First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	**:**	**CHI/OOML/OCE/2020/0008**
Property	**:**	**69 St Aubyns,** **Hove,** **BN3 2TL**
Applicant **Represented by**	**:**	**69 St Aubyns Hove Ltd.** **Commonhold and Leasehold Experts Ltd.**
Respondents	**:**	**Paula Syliva Lewis and Roy Andrew Anstead**
Date of Application	**:**	**2nd March 2020**
Type of Application	**:**	**To determine the terms of acquisition of the collective enfranchisement of the property**
Tribunal	**:**	**Bruce Edgington (lawyer chair)** **Roger Wilkey FRICS**
Date and place of hearing	**:**	**30th June 2020 by video hearing**

DECISION

UPON the Tribunal being told that the form of transfer TR1 (save for the price payable) had been agreed between the parties.

IT IS DETERMINED that:

1. The total collective enfranchisement price of the property is £45,000.00.

Reasons

Introduction

2. This application is for the Tribunal to determine the terms (including the price) of the collective enfranchisement of the freehold of the property.

3. This followed the service of an Initial Notice dated 8th July 2019 and a Counter-Notice by the Respondents dated 19th September 2019.

4. The Tribunal has issued directions orders timetabling the case to a final hearing including the filing of all evidence to be relied upon. Only the Applicant has filed any independent expert evidence.

5. In view of the current coronavirus pandemic, it has not been possible for the Tribunal to inspect the property and the hearing is by video conference.

6. This hearing has been confused by an agreement between the solicitors acting for the parties. On the 19th June 2020 at 15.34, Emily Fitzpatrick from Commonhold and Leasehold Experts Ltd. sent an e-mail to Erica Stocks who describes herself as a partner in ODT Solicitors – who were acting for the Applicants at the time – saying:

> "*In haste, I think we are agreed as follows:*
> 1. *£45k premium for freehold with leaseback of Flat 2 (as agreed already but subject to the plan being amended to remove the word 'garden' and to remove the door (which is actually there) between this building and next door – please can you let us have an amended plan urgently to approve?'*
> 2. *No new lease or leaseback on the GFF (our clients can deal with that when the lessee makes an application in due course for an extension in the normal way).*
> 3. *The section 168 application will be withdrawn but without prejudice to your clients rights to pursue costs in respect of the alleged breach (noting that my clients do not accept there is a breach and that Mr. Hawkins may have counterclaims which are also preserved). Mr. Hawkins Rules 13 costs application (in respect of the substantive application for a section 168 determination and in respect of the application for leave which was struck out) is preserved in so far as he will be permitted to raise a claim for Rule 13 costs, in the event that your client does pursue a claim for costs of the alleged breach. I think this essentially preserves the costs and substantive positions of your clients and Mr. Hawkins vis a vis the alleged breach.*
> 4. *Service charges (including any arrears) will be dealt with under the 1993 Act in the normal way.*
>
> *Please do confirm. If this is right, shall I draft this in detail in a letter to be signed by both of us (on Monday).*"

7. On the 19th June at 16.54, Ms. Stocks replied to Ms. Fitzpatrick. She put a 'without prejudice' heading, which Ms. Fitzpatrick had not. In view of the contents of the message, however, such words lose their effect. The message said:

> "*<u>Without Prejudice</u>*
>
> *Thank you for your email, I am pleased to confirm that my clients are prepared to settle on the basis of the terms set out in your email.*

I look forward to receiving to the letter on Monday

8. At the hearing, Mr. Anstead confirmed that he represented the views of himself and his sister, Paula Sylvia Lewis, the other Applicant. He was questioned by the Tribunal chair about these e-mails. He said "I admit that I said 'yes' to the proposals but 5 minutes later I telephoned my solicitor to say that I had changed my mind. She told me that it was too late as she had sent the message agreeing".

9. Mr. Anstead's view was that it was his right to change his mind. What happened thereafter was that there was correspondence between the solicitors about the wording of a formal agreement and indeed, a draft of such agreement was submitted to the Tribunal for consideration. Minor suggestions had been made by the Tribunal chair to make it more workable.

10. It is also important to note that when making his comments at the end of the hearing, Mr. Anstead said that he wanted the extra monies relating to potential development and breach of the terms of the lease because he and his sister wanted to get rid of the freehold and wanted the maximum possible amount to cover these things".

11. The parties have agreed the terms of the Transfer and the premium of £45,000.00, leaving a dispute about development potential and other unspecified amounts relating to alleged breaches of the lease relating to the basement flat. The Tribunal has also received an application under section 168 of the **Commonhold and Leasehold Reform Act 2002** issued by the Respondents against David Anthony Hawkins, the long leaseholder of the basement flat. The hearing of an application to strike out the section 168 application was immediately before this one and determined that such application be struck out.

12. In fairness to Mr. Anstead and in view of Ms. Fitzpatrick's comment to the Tribunal that the slight increase in the agreed price was simply to reflect 'commercial realities' on the part of her clients, the Tribunal decided to proceed with the enfranchisement application rather than adjourn matters. It considered that this was the proportionate way of proceeding. All the 'evidence' and representations about the increases sought by the Respondents had been filed and proceeding would enable the parties to conclude matters speedily and at the least possible cost.

The Inspection

13. There appears to be no dispute that the description set out in the Applicant's expert's report from Stewart Gray FRICS dated 4th June 2020 is sufficiently accurate for the Tribunal's purposes.

14. The report says that the property is a Victorian mid-terraced building of traditional design and solid brick/rubble main wall construction with rendered elevations under a flat main roof following a roof conversion.

15. There are 5 self contained flats. The lower 3 floors were originally one bedroom flats and the second floor and top floor flats have 2 bedrooms each.

The basement flat was converted from a 1 bedroom flat to a 2 bedroom flat some years ago. The top floor flat has a front terrace.

The Law

16. The price to be paid on collective enfranchisement is calculated in accordance with the provisions of Schedule 6 of the **Leasehold Reform, Housing and Urban Development Act 1993** ("the 1993 Act"). The capitalisation rate, deferment rate, capital values, relativity and the terms of TR1 save for the price are all agreed. The agreed part of the price without the increases sought was £43,494.00. The Tribunal had a signed agreement before it to confirm that. With the Applicant having decided, on a commercial reality basis to pay £45,000.00, and having considered that the Respondents had agreed this figure, this decision will not look at whether anything else should be paid as a base price.

17. As far as development potential is concerned, the Respondent landlords say in this case that the Applicant and, indeed, any potential purchaser would (a) be able to include the common staircase leading from the second floor flat to the top floor flat and a figure of £8,000.00 should be added for this and (b) a reasonable sum for allowing the Basement Flat to be sublet should also be added. No figure is suggested.

18. Potential development value is a well established valuation principle which both parties accept and is supported by case law. The difference between the parties is that the Applicant says that the Respondents' view of property values is wrong and there is, in effect, no potential development value (or 'hope' value as it is sometimes called) as suggested as at the valuation date of 8th July 2019.

19. It should be remembered that paragraph 5(4) of Schedule 6 of the 1993 Act says that a freeholder should be compensated for loss of development value which is defined as "*any increase in the value of the freeholder's interest in the premises which is attributable to the possibility of demolishing restructuring or carrying out substantial works of construction on, the whole or a substantial part of the premises*".

20. In the statement of agreed and disputed matters, it is also said that the Respondents want some compensation for the fact that the lessee of the basement flat has both altered it and sublet it without consent in breach of the terms of his lease. At the hearing, and for the first time, the Respondents said that £19,200.00 is the figure claimed for this matter.

The Hearing

21. Those attending the video hearing were Emily Fitzpatrick from Commonhold and Leasehold Experts Ltd. and Mr. Roy Andrew Anstead who was on the telephone only and said that he represented both himself and his sister, Paula Sylvia Lewis.

22. Mr. Anstead was invited to put the Respondents' case. He produced a handwritten skeleton argument which he said had been written about a week before and had been sent to the Tribunal the day before the hearing. It starts off with the comment "He who pays the piper calls the tune". Mr. Anstead said that he is a Bachelor of Engineering and a Master of Science.

Using his engineering skills, he said that he had been involved in construction works over some time.

23. The problem with this is that he did not appear to have any expertise in the assessment of residential property values. He referred to a sheet of paper said to have been produced by his valuer setting out some details on a single sheet of paper relating to 3 flats in St Aubyns, Hove and 1 in Stirling Place, Hove. The sales appear to have taken place or be subject to contract during late 2018 and early 2019. Of significance is the fact that none of the details supplied give any indication of the remaining terms of the leases which can have a very considerable effect on the sale prices.

24. What Mr. Anstead has then done is refer to the price per square foot for these 4 leasehold properties which range from £423 to £556, which brings him to an average of £513 per flat. The flats are on various floors and none appears to include any part of a staircase leading to it.

25. In his skeleton argument, also provided the day before the hearing, he refers to photographs in the Applicant's expert's report showing pictures of the staircase between the second floor and the top floor flats. He then says that with approximately 75 square feet of additional space in the staircase @£513 per square foot average, he comes to £25,650 allowing for a reduction of one third for circulation space.

26. Without any evidence, he suggests that the cost of the conversion work would be £1,650 leaving a net uplift in value of £24,000. With development value being assessed at one third, the amount the Respondents want is £8,000.

27. Mr. Anstead told the Tribunal that his surveyor and solicitor could not agree between them what the value was and this was why he was on his own. No details were given. Bearing in mind the professional ethical matters involved, the Tribunal did not ask for details. He also said that whilst he had respect for Mr. Stewart Gray FRICS, the Applicant's expert surveyor, "he was bound to be putting forward views which only benefitted his client".

28. He was reminded of the obligations imposed on an expert witness giving evidence to a court or Tribunal as imposed by the Royal Institution of Chartered Surveyors. Mr. Gray is clearly experienced in giving such evidence. It is also worth saying that Mr. Gray has clearly set out the basis on which his report was prepared and there is a statement of truth under item 14 of his report. Mr. Anstead provided no statement of truth.

29. Moving on to the claim for the failure to get permission for the subletting of the basement flat, he referred to the lease as amended by a Deed of Variation wherein it says that any subletting must be with "*the Lessor's prior written consent in respect of which the Lessor shall as a precondition of granting such consent require a reasonable sum to be paid in respect of the same…*" and in respect of subsequent sub-tenants, they must enter into a deed with the landlord to observe and perform the covenants in the lease.

30. The Respondents' case is that such 'reasonable sum' should be grossed up to reflect any future sub-lettings and added to the price. No-one has

suggested what that sum should be. Mr. Anstead said that this Tribunal could and should assess this. The Tribunal chair explained that this Tribunal could only assess service charges or administration charges and the sum referred to in the Deed of Variation did not appear to be either. It was an extremely unusual provision which, if disputed in its meaning – as would appear to be the case – is a matter of interpretation of the Deed of Variation which would be for the county court.

31. In support of his suggestion that it was a matter for this Tribunal, he referred to a case "involving Proxima decided by the Upper Tribunal in 2014-2016 which said that this Tribunal would determine a reasonable sum in these circumstances". No case report could be produced. It is assumed that he is referring to **Proxima GR Properties Ltd v McGhee** [2014] UKUT 0059 (LC) wherein the Deputy President of the Upper Tribunal, Martin Rodger QC, determined that a fee of £95 charged by a landlord's agent was reasonable in the unusual circumstances of that case.

32. The fee was for approving a subletting and the judge added, in paragraph 44 of the decision, that "*I would find it difficult to understand how a fee of £95 (including VAT) would be reasonable for the minimal administrative tasks involved*" for any routine case. It must be understood that this was the assessment of an administration charge made by the landlord's agent and involved no further compensation or 'price' for the landlord to the lessor.

Discussion

33. In essence, the Tribunal has to determine whether it accepts the Applicant's expert evidence or not. If such evidence is accepted, no development value or other compensation is payable.

Potential for Development

34. Mr. Gray's view is that if one includes the top part of the communal staircase into the top flat lease, the additional value of that flat would be nominal because all that would be added to it in practice is some additional storage space on the existing stairway. There are some photographs of this area in the documents supplied as part of a risk assessment undertaken on 5th September 2018.

35. However there would be costs to be incurred to include altering the doors, getting any building regulation approval, ensuring adequate fire escapes for the flats and altering the leases/deeds. Mr. Gray says that, in his view, "*Even without estimating the possible costs and legal complexity of achieving this in my opinion it is completely uneconomic for any leaseholder. No leaseholder is going to want to do this considering these hurdles and the financial implications*".

36. It is also necessary to consider the definition of development potential as defined in the 1993 Act as stated above. Is the development suggested the '*possibility of demolishing restructuring or carrying out substantial works of construction on, the whole or a substantial part of the premises*"? It is arguable, to say the least, that changing some doors and altering rights of occupiers within the building without changing the staircase in any way, does not come within that definition.

Other Claims

37. There is the claimed potential loss of income from being able to grant permission for each subletting of the basement flat. Mr. Gray says that this is included in the yield rate agreed and already included in the agreed figures. In any event, any fee charged as in the **Proxima** case, would be part of a service charge or administration fee which would have to be 'reasonable', in law, and cannot form a separate claim. Also, arguably, it cannot include any 'profit' element for the landlord.

38. The problem faced by the Respondents is that the 'reasonable sum' is not quantified either in the deed or by anyone and a set figure does not appear to have been demanded from the basement flat owner, Mr. Hawkins. The Respondents have known that Mr. Hawkins has been sub-letting for some years and if they had only made a claim and taken it to court, there would at least be some understanding as what those words mean. Even then, any attempt to capitalise that figure bearing in mind that no-one can know how often it would be payable, appears to be impossible.

39. The final disputed matter is the suggestion that some additional sum should be paid because of the alleged breach of the terms of the lease of the basement flat in that Mr. Hawkins allegedly altered it without the Respondents' permission.

40. In his skeleton argument, Mr. Anstead describes this as being the "Value of option to commence proceedings under section 146 of the Law of Property Act 1925 - £384,000 x 5% = £19,200". The £384.000 is said to be the average value of the 4 flats produced by the Respondents' expert which are referred to above. Where the 5% comes from is unknown.

41. Before the works were undertaken, this was a 1 bedroom flat. It is now a 2 bedroom flat with the main bedroom having an *en suite*. It was presumably the intention of Mr. Hawkins to increase rental income which is what should have been achieved. Thus the flat is now possibly more valuable than before. At the end of the term, the reversioners can either restore the flat to its previous condition or leave it as it is now. Thus if the reversioners leave it as it is, they will not have lost anything at all and may in fact have a more valuable flat than before.

42. The fact that the Respondents clearly decided not to take enforcement proceedings when, without any doubt at all, they knew about the breach in 2016, gives a clear indication that either they had decided not to take any action to remedy any breach or, as may be more likely, their inaction has acted as acquiescence extending to implied consent to the work.

43. The end result of all this appears to this Tribunal to be that if the Respondents did pursue a claim for breach of the terms of the lease, there is probably going to be (a) no forfeiture because consent to the work had been given OR (b) relief against forfeiture possible including (c) nominal damages to put the flat back into its original condition. Even if a costs order was made and recovered, it is well known that legal costs recovered in this way do not cover all of the costs involved and there is no compensation for the Respondents' time and effort spent.

44. The final point to be made is that if the flat is put back into its original condition, it will appear to be clean and freshly renovated which may increase its leasehold value slightly. In other words, the likely compensation obtained will, indeed, be nominal. It is doubtful whether a reasonably astute and sensible landlord would consider that there would be any benefit in seeking to enforce these lease terms.

Conclusions

45. The Tribunal was impressed by the thorough approach of Mr. Gray and his efforts to give the Tribunal the maximum possible information about his thought processes. The decision to increase the basic price from £43,494 to £45,000 on the basis of commercial reality is sensible and helpful.

46. On the other hand, Mr. Anstead's approach to the important and relevant issues had no expert support, despite the fact that he had employed an expert valuer whose views on these topics are unknown. His suggested methods of increasing the price appear to be based on pure guesswork. His experience as an engineer suggests that he does have expertise but not in the field of residential property valuation. As has been said on many occasions, valuation of residential properties is 'an art and not a science' because things such as values based purely on square footage are not feasible. Too many other things affect the value of residential property and the square foot value of flats even in the same building can differ depending on such things as the view, the layout, unexpired term of the lease etc.

47. Residential valuation requires experience of the marketplace which Mr Gray has. Mr. Anstead gave no indication that he had any such expertise. It should also be added that this is an 'expert' Tribunal. It prefers the evidence of Mr. Gray and the price of £45,000.00 in total is confirmed.

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Judge Edgington
1st July 2020

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.