232

Ref. No. LON/LVT/1571/03

LEASEHOLD VALUATION TRIBUNAL
for the
LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 21 OF THE LEASEHOLD REFORM ACT 1967

Applicants: The Eyre Estate

Respondent: Mr. M. Rembaum and Mrs. R. Rembaum

Re: 31 Queens Grove, London NW8

Application to Tribunal by the Eyre Estate: 25 February 2003

Hearing date: 8 July 2003

Appearances: Mr. K.S. Munro (Counsel)
Mr. S.J. Roberts and Miss P. Wallwork of Pemberton Greenish, Solicitors
Mr. J.E.C. Briant MRICS of Cluttons

for the Applicant

Mr. D. Conway of David Conway & Co., Solicitors
Mr. G. Buchanan BSc (Est.Man.), MRICS of Colliers CRE
Mr. M. Sulkin of Aston Chase
Mr. M. Rembaum

for the Respondents

Members of Leasehold Valuation Tribunal:

Mr. P.D. Wulwik LLB (Chairman)
Mr. L. Jarero BSc, FRICS
Mr. F.W.J. James FRICS

Date of notice of tenants' claim:	24 September 2002
Date of notice in reply to tenants' claim:	17 October 2002
Landlord's proposed price (as amended):	£485,000
Tenants' proposed price (as amended):	£397,294
Agreed valuation date:	24 September 2002
Leasehold Valuation Tribunal's determination:	£476,102

Date of Tribunal's decision: 6 AUGUST 2003

Ref. No. LON/LVT/1571/03

31 Queens Grove, London NW8

A. Introduction

1. This is an application by the Applicant landlord the Eyre Estate to determine the enfranchisement price payable by the Respondents Mr. and Mrs. Rembaum for the freehold of the property at 31 Queens Grove, London NW8 under Section 9 (1C) of the Leasehold Reform Act 1967 (as amended).

2. The Respondents are the tenants of the property under a Lease dated 28 December 1984 for a term of 79 years from 25 March 1984 at the initial yearly ground rent of £400 per annum subject to review in accordance with the provisions of Clause 3(3) of the Lease whereby the ground rent was to be reviewed to 1/60th of the land value on the expiration of the twenty-fifth, fiftieth and seventy-fifth years of the term.

3. The property comprises an early Victorian semi-detached 4 storey house of brick construction with rendered elevations under a slate mansard roof on lower ground, upper ground, first and second floors. There is a 2 storey side extension and off street parking in front of the house for two cars, but no longer a garage. There is a small garden at the front and a south-east facing garden at the rear.

4. There were Licences for Alterations dated 28 March 1989 and 11 February 1999. The gross internal area of the existing house is 319 m^2 or 3,434 sq. ft. The gross internal area of the original house was 267 m^2 or 2,875 sq. ft., including the original garage and side

addition of 24.62 m^2 or 265 sq. ft.

5. On 24 September 2002 the tenants gave notice of their claim to acquire the freehold of the property under the Leasehold Reform Act 1967. On 17 October 2002 the landlord the Eyre Estate served notice in reply admitting the tenants' right to acquire the freehold. On 25 February 2003 the landlord issued the present application to determine the enfranchisement price payable for the freehold of the property. The landlord's application proposed a price of £600,000.

6. On 10 April and 7 May 2002 the Tribunal gave preliminary directions.

B. Hearing

7. The hearing took place on 8 July 2003. The Applicant landlord was represented by Mr. K.S. Munro of Counsel instructed by Pemberton Greenish, Solicitors. The landlord's expert was Mr. J.E.C. Briant MRICS of Cluttons. The Respondent tenants were represented by Mr. D. Conway of David Conway & Co., Solicitors. The tenants' experts were Mr. G. Buchanan BSc (Est. Man.) MRICS of Colliers CRE and Mr. M. Sulkin, a Director of Aston Chase. One of the tenants Mr. M. Rembaum was also present.

8. The parties had agreed a statement of facts including the following matters:-

(1) The parties had agreed that the reversionary ground rent effective from 25 March 2009 should be £23,500 per annum.

(2) The valuers had previously agreed the improved freehold vacant possession value at £3,500,000, although on the subsequent advice of Aston Chase the tenants claimed that there should be a deduction of £200,000 for alleged blight from the existence of the residential premises at 32a Queens Grove and the photographic studio at 32b Queens Grove.

(3) The parties agreed that the improved leasehold vacant possession value should be 79% of the improved freehold vacant possession value, and that the unimproved leasehold vacant possession value should be 79% of the unimproved freehold vacant possession value.

(4) The appropriate yield and deferment rate was 6%.

(5) The parties had agreed a list of works which effectively described the tenants' works as a result of the two Licences for Alterations which had added value.

(6) The marriage value was to be shared equally between the parties.

9. The valuation date was taken by both valuers as the date of notice of the tenants' claim namely 24 September 2002. At that date, the Lease had 60½ years unexpired.

10. The matters in dispute between the parties were:-

(1) The value of tenants' improvements, including the question whether the works carried out under the 1989 Licence were improvements or whether the lessee was under an obligation to carry out those works under the terms of the 1989 Licence.

(2) The alleged blight effect of 32a and 32b Queens Grove.

(3) The terms of the transfer.

11. The experts gave evidence in accordance with their respective proofs of evidence, which they added to in their oral evidence. Mr. Rembaum gave evidence in accordance with his written statement, which he added to in the course of his oral evidence. The landlord now proposed an enfranchisement price of £485,000. The tenants proposed an enfranchisement price of £397,294.

12. The parties agreed that there should be liberty to apply in respect of the landlord's costs under Section 9(4) of the 1967 Act in the event that those costs were not agreed, and that for that purpose the matter should be reserved to the present Tribunal.

C. Inspection

13. The Tribunal inspected the subject property at 31 Queens Grove on 11 July 2003.

14. The property is an early Victorian semi-detached 4 storey house with a 2 storey side extension, off street parking for two cars but no garage. The 2 storey side extension is in

keeping with the remainder of the property.

15. There is a small garden at the front and a south-east facing garden at the rear. This was in full foliage at the time of the Tribunal's inspection. The photographic studio at 32b Queens Grove was partly hidden. Some trellising appeared to have come down towards the back of the garden in front of the side wall of 32a Queens Grove. If the side wall of 32a Queens Grove was painted and/or if the missing trellising was replaced and further foliage grown, it would make 32a Queens Grove less of a visual problem. There was no noise emanating from 32b Queens Grove at the time of the Tribunal's inspection.

16. The Tribunal also inspected externally the other properties mentioned in evidence namely 64 Avenue Road, 15 Acacia Road, and 17 and 23 Carlton Hill. The Tribunal have the following comments on those properties:-

(1) 64 Avenue Road is a detached 3 storey property including mansard and with an integral garage. It is an attractive looking property with a semi-circular drive. It is situated next to a primary school and is on a busy road.

(2) 15 Acacia Road is a detached 2 storey property which is double fronted and has a single garage. Again, there is a semi-circular drive. The property has an unkempt look and appears unmodernised from the outside.

(3) 17 and 23 Carlton Hill are semi-detached 4 storey properties. There is off street parking

for one car at 17 Carlton Hill but no off street parking at 23 Carlton Hill. Carlton Hill is some distance away from Queens Grove. In the Tribunal's view, Queens Grove is preferable to Carlton Hill.

D. Decision

(1) The issue of tenants' improvements

17. It was accepted by the parties that a large part of the works covered by the 1989 Licence was overtaken by the works permitted by the 1999 Licence. However there were substantial elements of the works covered by the 1989 Licence which remained untouched or largely untouched by the works permitted by the 1999 Licence, subject to adaptation and extension when the works permitted by the 1999 Licence were carried out.

18. The first question is whether the works carried out under the 1989 Licence were improvements or whether the tenants were under an obligation to carry out the works under the terms of the 1989 Licence.

19. The landlord sought to argue that the lessee was obliged to carry out the works covered by the 1989 Licence under the terms of that Licence and that there was no necessity for the obligation to carry out the works to be in any Agreement for Lease or in the Lease or otherwise contemporaneous with the Agreement for Lease or the Lease itself.

20. In support of their argument, the landlord sought to rely on the case of *Rosen v. Trustees of Campden Charities [2002] Ch. 69*. The landlord contended that it was apparent from

the sales particulars in 1984 that the property required improvement, that it was recognised that the incoming lessee would have to spend money on the property, that there was a reduction in the sum paid by the lessee when the lessee acquired the property representing value received by the lessee, that with Clause 1 of the 1989 Licence imposing an obligation to carry out the works covered by that document the *Rosen* test was satisfied and that the works covered by the 1989 Licence were therefore not improvements.

21. Mr. Conway for the tenants argued that there had been no obligation to carry out the works covered by the 1989 Licence under the Agreement for Lease dated 21 November 1984 or in the Lease itself, that the lessee had been under no compulsion to enter into the 1989 Licence and carry out the works covered by that document, that the Licence was entered into some 5 years after the 1984 Lease, that the matter did not fall within *Rosen*, and that it was simply a condition of the Licence that the lessee carried out the works within 6 months. It was a consent subject to conditions. There had been no obligation to carry out the works.

22. The Tribunal consider that the tenants are correct in this regard. The 1989 Licence was no more than a consent by the landlord to carry out the alterations covered by the Licence upon the conditions contained in the Licence, including the condition in Clause 1 of the Licence that the works should be carried out within 6 months. There was no pre-existing obligation to carry out the works as there was in *Rosen*, where there was an obligation to carry out the works in the agreement for lease. Furthermore there was no evidence

before the Tribunal that the lessee had received equivalent value in relation to the works covered by the 1989 Licence, some 5 years after the 1984 Lease.

23. Turning to the improvements themselves covered by the 1989 and 1999 Licences, Mr. Briant for the landlord considered that the value of the space additions was £275,000 and that of the other improvement was £255,000, giving a combined value for the improvements to be disregarded of £530,000 arrived at as follows:-

(1) *Space additions*: The combined effect of the improvements had been to create 76.14m^2 of new space at the expense of 24.61m^2 of rather inferior space. On a pro-rata basis, this gave a value of about £800,000 for the additional space. However, it was necessary to stand back. Adopting 40% pro-rata seemed to be consistent with the approach of the Leasehold Valuation Tribunal in the case of 64 Avenue Road (Ref. No. LON/LVT/1443/01). This gave a value of £325,000. There was a further reduction of £50,000 to reflect the demolition of the existing smaller side addition. This gave a value for the space additions of £275,000.

(2) *Other improvements*: Detailed analysis of the value of each of the other improvements gave a further deduction of £255,000.

24. Mr. Briant sought to draw support for his figure of £530,000 for the value of the tenants' improvements from the case of 64 Avenue Road, where the Leasehold Valuation Tribunal had deducted £650,000 for improvements.

25. Mr. Buchanan for the tenants, on the basis of an improved freehold value for the property of £3,500,000, considered that the value of the space additions was £506,000 and that of the other improvements was £620,000, giving a combined value for the improvements to be disregarded of £1,126,000 arrived at as follows:-

(1) *Space additions:* The improved value of the existing house was £3,500,000, subject to the question of blight. This equated to £1,019 per sq. ft. and gave a value for the new side extension of approximately £844,000. There was a deduction of 40% to reflect the previous garage and development potential, giving a figure of £506,000.

(2) *Other improvements:* On the basis of the sales of unmodernised houses at 17 and 23 Carlton Hill, the value of the other improvements was £620,000.

26. Mr. Buchanan sought to support his figure of £1,126,000 by considering the value of the original house by reference to the unmodernised houses in Carlton Hill.

27. On the basis of a reduced improved freehold value of £3,300,000, Mr. Buchanan's figure for tenants' improvements was £1,062,000.

28. The approach to be adopted under Section 9 (1A) (d) of the 1967 Act has recently been considered by the House of Lords in *Shalson v. Keepers and Governors of the Free Grammar School of John Lyon [2003] 3 WLR 1* where it was held that in order to rely upon the improvement disregard the tenant had to identify the improvements that he and

his predecessors in title had carried out at their expense and to satisfy the Tribunal that but for those improvements the house and premises would have been worth less, it being necessary to compare the value of the house as it stood and what its value would have been had the improvements not be made.

29. The Tribunal in the main preferred the approach of Mr. Briant. The Tribunal's figure for the value of improvements to be disregarded is £605,000 arrived at as follows:-

(1) *Space additions*: The size of the house had been increased by 824 sq. ft. At £1,019 per sq. ft., this gave a figure of £839,656. Adopting 40% pro-rata gave a figure of £335,862, say £335,000. The Tribunal considered that the 60% deduction was large enough to also reflect the demolition of the existing smaller side addition and that no further deduction was warranted in this regard.

(2) *Other improvements:* The Tribunal accepted the individual figures of Mr. Briant as amended at the hearing with the following exceptions:-

(a) The Tribunal did not consider that there should be an allowance of £5,000 for the reduction in size of the reception room, there being no discernable effect on the size of the reception room.

(b) The Tribunal considered that the allowance for the installation of new bathroom/wc fittings to bathrooms in the original main house plus the provision of the new shower

rooms should be £50,000, rather than Mr. Briant's revised figure of £45,000.

(c) The Tribunal considered that the value of the landscaping of the rear garden, the creation of the improved patio area and the construction of outbuildings would be about £40,000, rather than Mr. Briant's figure of £25,000 which the Tribunal regarded as too low.

The Tribunal's figure for the value of the other improvements was therefore £270,000.

30. Adding the figure of £335,000 for the value of the space additions and £270,000 for the other improvements gives a total value for tenants' improvements to be disregarded of £605,000.

31. The Tribunal were of the view that standing back Mr. Buchanan's figure of £1,126,000 for the value of tenants' improvements was too high, approaching one-third of the improved freehold value of the property. Further, the Tribunal did not find it of assistance when considering the value of the other improvements to have regard to the sales of unmodernised houses at 17 and 23 Carlton Hill. Those properties had been in very poor condition with outstanding insurance claims due to structural problems. That apart, Queens Grove in the Tribunal's view was preferable to Carlton Hill.

32. On the basis of the Tribunal's figure of £605,000 for the value of tenants' improvements, the unimproved freehold value of the property subject to the question of blight was £2,895,000.

(2) The alleged blight effect of 32a and 32b Queens Grove

33. The tenants contended that:-

(1) There was nuisance from the photographic studio at 32b Queens Grove.

(2) There was the unseemly look and dominant effect of 32a Queens Grove.

34. Based on the evidence of Mr. Sulkin, the tenants argued that there should be a deduction for blight of £200,000 from the improved freehold value of the property, giving a reduced improved freehold value of £3,300,000.

35. Mr. Briant for the landlord maintained that no deduction was justified.

36. Mr. Buchanan had not considered the question of blight in agreeing for the tenants the improved freehold value of the property of £3,500,000. It was suggested for the tenants that there had been a misunderstanding in this regard.

37. In the Tribunal's view, there should be no deduction for the alleged blight for the following reasons:-

(1) On the question of nuisance from the photographic studio at 32b Queens Grove, it was apparent from the evidence of Mr. Rembaum that any nuisance had been very spasmodic. He had not found it necessary to instruct Solicitors, go to the Police, call round or even

write to the occupiers of the property. It was very quiet when the Tribunal inspected.

(2) The visual effect of 32a Queens Grove was not the most attractive but could be improved by painting the side wall of that property and/or replacing the missing trellising and growing further foliage.

(3) The Tribunal would be most surprised if the proximity of the adjacent buildings at 32a and 32b Queens Road had not been taken into account by Mr. Briant and Mr. Buchanan in arriving at their figure of £3,500,000 for the improved freehold value of 31 Queens Grove.

(3) The terms of the transfer

38. The terms of the transfer in dispute were Clauses 3.1 and 3.2. The relevant clauses as proposed by the landlords were as follows:-

"3. The Purchasers hereby covenant with the Transforors for the benefit and protection of the adjoining and neighbouring unsold parts of the Transferors' Eyre Estate:-

3.1 Not to make any alterations of any kind whether structural or otherwise to the height elevation or external appearance of the Property without the previous consent in writing of the Transferors such consent not to be unreasonably withheld or delayed.

3.2 Not to put up any additional buildings or erections upon any part of the Property

without the like consent such consent not to be unreasonably withheld or delayed."

39. The tenants were willing to agree the restrictions contained in those clauses, but with the following amendments:-

(1) In Clause 3.1 the opening words to read "Not to make any alterations of any **material** kind ..."

(2) In Clause 3.2, the opening words to read "Not to put up any additional buildings or erections **of any material kind** upon any **unbuilt** part of the Property ...".

40. The landlord's position was that:-

(1) The wording of these clauses and the question of amending the clauses to refer to the materiality of the alterations had been considered by the Leasehold Valuation Tribunal in the case of 47 Avenue Road, St. John's Wood, London NW8 (Ref. No. LON/LVT/1291/00). The landlord submitted that the decision of that Tribunal was correct and should be followed.

(2) The case of *Burroughs Day v. Bristol City Council [1996] 1 EGLR 167* which was referred to by the tenants related to materiality in a planning context. That case represented precisely the sort of argument that the landlord wished to avoid.

(3) It was always difficult to say precisely what the effect was on the landlord's retained estate. However, this part of St. John's Wood would not look as it did if the landlord had

not sought to impose unqualified restrictive covenants and taken an active stance in maintaining the physical appearance of both its retained and former estate.

(4) Mr. Briant's evidence was that the landlord had a system of considering alterations which worked in practice. There had been no litigation, which was quite significant. The landlord had in fact consented by letter dated 13 March 2002 to the construction of limestone steps and a small porch at 31 Queens Grove.

41. Mr. Conway for the tenants relied on written submissions by Mr. E. Johnson of Counsel. His submissions dealt with the introduction of the materiality qualification into the restrictions on alterations, erections and buildings sought by the landlord in the transfer. He argued that:-

(1) Section 10 (4) of the 1967 Act gave the landlord no general right to introduce restrictive covenants into the transfer. The landlord had to satisfy the requirements of Section 10 (4) of the Act.

(2) The tenants considered that the relevant provisions were Section 10 (4) (b) (i) of the Act. The landlord had to prove that the disputed clauses in the form sought by the landlord were capable of benefiting other property and were such as to materially enhance the value of the other property.

(3) It was impossible to see how the introduction of a materiality qualification into the

disputed clauses could possibly have any effect, let alone a material effect, upon the value of any other property.

(4) The landlord could not satisfy the requirements of Section 10 (4) of the Act so far as their version of the disputed clauses was concerned.

42. The Tribunal consider that the restrictive covenants in Clauses 3.1 and 3.2 of the transfer insofar as the tenants' proposed amendments were not accepted by the landlord should be in the form proposed by the landlord and not the tenants, the Tribunal reaching this view for much the same reasons as the Tribunal in the case of 47 Avenue Road:-

(1) The starting point is the existing restrictions on external alterations to be found in Clause 2 (10) of the 1984 Lease, which contains a covenant that the lessee:-

"Will not make any alteration of any kind whether structural or otherwise to .. the height or elevation or external appearance of the said premises .. nor put up any additional buildings or erections thereon without the previous licence in writing of the Lessors ...".

The restrictive covenants in the form proposed by the landlord in Clauses 3.1 and 3.2 of the transfer to a large degree mirror what is in the existing Lease.

(2) The Tribunal can see the need to ensure that any external alterations should be professionally considered in the interest of the value of other properties on the Estate.

(3) The proposed restrictive covenants are subject to the express proviso that the Estate's consent is not to be unreasonably withheld or delayed. The Tribunal are of the view that on the evidence the tenants have no need to fear that the application of the restrictive covenants in the form proposed by the landlord would prevent the carrying out of minor alterations, as shown by the landlord's letter of consent dated 13 March 2002 to the construction of limestone steps and a small porch at 31 Queens Grove. The Estate cannot unreasonably withhold their consent.

(4) There is no evidence before the Tribunal that the restrictive covenants had not been operated fairly in other cases.

(5) It is important to bear in mind the special character of the St. John's Wood area. It is a high class area. There is no scheme of management in operation on the Eyre Estate. The landlord is justified in seeking to maintain the values of other properties on the Estate for the benefit of the landlord and other residents. In that respect, it is to be observed that the opening words of Clause 3 of the transfer expressly refer to the covenants being for the benefit and protection of the adjoining and neighbouring unsold parts of the landlord's Eyre Estate.

(6) Although as Mr. Munro accepted it is always difficult to say precisely what the effect was on the landlord's retained estate, the Tribunal nevertheless accept that the adoption of the restrictive covenants in the form proposed by the landlord will benefit and materially enhance the value of other property in which the landlord has an interest.

(7) The Tribunal is of the view that the restrictive covenants in the form proposed by the landlord satisfy the requirements of both Section 10 (4) (b) and (c) of the Act.

(8) The tenants' proposed wording in so far as it seeks to introduce a materiality qualification would produce a lack of certainty. Furthermore, the tenants' suggested wording for the restrictive covenants does not actually reflect the provisions of Section 10 (4) of the Act.

E. Determination

43. The Tribunal determine the enfranchisement price payable by the tenants to be £476,102 in accordance with the Tribunal's valuation annexed to the decision. The terms of Clauses 3.1 and 3.2 will be in the form proposed by the landlord in so far as the same is not agreed between the parties. There will be liberty to apply to determine the landlord's costs under Section 9 (4) of the 1967 Act in the event that those costs are not agreed. For that purpose, the matter will be reserved to the present Tribunal.

Chairman ..... P Wulwik .....
Peter Wulwik

Date: 6 AUGUST 2003 .....

LVT Valuation

PROPERTY	31 Queens Grove, London NW8	
VALUATION DATE	24.09.2002	
LEASE DETAILS		
DATE	28.12.1984	
TERM	79 years	
EXPIRY DATE	24.03.2063	
UNEXPIRED TERM	60.50 years	
STEPPED GROUND RENTS	£400 to	24.03.2009
	£23,500 from	25.03.2009 (1/60th land value)
VALUES	Unimproved values	
FHVP	£2,895,000	
UNEXPIRED TERM	£2,287,050	79%

VALUE OF FREEHOLD PRESENT INTEREST

TERM 1	GROUND RENT			£400		
	x YP	6.50 years @	6.00%	5.25		
					£2,100	
TERM 2	GROUND RENT			£23,500		
	x YP	54.00 years @	6.00%	15.9498		
	x PV	6.50 years @	6.00%	0.6850		
					£256,752	
REVERSION	FHVP(less Lessees' Improvements)			£2,895,000		
	x PV	60.50 years @	6.00%	0.00295		
					£85,402	
				Lessor's Interest		£344,254

MARRIAGE VALUE

	FHVP (less Lessees' Improvements)	£2,895,000	
Less			
	Lessor's Present Interest	£ 344,254	
	Lessees' Interest (less Lessees' Imps.)	£2,287,050	
Marriage Value		£263,696	
Take	50% Marriage Value		£131,848
		TOTAL	£476,102