4258

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/OCE/2015/0119**
Property	:	**Cope House 27-33 (odd) Earls Court Road London W8 6ED**
Applicant	:	**Cope House Freehold Limited**
Representative	:	**Mr Anthony Radevsky of counsel**
Respondent	:	**Carsten Management Limited**
Representative		**Mr Mark Loveday of counsel**
Type of Application		**An application under section 24(1) Leasehold Reform, Housing and Urban Development Act 1993 (the "Act") to determine the premium payable for the freehold of the property**
Tribunal Members		**Judge Pittaway** **Mr N Martindale** **Miss A Seifert**
Date and venue of hearing		**16 September 2015** **10 Alfred Place London WC1E 7LR**
Date of Decision	:	**23 December 2015**

DECISION

Decision of the Tribunal

1. Compensation for loss arising from enfranchisement

The Tribunal **determines** that **£30,000.00** is payable to the freeholder to compensate it for loss of development value in relation to the specified premises .

2. Costs

There was no application before the Tribunal in respect of section 60(1) costs.

Introduction

1. This is an application to the Tribunal by the Applicant to determine the price of the freehold of the Property.

   The Notice of Claim to Exercise this Right is dated 15 August 2014 and was admitted by the Respondent by way of Counter Notice dated 31 October 2014.

   The Applicant applied to the Tribunal on 21 April 2015 for the determination of the premium payable for the freehold of the property.

2. The Tribunal issued Directions on 7 May 2015.

3. The Application was heard on 16 and 17 September 2015 at which time it was thought that it would be necessary to reconvene the tribunal to hear further expert evidence in relation to the commercial parts of the Property on the ground floor and further Directions were issued in this connection. The parties subsequently advised the tribunal that the value of the commercial parts was no longer in dispute. The tribunal therefore reconvened on 26 November to reach their decision on the only remaining issue in dispute; namely the loss of development value to the respondent.

4. Mr Radevsky represented the Applicant tenant and Mr Loveday represented the Respondent landlord .

5. The Tribunal inspected the Property on 16 September 2015.

Matters to be determined

1. At the time of the initial Hearing the issues that had not been resolved by the parties was the price payable for the freehold by reason of
   1.1. The value to be attributed to the freehold of the commercial premises on the ground floor; and
   1.2. The potential development value of the airspace above the existing penthouses.

2. The tribunal agreed to reconvene the hearing to consider outstanding evidence relating to the valuation of the ground floor commercial space and issued further directions in this regard on 16 September 2016. Before a date had been fixed for such reconvened hearing the parties reached agreement on the value of the commercial premises on the ground floor so that the only issue before the tribunal to determine was the potential development value of the airspace above the existing penthouses.

Evidence and Submissions

1. The bundles before the Tribunal contained

    1. A Skeleton Argument on behalf of the Applicant,
    2. The Respondent's Opening Submissions
    3. Expert Witness statements on behalf of the Applicant from Mr Churchouse FRICS as to valuation and Mr Nicholas de Lotbiniere MRTPI as to planning; and
    4. Expert witness statements on behalf of the Respondent from Mr Christopher Ames MRICS as to valuation and Mr Bennett MRTPI as to planning.

2. The tribunal also heard evidence from Mr de Lotbiniere, Mr Churchouse, Mr Bennett and Mr Ames on the issues to be determined.

3. The tribunal had regard to the above in reaching their determination; and in particular the following evidence and submissions.

4. It was Mr de Lotbiniere's submission that the suggested construction of an additional flat above the existing premises would be unlikely to get planning permission. He referred to previous planning refusals for larger developments on the property than the development which had been built. Mr de Lotbiniere had regard to the proximity of the property to three conservation areas, the prominent position of the property and that in relation to the built scheme the planning committee report had considered it essential that the proposed building integrate into its surroundings and was of an acceptable scale and bulk. He thought an additional floor would unbalance the building

    Mr de Lotbiniere acknowledged the need in the Royal Borough of Kensington and Chelsea for additional residential accommodation; but referred the tribunal to the borough's strict design policies, in particular CL1 and CL2 of the Core Strategy and CD44 and CD45 of the "saved" UDP, the relevant provisions of which he set out in his witness statement. It was his submission that an additional floor would not comply with the borough's policies relating to additional storeys; it would make the building higher than its surrounding neighbours (except for Warwick Chambers on Pater Street); and that the existing 3rd floor is set back is designed to be read as an already existing recessive "additional level".

The plans of the proposed additional floor that he had seen did not, in his opinion, contribute positively to the context of the landscape. Further the respondents had not considered the history of planning refusals for taller buildings on the site. Mr de Lotbiniere accepted in cross examination that in the borough since those refusals emphasis on housing had increased, but submitted that the drive to increase housing capacity, whilst a factor, was of less significance when only one or two units were being considered and in this instance the design considerations outweighed this.

Mr de Lotbiniere did not consider that an application would have a good prospect of success; offering a 10-15% likelihood but preferring judgemental terms.

On the report by Metropolis Planning (Mr Bennett's previous company) he disagreed with the use of comparables in Kensington High Street (as being an entirely different urban form and context) and that they failed to consider the planning history of the site.

5. It was Mr Churchouse's submission that without planning permission or the likelihood of obtaining planning permission a purchaser would pay nothing for the alleged development potential. He considered the planning potential to be "very speculative"; the building was only completed six years ago, there is no planning permission for further development, no pre-application enquiries have been made, there is no fixed scheme, and there have been two previous refusals for applications for a taller building.

6. Mr Radevsky submitted that the leases of the flats at the property limit further development. He referred the tribunal to clause 4.2 of the Flat 2 lease which qualifies the development reservation at paragraph 5 of Schedule 3 of the lease; so that any development must not materially adversely affect the use and enjoyment of the property for the permitted use. He also referred to the fact that Flats 1 and 2 were sold as, and are, penthouse flats and a potential purchaser of the freehold would be concerned that this would preclude them building. Insofar as parking spaces in the basement are concerned Flats 3 and 4 have designated spaces and Flats 1 and 2 have two undesignated spaces each. Mr Radevsky submitted that there was no spare car parking space in the basement.

Mr Radevsky distinguished the *Arrowdell* case, as in that case the appellant landlord was able to show a good precedent for the likelihood of obtaining planning and a present intention to develop. He then considered where tribunals have awarded a nominal figure which someone might pay for the prospect of future planning permission, citing by way of example *Trustees of the Sloane Stanley Estate v Carey-Morgan,* where the Upper Tribunal upheld the tribunal's decision to attribute £10,000 to this likelihood.

Mr Radevsky also drew the tribunal's attention to the price that the Respondents had paid for the freehold in 2011 (after it had been developed) of £5,000 as being inconsistent with an alleged value of £1,544,000 and invited the tribunal to determine the price at £1,000.

7. Mr Bennett, acting for the respondent, clarified in his Expert Report that he was formerly with Metropolis pd, but now a director of Magenta Planning Limited.

Mr Bennett considered that there were very good prospects of a successful planning outcome.

He explained that there was as yet no fixed design solution; the Council had not yet been formally approached but that certain preliminary options had been designed by Biscoe + Stanton.

Insofar as the Council's Local Policy is concerned he referred to the fact that it is not in a Conservation Area but is in a designated neighbourhood Town Centre Area. He also referred to CL8-Existing Buildings- Roof Alterations/Additional Stories as having replaced the previous UDP policies CD44 & 45 to which Mr de Lotbiniere had referred. His submissions included that

1. that the building height will be sympathetic to its surroundings;
2. that the building had not been further extended at roof level since its redevelopment;
3. that the proposed alterations were architecturally sympathetic;
4. that all the proposed designs incorporate setbacks at three sides.

It was Mr Bennett's further submission that there was sufficient capacity in the basement car parking area to accommodate extra residential flats.

He referred to the current extension at 36 Earls Court Road (on the opposite side of the road) as a comparable precedent.

8. For the Respondent Mr Ames valued the development hope value by

1. Valuing a new flat on the top floor and deducting build costs (of £2.688m); and
2. applying an "all-risks" adjustment of 50%

There was disagreement between Mr Churchouse and Mr Ames as to what deductions should be taken from a gross figure for the flats; Mr Churchouse commenting on the absence of deductions for finance costs, professional fees, sales fees and developer's profit from Mr Ames' calculation. He also pointed to the unknown cost of extending the lift.

Mr Ames suggested a seventh parking space might be possible in front of Flat 2's storage.

9. Mr Loveday's submission in respect of clause 4.2 and paragraph 5 of Schedule 3 of the leases (also referred to by Mr Radevsky) was that, with the exclusion of the roof and airspace above it from the flat leases and the exclusion of implied easements reserved to the lessor the contractual right to carry out a rooftop development.

8. As to the price paid by the Respondents for the freehold in 2011 Mr Loveday submitted (without supporting evidence) that the Respondent is an associated company of the previous freeholder and that the owner of Flat 1, Mr Lynch is the "guiding light behind both companies".

Inspection

The Tribunal inspected the Property on 16 September and noted

1. That the property is set on a corner, with three elevations fronting on Cope Place, Earl's Court Road and Pater Street respectively. To the rear of the property there are houses abutting on the eastern boundary of the property (between Cope Place and Pater Street). The terrace area outside the penthouse flats at the property is above the ridge line of these houses;
2. The taller buildings opposite the property in Pater Street and Earl's Court Road;
3. There was no clearly obvious area in the basement that could be designated as a further car parking space; and
4. That the nearby conservation areas were visible from the Penthouse terrace area.

Reasons for the Tribunal's determination

1. Given the terms of the leases the tribunal consider that the respondent has the contractual right to carry out a rooftop development. From their inspection of the basement and review of the terms of the leases they did not consider that the respondent was legally or physically able to provide further designated parking in the basement, notwithstanding the submission that this would be possible.

2. It was then necessary for the tribunal to consider the likelihood of the respondent gaining planning permission for such rooftop development.

3. The tribunal had regard to the decisions in *Arrowdell (*where development value was attributed to the roof by reference to development value achieved by the adjacent block to which the property the subject of the decision was directly comparable) and *Trustees of the Sloane Stanley Estate v Carey-Morgan* (where the Upper Tribunal had upheld the LVT's decision that a "cautious and prudent investor" would consider a residual valuation unreliable, in the absence of a realistic likelihood of planning permission being achieved, and would rely on his instinct and knowledge to value the prospect of a future application being treated sympathetically at £10,000, a "gambling chip").

4. The tribunal did not have before it the quality of evidence that had been available in the *Arrowdell* case, where planning permission had been granted for a directly comparable property; or even the *Carey-Morgan* case, where there had been a pre-planning application meeting with the relevant planning department.

5. The tribunal preferred Mr de Lotbiniere's evidence as to the development potential of the property to that of Mr Bennett. The tribunal were not persuaded by the quality of evidence provided by Mr Bennett as to the development potential of the site. They were provided with a number of unclear architectural proposals for an extension which had not been worked up and were advised that there had been no pre-planning discussion with the planners at R B Kensington and Chelsea. Mr Bennett in his evidence stated that the planners had not been approached but on the second day of the hearing it became apparent that Mr Bennett knew that the respondent had recently submitted a planning application, to which he had not been referred when he gave evidence to the tribunal, thereby presenting an incomplete picture to the tribunal.

   There was no evidence before the tribunal that there would not be serious opposition to an application to add a further floor to the building.

6. As to the evidence given by Mr Bennett that the proposed extension would be sympathetic to its surroundings in terms of height the tribunal noted on its inspection that while there was a taller building on the opposite side of the road to the property, the property was in a corner location which returned to residential roads where the buildings were lower than the property as currently developed and that any extension would be visible to the nearby conservation areas.

7. The tribunal agreed with Mr Churchouse's submission that the planning potential to be "very speculative". The tribunal further noted that the respondent had acquired the freehold on 17 February 2011 for £5,000.00.

8. As an expert tribunal the tribunal do not believe that a buyer of the freehold would agree to pay a significant premium for the development potential of the site in the absence of planning permission, unless the agreement was conditional upon planning permission being obtained. The tribunal's determination cannot be so conditional; it has to be based on the present actuality.

9. In the circumstances the tribunal consider the residual valuation approach adopted by Mr Ames to be an unreliable method of valuation and consider that this is a situation where a prudent investor would rely upon his instinct and knowledge. They consider that such an investor, possessed of the information that was before the tribunal, would not be prepared to pay more than £30,000 for the potential development value of the property.

The Law

The relevant statutory provisions of the Act and cases referred to were set out in the bundles before the tribunal.

Name: Judge Pittaway **Date:** 23 December 2015

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.