4109

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	AGR/LON/00AW/OLR/2015/1191
Property	:	Flat 3, 10 Lennox Gardens London Sw1 0DG
Applicant	:	Frederick and Samir Masri
Representative	:	For lease terms and use of communal garden: Mr Piers Harrison of Counsel
Respondent	:	10 Lennox Gardens Limited
Representative	:	Ms Diane Doliveux of Counsel
Type of application	:	Applications to determine the premium payable on a flat lease renewal under section 48(1) of the Leasehold Reform Housing and Urban Development Act 1993 ("the Act")
Tribunal member(s)	:	Judge Pittaway Miss Krisko FRICS
Date and venue of Hearing	:	10 November 2015 at 10 Alfred Place, London WC1E 7LR
Date of decision	:	1 December 2015

DECISION

Decisions of the tribunal

1. The tribunal determines that lease should be in the form of the draft provided by the applicants.

2. The tribunal determines that the premium payable for the extended lease is **£23,212.00**. Please see the tribunal's valuation attached at Appendix 1.

3. The tribunal makes no order for costs in respect of the costs claimed by the respective parties under Rule 13.

Background

1. By an application dated 9 July 2015 the applicant seeks a determination pursuant to section 48(1) of the Leasehold Reform Housing and Urban Development Act 1993 (as amended) (the "**Act**") as to the premium payable for the proposed extended lease of Flat 3, 10 Lennox Gardens, London SW1X 0DG.

2. The Tribunal issued directions on 27 July 2015. These provided, among other things, for the landlord to submit a draft lease to the tenant for approval.

   They also provided for the parties to exchange expert reports at least two weeks before the hearing date that had been notified to them, for bundles to be prepared by the applicant once agreed and sent to the tribunal at least one week before the hearing.

3. The tribunal received a bundle from the applicants on 3 November 2015 and a supplemental bundle from the respondent on 6 November 2015.

4. In making its determination the tribunal had regard to the bundles of documents provided, which included the statements of case and respondent's response. They also had regard to the submissions made by the parties at the hearing, and the cases referred to and copied in the bundles.

5. The relevant statutory provisions are set out in the Appendix 2 to this decision.

Evidence

The form of the Lease

1. Mr Harrison referred the tribunal to
   a. the applicants claim form dated 24 November 2014 which expressly stated that the terms to be contained in the new lease should be as set out in the schedule to the claim notice. The schedule stated that the new lease of the flat should be *"at a peppercorn rent for a term expiring 90 years after the term date of the existing lease, and save as to the mandatory terms required by statute otherwise on the same terms as the existing lease";*
   b. the respondent's counter-notice which accepted the applicants' proposals in their Notice of Claim in respect of the new lease *"save for the proposal for payment of a premium of £17,000 for the grant of the New Lease"*
   c. the applicants' application to the tribunal of 9 July 2015 which indicated that the only issue in dispute was the premium to be paid for the lease;
   d. the differences between the lease provided by Trowers and Hamlin in response to the directions and the existing lease
   e. the draft lease provided by the applicants on 20 August 2015, which he submitted was in an identical form to the existing lease save for some terminology having been updated (for example referring to "landlord" rather than "lessor").

2. Ms Doliveux submitted
   a. that it is not necessary for the landlord to deal with the terms of the lease in the counter-notice (other than the term (length) of the lease and the rent) and not doing so did not prevent the landlord doing so subsequently;
   b. that section 57(6) of the Act expressly provides for the possibility that the parties may agree new lease terms indicates that of the Act did not intend the section 45 notice of claim to impose finality as to the lease terms.
   c. On the form of the draft lease provided by Trowers and Hamlin (drafted in accordance with the tribunal's directions and before they received that proposed by the applicants) the differences identified by Mr Harrison were intended to clarify ambiguities in the existing lease and sought to achieve consistency (although consistency with what was not stated). Alternatively the lease in its current form was defective and the defects required to be remedied under section 57(6)(a).

3. It was accepted by the respondents at the hearing that certain cross references to clauses in the old lease had been unintentionally omitted from their draft lease (so that, for example, the landlord's covenant for quiet enjoyment had not been included).

4. The tribunal invited Ms Doliveaux to consider the effect of section 45 (3) of the Act which requires the landlord's counter claim to state which proposals in the tenant's notice are accepted and which (if any) of those proposals are not accepted; together with the landlord's counter-proposal to each proposal not accepted.

5. Ms Doliveux was unable to confirm whether or not the lease drafted by the applicants was in the form of the existing lease.

The Premium

1. Mr Masri provided details of various properties in the area for consideration by the tribunal. These were categorised by him as
   a. "Best"; namely
      2nd floor 30 Cadogan Square
      2nd floor 15 Lennox Gardens; and
      ground floor 42 Lennox Gardens
   b. Irrelevant as comparables by reason of their location on the opposite side of Lennox Gardens (by reason of their room size, architectural merit and grandeur of their common parts); namely
      2nd floor 23 Lennox Gardens; and
      3rd floor 43 Lennox Gardens.
   c. Secondary comparables whose value broadly supported his "best" comparables; namely
      2nd floor, 22 Lennox gardens;
      Ground floor 31-32 Hans Place
      2nd floor 26 Hans Place;
      3rd floor 26 Hans Place; and
      2nd floor, 63 Pont Street.

2. For each of these properties he calculated an unadjusted value per square foot basing this on the Lonres.com website price given for the sold price (which was accepted by Mr Shapiro as evidence of the sold price) divided by the square area of each flat derived from available estate agents particulars. These values were not disputed by Mr Shapiro.

3. Mr Masri then made various adjustments to the price per square foot so calculated;
   a. Of between 15 and 20%, for the existence of a lift. The property has no lift;
   b. Of 5% where he considered that the agents particulars suggested that the comparable in question had been modernised. The parties agreed that the property was not modernised.
   c. Of 3.75% by reason of the property suffering from close access to a restaurant ventilator. This adjustment was agreed by Mr Shapiro;
   d. Of between 5 and 10% to reflect that the property had no right of access to a communal garden granted to it by its lease; and

e. Of between 5 and 10 % for the properties on the opposite side of Lennox Gardens, to reflect their grander common parts.

Mr Masri made no adjustment for the date of sale of the above comparables compared to the agreed valuation date for the property of 24 November 2014.

4. Mr Masri then calculated the value of the freehold current interest (but not the value of the freeholder's proposed interest) based on the adjusted rates per square foot of his "best" comparables only to propose a premium for the extended lease of £18,164.00.

5. Mr Shapiro provided the following comparables in his valuation report;
   a. Flat C, 12 Lennox Gardens
   b. Flat 6, 43 Lennox Gardens; and
   c. Flat E 23 Lennox Gardens.

   He also accepted and adopted Mr Masri's comparable of second floor, 22 Lennox Gardens.

6. Mr Shapiro accepted that an allowance needed to be made for the absence of a lift to the property; but submitted that an allowance of 5% rather than 15% or 20% was appropriate for a flat on the second floor of a building, also submitting that in some old buildings (like those in Lennox Gardens) the lifts installed were very small. He accepted that had the flat been on a higher floor a greater adjustment may have been appropriate.

7. Mr Shapiro accepted that the properties on the east side are grander than those on the west side of Lennox Gardens but submitted that they need not be disregarded if a suitable allowance could be made; which Mr Shapiro submitted should be in the region of 5-10%. Mr Shapiro accepted that the size of the respective living rooms on each side of Lennox Gardens might be a relevant consideration (but not the size of the respective bedrooms) but that this is in any event taken into account where the valuation is calculated on a value per square foot. He pointed out that the reception room at 22 Lennox Gardens was not of "ballroom" proportions.

8. Mr Shapiro submitted that the best comparables were those that were sold closest to the valuation date of 24 November 2014; but that it was possible to adjust comparables sold at different dates by utilising a suitable index; and he adopted the Savills index for south west flats for this purpose.

9. There was some evidence given as to the value attributable to tenant's improvements at the flat. It was accepted that the only alteration that was relevant to this consideration was the reduction in size of the bathroom en suite to the second bedroom, to convert this into a double bedroom from a single bedroom. Mr Shapiro submitted that the

reduction in size of the bathroom and the increase in size of the bedroom effectively "cancelled out" this improvement.

10. Mr Shapiro disagreed with Mr Masri's submission, in respect of 22 Lennox Gardens, that a further adjustment of 6.25% was required (over and above the agreed adjustment of 3.75 % to reflect the proximity of the property to a restaurant ventilator) to reflect the different rear views of the two flats. He agreed that an adjustment needed to be made but submitted that an adjustment that was, in effect, over £200,000 was too much, where the only one bedroom and the kitchen had the better rear view. He submitted that an adjustment (in additional to the agreed 3.75% adjustment) of 1.25% was more appropriate.

11. The summary of issues in dispute in the Trowers & Hamlin bundle referred to
    a. the effect on value of the tenant not being permitted to use the communal gardens. During the hearing it became clear that that the tenants' existing lease did not grant them the right to use Lennox Gardens but there was nothing prohibiting them from using the gardens, subject to payment of the relevant garden charge; and
    b. disturbance from flat 4, but this was not pursued at the hearing by either party.

12. In her closing submissions Ms Doliveux invited the tribunal to have regard to the fact that Mr Masri was not an independent expert and that the respondent had therefore not had the opportunity of examining an expert on the basis for the adjustments he had put forward on his own behalf.

13. The parties, on being questioned by the tribunal, agreed that an inspection by the tribunal was unnecessary.

Costs

1. Mr Masri asked for the tribunal to order the respondent to reimburse him the cost of instructing counsel to appear on the applicants' behalf on the basis that it had only been necessary to instruct counsel by reason of the respondent having acted unreasonably as to the form of the proposed lease.

2. Ms Doliveux submitted that the need to instruct counsel might not have arisen if the valuation had been agreed.

3. Ms Doliveux in turn asked the tribunal to order the applicants to reimburse the respondent's costs of preparing supplemental bundles and counsel's fees. In her submission it should have been possible to agree the valuation without the need of a hearing.

Reasons for the tribunal's decision.

The Lease

1. The tribunal agree with Mr Harrison's submission that as the respondent's counter claim did not indicate that any of the tenant's proposals as to the terms of the new lease were not accepted the new lease should be on the same terms as the existing lease.

2. At the hearing Ms Doliveux accepted that were differences between the draft lease prepared by Trowers & Hamlin in accordance with the directions and the existing lease, despite a letter of 25 August 2015 from Trowers & Hamlin to the applicants having asserted that that *"the lease does not add new lease terms but sets out the existing terms that are in the current lease and includes the mandatory wording required under the legislation"*

3. While the lease may have been drafted by Trowers & Hamlin in the form in which it was for good reasons it differs from the form of the existing lease and the tribunal do not consider that the differences are justified under section 57(6).

4. The tribunal accept Mr Harrison's submission that the draft lease provided by the applicants to Trowers & Hamlin on 20 August 2015 is in the form of the existing lease. They do not consider who drafted it to be relevant; it is its contents that matter.

5. Accordingly the tribunal determines that the new lease should be in the form of the applicants' draft.

The Premium

Having heard the evidence and submissions of both parties, and having regard to the fact that the respondent had provided the report of an independent expert;

1. the tribunal consider that the most appropriate comparables for the property are the flats at
   a. 12 Lennox Gardens;
   b. 43 Lennox Gardens;
   c. 23 Lennox Gardens; and
   d. 22 Lennox Gardens.

   They also considered that it was useful to have regard to the flats at the following properties although they did not consider them to be as useful;
   a. 30 Cadogan Square;
   b. 15 Lennox Gardens; and

c. 42 Lennox Gardens.

The tribunal did not consider that the comparables offered by the applicant in Hans Place and the one comparable offered in Pont Street to be sufficiently similar to the property, in terms of location, to assist them.

2. The tribunal took the value per square foot, as agreed by the parties, for each of the suitable comparables referred to above and, having considered the submissions made by both parties as to the appropriate adjustments to be made to the price per square foot of the same, the tribunal made the following adjustments.

a. The agreed adjustment of 3.75% to reflect the proximity of the restaurant ventilator to the property;
b. An adjustment for time in accordance with the Savills index in relation to 12 and 22 Lennox Gardens, which the tribunal did consider an appropriate index to be used;
c. The tribunal considered that an adjustment of 5% (rather than 15% or 20% proposed by Mr Masri) was the most appropriate adjustment to take into account the absence of lift at the property, which they applied to all the flats except those at 22 Lennox Gardens and 42 Lennox Gardens;
d. For those flats on the opposite side of Lennox Gardens (nos. 43 and 23 Lennox Gardens) the tribunal made a deduction of 10% to reflect the better location and style of the buildings. The tribunal agreed with Mr Shapiro that where the rooms in the flats were larger this was effectively taken into account in the price per square foot.
e. While it was difficult to ascertain the actual level of modernisation that had been undertaken to various of the comparables, where the only evidence before the tribunal was descriptions from estate agent's particulars, the tribunal were prepared to allow an adjustment of 5% (being the percentage proposed by both parties) for modernisation for the flats in 22, 42 and 43 Lennox Gardens and 30 Cadogan Square.
f. The tribunal did not consider it necessary to make any adjustment for the absence of a right in the applicants' lease to use the communal gardens without charge, in the absence of any evidence that this was a right in any of the comparable flat leases.
g. For 22 Lennox Gardens where the parties had respectively submitted that a further adjustment of either 6% (the applicant's proposal) or 1.25% (the respondents' proposal) was required to reflect the better view from the rear of that flat (as against the view from the rear of the property) the tribunal had regard to the view in question being the rear view and preferred an adjustment of 1.25%.

3. The tribunal then took the average of the adjusted value per square foot of each of the comparable properties of £2,076 to calculate the value of

the extended lease of the property adjusting this by the agreed 1% to calculate the value of the freehold current interest.

Costs

The tribunal considered both parties' claims for Rule 13 costs, each of which they considered might have merit. They were however also conscious that one claim was likely to cancel out the other and, given the tradition that the tribunal is a "no costs" tribunal (although they do have the right to award costs), have determined that they will make no award for costs in favour of either party.

Name: Judge Pittaway Date: 1 December 2015

APPENDIX 1

VALUATION

Agreed matters

Valuation date	24/11/2014	
Term of years	90 years from 27/09/2015 expiring 26/09/2105	
Number of years unexpired	90.84	
Floor Area	943 square feet	
Capitalisation rate, reversion	5.00%	

Tribunal determination

Value of extended lease 943 sq ft @ £2076	**£1,957,668.00**	
Reversion to VP value (+1%)	**£1,977,245.00**	
x PV of £1 to reversion	**x 0.01189**	
Value of freehold current interest		**£23,509.00**
Less		
Value of freeholder's proposed interest		
reversion to VP value	**£1,977,245.00**	
x PV of £1 to reversion after proposed term	**x 0.00015**	**- 297.00**
Premium for lease extension		**£23,212.00**

APPENDIX 2

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

s 48 Applications where terms in dispute or failure to enter into new lease.

(1) Where the landlord has given the tenant—
(a) a counter-notice under section 45 which complies 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 46(4) or section 47(4) or (5),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

(7) In this Chapter "the terms of acquisition", in relation to a claim by a tenant under this Chapter, means the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of the lease, or otherwise.

S 57 Terms on which new lease is to be granted.

(1) Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1)), the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate to take account—

(a) of the omission from the new lease of property included in the existing lease but not comprised in the flat;

(b) of alterations made to the property demised since the grant of the existing lease; or

(c) in a case where the existing lease derives (in accordance with section 7(6) as it applies in accordance with section 39(3)) from more than one separate leases, of their combined effect and of the differences (if any) in their terms.

(6) Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as—

(a) it is necessary to do so in order to remedy a defect in the existing lease; or

(b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

SCHEDULE 13 PART II

Premium payable by tenant

2 The premium payable by the tenant in respect of the grant of the new lease shall be the aggregate of—

(a) the diminution in value of the landlord's interest in the tenant's flat as determined in accordance with paragraph 3,

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

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

Diminution in value of landlord's interest

3(1) The diminution in value of the landlord's interest is the difference between—

(a) the value of the landlord's interest in the tenant's flat prior to the grant of the new lease; and

(b) the value of his interest in the flat once the new lease is granted.

(2) Subject to the provisions of this paragraph, the value of any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) 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 neither the tenant nor any owner of an intermediate leasehold interest buying or seeking to buy) on the following assumptions—

(a) on the assumption that the vendor is selling for an estate in fee simple or (as the case may be) such other interest as is held by the landlord, subject to the relevant lease and any intermediate leasehold interests;

(b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;

(c) on the assumption that any increase in the value of the flat 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 paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the relevant lease has effect or (as the case may be) is to be granted.

(3) In sub-paragraph (2) "the relevant lease" means either the tenant's existing lease or the new lease, depending on whether the valuation is for the purposes of paragraph (a) or paragraph (b) of sub-paragraph (1).

(4) It is hereby declared that the fact that sub-paragraph (2) 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 any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) might be expected to realise if sold as mentioned in sub-paragraph (2).

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

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.