289

Ref LON/ENF/1089/04

LEASEHOLD VALUATION TRIBUNAL
FOR
LONDON RENT ASSESSMENT PANEL

DECISION

RE APPLICATION UNDER
SECTION 24 OF THE LEASEHOLD REFORM HOUSING AND URBAN DEVELOPMENT ACT 1967

Premises:	**74 Highbury New Park Islington London N5 2DJ**	
Applicant:	74 Highbury New Park Ltd	[*Nominee Purchaser*]
	Represented by Messrs Freemans Solicitors	
Respondent:	Portmay Properties Ltd	[*Reversioner*]
	Represented by Messrs Colman Coyle Solicitors	
Hearing:	14 December 2004	
Appearances:	None	

Members of Tribunal: Professor J T Farrand QC LLD FCIArb Solicitor
Mr D D Banfield FRICS
Mr F W J James FRICS

1) The qualifying tenants' Initial Notice (under s.13 of the 1993 Act, dated 30 September 2003) proposed to acquire the freehold of the premises and appurtenant land for a total price of £16,200 (£100 being for the appurtenant land). The Reversioner's Counter-Notice (under s.21 of the 1993 Act, dated 4 December 2003) admitted, in effect, the tenants' right to enfranchise the premises but not the appurtenant land and proposed a price of £73,000 as well as the inclusion of various provisions in the transfer to the Nominee Purchaser.

2) At the request in writing of the solicitors acting for the Nominee and for the Purchaser respectively, the Tribunal's determination was made on the basis of written submissions without an oral hearing.

3) By the time of the hearing only two issues remained in dispute. The first issue was as to any 'hope value' of the roof space and the second was as to precise provisions of the transfer.

First Issue

4) The parties had instructed experts for the purposes of the valuation: B R Maunder Taylor FRICS for the Nominee Purchaser and M D L Green BSc MRICS. These experts had signed an agreement on behalf their clients to the effect that, apart from any value attributable to the roof space, the enfranchisement price would be £18,500. This was on the agreed basis that "the valuation date will be the date when agreement is reached on the premises to be enfranchised, or the day of the Tribunal hearing" but otherwise no details of their valuation calculations were supplied. The Tribunal was content to accept these agreements without further query, although considering that the valuation date should properly be as at the date of the Counter-Notice (ie 3 December 2003), since this effectively determined by agreement "what freehold interest in the specified premises [not in the appurtenant land] is to be acquired" within para.1(1) of Schedule 6 to the 1993 Act.

5) The agreed issue between the parties was as to the value of the roof space:

   The Applicant Nominee Purchaser contends for nil.
   The Respondent Landlord contends for £52,500.

   Accordingly, each of Mr Maunder Taylor and Mr Green expert witness statements and submissions, supplemented by photographs, in support of their clients'

6) It was not in dispute that the freehold value may be increased for enfranchisement purposes (ie within para.3 of Schedule 6 to the 1993 Act) by an assumption of 'hope value' attributable to the possible development of the premises by the construction of an additional flat in the roof space. This value would depend upon whether a hypothetical purchaser in the open market would pay a higher price for the premises because of the possibility.

7) There was no submission here that the development, and therefore the 'hope', would be precluded because the construction would constitute a breach of any covenants in the leases of existing flats (see *Devonshire Properties Ltd v Trenaman* [1997] 20 EG 148; cp *Hannon v 169 Queensgate Ltd* [2000] 09 EG 179). Instead, Mr Maunder

Taylor primarily relied on the submission that there was no realistic prospect of obtaining both planning permission and listed building consent. He relied on the fact that each of these had been refused, with reasons and without appeal, in 1995 for 'Conversion of loft to form an additional two bedroom flat, entailing alterations to the roof'. He also relied on a copy letter dated 10 June 2004 from an Islington Principal Planning Officer to representatives of the Reversioner, in relation to revised drawings, stating:

> "Planning permission and listed building consent would be required for the insertion of roof lights and rear dormers but you are unlikely to gain consent because of the detrimental impact on the character and appearance of this listed building and the conservation area in general."

In addition, Mr Maunder Taylor submitted that the hypothetical purchaser would not be satisfied that the development was technically feasible and financially viable.

8) For the Respondent, Mr Green recounted the planning history, including four copy letters, dated post June 2004, from or on behalf of the Respondent to the Islington LBC but with no letters in reply, before stating: "It seems clear that the principle of a residential unit is accepted by the planners for the conversion of this roof space to provide a self-contained flat, provided their policies and criteria are strictly adhered to." (Witness Statement para.10.04). Consequently, he expressed the opinion that the hypothetical purchaser "would reflect in his bid a sum to reflect this factor" (para.10.07). In the light of this, various valuation exercises were undertaken by Mr Green to produce the figure of £52,500 as the value of the roof space. Essentially, these involved valuing, by referenced to alleged comparables, "a newly converted one-bedroom walk-up flat with restricted headroom in some areas" at £190,000 and then deducting assumed development and sale costs to produce an estimated profit of £30,291. In the belief that a hypothetical purchaser would be satisfied with a 15% profit, he reached a value of £75,000 for the roof space which he adjusted by a 30% discount "to reflect the fact that, whilst the town planning position is highly probable, it is not a cast iron certainty" (para.13.01).

9) The Tribunal was not persuaded that a hypothetical purchaser would pay any element of 'hope value' for the possibility of developing the roof space. As at the date of the Tribunal's hearing (ie the later of the agreed valuation dates), such a purchaser could be expected to take account of the 1995 refusals of planning permission and listed building consent coupled with the letter of 10 June 2004 relied upon by Mr Maunder Taylor. He could not be expected to regard the subsequent letters from or on behalf of the Respondent to Islington LBC as showing that obtaining the requisite permission and consent would be possible, never mind probable, in the near future. These were letters written in the cause of a party with an interest in securing a higher payment for itself. There was no cogent evidence adduced that the planning authority had replied to or otherwise agreed with their contents. Mr Green did not himself profess any special planning expertise or experience and there was no evidence submitted in support of his opinions from any planning expert. Further, the valuation assumptions, particularly as to costs, made by Mr Green were not supported by any evidence sufficient to persuade the Tribunal that a hypothetical purchaser would consider it worthwhile investing time and money in the suggested development.

10) Accordingly, the Tribunal's determination of the first issue is that there is no 'hope value' to be attributed to the roof space. From this it follows that the enfranchisement price is determined at the sum of **£18,500**.

Second Issue

11) Despite expressed hopes, the solicitors respectively representing the Nominee Purchaser and the Respondent have not agreed the provisions of the transfer from the latter to the former. What were evidently last minute submissions were received by the Tribunal together with a form of transfer indicating various provisions and amendments which had been proposed by each side.

12) The Tribunal does have jurisdiction to determine, in default of agreement, the provisions to be contained in any conveyance or transfer (see ss.91 and 24(8) of the 1993 Act). However, this does not confer a general discretion to include or exclude provisions but only a power to consider whether or not the requirements in this respect of the 1993 Act are complied with. The Act stipulates that the transfer shall conform with the provisions of Schedule 7, "except to the extent that any departure is agreed to by the nominee purchaser and the person whose interest is to be conveyed" (s.34(9)(a)). Unfortunately, from the submissions received, it was not adequately clear to the Tribunal precisely what was and was not agreed. Accordingly, the Tribunal is not in a position to make a final determination as to this issue. It follows that this must be adjourned to enable clarifying submissions to be made, hopefully after further constructive negotiations.

13) However, in the meantime, certain observations may be offered as to the three (sub)issues identified in the submissions received from the Nominee Purchaser's representative. First, as to 'Rights Reserved for the Benefit of the Retained Land', it appears that these do not depend upon agreement but are to be "such provisions (if any) as the freeholder may require for the purpose..." (para.4(b) of Schedule 7). Second and similarly, as to 'Restrictive Covenant to be entered into by the Transferee', again this does not appear to depend upon the Nominee Purchaser's agreement or even on being necessary but to be within "such further restrictions as the freeholder may require..." (para.5(1)(c)). Third, as to 'Restrictive Covenant to be entered into by the Transferor', this does appear to depend upon agreement in that there does not appear to be any requirement that the freeholder should enter into the particular covenant proposed (cp para.5(1)(b) which refers to the continuance of existing lease covenants).

CHAIRMAN

Julian Faward

DATE December 2004