FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**MM/LON/00BB/OCE/2021/0195**
Property	**:**	**Flats 3-6 Odessa Court, Odessa Road, London E7 9BE**
Applicant	**:**	**(1) Peter Hinchliffe, (2) James Wallace-Jarvis, (3) Zachary Lambin and Michael Mckimm**
Representative	**:**	**Stan Gallagher of Counsel**
Respondent	**:**	**Aneesh Limited**
Representative	**:**	**Nicola Muir of Counsel**
Type of application	**:**	**Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act")**
Tribunal members	**:**	**Judge Professor Robert Abbey Mark Taylor MRICS**
Date of determination and venue	**:**	**2 and 3 August 2022 by video hearing**
Date of decision	**:**	**15 August 2022**

DECISION

Summary of the tribunal's decision

1. The total premium/consideration to be paid is to be the sum of £147,942.

Background

2. This is an application made by the applicant nominee purchaser pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid for the collective enfranchisement of **Flats 3-6 Odessa Court, Odessa Road, London E7 9BE** (the "property") registered at the Land Registry under title number EGL15268.

3. By a notice of a claim dated 18 June 2021, served pursuant to section 13 of the Act, the applicant exercised the right for the acquisition of the freehold of the subject property and proposed to pay a premium for the freehold.

4. On 23 August 2021, the respondent freeholder served a counter-notice admitting the validity of the claim and counter-proposed a premium for the freehold.

5. On 17 November 2021 the applicant applied to the tribunal for a determination of the premium and terms of acquisition.

The issues

Matters agreed

6. Whilst there were significant matters unresolved at the time of the making of the application in November of last year, it was reported to the Tribunal at the time of the hearing that many of these outstanding matters had in fact been agreed prior to the hearing. The following matters were agreed prior to or at the start of the hearing:

   (a) All elements of the premium/consideration for the freehold of the relevant premises other than development value and hope value for Flats 3-6 Odessa Court, Odessa Road, London E7 9BE.

   (b) The conveyancing terms of the Transfer were agreed between the parties save for the possible insertion of an overage provision inserted by the respondent and not agreed by the applicant.

Matters not agreed

7. The following matters was not agreed:

   (a) The development value and hope value for Flats 3-6 Odessa Court, Odessa Road, London E7 9BE.

   (b) The final form of land registry Transfer

   The development value was at the core of the hearing before the Tribunal. What was in dispute was the amount that should be paid for the potential to build in the airspace above the property.

The hearing

8. The hearing in this matter took place over two days on 2 and 3 August 2022. The applicant was represented by Mr Gallagher of Counsel, and the respondent by Ms Muir of Counsel.

9. The tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions.

10. This has been a remote video hearing which has been consented to by the parties. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and constraints and more particularly because all issues could be determined in a remote video hearing. The documents that were referred to are in a bundle of many pages, the contents of which the Tribunal has recorded and which were accessible by all the parties.

11. In the context of the COVID 19 pandemic the Tribunal did not consider that an inspection was possible. However, the Tribunal was able to access the detailed and extensive paperwork in the trial bundle that informed their determination. In these circumstances it would not have been proportionate to make an inspection given the current circumstances and the very specific valuation issues in dispute.

12. **The right to collective enfranchisement**

13. The relevant part of the Act states: -

> ***1 The right to collective enfranchisement.***
>
> *(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf—*
>
> *(a) by a person or persons appointed by them for the purpose, and*
>
> *(b) at a price determined in accordance with this Chapter;*
>
> *and that right is referred to in this Chapter as "the right to collective enfranchisement".*
>
> *(2) Where the right to collective enfranchisement is exercised in relation to any such premises ("the relevant premises")—*
>
> *(a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not*

comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and

(b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.

(3) Subsection (2)(a) applies to any property if at the relevant date either—

(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or

(b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).

(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—

(a) there are granted by the person who owns the freehold of that property—

(i) over that property, or

(ii) over any other property,

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

(b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted.

14. The applicants are the lessees of Flats 3,4,5 and 6. The respondent holds a headlease in respect of each flat each of which is for a term of 999 years from 1st August 2013. The freehold is also owned by the respondent. The following matters have been agreed between the experts in a Statement of Agreed facts:

Long leasehold value	Premium of the freehold value in the leases
Flat 3 £270,000	£47,291

Flat 4 £270,000	£48,342
Flat 5 £265,000	£250
Flat 6 £265,000	£12,059
TOTAL	£107,942

Accordingly, the price payable exclusive of any development value and any compensation payable under 1993 Act, Schedule 6, paragraph 5 has been agreed in the sum of £107,942: This sum is payable to the Head Lessee.

The applicant's valuation expert, Richard Stacey MRICS, assesses the development hope value in the sum of £10,000. The respondent's valuation expert, Peter Gunby MRICS, assesses the premium attributable to development value in the sum of £225,000. This vast disparity is the reason for this dispute and for the need for this hearing.

The tribunal's determination and reasons for the tribunal's determination

15. At the start of the hearing there were three preliminary matters to be dealt with. They were: -

(i). whether the respondent was entitled to adduce the evidence of four witnesses of fact and one further expert (Mr Mukund Kataria - Expert (Planner), whose witness statements were in a Supplemental Bundle;

(ii). whether the respondent was entitled to include an overage provision in the transfer; and

(iii). whether for the purposes of 1993 Act, Schedule 6, paragraph 5 (Compensation for loss resulting from enfranchisement) the respondent company (Aneesh Limited, the freehold owner of 3-6 Odessa Court) was entitled to be treated with Haveli Limited (the freehold owner of 1-2 Odessa Court) as a single economic entity i.e. whether the corporate veil should be lifted so as to disregard the fact that Aneesh Limited and Haveli Limited are separate companies, and hence are separate legal entities, and thereby enable Aneesh Limited, as the reversioner for the purposes of the collective enfranchisement claim in respect of 3-6 Odessa Court, to claim compensation for the contended diminution in the value of Haveli Limited's freehold ownership of 1-2 Odessa.

16. With regard to preliminary matter (i) the tribunal heard submissions from both Counsel on the matter of the additional evidence. The Tribunal was told that this additional evidence had in fact been submitted to the other side as long ago as 18th May 2022. If the applicant had been concerned it was open to them to seek further Directions. This was not done. In all the circumstances the Tribunal decided that there was no prejudice caused by the additional evidence and so the Tribunal allowed the evidence to be presented as set out in the supplementary bundle.

17. With regard to preliminary matter (ii) the respondent conceded that in the light of the objection to the overage provisions in the form of transfer that it could not require the inclusion of these provisions. Therefore, the Tribunal confirmed and determined that the Transfer in Land Registry Form TR1 was to be executed without these provisions in it. The overage provisions were therefore excluded as Schedule 7 of the 1993 Act does not allow either party to insist on an overage provision such as the one the respondent sought to insert in the TR1.

18. With regard to preliminary matter (iii), what is at issue in this dispute generally is what was the amount that should be paid for the potential to build in the airspace above the property. The development proposed, by the respondent, in this case would be on top of both the property and 1 and 2 Odessa Court which is owned by Haveli Ltd, a company owned by the same family as owns or controls the respondent company. The respondent says that if the respondent was selling the freehold of 3-6 Odessa on the open market, Haveli Ltd would sell the freehold of 1-2 Odessa Court (or an airspace lease) to the hypothetical purchaser at the same time in order to realise the development potential across both parts of the building. The respondent asserted that this is something which the Tribunal can take into account when determining the development value. The freeholder of 3-6 Odessa Court is Aneesh Limited and the freeholder of 1-2 Odessa Court is Haveli Limited. Both companies are wholly owned by Mr. Ajay Arora and his wife, Shiwani Arora. The respondent says that the value of 1-2 Odessa Court will be diminished if 3-6 Odessa Court is acquired by the applicant because Haveli Limited will be deprived of the opportunity to carry out a joint development of the roof above the whole building.

19. In support of this the respondent says that compensation is available under paragraph 5 of Schedule 6 of the Act which states that : -

> *"(1) Where the freeholder will suffer any loss or damage to which this paragraph applies, there shall be payable to him such amount as is reasonable to compensate him for that loss or damage.*
>
> *(2) This paragraph applies to—*

(a) any diminution in value of any interest of the freeholder in other property resulting from the acquisition of his interest in the specified premises; and

(b) any other loss or damage which results therefrom to the extent that it is referable to his ownership of any interest in other property.

(3) Without prejudice to the generality of paragraph (b) of sub-paragraph (2), the kinds of loss falling within that paragraph include loss of development value in relation to the specified premises to the extent that it is referable as mentioned in that paragraph.

(4) In sub-paragraph (3) "development value", in relation to the specified premises, means any increase in the value of the freeholder's interest in the premises which is attributable to the possibility of demolishing, reconstructing, or carrying out substantial works of construction on, the whole or a substantial part of the premises.

(5) Where the freeholder will suffer loss or damage to which this paragraph applies, then in determining the amount of compensation payable to him under this paragraph, it shall not be material that—

(a) the loss or damage could to any extent be avoided or reduced by the grant to him, in accordance with section 36 and Schedule 9, of a lease granted in pursuance of Part III of that Schedule, and

(b) he is not requiring the nominee purchaser to grant any such lease.

20. The respondent asserts that paragraph 5(2) does not limit what "any interest of the freeholder" in the other property should be. The respondent says that the wording is kept deliberately wide and extends to "any interest". Aneesh Ltd and Haveli Limited are associated companies in that they are both controlled by the same person or persons. The respondent went on to say that in the context of compulsory purchase it has been held that the Court is entitled to look at the realities of the situation and "pierce the corporate veil" to determine whether two companies which were both wholly owned by a third company had to be treated as independent entities in determining whether the owners of the business had been disturbed in their possession and enjoyment of it - *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (1978) 30 P & CR 251.

21. On the other hand, the applicant says that under the 1993 Act, Schedule 6, para 5 allows the freeholder to obtain reasonable compensation for loss or damage in respect of the diminution in the value of an interest of the freeholder in other property (i.e. property other than the freehold that is to be acquired on the collective enfranchisement and hence not, in this case, 3-6 Odessa).

22. Schedule 6, para 5 is authoritatively summarised in the recent decision of the Upper Tribunal in *House of Mayfair Limited* (2021] UKUT 73(LC) at para 13

> *"The FTT's reference to paragraph 5 is therefore puzzling. That provision is concerned only with the loss or damage which a freeholder suffers as a result of a diminution in the value of other property belonging to it, rather than with the value of the specified premises which are being acquired. It is true that the example of the kind of loss or damage given in paragraph 5(3) refers to loss of development value in relation to the specified premises themselves where it is referable to the freeholder's ownership of any interest in other property, but the FTT did not seem to identify what other property it had in mind. "*

23. The Tribunal considered what constituted "other property". In this case 1-2 Odessa Court, is owned by Haveli Limited, not Aneesh Limited, who owns the freehold of 3-6 Odessa Court and is therefore the reversioner and the Respondent in these proceedings. Companies have a distinct legal entity, separate from such persons as may be controlling it as members or shareholders. Companies have legal rights and duties, they may enter into contracts, own property and assume a distinct existence (*Salomon v Salomon Limited* [1897] AC 22). This means that the two companies in this dispute are two separate entities and must be treated as such. The companies are registered on the two registered titles and are clearly different and separate. They may share an address but that is merely descriptive and serves to highlight an address for service as set out on the title registers. That could be an Accountant's address being an administrative facility for the companies. In the circumstances before the Tribunal the split ownership of the freehold of Odessa Court would appear to be the product of the Arora family operating its property business through a number of companies in order to, in the words of Mr Arora *"spread risk and for tax planning reasons*".

24. The respondent refers to the *DHN* case but the Tribunal was not persuaded that this might apply to these circumstances. That case decided by Lord Denning in 1978 was focussed particularly upon compulsory purchase, a system that is entirely different to the process of enfranchisement and where the formal procedure bears no resemblance to that which applies in this case. There are two different statutes that apply, two different Rules and as such the Tribunal considered that the case could be distinguished as a consequence. It should also be noted that the DHN case has been doubted in *Woolfson v Strathclyde Regional Council* [1978] UKHL 5 and qualified in *Adams v Cape Industries plc* [1990] Ch 433.

25. For all these reasons the Tribunal determined that the respondent's single economic entity argument should be rejected and the Tribunal therefore rules that, as the whole of Aneesh Limited's interest in 3-6 Odessa Court is to be acquired by reason of the provisions of the 1993 Act, there can be no involvement of Haveli Limited in the compensation arrangements in this enfranchisement case.

26. The valuation date is agreed to be 18 June 2021. There does not seem anything explicit in the occupational leases that might prevent building on the roof. In principle therefore it would appear that the lessor could seek to build on the flat roof at the property, albeit so far as this application is concerned, on the roof space above flats 3 to 6 Odessa Court. At the valuation date there was no planning permission in place or indeed a pre-application advice or guidance from the local planning authority that might give some support to the possibility of a roof top development.

27. Starting at a residual valuation the tribunal adopted the calculations set out by Mr Stacey with two exceptions as set out below

Gross Development Value

The comparable evidence presented was not entirely helpful, not as a criticism of the valuer's but merely that there was a dearth of directly comparable properties. As such the agreed transactions in respect of the long leasehold values already agreed by the parties was considered the best starting point, with the Ground floor flats @ £270,000 equating to £546 per sq.ft. These were assumed to be in an unimproved condition. In this respect the tribunal agreed that an adjustment of £30,000 as proposed by Mr Stacey was appropriate. A further adjustment of 7.5% to reflect a new build premium and a reduction of £10,000 to reflect a "no car obligation" again as proposed by Mr Stacey were also considered appropriate which produced an adjusted rate of £568 per sq.ft. which applied to the GIA of 742 sq.ft. gives a value of £421,456 but say £420,000.Mr Stacey's argument in terms of a rate per sq.ft. reduction as flat size increases is noted but in this case would be counter balanced by the high percentage of useable space and attractive nature of the flat spanning over both existing flat foot prints.

The second point is that of developers profit which the tribunal preferred the rate of 15% adopted by Mr Gunby. It is a constrained site but there was no evidence to suggest that this would be more difficult/risky to justify differentiation on this item. This produced a site value of £36,608.

The bottom-up approach was then considered and in broad terms adopting the GDV of £420,000 and a percentage for site value of 33% produced a figure of £138,600. The tribunal considered that a further adjustment of 70% was appropriate to reflect planning risk at the

valuation date, given that there was no planning consent or even pre-application advice in place, albeit that subsequently this has proved positive for the wider scheme.

This produced a figure of £41,580. Stepping back from these figures the tribunal has decided that a figure of £40,000 is to be determined for the development/Hope value of the roof space of the subject application

28. Appeal rights are set out in an appendix to this decision.

Name:	Judge Professor Robert Abbey	**Date:**	15 August 2022

Appendix

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).