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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/OCE/2016/0318**
Property	:	Newcastle House Luxborough St London W1U 5BR
Applicant	:	Newcastle House Freehold Ltd
Representative	:	Mr P Harrison of Counsel
Respondent	:	Rodenhurst Estates Ltd
Representative	:	Mr A Radevsky of Counsel
Type of Application Urban Development Act 1993	:	S24 of the Leasehold Reform Housing and
Tribunal Members	:	Judge F J Silverman Dip Fr LLM Mr N Martindale BSc FRICS Mr K Ridgeway BSc FRICS
Date and venue of	:	Alfred Place London 25 and 26 April 2017
Hearing	:	25 April 2017
Date of Decision	:	05 May 2017

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Decision

The Tribunal determines that the value of the coal holes is nil (£0). The value of the drying area is £25,000 and the development value of the roof area is £350,000. Subject to the insertion of these figures in the valuation, the Tribunal adopts without further amendment the residual valuation calculation presented by the Respondent.

Reasons

1 The Applicant nominee purchaser filed an application on the 21 October 2016 asking the Tribunal to determine the price payable to purchase the freehold of the property known as Newcastle House Luxborough Street London W1U 5BR (the property) under section 24 Leasehold Reform Housing and Urban Development Act 1993 and other matters relevant to that transaction.

2 The Applicant's initial notice had been served on 12 May 2016 and the Respondent landlord's counter–notice is dated 21 July 2016. The parties agreed that the valuation date was 12 May 2016.

3 The hearing of the matter took place before a Tribunal sitting in London on 25 and 26 April 2017 at which Mr P Harrison of Counsel represented the Applicant and Mr A Radevsky of Counsel represented the Respondent. The Tribunal heard evidence from Mr A Cohen MRICS and Mr R Hutt FRICS, the surveyors representing the respective parties. Agreed bundles of documents were placed before the Tribunal for its consideration.

4 The Tribunal had the benefit of oral and photographic evidence of the property and carried out an inspection of the property after having heard the oral evidence. The property is situated in a mainly residential street close to Marylebone High Street. The property is thought to have been built in the early twentieth century (1910-1925) and has a red brick frontage to Luxborough Street, the rear of the building being composed of glazed white bricks with some unglazed paler bricks at higher levels. The property presently comprises 18 self-contained flats. The exterior and interior common parts of the building were generally in good condition. The interior common parts were clean and carpeted with a staircase leading from the common hallway at ground floor level to the upper floors. There is no lift at the property. None of the flats have any designated outside space and the exterior areas of the property are limited to a small lower ground passage with a narrow stairway from street level at the front of the building which gives access to a series of small storage spaces (referred to by the parties as 'coal holes') and a derelict brick built flat roofed room (referred to by the parties as the 'drying area') which occupies the greater part of an enclosed courtyard/lightwell. Access to the latter is through a doorway at the rear of the ground floor hallway but both the head room and physical access to the doors of the drying area are height restricted and narrow. The split level asphalted flat roof of the property is accessed from a doorway at the top of the main staircase. The roof area houses a number of substantial chimney stacks, satellite dishes, and a fire escape passage and stairway which operates as a mutual form of escape for both the property and an adjacent block of flats. The roof area is overlooked by flats in nearby blocks. There is no parking at the property and on

street parking in the vicinity of the property is either restricted or permissible only by permit.
The area in which the property is situated contains a mixture of residential, educational and commercial property. Public transport, shops and other amenities are close by in Marylebone High Street and the West End.

5 At the commencement of the hearing the Tribunal was informed that the parties had reached an accommodation on most of the issues in the case and the Tribunal's determination was therefore restricted to the three areas then outstanding which were the respective values of the coal holes, the drying area and the roof. The remit of this decision is thus confined to those three areas; the Tribunal was not required to produce a definitive valuation nor to assess the purchase price for the enfranchisement.

6 In relation to the **coal holes** it was common ground between the parties that these small subterranean storage areas did not form part of the demise to any of the leaseholders but that some of the leaseholders did make use of them to store goods. Only two coal holes, one at each end of the narrow sub-ground passage, were included in the Applicants' application although the Respondent was prepared to transfer all of them to the Applicant. The parties agreed that the passage or light-well between them had no monetary value. Mr Cohen for the Applicant argued that these storage areas were small, damp, and difficult to access and of little commercial value. Mr Hutt for the Respondent initially argued that the areas had some intrinsic value but accepted that his offer to the leaseholders to sell individual spaces at a price of £2,500 had not achieved any sales and that his own valuation at £1,600 each was overstated. In closing submissions it was conceded by the Respondent that no value should be attributed to them. The coal holes are briefly described in paragraph 4 above. On inspection the Tribunal found them to be dark, damp and very small. Some were secured by doors others were open fronted. Although it is acknowledged that any additional storage space in a central London flat is a bonus, the coal holes would offer only a very limited capacity both in size and in the range of materials which could be kept there. On that basis, the Tribunal considers that the Respondent's revised assessment of their value as zero is realistic and adopts that figure in its decision.

7 Both parties agreed that the **drying area** was unlikely to be developed for independent residential use ie as a separate flat. The Respondent argued however, that it was feasible to imagine that the area could be incorporated into Flat 3 as extra living accommodation or accessed externally from that flat as an office space. In the event that the area could be converted to useable residential space (subject to conversion and to planning permission) Mr Hutt valued the drying area at £80,000. Alternatively, he argued that the room could be used for storage or as an artist's studio and demonstrated the price of separate storage areas at paragraph 9.21.3 of his report where he referred to the sale by auction in February 2017 of two leasehold storage rooms at 3 Cleveland Gardens Bayswater which had together achieved a sale price of £122,000. Mr Hutt considered that the location of those two rooms was inferior to that of the subject property but having applied their sale price of £192.62 psf to the drying area, arrived at a valuation for use of the drying area as storage space of £25,698. For the Applicant, Mr Cohen regarded this area as being without significant value and placed a price of £1,500 on it. He viewed it as physically difficult to access and so situated as to make it virtually impossible to ameliorate by

either raising the ceiling height or lowering the floor level. The drying area is briefly described above (paragraph 4). After inspection the Tribunal agreed with Mr Cohen's assessment of the difficulty in altering the physical aspects of the room and also considered that any use unconnected with the owner(s) of one of the existing flats was unlikely from the viewpoint both of planning permission and of the limited access. The area did nevertheless have some intrinsic value whether as a home office or perhaps a bicycle store and the Tribunal assessed this at £25,000 in line with Mr Hutt's storage area calculation and having regard to the comparable property at 3 Cleveland Gardens.

8 The most significant area of difference between the parties related to the development value of the **flat roof space** where the Respondent contended that the area had significant value for the potential development of an additional storey comprising two or three flats. To support this contention Mr Hutt had marketed the freehold of the property between May and December 2016 and he produced evidence to demonstrate that a large amount of interest had been generated indicating that the development potential of the property was of interest to potential buyers. Offers of around £950,000 had been received for the freehold despite the fact that no planning permission had yet been granted for the property. Similarly, a pre-planning enquiry (R Annex 16) made to the local authority had received a favourable response, and subject to some constraints on siting and privacy which could be incorporated into any formal designs the Respondent asserted that the grant of permission for residential development on the site could be achieved. The Applicant however attributed minimal value to the roof area saying that it had multiple problems as a development site, not only on size but principally because of the wording of a deed dated 2 January 1956 (page 312) and made between the owners of the property and the owners of the adjacent block called Luxborough House. He asserted that this deed which granted rights to residents of the adjacent block to use the fire escape effectively prevented further development. Additionally, there were potential problems with rights of light, nuisance, the physical stability of the existing building and construction problems relating to the difficulty of access to the site and associated costs.

9 On inspection of the property it was evident that a number of blocks in close proximity to the property had already taken advantage of the development opportunities afforded by a flat roof suggesting that the local planning authority was susceptible to applications for this type of development in the locality. The Respondent produced evidence of similar roof top development schemes (Annexes 14 and 15) which were not subjected to cross-examination during the hearing. The Tribunal therefore accepts that in principle planning permission would not be a major obstacle to the future development of the roof area.

10 One potential problem associated with the proposed development of the roof space is the wording of the fire escape deed (page 312) which the Applicant argued effectively prevented the proposed development and which could be injuncted by any of the leaseholders who had the right to use the fire escape. This assertion relies on interpreting Clause 3(b) of the deed as preventing alteration of the route of the fire escape except where required to do so by the relevant local or public authority. Re-routing or re-positioning the fire escape would be an inevitable consequence of any development of the roof area because its present position runs across the centre of

the roof area forming a protected passageway between the roof access doors to both Luxborough House and the subject property, Newcastle House.

11 Clause 3(b) of the fire escape deed reads as follows: 'All or any of the staircases on either of the said premises may from time to time be altered in position character or otherwise in such manner as to comply with the requirements of any authority (public or local) having jurisdiction in that behalf'. The Applicant argues that this wording prevents the alteration of the fire escape unless required to do so by the local or other authority. Although it would be possible to construe the clause in that fashion the Tribunal does not agree with the Applicant's interpretation. Firstly, the clause does not say that the fire escape cannot be altered; there is no negative expression in the clause itself. A common sense interpretation of the wording suggests that the intention of the clause is not to prevent alteration of the fire escape but rather to ensure that any such alteration continues to comply with regulatory requirements. Further, the wording of the clause only refers to the 'staircases' and does not appear to apply to the alteration of the guard rails which protect the main escape route over the roof. There is a discrepancy between the route of the escape on the plan attached to the deed and the actual route of the escape over the roof which the Respondent suggested was evidence that the route of the escape had previously been altered. Having in inspected the property, the Tribunal considers it more likely that the agreed route as shown on the plan attached to the deed proved impossible to construct because of the presence of chimney stacks and a practical solution has been achieved by siting the escape route around the stacks.

12 Even if the Applicant's interpretation of the wording of the clause is correct, any development of the roof area would need to be compliant with current fire regulations and it is highly likely that the local fire authority would require the re-routing of the fire escape as a part of the development scheme. The re-routing would therefore be carried out in compliance with the Applicant's interpretation of the clause and no actionable claim would arise.

13 Similarly, the Applicant's suggestion that the permitted users of the fire escape would have the right to an injunction if the escape route was altered in contravention of the fire escape deed is more theoretical than practical. Provided that the roof top development included a proper and safe escape route for the residents it is unlikely that an injunction would be granted and any monetary award by way of damages would be small. The Tribunal dismisses this objection as being unrealistic.

14 A further potential problem raised by Mr Cohen for the Applicant was that any development of the roof area would infringe the rights of light of occupiers of adjacent properties and would be susceptible to injunctive relief and actions for damages. A report from Ansty Horne dated 6 April 2017 (page 63) commissioned by the Respondent agreed that there was a danger that rights of light would be infringed by the proposed development but put forward a number of possible solutions including the siting and design of the proposed development and making an allowance in the development costings for compensation payments to affected parties. Although the Applicant asserted that injunctive relief was the primary remedy in cases of this type the Tribunal prefers the Respondent's case which accepted that there could be actionable infringements of rights of light but took the view that the payment of compensation was the most likely outcome of any complaint. Similarly, any claims in nuisance arising out of the proposed development

would be likely to be settled by compensation rather than injunction and an allowance for this eventuality could be made in the construction costs.

15 The planning authority, in response to the Respondent's pre-planning enquiry, had also raised issues in relation to privacy and light. The Tribunal agreed with the Respondent's suggestions that these matters could be addressed by the design and siting of the development.

16 The Respondent had also commissioned a construction report from Jenkins and Potter dated 8 December 2016 which highlighted a number of potential structural problems with the development of the roof area but also suggested (at pp 35-36) practical and viable suggestions to facilitate the proposed development. The report noted that the neighbouring building had been completely destroyed by bomb damage during World War II and that there was therefore a risk that some residual damage had been sustained by the subject property which might affect its capacity to sustain the weight of an additional storey. The report suggested that such risk could be established by testing and if found to exist could be minimised by various construction and engineering techniques. The Applicant relied on this report to suggest that the proposed development would not be commercially viable because of the cost of stabilising the building coupled with the high construction costs caused by the difficulty of access to the site.

17 Both parties' valuers had prepared residual valuations to assess what a developer would be likely to pay for the site. Although the Tribunal does not advocate the use of residual valuations it does accept them in this case because both parties had agreed that this was a method of valuation appropriate to the circumstances.

18 The Respondent's valuer, Mr Hutt, had arrived at a figure of £350,000 as the development value of the roof area whereas for the Applicant, Mr Cohen initially calculated the same area as being worth £59,434, a figure corrected during the hearing to £74,292 owing to an arithmetical error. Mr Cohen's starting point had in fact been £297,168 from which he had made a 75% deduction for risks associated with the site. He had later revised his estimate to nil. Mr Hutt's figures were based on the offers which had been received for the freehold when it had been marketed just prior to the service of the s13 notice and took into account the risks, problems and solutions highlighted in the independent light and engineering reports which he had commissioned and had relied on in his evidence. The Tribunal considers that Mr Hutt's approach was based on realistic evidence and risks and prefers it to the approach taken by Mr Cohen. The Tribunal therefore adopts the figure proposed by Mr Hutt of £350,000 as being the development value of the roof area.

The Law

13 Section 24 Leasehold Reform Housing and Urban Development Act 1993 Applications where terms in dispute or failure to enter contract.

(1)Where the reversioner in respect of the specified premises has given the nominee purchaser—

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

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

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

(2)Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the nominee purchaser.

(3)Where—

(a)the reversioner has given the nominee purchaser such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b)all of the terms of acquisition have been either agreed between the parties or determined by a leasehold valuation tribunal under subsection (1),

but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6), the court may, on the application of either the nominee purchaser or the reversioner, make such order under subsection (4) as it thinks fit.

(4)The court may under this subsection make an order—

(a)providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);

(b)providing for those interests to be vested in him on those terms, but subject to such modifications as—

(i)may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and

(ii)are specified in the order; or

(c)providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6);

and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above.

(5)Any application for an order under subsection (4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).

(6)For the purposes of this section the appropriate period is—

(a)where all of the terms of acquisition have been agreed between the parties, the period of two months beginning with the date when those terms were finally so agreed;

(b)where all or any of those terms have been determined by a leasehold valuation tribunal under subsection (1)—

(i)the period of two months beginning with the date when the decision of the tribunal under that subsection becomes final, or

(ii)such other period as may have been fixed by the tribunal when making its determination.

(7)In this section "the parties" means the nominee purchaser and the reversioner and any relevant landlord who has given to those persons a notice for the purposes of paragraph 7(1)(a) of Schedule 1.

(8)In this Chapter "the terms of acquisition", in relation to a claim made under this Chapter, means the terms of the proposed acquisition by the nominee purchaser, whether relating to—

(a)the interests to be acquired,

(b)the extent of the property to which those interests relate or the rights to be granted over any property,

(c)the amounts payable as the purchase price for such interests,

(d)the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e)the provisions to be contained in any conveyance,

or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of section 1(4) or 21(4).

Judge F J Silverman
as Chairman
05 May 2017

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.