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HM Courts & Tribunals Service

Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER LEASEHOLD REFORM, HOUSING AND URBAN DEVLEOPMENT ACT 1993

Case Reference:	LON/00AW/OCE/2012/0054
Premises:	61 Queens Gate, London SW7 5PJ
Applicant:	61 Queen's Gate Freehold Ltd
Representative:	Swabey & Co
Respondent:	Queensbridge Investments Ltd
Representative:	Forsters LLP
Date of hearing:	11th & 12th March 2013
Appearance for Applicant:	Mr C Fain, counsel
Appearance for Respondent:	Mr S Jourdan QC
Leasehold Valuation Tribunal:	Mr NK Nicol Mrs SF Redmond BSc (Econ) MRICS
Date of decision:	28th March 2013

Decisions of the Tribunal

(1) The service charge percentages to be inserted in the leasebacks of Flats A, 8 and 9 shall be as proposed by the Applicant, namely in the proportion the GIA of each flat bears to the GIA of all the flats in the building.

(2) In relation to the value of developing a studio flat to the rear at fourth floor level, deductions need to be made of 50% for each of the risks of being refused planning permission and facing enforcement of the relevant restrictive covenants and the overall development value is £30,000.

(3) The differential between the value of the freehold and the 999-year leasebacks of Flats A, 8 and 9 is 0.5%, plus an additional amount of 1.48% to take account of the value of the loss of the current service charge arrangements.

(4) The issue of the costs to be paid to be paid to the Respondent in accordance with s.33 of the Leasehold Reform, Housing and Urban Development Act 1993 would be better dealt with in a separate application, if they are not agreed.

(5) The Respondent shall pay the Applicant £500 towards their costs in these proceedings in accordance with paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

The application

1. On 29th October 2012 the Tribunal issued a decision on four preliminary legal issues in this application for collective enfranchisement. As well as the determination of those issues, the decision contains relevant background information, including details of the subject property, and, in an Appendix, relevant provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). This further decision will not repeat that information and must be read as a continuation of the previous decision.

2. The Respondent sought but was refused permission to appeal the decision of 29th October 2012 by both the Tribunal and the Upper Tribunal. Unfortunately, the Upper Tribunal's decision was not issued until 6th March 2013. The parties had understandably waited for that before making their final preparations for the hearing on 11th and 12th March 2013. Neither party sought an adjournment but spent the first morning narrowing the issues between themselves. Attached as Appendix 1 to this decision is the list of issues which the parties informed the Tribunal they had agreed.

The issues

3. The parties agreed that the remaining issues were:-

(1) The Tribunal had previously left open the service charge apportionment to be inserted into the leasebacks to be granted to the Respondent in relation to Flats A, 8 and 9.

(2) The parties disputed the value of developing a studio flat above the existing Flat 5. In particular, they disputed:-

(a) The degree of planning risk; and

(b) The effect of the restrictive covenants in the transfer.

(3) In two respects the parties disputed the freehold value of the three flats, A, 8 and 9, currently retained by the Respondent and to be subject to leasebacks:-

(a) The parties' respective valuers disputed whether the differential between the value of the freehold and the 999-year leases for the three flats would be 0.5% or 1%; and

(b) They also disagreed on the value of the current favourable service charge arrangements which would be lost in the leasebacks.

(4) The parties have yet to attempt agreement in relation to the costs to which the Respondent is entitled under s.33 of the Act.

(5) A previous Tribunal, in a directions order dated 22nd June 2012, reserved to this Tribunal the determination of an application made by the Applicant for a costs order under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

4. Each of these issues is considered in turn below. The Tribunal was assisted by expert evidence presented by both parties. The following experts gave evidence and were cross-examined:

	For the Applicant	For the Respondent
Valuation	Mr J Bennett BSc (Hons) MRICS ACIArb	Mr G Buchanan BSc MRICS
Planning	Mr J Drew MRTPI	Mr J Wright BSc DipTP MRTPI

Service Charge Percentages

5. In its decision of 29th October 2012 the Tribunal determined that the terms of the leasebacks in respect of the three flats retained by the Respondent, namely A, 8 and 9, will be in the form proposed by the Applicant. That form is the same or virtually the same as the current leases for Flats B and 1-7 and includes the following:-

LEASE PARTICULARS

8. THE SERVICE CHARGE PERCENTAGE [*see below*]

1. Interpretation

1.1 Definitions

In this Lease the following words and expressions shall have the meanings hereby assigned to them respectively that is to say:

the Service Charge means the percentage specified in paragraph 8 of the Particulars (or such other percentage as shall become payable pursuant to the provisions of the Lease) of the cost and expenses of each of the services relating to the Building as set out in Part II of the Eighth Schedule

3. The Tenant HEREBY COVENANTS

3.2 with the Landlord and as a separate covenant with the tenants or occupiers or owners of the other flats in the Building to observe and perform the obligation set out in Part II of the Fourth Schedule ...

THE FOURTH SCHEDULE

PART II

1. To pay to the Landlord the Service Charge in accordance with the provisions contained in the Eighth Schedule

THE EIGHTH SCHEDULE

Service Charge Regulations

Part 1

1. If in the opinion of the Landlord it should at any time become necessary or equitable to do so by reason of any of the properties in the Building ceasing to exist or to be habitable or being compulsorily acquired or requisitioned by any public or competent authority or the number being increased or for any other reason the Landlord or its surveyor shall recalculate the proportion payable by the Tenant either as appropriate to the remaining properties or as appropriate to all the properties (as the case may be) and notify the Tenant and the owners of the other properties accordingly and in such case as from the date of such event the new proportion notified to the Tenant in respect of the Demised Premises shall be substituted for that referred to in paragraph 8 of the Particulars hereto and all reference to the proportion payable by the Tenant shall be construed as a reference to the new proportion as calculated.

6. In its decision of 4th January 2013 refusing the Respondent permission to appeal, the Tribunal stated at paragraph 15:-

> The Respondent's grounds of application point out at paragraph 22 that the Applicant's draft leasebacks left blank the service charge percentage. This was not an issue specifically addressed by the Applicant at the hearing nor by the Tribunal at the hearing or in its determination. The Tribunal understood the Applicant to be proposing a revised percentage for all flats based on floor area (albeit that they were mistaken in thinking that the Respondent agreed this method). The Tribunal made it clear in its original determination that the

Applicant's proposed leasebacks, including the revision of the percentages, was accepted. Since neither party has addressed how the revision is to be achieved, they must do so at the next hearing. For the Applicant, it is for them to show how the percentages of the other leases may be varied appropriately, whether by agreement or otherwise.

7. Paragraph 16(1) of Schedule 9 of the Act specifies that the leasebacks may require the Respondent to bear a reasonable part of the costs incurred by the Applicant in discharging or insuring against the obligations imposed by the covenants required by paragraph 14(1) (repairing covenants) or in discharging the obligation imposed by the covenant required by paragraph 14(2)(a) (insurance). As confirmed by HHJ Robinson in her decision of 6th March 2013 refusing the Respondent permission to appeal to the Lands Chamber of the Upper Tribunal, this gives the Tribunal the power to insert into the leasebacks service charge percentages which are different from the current apportionment to the extent that the old percentages are not "reasonable" and the new ones are.

8. The current service charge percentages (detailed in a table below) result in the 8 participants in the Nominee Purchaser paying 91.77% of the service charge expenditure whereas Flats A and 9 pay nothing while Flat 8 pays 8.15%, leaving 0.08% to be borne by the Respondent. The Applicant proposes that the service charge apportionment is calculated by the GIA (Gross Internal Area) of each flat relative to the total GIA for all the flats. It is asserted that this is fair, equitable and reasonable, unlike the current arrangements.

9. The Respondent pointed to some anomalies such as Flat A not benefitting from the lift or the entryphone and questioned whether a calculation relying entirely on floor area could possibly be fair when all such considerations are taken into account. More importantly, Mr Jourdan pointed out that the existing percentages arise from contracts freely agreed by the respective parties. He proposed that the percentages should remain as they are save that the total of 8.23% currently borne by the Respondent as freeholder should be equitably split between the three leasebacks. He previously asserted that the Tribunal was obliged to accept this as a matter of law but that submission was rejected in the previous decision of 29th October 2012. He now asserted that his proposal was the appropriate outcome in the circumstances.

10. There is a problem in that the Tribunal can only determine the service charge percentages to go into the leasebacks. The Tribunal has no power in these proceedings to alter the percentages of the other 8 flats. If the Tribunal accepts the percentages proposed by the Applicant for the leasebacks, the total service charge apportionment would be greater than 100%. This is not as great a problem as it may appear since the money would not go into the Applicant's pocket because it would be held on trust to meet service charge expenditure. In any event, Mr Fain informed the Tribunal that his instructions were that the lessees of the 8 flats in question had committed themselves to changing their respective service charge percentages in accordance with the Applicant's proposal. It would have been preferable if this had been evidenced, including by producing draft deeds of variation. However, in the circumstances, the Tribunal accepts that the Applicant intends to change the

percentages accordingly. It is unlikely that the lessees will fail to co-operate given that they will each benefit.

11. The existing and proposed service charge percentages are:-

Flat	Existing	Proposed by A	Proposed by R
A	0	10.53%	2%
B	13.12%	9.49%	13.12%
1	14%	9.25%	14%
2	6.41%	4.93%	6.41%
3	6.41%	5.05%	6.41%
4	17.92%	12.05%	17.92%
5	6.21%	4.37%	6.21%
6	12.05%	10.84%	12.05%
7	15.65%	10.33%	15.65%
8	8.15%	6.11%	2.23%
9	0	17.05%	4%

12. According to the Respondent's own arguments (see further below), the current favourable service charge percentages add over 10% to the value of their interest, meaning that they are extremely valuable. However, service charges are payments for services delivered – there should not be any profit element for anyone involved. The Respondent is essentially asking for their fellow lessees to subsidise their receipt of the usual services and to receive the benefit of those services without having to pay anything like their true value. The current arrangement could not possibly survive a revision of the service charge percentages under paragraph 1 of the Eighth Schedule in the relevant leases because, in the words of that provision, it is not equitable. Despite all this, the Respondent continues to argue that they should only have to pay their current share. On the Respondent's arguments, there seems no principled basis for splitting the percentage paid by Flat 8 between it and Flats A and 9.

13. The Tribunal is satisfied that the current service charge percentages are not, in the words of the statute, reasonable. Of course, that does not necessarily mean that the Applicant's alternative proposal is reasonable. However, the Tribunal is not convinced by the Respondent's arguments. The various parties did agree their percentages but, in all likelihood, in ignorance of those paid by any other lessees. Further, it is unlikely that the Respondent would have been prepared to enter into negotiations to alter the percentage presented to each potential purchaser in the lease doubtless drawn up on its behalf.

14. Moreover, it is not practical to try to achieve percentages which precisely reflect the proportions of the actual services received. It is reasonable for a landlord to use a method which only roughly achieves fairness. It is likely to be more trouble than it is worth to try to gauge whether Flat A should have a lower percentage due to the fact that the occupants are unlikely to use the lift or a higher percentage due to the fact that it has a roof which it does not share other than as a terrace with one other flat.

15. The Applicant's proposed method of calculating the service charge percentages reflects common practice for leasehold properties. If GIA is not used, rateable values often achieve a similar effect.

16. In the circumstances, the Tribunal is satisfied that the Applicant's proposed service charge percentages are reasonable and those set out in the above table for Flats A, 8 and 9 should be inserted into the leasebacks.

Development Value of Studio Flat

17. The Respondent argued that the subject building had potential development value. As recorded at paragraph 12(e)(i) of the Tribunal's decision of 29th October 2012:-

> The Respondent has put forward two schemes of redevelopment, one involving the addition of a studio flat to the top of the rear extension and the second a redevelopment of and below Flat A which would involve the incorporation of the courtyard and the construction of two sub-basement levels. The Respondent's valuer, Mr Gavin Buchanan BSc MRICS, puts the value of these two schemes at £220,737 and £951,425 respectively. The respective figures of the Applicant's valuer, Mr Justin Bennett BSc (Hons) MRICS ACIArb, are £18,500 and £10,500, principally due to the practical and planning difficulties involved in the proposed redevelopments.

18. The parties agreed that the development value attributable to a possible future development incorporating Flat A is £5,000, as recorded in Appendix 1. However, subject to having agreed the applicability of VAT and the build costs, the development value of adding a studio flat to the top of the rear extension was still in dispute.

19. The Tribunal accepts that the correct approach to assessing the development value is what the hypothetical prospective purchaser would pay on receiving sound and responsible planning advice – see *31 Cadogan Square Freehold Ltd v Earl Cadogan* [2010] UKUT 321 at paragraphs 80-83. To that end, each party relied on the evidence of their respective planning experts as to the likely planning risk.

20. Mr Wright, for the Respondent, produced a thin report dated 18th October 2012 in which the last two paragraphs considered whether planning permission would be granted when considering the height of the rear extensions of the neighbouring properties in the same terrace. He put the chances of achieving

permission for the sub-basement development at 90% and that for the fourth-floor extension at 80%.

21. Mr Drew, for the Applicant, produced a much lengthier report dated 12th October 2012. Brevity is always welcome and this report cannot be judged simply on its length. It was also considerably more comprehensive, considering issues of minimum unit size, daylighting and overlooking. He put the chances of obtaining planning permission for the fourth-floor extension at 50%, principally due to the fact that, at 29.8m^2, the proposed studio flat would be below the minimum unit size specified in the Mayor's London Plan.

22. At paragraph 49 of its decision of 29th October 2012, the Tribunal stated,

> In relation to the valuation evidence, the Tribunal has yet to hear it and therefore has no view one way or the other at the moment. However, the Tribunal would wish to make it clear how important it is that the evidence is presented properly and comprehensively. In that regard, the parties' attention is directed to the example provided by the judgement of the Lands Chamber of the Upper Tribunal in the case concerning Vale Court between the Trustees of the Sloane Stanley Estate and Messrs Carey-Morgan and Stephenson [2011] UKUT 415 (LC) at paragraph 72.

23. The Upper Tribunal stated in that passage:-

> What we find remarkable is that in all the extensive evidence called on behalf of the appellants there is nowhere any useful factual material as to the pattern of permissions and refusals for rooftop development either by the council or on appeal. A purchaser in our view would undoubtedly wish to be advised about this, rather than basing his bid on the opinions of a planning consultant and a conservation area specialist unsupported by such material. He would know that, due to the very nature of planning, it is often possible to make out a reasonable case that a particular development would accord with planning policy or would be acceptable in planning terms. In support of his evidence that planning permission could be expected Mr Oliver produced ten planning permissions granted by the council for rooftop development. One of these, at 352A King's Road was for the renewal of a 1998 permission for the erection of an additional storey in the form of a mansard roof; another (25-39 Thurloe Square) was for the replacement of existing mansard extensions; and eight (all of them properties in the same terrace on King's Road) were for the replacement of roof access housing. No fuller description of the development and no drawings were produced. These instances are wholly insufficient to suggest that planning permission might be expected for the particular schemes of rooftop development suggested for Vale Court. Moreover Mr Oliver had not sought to establish what planning refusals there had been, so that the picture presented was incomplete and one-sided. We do not think that, in giving the evidence that he did in this respect, Mr Oliver was fulfilling his duty to the Tribunal.

24. In response, Mr Drew attempted to contact Mr Wright to try to agree further evidence for the Tribunal. As recorded in his supplementary report dated 7th March 2012 (which was not challenged), Mr Wright made no attempt to contact Mr Drew, whether in response to Mr Drew's attempts or at all. Mr Wright did not provide any supplementary evidence of any kind. Unfortunately,

Mr Drew's supplementary report concentrated on the allegedly more valuable potential development incorporating the additional sub-basements which was, as it happened, eventually agreed. Mr Jourdan severely criticised Mr Drew on his attitude in cross-examination which he argued showed Mr Drew to be a "hitman" for the Applicant. However, in terms of written material, there can be no doubt that it was Mr Drew who made the only genuine attempt to assist the Tribunal, not Mr Wright.

25. This is reinforced by the fact that, in his cross-examination of Mr Drew, Mr Jourdan relied heavily not on any material provided by Mr Wright, but on documents he himself had found through his own researches. Mr Jourdan pointed Mr Drew to a document he had downloaded from the website of the local planning authority, the Royal Borough of Kensington & Chelsea, which showed guidance originally introduced under extant policies which survived from the previous Unitary Development Plan following the introduction of the replacement Core Strategy. It appeared to show that the minimum unit size was not $37m^2$ as Mr Drew had derived from the London Plan but $30m^2$. Mr Drew expressed his understanding that the extant policies no longer applied by the valuation date but Mr Jourdan pointed to the wording accompanying the download which suggested that the policy was actually still in place.

26. The Tribunal has been left with apparently contradictory evidence between Mr Drew and the material downloaded by Mr Jourdan. Mr Drew did not have the opportunity to talk to his contacts at Kensington & Chelsea to find out their position because this material was only presented to him at the last moment. It was incumbent on the Respondent to instruct Mr Wright to fill the gap. However, he had decided previously not to seek pre-application advice and was unable to give evidence as to what the relevant planning officer's advice might actually be. All he was able to state was that, in his experience, planning permission would not be refused for a development which was $1.1m^2$ under the minimum unit size, particularly in the light of the fact that Flat 5 at the subject property was already of the same size.

27. The Tribunal is unable to accept Mr Wright's evidence. Whether it is due to a lack of instruction or his own lack of effort, he has not fulfilled his duty to provide the Tribunal with the evidence which supports his opinions.

28. In cross-examination, Mr Drew went further than his report and said that, while there was a 50% chance of any planning permission being granted, he would put the chances of refusal for the current plan for a studio flat at 90%. However, the Tribunal sees the force in the argument that the proposed development would be the same size as an existing flat and is not persuaded that Mr Drew had sufficient basis for departing from the opinion given in his report. In the Tribunal's opinion, a prudent prospective purchaser would put the planning risk at 50%.

29. The Respondent is also the freehold owner of another property in the same terrace at number 53, which is 8 doors down from the subject building. Following the completion of the enfranchisement, the Respondent will benefit

from absolute restrictive covenants in the transfer which prohibit the erection of additional building on the subject property or using it other than as 11 self-contained residential units occupied by one family only. The Respondent would, therefore, potentially have the power to prevent the proposed fourth-floor extension. Any prospective purchaser would have to evaluate the risk that the Respondent would do so successfully or the amount which would have to be paid out, either to the Respondent to give up their objection or in legal costs in having the restrictive covenants removed.

30. Mr Jourdan asserted that the restrictive covenants were of little practical effect or value, which begs the question of why the Respondent wanted them in the transfer. Nevertheless, he pointed out that number 53 is so far away that the Respondent might never even become aware of any breach of covenant and a prospective purchaser would consider the possibility of going ahead with the development anyway on the basis that it would never be challenged. In the alternative, he pointed to the procedure under s.84 of the Law of Property Act 1925 which gives the Upper Tribunal the power to discharge or modify a restrictive covenant. He asserted that the procedure would be so likely to succeed that a prospective purchaser would consider they would only need to pay out a small sum, either in compensation or in legal costs.

31. In his original report, Mr Bennett assessed the restrictions on "airspace" as reducing the value of the potential development by 50%. In his evidence to the Tribunal he said he meant this to include not only the Respondent's original attempt to exclude the airspace above the building from the transfer but also the effect of any restrictive covenants. He also said that he now assessed the risk of a successful enforcement of the restrictive covenants at no less than 50% but not more than 90%.

32. In contrast, Mr Buchanan, for the Respondent, assessed the risk at only 5%. He said that this equated to the risk that a purchaser would have to pay the Respondent around £5,000 to persuade them not to enforce the restrictive covenants to which the Respondent would agree due to the likelihood of losing in a case conducted pursuant to s.84 of the Law of Property Act 1925.

33. In the Tribunal's opinion, Mr Buchanan's position is optimistic and sits at one end of the range of potential risk. Legal procedures are rarely, if ever, simple and assured, even when one side's case is strong. As emphasised in the case referred to above, *31 Cadogan Square Freehold Ltd v Earl Cadogan*, the Tribunal is not concerned with a hypothetical purchaser who is over-eager or optimistic. On the other hand, Mr Bennett was unable to explain why his position had changed since there seemed to be no new factors or material to take into account.

34. The Tribunal is satisfied that it is appropriate to make a further 50% deduction to take account of the risk of a successful enforcement of the restrictive covenants.

35. In respect of the value of the development, by the final hearing the valuers had agreed gross development value at £365,000 and costs. Mr Buchanan's calculations included £159,341 for 'costs of construction works (including contingency and professional fees)'. Mr Bennett adopted £159,361 for 'building costs'. They adopted alternative methods in reaching site value.

36. Mr Bennett said that he had been asked by developers for 'back of the envelope' calculations which he considered appropriate in this case. His calculations resulted in a net value of £205,639 from which he then deducted 50% for planning risks, giving £102,820 for site value and profit. He took site value at 50%, £51,410. He had also run a cross check with Mr Buchanan's residual calculation which produced a figure of £65,066, £62,000 after deferral. He then applied his additional discount (90%) for the restrictive covenants to the average of these figures to give £5,670.

37. Mr Buchanan carried out a residual valuation which produced a site value of £137,006. He then applied planning risk at 20% and, after deferring for 1 year at 5%, a further 5% adjustment for the restrictive covenants, so that his final figure was £99,127.

38. The Tribunal is aware that whichever approach is adopted to calculate site value, the end figure depends on the variable inputs. Applying the planning risk determined by the Tribunal to Mr Buchanan's calculation produces £68,500. Mr Bennett's approach produces £51,410. The Tribunal considers that neither approach is to be preferred and takes the average of these two figures which is £60,000 (rounded) and makes no further adjustment for deferral.

39. Applying the discount of 50% determined in respect of the effect of the restrictive covenants produces £30,000 as the development value of the studio flat.

Freehold Value of Flats A, 8 and 9

40. As recorded in Appendix 1, the parties agreed that the value of the freehold interest in Flats A, 8 and 9, subject to the statutory tenancies (or claimed statutory tenancies) of Flats A and 8, is £2,325,000. Mr Bennett argued that the difference between the values of the freehold and the 999-year leasebacks should be 0.5% whereas Mr Buchanan argued for 1%.

41. Mr Jourdan pointed to a previous Tribunal decision in relation to 82 Portland Place in which the Tribunal had been given a choice of 0% or 1% and had decided on the latter. However, that decision is not binding and is not that persuasive given that the Tribunal did not receive any argument for any positive figure less than 1%.

42. Having said that, Mr Bennett conceded that there is little to choose between one figure or another since the amount represents a mostly psychological

effect by which potential purchasers see a lease of any length as inferior to a freehold. In the experience of this Tribunal, most valuers put this effect at 1% in relation to leases of more than 99 years on the basis of 'tapering' relativity. In this case the leases are for 999 years and the Tribunal considers that the difference between a lease of this length and freehold is adequately distinguished by 0.5%.

43. More significant is the value to be attached to the service charge arrangements. As already referred to above, the Respondent benefits at the moment from favourable service charge arrangements by which they bear a disproportionately low percentage of the service charge expenditure but this will not be maintained in the leasebacks. Mr Buchanan calculated the value of the existing arrangements by estimating the amount of current and future service charges to which the Respondent would now be liable, capitalised at a rate of 3%, making a total of £263,060.

44. Mr Buchanan's calculation starts from his assumption at paragraph 8 of his supplementary report dated 7th March 2013 that, "the Respondent will have to pay an additional Service Charge contribution for 999 years." This is preposterous. In every other aspect of his valuation evidence, Mr Buchanan took a robustly practical approach, judging what is likely to happen by reference to the way things happen in the real world. Presumably because it helps his client achieve a much higher level of compensation, he has abandoned this approach in relation to the value of the current service charge arrangements.

45. Mr Jourdan attempted to support Mr Buchanan's approach by questioning whether the Respondent could ever be subjected to some form of court order which would alter the service charge percentages. The difficulty in obtaining such an order would point towards the benefit lasting longer than if it did not pertain, as does the fact that no lessee to date has attempted to do so (other than by way of the current application for collective enfranchisement). However, such considerations cannot possibly be conclusive.

46. The Tribunal referred the parties to the case of *Molasses House* LON/00BJ/LSC/2010/0611. The current Chairman was the Chairman of the Tribunal which issued a decision on 21st February 2011 on a preliminary issue. In a form similar to paragraph 1 of the Eighth Schedule of the current leases as set out above, the lessor in that case had the duty to vary the service charge percentages if certain conditions were fulfilled. The Tribunal held that, if it could be established that the lessor had breached its duty by not varying the percentages, then it could be argued that the service charge is not payable to the extent that the percentages are higher than they should be. By this argument, a lessee would not obtain a variation of the service charge percentage in their lease but would only be liable for service charges calculated on a lower percentage, leaving the lessor to pay for the balance.

47. Mr Jourdan sought to distinguish the lease term in *Molasses House* from that in the current leases but that is to miss the point. Either way, there remains a

more than negligible risk that the Respondent could have, at some point in the future, faced a successful challenge to the apportionment of the service charges. In addition, there are other risks or ways in which relevant matters may change. The building could cease to exist. Technology, changes in work practices or even just changing contractors could change the amount of the service charges. Lessees could agitate for a change in the percentages sufficiently to persuade the Respondent or their successor-in-title to alter them to at least some degree. The percentages could be changed as part of a compromise in litigation on related or other issues. There are probably more possibilities that the Tribunal has not thought of.

48. As already referred to above, the Tribunal is looking at this matter from the point of view of a hypothetical purchaser who receives sound and responsible advice. The Tribunal is satisfied that no such purchaser would calculate the value of the existing service charge arrangements on the basis that they would continue for 999 years. It is possible that a purchaser would not even notice or pay any attention to the service charge arrangements, although that would be unlikely given that the Respondent would presumably demand a higher price to take account of them.

49. Mr Bennett's initial view was that the value of the service charge arrangements was adequately encompassed within the differential between the values of the freehold and the leasebacks for Flats A, 8 and 9. Following questions from the Tribunal on the first day of the hearing, on the second day he produced a calculation similar to Mr Buchanan's but on the assumption that the favourable service charges would continue for only 5 years rather than 999 years. He also used a range of rates rather than the 3% used by Mr Buchanan. He expressed the result in terms of a percentage discount to the freehold with the resultant average for the agreed freehold value at 1.48%.

50. There can be no doubt that the current service charge percentages confer a significant benefit on the Respondent and that benefit has a value. However, the hypothetical purchaser would not assume that they could continue to enjoy such an obviously disproportionate benefit in perpetuity. They would pay a price which was high enough to reflect the return which they would think they were likely to get from it. That would not be anything like as high as the amount calculated by Mr Buchanan. The Tribunal is satisfied that making an additional discount of 1.48% adequately compensates the Respondent for the loss of this benefit.

Statutory Costs

51. The Respondent is entitled to their costs of the enfranchisement in accordance with s.33 of the Act. The application asked for the Tribunal to determine the costs along with the premium and the terms of transfer. However, the Mr Jourdan pointed out that some of the costs have yet to be incurred and argued that it would be inappropriate to determine the issue on the basis of estimated costs.

52. The Tribunal was presented with a schedule of costs but was left with no time at the end of the hearing to take further representations from either party on them. The parties indicated that they were content for the costs to be determined on the papers, without a further hearing. The only question is whether the costs should be decided within the current proceedings or by further application.

53. The problem with determining the costs in the current proceedings is that they may still not all have been incurred within any directions timetable set by the Tribunal. Such a timetable might also not allow sufficient time for the parties to attempt agreement without the need for a further Tribunal determination. The Tribunal is satisfied that it would be simpler and easier to leave the costs issue to a separate application, if that is required.

Application for Order for Costs

54. On 22nd June 2012 the Tribunal issued an order postponing the hearing listed for 27th June 2012. The reasons given for that decision record that the Respondent conceded that they had failed to comply with the Tribunal's previous directions in that they should have submitted a draft transfer and leaseback by 2nd April 2012 and returned a listing questionnaire by 11th May 2012 but had still not done so as at 22nd June 2012. It is relevant to note that the Respondent has not attempted to apologise or provide an explanation at any time.

55. The Applicant sought, and continues to seek, an order under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 that the Respondent pays the Applicant the maximum sum of £500 in respect of their costs on the basis that the failure to comply with the directions constituted unreasonable behaviour. The Tribunal on 22nd June 2012 could not decide the issue because it was constituted by a single member sitting alone and so the application was adjourned to this Tribunal.

56. The Respondent's behaviour, not just in failing to comply with the Tribunal's directions, but also in failing even to attempt to provide anything by way of apology or explanation, is clearly unreasonable. Too often, the Tribunal's directions and pending hearings are regarded by parties to a collective enfranchisement as an inconvenient backdrop to ongoing settlement negotiations but they are provided for the better administration of each case and they are not optional. In the circumstances, the Tribunal is satisfied that it is appropriate to make the order sought.

Conclusion

57. Taking into account the findings above, the Tribunal determines the premium to be paid in this case as £219,120 in accordance with the calculation set out at Appendix 2.

Chairman: _____

NK Nicol

Date: 28th March 2013

APPENDIX 1

(from handwritten document handed to the Tribunal prior to the commencement of the hearing on 11th March 2013)

Additional Matters Agreed

1. The value of the freehold interest in flats A, 8 and 9, subject to the statutory tenancies (or claimed statutory tenancies) of flats A and 8, is £2,325,000 (Flat A is agreed at £515,000 and Flat 8 is agreed at £360,000)
2. The development value attributable to a possible future development incorporating flat A is £5,000.
3. The purchaser would assess the development value attributable to the possible construction of a new studio flat above flat 5 on the basis that no VAT would be payable.
4. The Third Schedule to the transfer should say that the benefit of the covenants will annex to and run with 53 Queen's Gate, London SW7 5JW.
5. The capitalisation rate is 5.5% meaning that the capital value of the right to receive the ground rent is £83,183.00.

The Tribunal was verbally informed by counsel that the parties had also agreed that the build costs for the construction of a new studio flat above flat 5 would be £159,361.

Appendix 2

LEASEHOLD REFORM, HOUSING & URBAN DEVELOPMENT ACT 1993
VALUATION FOR ENFRANCHISEMENT
61 Queens Gate, London SW7 5JP

Matters Agreed:

Valuation date:	06/10/2011
Term unexpired:	94.96 years
Value of rent income @ 5.5%	£83,183
Value of reversion unimproved:	£5,511,000
Deferment rate:	5%
Development value of basement:	£5,000
Freehold value of leaseback flats A, 8, 9	£2,325,000

Facts and matters determined:

Relativity of 999 year lease to Freehold	0.50%
Effect of existing service charges as discount to Freehold v	1.48%
Total percentage adjustment to Freehold value	1.98%
Planning risk	50%
Site value of Studio incorporating planning risk	£60,000
Risk of enforcement of restrictive covenants	50%
Site value of Studio incorporating 'covenant' risk	£30,000

Diminution in Value of Freeholder's interest

Freeholder's Present Interest:	£	£
Value of current Ground Rent income		83,183
Reversion to virtual Freehold value	5,511,000	
deferred 94.46 years @ 5%	0.009962	54,902
Value of Specified Premises		138,085
Development Value of basement		5,000
Development Value of Studio		30,000
Loss in value of reversion due to leaseback, allowing for notional loss due to new service charge regime:		
Agreed value of flats 1, 8 and 9	2,325,000	
Difference between Freehold and 999 year lease including restrictive covenant effect	1.98%	46,035
Price Payable		**£219,120**