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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UK/OCE/2012/0038**
Property	:	**De Winter House, 33 Granville Road Sevenoaks, Kent, TN13 1EZ**
Applicant	:	**DE WINTER HOUSE LIMITED**
Representative	:	**Mr Enderby (Director)**
Respondent	:	**SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED**
Representative	:	**Mr Holden (Surveyor)**
Type of Application	:	**Section 24, Leasehold Reform Housing and Urban Development Act 1993: Determination of premium payable**
Tribunal Members	:	**Judge D Dovar (Lawyer chair)** **Judge E Morrison (Lawyer member)** **Mr Wilkey FRICS (Valuer member)**
Date and venue of Hearing	:	**17th October 2013** **Donnington Manor Hotel, Sevenoaks, Kent**
Date of Decision	:	**28th October 2013**

DECISION

Introduction

1. This is an application under s24 of the Leasehold Reform, Housing and Urban Development Act 1993 for a determination of the purchase price payable for the freehold interest in the Property.

2. At the outset of the hearing the parties confirmed that the issues between the parties were the impact on the purchase price (as calculated by reference to Schedule 6 of the 1993 Act) of:

    a. A right of way over parts of the Property;

    b. The presence of Japanese Knotweed;

    c. Disrepair to the roof.

3. There had also been an issue relating to the impact on the purchase price of a cap on the ground rents contained in the underleases. However, in the course of the hearing, Mr Enderby for the Applicants conceded that he was not able to argue that point following the decision of the Upper Tribunal in *Sinclair Gardens Investments (Kensington) Ltd v. 31 Croydon Road Ltd* [2012] UKUT 310 (LC) and in light of advice that he had been given that realistically, if the Applicants were to challenge that decision, they would have to take the matter to the Court of Appeal.

4. At the hearing the Tribunal were handed a number of documents by Mr Enderby including the Land Registry title for the Property, correspondence with his surveyor and an Advice from counsel. The hearing was adjourned for a short period in order to allow the Mr Holden to digest the material and make submissions. No objection was

made by Mr Holden to the introduction of these documents at this late stage and the Tribunal was therefore prepared to take them into consideration.

The Property and inspection

5. The Tribunal inspected the premises before the hearing in the company of Mr and Mrs Enderby and Mr and Mrs Beaumont (all of them leasehold owners and participating tenants).

6. The Property is a block of 21 residential flats (some one bedroom, some two bedroom) in Sevenoaks. There is an access way which runs off Granville Road and under some of the first floor flats on the north side of the building. This access way leads to an open space at the rear of the Property which consists of a continuation of the access way and car parking spaces. There is also further car parking under the building and an entrance allowing access inside. Mr Enderby pointed out the rear perimeter of the Property and a parcel of land beyond, which ran west down a steep slope to railway tracks ('the Adjacent Land'). He also pointed out the presence of Japanese Knotweed in the southern perimeter of the Property which was growing at a raised level along the boundary adjacent to the building.

Valuation

7. The Tribunal were provided with a joint statement of agreed facts and valuations prepared by the parties' surveyors (Mr Holden and Mr Martin) dated 2nd September 2013. That agreed a price payable for the

freehold of £96,136 on the basis that there was no cap on the ground rent payable under the terms of the lease.

8. As has been mentioned above, in the course of the hearing, Mr Enderby conceded that the cap no longer applied in light of the *31 Croydon Road* case. However, he sought to argue that despite his expert agreeing a premium of £96,136 in those circumstances, for the three reasons set out above, the premium should be lower. The Tribunal accepts that it is not bound by the value agreed by the experts and must make a determination on all the relevant matters put before it, however, the fact that the experts have agreed is a significant factor in that determination.

9. Mr Enderby stated that in the absence of the Respondent providing an indemnity for the costs of knotweed and/or any action or losses arising out of the Right of Way, these matters should be taken into account in determining value. Mr Holden was not in a position to confirm that any such indemnity would be provided.

Roof disrepair

10. Mr Enderby was unable to point to any evidence of disrepair of the roof. He was uncertain of the extent of any disrepair; he said he had 'no idea of the extent of the problem'. Accordingly the Tribunal is unable to take any potential disrepair into account in value.

Knotweed

11. Mr Enderby submitted that the presence of the knotweed had the potential to have a serious effect on the value of the freehold because it could undermine the structure of the building.

12. Apart from the actual presence of Knotweed, there was no evidence that it was causing damage to the structure of the building or the extent of such damage. Mr Enderby said that it was not possible to determine the extent of any damage without digging up the foundations.

13. The Tribunal was provided with a letter from Respondent dated 13th May 2013 in which it was stated that a maintenance plan (following treatment which had already been carried out) would cost around £900 a year and a 20 year guarantee, £20,000. Mr Enderby contended that the guarantee was necessary before a mortgagee would lend against a flat in the Property.

14. The Tribunal was also provided with a letter from the Applicants' expert, Mr Martin, dated 4th September 2013, in which he gave his view that this was not a matter that would ordinarily be reflected in the valuation.

15. The Tribunal considers that this was an issue that is not likely to affect value and was a matter to be dealt with under any repairing obligations and under the service charge provisions. In any event, there was insufficient evidence that the Knotweed was causing any, let alone any sufficient damage to the structure of the building to warrant any reduction. Accordingly the Tribunal makes no reduction to take into account the presence of the Knotweed.

Right of Way

16. The final matter which Mr Enderby contended had a suppressive impact on the purchase price was the existence of a right of way over the access way to the Adjacent Land and in favour of the Adjacent Land.

17. The right of way is set out in the charges register of the freehold title and states:

> *"The land is subject to the following rights reserved by a Transfer dated 18th July 1994 made between (1) Pennell Developments Limited (Transferor) and (2) Sinclair Gardens Investments (Kensington) Limited (Transferee) –*
>
> > *"Excepting and reserving unto the Transferor and its successors in title a right of way with or without vehicles for all reasonable purposes connected with the proper use of the Transferors adjoining land ... over and along the accessway the approximate position of which is coloured brown on the said plan. ..."*

18. The sample lease provided is dated 20th May 1988 between Northlands Housing Association Limited and Jennifer Mary Noble. It refers to a Development, meaning the 21 flats, car parking spaces and accessway as well as the Retained Land which appears to be the Adjacent Land. Paragraph 2 of the 4th Schedule reserves 'a right of way on foot only but with machinery tools and equipment over and along the roadways and the staircase situate on the Development for the purposes of access to and egress from the retained land' for the benefit of the Landlord its

successors in title 'and all other persons to whom a like right has been or may be granted'. This suggests that a right of way was in existence prior to the Transfer of 18th July 1994 and may also have existed prior to the grant of the lease in 1988.

19. Mr Enderby pointed out that the leases were not only of a flat, but also of allocated car parking spaces. He considered that the exercise of the right of way in relation to any development of the Adjacent Land had the potential not only to cause disruption to the leaseholders, but that it trammelled some of the car parking spaces which had been demised with the flats. He considered that the existence of the right of way made the flats potentially unmarketable. He also submitted that the existence of the right of way amounted to breach of covenant for quiet enjoyment, in that the freeholder had effectively granted rights over land that had already been demised. As a result of that, any individual who took the freehold would then be at risk of facing claims for breach of covenant by the leaseholders. The net effect of this was that the freehold had a negative value; no one would wish to take on the freehold.

20. Mr Enderby asserted that the right of way had been granted in order to facilitate the development of the Adjacent Land. The Tribunal saw some force in this assertion given that the Adjacent Land was a vacant plot and may have some development potential. However, the Tribunal noted that it abutted a railway track and was on steep slope. Mr Enderby accepted that the right of way could only be used to benefit the Adjacent Land and not any neighbouring land.

21. Both surveyors accepted that at the time that they made their joint statement, they were not aware of the Right of Way or any issues in relation to it. However, Mr Holden said that any development of the Adjacent Land was pure speculation and that as the right of way was clearly marked on the freehold title, any impact caused by its existence was already factored into the prices paid for the flats over the years. Recent sale prices had been taken into consideration by the valuers. Mr Holden also opined that the Adjacent Land was too steep to develop. He therefore submitted that no adjustment should be made.

22. Mr Martin for the Applicant gave evidence on this point and whether, had he known of the right of way at the time he arrived at the agreed figures, he would have adjusted them. He said he would have done, but only by a factor of "maybe 5%". The Tribunal formed the impression from the manner in which he gave this evidence that he said this with some reluctance and was not entirely convinced that he would have made any adjustment. He conceded that any calculation would be based on a "finger in the wind" approach.

23. Whilst not determining the scope of the right of way, the Tribunal does have to consider whether there is a risk that if the right of way is exercised it would encroach upon the land demised under the leases of the flat. The Tribunal does not consider that there is any such risk. The Tribunal's view is that the right of way does not appear to be over the car parking spaces; the only suggestion that it does arises out of the reference to the brown land, which, at best could be over one or two spaces. However, the Tribunal notes that the right of way is over the

'accessway' and not the car parking spaces and further that the brown land is only an approximation of where the right of way is. The Tribunal does not therefore consider that the risks are as Mr Enderby fears. Whilst this means that it would not serve to reduce the premium payable, it is hoped that Mr Enderby takes some comfort from the fact that this Tribunal does not consider that his leasehold interest is unmarketable. The Tribunal's view is further reinforced by the fact that a right of way was included in the leases (albeit on foot only).

24. In any event, the Tribunal is satisfied that, as the right of way appears plainly on the title to the Property, it can assume that it has been taken into account in the prices paid for the flats which have formed the basis of the experts' valuations.

25. At one point Mr Enderby wished to call his wife to adduce evidence of the level of cost for insurance to guard against the risk that there was defect in title. The Tribunal refused him permission to do so. Mr Enderby had not raised this point prior to his submissions and had not produced any witness statement or documentary evidence (by way of quotation) in that regard and the Tribunal was not prepared to take evidence in this manner. In any event, in light of the Tribunal's view of this issue, it would have served no purpose.

26. It follows that the Tribunal makes no reduction for the Right of Way.

Conclusion

27. Accordingly the Tribunal makes no reduction from the experts agreed purchase price of £96,136.

28. In their written submissions, the Respondent had raised an issue of wasted costs. However, at the hearing Mr Holden confirmed that he would not be pursuing that issue.

Judge D Dovar

Chairman

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.