4179

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/OCE/2015/0267**
Property	:	**210-221 Helen Gladstone House, Nelson Square, London, SE1 0QB**
Applicant	:	**Helen Gladstone House Ltd**
Representative	:	**Mr Heather of Counsel**
Respondent	:	**London Borough of Southwark**
Representative	:	**Mr Fain of Counsel**
Type of application	:	**Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	:	**Judge I Mohabir** **Mr D Jagger MRICS**
Date of determination and venue	:	**8 March 2016 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**25 April 2016**

DECISION

Introduction

1. By an application dated 5 October 2015, the Applicant nominee purchaser applied to the Tribunal under section 24(1)(a) of the Leasehold Reform Act 1967 (as amended) ("the Act") to determine the purchase price to be paid for the freehold interest in the property known as 210-221 Helen Gladstone House, Nelson Square, London, SE1 0QB ("the property").

2. The property is a four-storey purpose built block of flats, which is comprised of 12 maisonettes. These are either 3 bedroom garden maisonettes or 2 bedroom maisonettes with a small balcony. The Respondent retains Flats 212 and 219, which are let on secure tenancies. The property forms part of a larger estate of which the Respondent is the freeholder.

3. By an initial notice given on 17 February 2014, the Applicant exercised the right to acquire the freehold interest in the property. On 14 April 2014, the Respondent gave a counter notice denying the right to acquire the freehold interest. Ultimately, the County Court determined that the Applicant was so entitled and on 4 August 2015, the Respondent gave an admitting counter notice requesting a voluntary leaseback of the storeroom on the first floor, which is subject to a commercial lease granted to Virgin Media Ltd dated 16 May 2014.

4. Eventually the parties were able to agree the price and other terms on which the Applicant would acquire the freehold of the property, save for the Transferee's covenants in the draft Transfer and mandatory leaseback of Flats 212 and 219 set out below and the Respondent's statutory costs.

Restrictive Covenants – The Legal Position

5. Schedule 7, paragraph 5(2) of the Act defines a restrictive covenant as a covenant or agreement restrictive of the user of any land or building. Paragraph 5(1)(a) of Schedule 7 provides that the conveyance must

include such provisions (if any) as the freeholder may require to secure that the nominee purchaser is bound by or shall provide an indemnity against any breaches of any restrictive covenants which affect the relevant premises otherwise than by virtue of any lease to which they are subject and are enforceable for the benefit of other property at the time of the conveyance.

6. Either the freeholder or the nominee purchaser may require the continuation of any restrictions in any lease to which the premises are subject with such modifications as may be necessary if:

   (a) the covenants affect the relevant premises and are capable of benefitting other property and, if enforceable only by the freeholder, materially enhance the value of the property; or

   (b) affect other property and materially enhance the value of the relevant premises.

7. Paragraph 5(c) of Schedule 7 also provides that the conveyance must also include such further restrictions which the freeholder may require to restrict the use of the relevant premises as they have been enjoyed during the currency of the existing leases, but will materially enhance the value of other property in which the freeholder has an interest at the relevant date.

8. The statutory terms on which any leaseback is to be granted are to be found generally in Schedule 9, Part IV of the Act.

9. Of course, it is open to the parties to agree any other terms in the Transfer or the leaseback.

Decision

10. The hearing in this matter took place on 8 March 2016. The Applicant and Respondent were represented by Mr Heather and Mr Fain of Counsel respectively.

Terms of Transfer (TR1)

11. Paragraph 12.6.9 in the draft Transfer provides for the Transferee:

> *"To use their best endeavours to provide at all times a supply of hot water cold water and central heating from the Boiler Room to 222-269 HGH."*

12. The Applicant contended for the insertion of the words "*to use their best endeavours to*" on the basis that the omission of these words would result in an absolute covenant and it did not want the imposition of what would be a strict liability. In any event, Mr Heather submitted that the Act does not entitle the Respondent to a positive covenant.

13. Mr Fain, for the Respondent submitted that paragraph 2 of Schedule 7 to the Act allowed the proposed covenant to be imposed. He further submitted that it should absolute because the Respondent was still the owner of the flats next door, which relied on this service provision. In the alternative, he submitted that the minimum obligation on the Applicant would be to use its "best endeavours" to do so.

14. The Tribunal accepted the submission made by Mr Heather that the Respondent was not entitled to the absolute positive covenant as proposed. The position is directly analogous to the acquisition of the freehold interest under the Leasehold Reform Act 1967[1]. In addition, the Tribunal was satisfied that there was no provision within Schedule 7 to the Act that allowed such a covenant to be imposed on the Applicant.

[1] see ***Ackerman v Mooney*** [2009] PLSCS 266

15. Moreover, clause 3(5) of the residential leases contains a similar qualified covenant on the part of the Respondent. Paragraph 2(2) of Schedule 7 provides that the freeholder shall not be bound to convey any better title or covenant for title with limited title guarantee. It follows, therefore, that the Respondent cannot properly insist on such a covenant being included in the Transfer, which imposes a greater obligation than it had under the residential leases.

16. Accordingly, the Tribunal concluded that the qualified covenant as proposed by the Applicant at paragraph 12.6.9 of the draft Transfer should remain unamended.

17. Paragraph 12.9 in the draft Transfer provides that:

> *"The Transferor (and all those authorised by it including his agents or licensees) shall not disconnect 222-269 HGH (including any flat contained therein) from the central heating system on the Property is such system serves 222-269 HGH (including any flat contained therein) without the previous consent of the Transferee not to be unreasonably withheld or delayed."*

18. The Applicant submitted that the words *"not to be unreasonably withheld or delayed"* were not necessary as the covenant did not need to be further qualified. The Respondent submitted that because this was a restrictive covenant, the addition of the words were reasonable.

19. The Tribunal was satisfied that the inclusion of the words *"not to be unreasonably withheld or delayed"* was reasonable. It recognised the practical reality of the Respondent providing a shared central heating service for the flats. For example, it may become necessary for the Respondent to effect urgent or necessary repairs from time to time and the inability or reluctance on the part of the Applicant, for whatever reason, should not unduly prevent any such works from being carried out. The introduction of the test of reasonableness also enable any possible competing interests by the parties in relation to the central

heating to be properly balanced. In the event of fundamental disagreement, either can make the appropriate application to the County Court as to whether the covenant has been satisfied.

20. Accordingly, the draft paragraph is allowed with the additional insertion of the words *"hot and cold water"* after the words *"central heating"*, which was agreed by the parties.

Leaseback

21. The same disagreement arose in relation to 2(8) of the draft lease, which contained the same term as 12.9 of the Transfer. Both parties relied on the same submissions and for the same reason set out above, this clause was allowed as proposed.

22. Two further clauses of the draft leaseback remained in issue. These contained proposed covenants on the part of the Respondent:

> *"3(12) To observe all reasonable regulations made by the Landlord from time to time controlling the exercise of any easements or rights with this lease."*
>
> *3(17) to observe and perform all such other reasonable regulations or restrictions as may be made from time by the Landlord for the management of the Building or of the estate."*

23. The Applicant submitted that the inclusion of these clauses were necessary to provide regulation in the overall management of the property and the Tribunal had jurisdiction to do so under paragraphs 4(1)-(4) of Schedule 9 and Part IV of the Act.

24. The Respondent primary submission was that, in the absence of agreement between the parties, the Tribunal did not have jurisdiction to vary the terms of the lease, which had to be granted on the terms set out in Part IV of Schedule 9. In the alternative, the Respondent submitted that the inclusion of the above clauses were reasonable otherwise the Applicant could dictate regulations to the Respondent.

25. The Tribunal did not accept the Respondent's submission that it did not have jurisdiction to vary the terms of the lease to be granted to the freeholder in the absence of agreement between the parties. It is clear that paragraph 4(2) or 7(2) of Schedule 9, Part II & III, as the case may be, allows the Tribunal to do so where it considers it to be reasonable in the circumstances. Before doing so, in each instance, the Tribunal must have regard to the actual of intended tenant under sub-section (3).

26. Applying that test to the present case, the Tribunal was satisfied that both of the draft clauses were reasonable because they ensured the day to day management of the property could take place effectively and without, for example, seeking to formally vary the leases when no appropriate contractual provision was included in the leases. Again, for the reasons set out at paragraph 19 above, the inclusion of the test of reasonableness would enable the interests of both parties to be properly balanced in the event of a disagreement and would prevent the arbitrary imposition of any regulations by the Applicant.

27. The final disputed term of the draft leases to be granted to the Respondent is paragraph 8 of the first Schedule where a right (in common with the Landlord and all persons authorised by them) to use the storage sheds within the Building was claimed.

28. The Applicant submitted that there was no express right for the Respondent to use the storage sheds and this provision was, therefore, unnecessary and ought to be removed.

29. The Tribunal did not accept this submission for the reasons given by the Respondent. The Respondent, rightly, pointed out that in the Applicant's section 13 notice, a similar right was claimed in relation to the storage sheds in the event that they did not form part of the freehold title to be acquired. As the sheds do form part of the freehold interest being acquired by the Applicant, it must follow that the Respondent should be granted a similar right.

30. Accordingly, the Tribunal concluded that paragraph 8 in First Schedule of the draft lease should remain unamended.

Section 33 Costs

31. The legal costs claimed by the Respondent are £5,271 plus VAT of £1,054.20 plus disbursements of £263 and valuation fees of £9,000 inclusive of VAT.

32. The work carried out on behalf of the Respondent was done by two fee earners, namely, Louise Uphill (4 years PQE) at £165 per hour and Peter Gammie (28 years PQE) at £295 per hour.

33. The Applicant agreed the hourly rate for Ms Uphill, the attendance of £442.50 claimed for drafting and serving the counter notice and the disbursements in the sum of £263.

34. Having carefully considered the Respondent's breakdown of costs and the submissions made by both parties, the Tribunal determined that the following costs under section 33 (1) of the Act should be allowed as reasonable.

35. The Tribunal allowed the hourly rate of £295 for Mr Gammie on the basis of his experience and the level expertise required to carry out this type of highly technical work.

36. The Tribunal allowed £495 (3 hours attendance at £165 per hour) as reasonable for investigating title and verifying the claim. Although there are 8 participating and 2 non-participating tenants, the leases are on the same terms and it would not in reality require over a day's fee earning time to carry out this work competently.

37. The attendance at £442.50 for drafting and serving the counter notice was agreed.

38. The Respondent did not challenge the assertion made by the Applicant that it had in fact drafted the Transfer for negotiation and approval. Therefore, nothing is allowed in this respect for the Respondent. However, it seems that the Respondent did prepare the daft leasebacks, albeit in the same form. Therefore, a total of £1,475 (5 hours at £295 per hour) is allowed for drafting, amending and approving the leasebacks.

39. In relation to the preparation of the contract, dealing with completion and post completion matters, the Tribunal was satisfied that these were reasonably incidental to the conveying of the freehold and mandatory leasebacks. However, the Tribunal did not consider that over a day's fee earning time would be required to attend to these matters. Therefore, a total of £590 (2 hours at £295) was allowed was reasonable.

40. Accordingly, the total legal costs allowed for the Respondent is £3,002.50 plus VAT of £600.50 making a total of £3,603.

41. Turning to the Respondent's valuation costs, the Tribunal had little hesitation in concluding that these were wholly unreasonable. It was clear that only a valuation of 2 flats was carried out. No marriage valuation was required and the only additional valuation work was the calculation of the capitalisation rate for the ground rent for each of the leases. Therefore, the Tribunal allowed the same amount of fees incurred by the Applicant's valuer, namely, £750 plus VAT.

Judge I Mohabir
25 April 2016