Why should Mr Oudatzi be in a different position merely because he has a long lease? Mr Cowen is forced to conclude that no additional marriage value can be claimed because of the express provision of the Act. Logic would suggest that no windfall should be recoverable by the Respondent against the other lessees.

48. We accept Mr Cowen's argument that one of the advantages or benefits to be enjoyed by lessees through enfranchisement is the elimination of potential disputes with the landlord, including the risk of forfeiture or injunctive proceedings. This is a matter which is taken into account in adjusting the long leasehold value of a flat to compute the virtual freehold value. The experts are agreed on both the long lease and the virtual freehold values of the flats. It is not appropriate for this Tribunal to go behind what has been agreed between the parties on these valuations.

49. We therefore accept Mr Duckworth's argument and determine that it is not open to a reversion to claim additional marriage value as contended by the Respondent.

<u>The Assessment of Any Additional Marriage Value</u>

50. If we are wrong on this issue of principle, we turn to consider how any additional marriage value would be assessed. Mr Holden has assessed the additional marriage value payable in respect of Flat A at £50,000 (see 41 above). Mr Holden's calculation for Flat G is slightly different. The agreed short lease valuation in its unimproved condition is £405,000. He estimates that the works would increase the value of the flat by £75,000 to £480,000. However, he assesses that the

reinstatement cost is likely to be more than this, particularly if the landlord's professional fees are to be added. He therefore suggests that the tenant would be willing to pay as much as £100,000 to obtain the landlord's consent and avoid litigation. However, in computing the adjusted marriage value (at "GH6" – p.270aa) he inserts an existing leasehold interest value of £305,000, namely £405,000 less £100,000. Again, this seems to the Tribunal to be a wholly artificial value.

51. Mr Holden's position is that the reversioner would be able to hold a gun to the head of the tenants and extract the full increase in the value of Flats A and G (but not Flat E) as a result of the works. Indeed, he suggested that the landlord could extract even more in respect of Flat G. This reflected his assessment of the strength of the landlord's bargaining position. However, under cross-examination, he was forced to concede that if the prospect of the landlord being able to demand reinstatement was not certain, the effect on his valuations was less clear.

52. Mr Pridell's primary argument is that he disputes that any additional marriage value is payable in these circumstances. Prior to the hearing, he had no knowledge as to how Mr Holden was going to frame his valuation. In his evidence, he described how both experts had "been floundering":

(i) If deprived of the assumption that the landlord had a clear and unimpeachable right to compel reinstatement, then he could not suggest any figure that could safely be adopted as the appropriate marriage value to reflect the unauthorised/trespass works.

(ii) Further factual material, followed by appropriate legal guidance, would be needed before that problem could be overcome.

53. We are satisfied that were an additional element of marriage value to be payable in these circumstances, the Tribunal would need to make a careful assessment of the risk of enforcement action and impact of that risk on the value of the existing leasehold interests. An immediate issue arises. What does one take the existing leasehold interest to be? Is it (i) the actual non-Act value (assessed by Mr Holden at £455,00 for Flat A and £480,000 for Flat G) or (ii) the "artificial values" adopted by Mr Holden (£405,000 in each case)? If any adjustment is to be made, we can see no justification for taking an artificial value. The consequence of this decision is that there would only be any additional marriage value were the risk of enforcement to reduce the value of the flats below their unimproved value. In the case of Flat A, Mr Holden does not suggest that it does. In respect of Flat G, he takes a reinstatement figure of £100,000 rather than the improved value of £75,000. We can see no justification for taking this higher figure.

54. In neither of these cases has it been suggested that the reversioner has suffered any prejudice as a result of these works. Rather, the works have increased the value of all the flats. This is highly relevant to the

element of "risk value". Further factors would be "consent" (a live issue in Respect of Flat A), knowledge, acquiescence and waiver.

55. If we are wrong on the issue of principle. It was for the Respondent to establish that an additional element of "marriage value" should be payable in respect of Flats A and G. We reject the claims for £25,000 for Flat A and £50,000 for Flat G as being fanciful. The Respondent has failed to satisfy us that any additional sum would be payable particularly given the increase in the value of the subject flats and the absence of any prejudice to the reversioner.

Costs for Unreasonable Conduct

56. On 5 March, the Mr Duckworth submitted his representations seeking costs in the sum of £19,244.88 in respect of the Respondent's unreasonable conduct of the proceedings. These are the costs which the Applicant asserts that it has incurred from and after 19 February 2014, the date on which the experts had agreed the premium that was payable, subject to the Respondent's additional marriage value argument. The Respondent's Solicitor submitted their representations in response on 11 March. If we are minded to make a costs order, the Respondent invites us to determine the costs at a detailed assessment.

57. Rule 13(1)(b) of the Tribunal Procedure Rules provide:

> "(1) The Tribunal may make an order in respect of costs only:
>
> > (b) if a person has acted unreasonably in bringing, defending or conducting proceedings .."

58. The Tribunal Procedural Rules have applied since 1 July 2013. They make two significant changes to the those previously to be found in Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

> (i) The 2002 Act referred to the conduct of a party who had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably" in connection with the proceedings.
>
> (ii) The limit of £500 has been removed. This gives effect to the recommendation made at [105] in the report "Costs in Tribunals" by the Costs Review Group chaired by Sir Nicholas Warren. The Committee suggested that the means of the parties may be a relevant factor in assessing the size of any order. It also noted (at [104]) that the enfranchisement jurisdiction deals with part and party disputes where it may be appropriate for the normal costs-shifting rules to apply. This suggestion has not been implemented.

59. Mr Duckworth argues that the new wording is intended to lower the threshold at which the Tribunal's costs jurisdiction is

engaged. We disagree. We are satisfied that the abbreviated language in the new Rules, now restricted to the single term of "unreasonable", does not make any substantive change to the circumstances in which we should make such an order. The four additional terms were merely examples of unreasonable behaviour. A party must satisfy a high threshold before a Tribunal should make a costs order based on the unreasonable conduct of a party. The basic principle is that this remains a "no costs" jurisdiction.

60. We agree with the Respondent that we should continue to have regard to the guidance provided by HHJ Huckinson in *Halliard Property Co Ltd v Belmont Hall and Elm Court RTM Company Limited* LRX/130/2007; LRA/85/2008 at [36]:

> "So far as concerns the meaning of the words "otherwise unreasonably" I conclude that they should be construed *ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10 behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively or disruptively. I respectfully adopt the analysis of Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield [1994] 3 All ER 848* as to the meaning of "unreasonable" (see paragraph 13 above) which I consider equally applicable to the expression "otherwise unreasonably" in paragraph 10 of schedule 12 to the 2002 Act. Thus the acid test is whether the behaviour permits of a reasonable explanation."

61. The Applicant submits that the Respondent has conducted the proceedings unreasonably for the following reasons:

(i) The Respondent did not take the proceedings seriously until about a week before the trial commenced. As a result, the Respondent attended to advance a case which it was not ready to advance. Mr Cowen had conceded at [9] of his Skeleton argument that the Tribunal "simply [did] not have the evidence upon which it can provide a reasoned decision on this issue".

(ii) The Respondent's application for an adjournment was completely without merit and was unreasonably made. This application took up half a day of Tribunal time.

(iii) The Applicant asserts that the trial itself "was a wholly empty and, frankly, embarrassing exercise...... Indeed, we ended up in the farcical situation whereby the valuers on both sides said that they were simply unable to put forward any figure at all for the additional component of marriage value in this case".

(iv) It would be egregious for the Applicant to be left out of pocket as a result of the Respondent's decision to advance an unprepared and therefore futile case.

62. The Respondent replies that:

(i) It is the Applicant who failed to comply with the Directions and that the Tribunal had failed to make appropriate Directions. The Respondent rehearses the facts which this Tribunal had addressed in refusing the adjournment, albeit that the Solicitor puts a slightly different gloss on the history of the proceedings to that advanced by Mr Cowen.

(ii) The Respondent had a "valid and arguable case for the payment of additional marriage value where there are breaches of covenant and trespass to the landlord's land".

(iii) The Respondent's argument on the right to claim additional marriage value was correct as a matter of principle.

(iv) Mr Holden had done his best to engage with the valuation issues which arose were additional marriage value found to be payable. It was rather Mr Pridell who had failed to engage.

63. The Tribunal does not intend to repeat the matters which were relevant to our decision to refuse an adjournment. Had the Respondent alerted the Tribunal to the fact that it intended to seek an adjournment and pay the cost thrown away, we would have been more sympathetic to the application. We are satisfied that there was an arguable issue which it was open to the Respondent to take. As is apparent from this decision, it is not one which is entirely straight forward. The procedural problem is that the Respondent failed to raise this issue at the appropriate time and seek directions necessary to ensure that it could be determined in a proportionate manner. Mr Pridell thought that the basic premium was agreed. He was unaware of the substance of the Respondent's case in respect of the additional marriage value. It would have been open to Mr Duckworth to argue that the Respondent should not be permitted to raise the new issue on the basis that it was unarguable or that he was unable to deal with it at the hearing. He took the tactical decision to oppose the adjournment, but allow the issue to be argued. Had directions been sought at the appropriate time to enable the issue to be fully pleaded and presented, the costs would have been substantially greater that those incurred between 19 and 26 February. The Tribunal took time to consider the application for the adjournment because we were aware of the impact that our decision would have on the parties. In the event, the Applicant had the tactical advantage of responding to a case which had been ill-prepared. This would have been a two day case, even had the Respondent not sought an adjournment.

64. In these circumstances, we decline to make an order for costs against the Respondent on the grounds of its unreasonable conduct of the proceedings. The Applicant has not met either the high threshold which this Tribunal has indicated that a party seeking such an order must satisfy. Neither does it meet the lower threshold that Mr Duckworth contends now applies.

Robert Latham

Tribunal Judge

14 April 2014

APPENDIX – LEGISLATIVE PROVISIONS

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3 - Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Rule 13 - Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in:
(i) an agricultural land and drainage case,

(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a

detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

Leasehold Reform, Housing & Urban Development Act 1993

Schedule 3 – The Initial Notice: Supplementary Provisions

7. Restriction on proceedings against participating tenant to enforce right of re-entry or forfeiture

(1) Where a relevant notice of claim is given, then during the currency of the claim—

> (a) no proceedings to enforce any right of re-entry or forfeiture terminating the lease of any flat held by a participating tenant shall be brought in any court without the leave of that court; and
>
> (b) leave shall only be granted if the court is satisfied that the tenant is participating in the making of the claim solely or mainly for the purpose of avoiding the consequences of the breach of the terms of his lease in respect of which proceedings are proposed to be brought.

(2) If leave is granted under sub-paragraph (1), the tenant shall cease to be entitled to participate in the making of the claim by virtue of being a qualifying tenant of the flat referred to in that sub-paragraph, and shall accordingly cease to be a participating tenant in respect of the flat.

Schedule 6 – Purchase Price Payable by Nominee Purchaser

3. Value of Freeholder's Interest

(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 within 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, but
> >
> > (ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the nominee purchaser;

(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);

(c) on the assumption that any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense by the tenant 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 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, or

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

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

(c) an owner of an interest which the nominee purchaser 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] [1] 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 withsection 36 and Schedule 9 , the value of his interest in those premises at [the relevant date] [1] 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).

4. Freeholder's Share of Marriage Value

(1) The marriage value is the amount referred to in sub-paragraph (2), and the freeholder's share of the marriage value is 50 per cent. of that amount.

(2) Subject to sub-paragraph (2A), the marriage value is any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the persons who are participating tenants immediately before a binding contract is entered into in pursuance of the initial notice, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value—

(a) which is attributable to the potential ability of the persons who are participating tenants immediately before a binding contract is entered into in pursuance of the initial notice, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term, and

(b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price.

(2A) Where at the relevant date the unexpired term of the lease held by any of those participating members exceeds eighty years, any increase in the value of the freehold or any intermediate leasehold interest in the specified premises which is attributable to his potential ability to have a new lease granted to him as mentioned in sub-paragraph (2)(a) is to be ignored.

(3) For the purposes of sub-paragraph (2) the value of the freehold or any intermediate leasehold interest in the specified premises when held by the person from whom it is to be acquired by the nominee purchaser and its value when acquired by the nominee purchaser—

> (a) shall be determined on the same basis as the value of the interest is determined for the purposes of paragraph 2(1)(a) or (as the case may be) paragraph 6(1)(b)(i); and
>
> (b) shall be so determined as at the relevant date.

(4) Accordingly, in so determining the value of an interest when acquired by the nominee purchaser—

(a) the same assumptions shall be made under paragraph 3(1)(or, as the case may be, under paragraph 3(1) as applied by paragraph 7(1)) as are to be made under that provision in determining the value of the interest when held by the person from whom it is to be acquired by the nominee purchaser; and

(b) any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser shall be disregarded