2256

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HP/OLR/2009/0039

Decision of the Leasehold Valuation Tribunal on an application under Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993

Applicant	Allyson Ann Currie
Respondent	Max Spelman
Re:	Flat 5 & Parking Space 5, The Pentagon, 94 Stanley Green Road, Poole BH14 3AG
Date of Application	16TH July 2009
Date of Inspection	16th October 2009
Date of Hearing	16th October 2009
Venue	Holiday Inn Express, Poole
Appearance for Applicant	A Howard, Solicitor, Coles Miller
Also attending	Ms Currie and Mr S A Higley BSc FRICS
Appearance for Respondent	Mr C McGowan, Surveyor

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Chairman
T E Dickinson BSc FRICS	Valuer Member
Miss C D Barton BSc MRICS	Valuer Member

Date of Tribunal's Decision: 28th October 2009

Decision

1. The premium payable by the Applicant to the Respondent for a new lease of the Flat 5 and Parking Space 5, 94 Stanley Green Road, Poole (the Premises) to be granted under Section 56 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act")

   a) is the sum of £19,314;

b) on the same terms as those set out in the Draft Deed of Surrender and Lease annexed to the Counter Notice dated 12 May, 2009 with the following variations:

   i) Clause LR 5.1 shall be deleted;

   ii) Clause LR 5.2 shall read "LR 5. This lease is made under Section 56 of the Leasehold Reform Housing and Urban Development Act 1993".

   iii) Clause 2 (v) shall be deleted;

   iv) In Clause 2 (vii) (a) the words "foundations, external and load bearing walls" shall be added following the words "main roof" and the words "and coloured green hatched black" shall be deleted;

   v) In Clause 3 (i) the words "That on receipt of the contribution by the Tenant under Clause 2 (vii) hereof" shall be deleted;

   vi) Clause 3 (iv) shall be deleted and replaced with the insurance clause set out at paragraph 5 of the Rider produced to the Tribunal and annexed to the draft Surrender and Lease.

2. Application for costs. The Tribunal determines that the Respondent shall not be ordered to pay any costs in relation to the proceedings under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act).

Reasons.

Introduction.

3. By her Notice of Claim the Applicant had claimed a new tenancy of the Premises under Section 56 of the Act, proposing a premium £13,075 but otherwise on the same terms as the existing lease, as varied as applicable at the date of the notice but modified in such a way as reasonably required and incorporating all appropriate rights and easements and further modified to take account of certain specified circumstances namely:

   a) the term is to be for a term expiring 90 years after the term date of the existing tenancy;

   b) the rent payable from the date of grant of the new lease is to be a peppercorn;

   c) to contain the prescribed statutory statement;

   d) such amendments as are necessary to make a new lease compliant with the requirements of the Council of Mortgage Lenders.

4. By Counter-Notice dated 12th May 2009, the Respondent accepted the Applicant's proposals as set out at paragraph 3 above save that he proposed a premium of £45,000;

5. The matters which remained to be determined by the Tribunal were:

    i) the premium payable;

    ii) the terms of the transfer;

    iii) costs payable under Schedule 12 to the 2002 Act.

Inspection

6. The Tribunal inspected The Pentagon and the Premises in the presence of the Applicant, Mr Higley and Mr McGowan.

7. The Pentagon is situated in a residential area. It was constructed in the 1960s of brick under a felt roof. It comprises 5 flats and 5 parking spaces to the rear. Access to Flat 5 on the 2nd floor is by means of external concrete stairways. The driveway and forecourt to the parking spaces are gravelled but in poor condition. One or more of the flats in the Pentagon has a garden but the Premises do not.

8. The Premises comprise a 3 bedroom flat with a spacious living room (opening on to a large balcony), the main bedroom, a small bedroom and another bedroom (which has been reduced in size by extension of the bathroom to provide space for a shower unit), bath/shower room and a kitchen. The flat has tenant's improvements consisting of double glazing throughout, balcony decking, a modern bathroom/shower room and a kitchen whose fitted units are probably not original but installed prior to 2000 (when the Applicant purchased the flat).

9. The external stairway is deteriorating and is likely to need extensive repairs in the foreseeable future.

10. We also noted Halcyon Court immediately adjacent, a block of flats of similar age and construction, which had been referred to us for comparable flats.

Hearing

11. The Tribunal had previously received papers, submissions and other documents from the parties. These consisted of the Notice of Claim, Counter Notice, existing lease, draft transfer & Rider, Applicant's report dated 17 September, 2009, Applicant's Skeleton Argument dated 6 October, 2009, Statement of Case/skeleton argument of the Respondent dated 12 October, 2009, Report and Valuation of Mr Higley dated 20th August 2009, a statement of Mr Nicholas Richards dated 15th October 2009, the Respondent's calculation of the premium payable, a copy of the Council of Mortgage Lenders Handbook (2007) and some information as to comparables.

12. Provisional directions dated 20th July 2009 and Revised directions dated 10 August, 2009 provided for Valuers to exchange reports and also to provide a joint report setting out matters agreed and identifying issues remaining in contention. The Respondent's valuer did not provide a valuation report to the Applicant or the Tribunal either before or at the hearing and we are satisfied took no steps to attempt to agree a joint report.

13. The parties agreed that the issues as to the terms of the draft transfer which remained to be determined would not affect the determination of the premium payable.

14. Case for the Applicant.

    a) Mr Howard confirmed it was agreed that the valuation date is 5th March 2009 and that the remaining term is 54.3 years. As regards issues arising from the Respondent's skeleton:

        i) he relied on Mr Richards' statement that it was part of the proposed sale terms of the Premises that the Applicant was to pay the premium and costs relating to the lease extension.

        ii) As to the Respondent's contention that the improvements noted above should not reduce the premium payable, he relied on paragraph 3(2)(c) of Schedule 13 of the Act which provides for valuation 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".

        iii) He noted that the Respondent's valuation referred to the valuation of the freehold interest.

        iv) By reference to case law he submitted that the Respondent had provided no reason to support the capitalisation rate of 7.5% and that the Tribunal should accept Mr Higley's rate of 8% for the reasons set out in his report.

        v) As to the deferment rate, for the reasons set out in his skeleton, 5% is only a starting point but subject to any evidence to the contrary.

    b) Mr Higley gave evidence for the Applicant on the basis of his Report and valuation. Particular points arising:

        i) he had applied a yield to the ground rent of 8% which is relatively high because the rent of £15.75 per annum is small and the administration costs high in relation to it.

        ii) He had adopted a deferment rate of 5.5% because the property is not in prime central London. The ground rent is small: there is a low value to the term. Costs can't be recovered and would exceed ground rent income. There is no ability to recover management costs.

iii) He considered the improvements to the Premises added about £12,500 to the Premises value, that the Premises, in the absence of those improvements constituted its condition as built in the 1960s.

iv) Relativity. The flat is quite unusual, relativity in Bournemouth/Poole tends to be quite high (that is his experience but not based on specific evidence) and he considered it was appropriate to take into account the HM Land Registry House Price Indices. He accepted that flat prices may vary against the full range of property types and that flat values had declined more than houses.

v) Other points in cross-examination:

(1) he estimated the total cost of improvements would be about £18,250 and together added value of £12,500;

(2) he considered the property to be in a convenient location; the previous windows were probably Crittall; the comparables in Halcyon Court were on the ground or first floors; he was not sure if he had used the 2009 relativity revision; he had applied a percentage of 2.5% for valuation in the "no Act world" which he had used locally in other settlements; he had not taken into account the cost of repair of the stairway.

15. Case for the Respondent

a) Mr McGowan told us that he is a Member of the Royal Institution of Chartered Surveyors and practices at 68 Petersham Road, Richmond, London. His practice relates to mortgage valuations and he has no other experience relating to the Bournemouth/Poole Area. He said that he had prepared a report and sent it to the Respondent's solicitors. He had not got a copy of the report with him at the hearing.

b) He agreed the valuation of £160,000 on the basis that the lease extension is obtained and paid for by the Applicant. As a comparable he referred to 117c Fernside Road, Poole, a detached house with 2.5 bedrooms which had exchanged contracts for sale on 7 October, 2009 at a price of £157,500. He had not seen the property.

c) As regards improvements: he did not consider the kitchen units would increase the value of the Premises; that the work to the bathroom would increase its value but would likewise reduce the value of the small bedroom; that the value of improvements, including decking, had not increased the value by £12,000 and suggested an increase of £5,000. He considered the cost of the improvements would be about £15,000 spent today, that they would increase the value by £10,000 but then subject to a reduction of 50% because of the length of time since the works were done. He did not in any

event accept the Applicant's contention that they were to be disregarded in the valuation.

d) He said that the management costs are reflected in the valuation.

e) He had not seen the subject property before the day of the hearing. Although his valuation calculation suggested that it was in respect of the Freehold interest, it was actually in respect of the leasehold value of the premium which t6he calculation showed should be £22,690.

f) He had based the deferment rate of 5% on the Sportelli case and saw no reason to move from it: he saw no evidence to affect it. He said that relativity was extremely subjective and Mr Higley provided no evidence: he had adopted a mean percentage of 79% from the Graph of Graphs which he considered to be appropriate for both flats and for a lease of this term. He accepted however that relativity is higher in this area and that Mr Higley's local knowledge is to be preferred.

g) He said that flats form only a small percentage of house sales.

h) In cross-examination he added that this was the first valuation he had done in Poole; that the cost of collection of ground rent exceeded its value but that was not material. He did consider the relativity graphs which are material, but he also took into account regional variations and considered Lands Tribunal decisions which relate to a larger area. As regards capitalisation rate, he said that there was very little between him and Mr Higley. As regards marriage value he said that the best evidence on that was the current transaction.

16. Mr McGowan said that he had no instructions on the issues of lease terms or costs and he left the hearing.

a) Terms of the draft lease. Mr Howard's submissions were based on Paragraphs 9 and 10 of his skeleton argument. Additionally he emphasised that the Counter Notice had accepted the proposed terms of new lease referred to in the Notice of Claim. It was therefore agreed that the new lease should include amendments necessary to comply with the requirements of the Council of Mortgage Lenders (CML). He referred to those requirements set out in paragraphs 5.10.4.2 and 6.13. He said that alternatively it was open to the Tribunal to decide the terms of the new lease under the provisions of section 91 of the Act .

b) Schedule 12 Costs. In support of his claim he relied on the terms of the directions given in this case as noted above with which the Respondent had not complied. He submitted that as a result, the Respondent had acted unreasonably in connection with the proceedings, so his client had incurred additional costs which he put at £320 plus VAT, a total of £368.

Consideration.

17. We considered all the expert evidence, both written and as given at the hearing. We also took into account our inspection of the Premises, the block and of the comparables to which we had been referred and also took into account our own knowledge and experience.

18. In respect of the valuation evidence given for the Respondent, we noted that not only did we not have a report in writing, let alone one complying with the requirements of the Royal Institution of Chartered Surveyors, it appeared to us that Mr McGowan had little or no relevant experience in this type of case; he had no experience of valuation in this geographical area; he had not inspected the property before making any valuation calculation nor had he inspected the comparable that he put forward. Save as set out below, we therefore preferred the evidence of Mr Higley.

19. Improvements.

    a) We considered that the figure of £12,000 increase in value of improvements by Mr Higley to be, in our experience, too high. In this respect we also took into account Mr McGowan's evidence. We found that the improvements to the bathroom would have an adverse effect on the value of the 3rd bedroom, that there was little improvement value in the kitchen; that the significant value was in the double glazing but that overall the true present value of improvements was reflected in the sum of £9,000.

    b) Furthermore, we found that the Act requires the valuation to be made according to the assumption in the Act as set out above and that applies regardless of whether the windows are included in the demise, whether or not alterations were authorised or whether or not the tenant is required under the lease to maintain the kitchen (maintenance does not include improvement). Accordingly we found the sum of £9,000 to be deducted from the agreed value of £160,000 in arriving at the present value of the present lease. This leaves a present value of £151,000 which did appear to be consistent with the material comparables in this and the adjacent blocks.

20. Relativity. While we agree the relativity percentages referred to by Mr Higley in his report which ranged between 70% and 83%, we did not feel that Mr Higley was justified in adopting a value of £125,000 resulting in a relativity figure of 84.74%. We considered that a relativity figure of 80% was appropriate.

21. Subject to the above points we accepted Mr Higley's report and methodology and made our calculations accordingly. Our calculations are set out in the Schedule below.

22. Lease terms.

a) Clauses LR 5.1. & amendment to LR 5.2 the amendments made to these clauses, the deletion of the former and the amendment of the latter were not disputed by the Respondent and we determined them accordingly.

b) Clause 2 (v). This clause in the present lease refers to caring for the garden coloured Brown on the plan. The Premises do not include a garden and there is no brown colouring on the plan. The Respondent did not object to its deletion and we determined it accordingly.

c) In making the following decisions which are consistent with our statutory powers mentioned earlier, we have also taken into account the CML requirements to which we have been referred by the Applicant. Paragraph 5.10.4 of those requirements requires purchaser's solicitors to take reasonable steps to check that there are satisfactory legal rights, particularly for access, services, support, shelter and protection; also that there are adequate covenants and arrangements in respect of the following matters: building insurance, maintenance and repair of the structure, foundations, main walls, roof, common parts, common services and grounds. We consider on that basis that unless we approved the following, the requirements of the CML would not be met and the leaseholder would be prejudiced both in terms of the value of the lease and the proper management of the Premises and the block. We acknowledge that such amendments will mean that the terms of the new lease of the Premises will differ from the leases of the other 4 flats in the block, but nevertheless the amendments should be made in accordance with the proposals agreed in the Notice of Claim and Counter Notice, our statutory powers and the CML requirements.

d) Clause 2 (vii) (a).

i) The clause in the existing lease refers to the tenant contributing one-fifth of the cost of repair of the main roof and timbers but no other parts of the structure which are the responsibility of the Respondent. The Applicant proposes that the other structural parts be included by insertion of the words "foundations, external and load bearing walls". The Respondent does not object and we made our decision accordingly.

ii) The Respondent acknowledges that there is no green colouring on the plan: this was confirmed by our inspection of the original lease plan itself which shows blue colouring, part being hatched and part crosshatched. To make sense of the lease and to comply with the requirements of CML we accepted the amendment proposed by the Applicant.

e) Clause 3(i).

i) The Respondent objects to the proposed amendment which is that there should be deleted from this present clause words "that on receipt of the contribution by the tenant under clause 2 (vii) hereof". He does so on the

ground that there is a history of Leaseholders not paying for repairs and that this amendment would mean the leases not being in identical form.

ii) In our view, if a tenant pays the contribution while others do not, the paying tenant is prejudiced by non-payment of 3rd parties if as a result the lessor does not carry out work. Conversely, the lessor has the right to enforce payment while a paying tenant does not. We accordingly agreed the proposed amendment.

f) Clause 3 (iv). The existing insurance covenant only obliges the lessor to insure against fire and "and such other risks (if any) as the landlord thinks fit". This is plainly unacceptable: it needs to cover as an obligation all the usual risks as mentioned in the Applicant's proposed replacement clause. Unless it does the tenant is at serious risk and present terms would certainly not comply with the CML requirements. We therefore accept that the amendment in its full terms as proposed should be made.

23. Schedule 12 Costs.

a) The application for costs is based on the Respondent's failure to comply with the directions. We accept that there has been almost complete failure by the Respondent in that respect. If the Respondent had complied, a valuer's report would have been available for consideration and there would also have been a joint experts' report. As it proved not possible for the Applicant to begin to agree a joint report, the Applicant's solicitors prepared a report dated 17 September, 2009 recounting the Respondent's failures. The report focuses almost entirely on that aspect, but in the final two paragraphs states that valuation and the terms of the new lease had not been agreed. We accept that preparation of that report would have incurred additional cost to the Applicant but, with respect to her solicitors, it does not add greatly to the determination of the issues and in our view was largely unnecessary. Certainly we would not have taken issue with the Applicant for the lack of a joint report which has plainly been by reason of the Respondent's failure.

b) It seems to us that if the Respondent had complied with the directions, further work would have been carried out beyond what the Applicant and her advisers have been able to carry out and that in itself would have resulted in expense which she has not had to incur.

c) So even if the Respondent's failures would constitute acting in "unreasonably in connection with the proceedings", on which we have doubt, we found that the Applicant has probably incurred less expense by not having to carry out certain work and on the other hand unnecessary work has been carried out. For those reasons we did not consider that the Applicant was out of pocket by reason of the Respondent's failure and that no costs should be awarded under Schedule 12.

24. We made our decisions accordingly.

M J Greenleaves (Chairman)

A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor

The Schedule

Freehold as is			
Present Interest			
Ground Rent		15.75	
YP for 54.3 years @ 8%		12.31	193.88
Reversion to capital value		151,000	
PV £1 in 54.3 years @ 5.5%		0.05454	8,235.54
Diminution			**8,429**
Marriage Value			
Freehold after			
Leasehold after		151,000	
Freehold before	8,429		
Leasehold before 80%	120,800	129,229	
Marriage value		**21,771**	
Marriage value @ 50%			10,885
Premium payable			**£19,314**