

44182



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **VG/LON/00BK/2015/0206**

Property : **The Phoenix, 8-13 Bird Street,
London W1 3BU**

Applicant : **The Phoenix Freehold Limited**

Representative : **Mr. A Radevsky QC, counsel
instructed by Forsters LLP**

Respondent : **The Kaizan Investment Company**

Representative : **Mr. Furber QC, counsel instructed
by Thrings LLP**

Type of Application : **Collective Enfranchisement**

Tribunal Members : **Judge Tagliavini
Miss M Krisko FRICS**

**Date and venue of
hearing** : **10 Alfred Place, London WC1E 7LR
15 & 16 March 2016**

Date of Decision : **6 May 2016**

DECISION

- (1) The tribunal determines that the total sum payable by the Applicant Nominee Purchaser to the Respondent Freeholder for the freehold interest of the subject property is **£518,00.00.**
- (2) The tribunal makes the determinations as set out under the various headings in this Decision.

The application

1. The Applicant nominee purchaser seeks a determination pursuant to the provisions of The Leasehold Reform housing and Urban Development Act 1993 (as amended) [“the Act”]. By section 13 of the Act the Applicants initial notice dated 17 November 2014 asserted the right to:
 - Acquire the freehold of the Specified premises known as The Phoenix 8 Bird Street London W1U 1BU for £275,000.
 - Purchase the freehold of the basement vault for £1.
2. By a counter notice dated 26 January 2015 the Respondent landlord:
 - Admits right of the Applicant to exercise the right to collective enfranchisement.
 - Does not admit right to acquire the freehold of appurtenant property known as the basement vault.
 - Proposed a purchase price of £1,330.001 for the Specified Premises with a leaseback of 999 years at a peppercorn rent of Parking space 38 with rights of access and services.
 - Alternatively a purchase price of £1,480.000 if no leaseback of parking space 38 is granted.

The hearing

3. The Applicant was represented by Mr. Radevsky QC at the hearing. The Respondent was represented by Mr. Furber QC. The tribunal was provided with three lever arch bundles labelled A, B and C and included the expert reports of Mr. Ian Asbury BSc (Hons) MRICS, on behalf of the Applicant nominee purchaser who calculated the price payable for the freehold as £396,000 in his expert report dated 23 February 2006. Mr. Nigel Leedham MRICS ACI Arb for the Respondent freeholder asserted in his expert report dated 1 March 2016 that the price payable for the freehold is £1,134,412.00.

The background

4. The property, which is the subject of this application, is a block of 64 flats situated north of Oxford Street, W1. The flats are let on 999 leases at an annual ground rent of £350 totalling £22,400 per annum. There are 38 numbered underground car parking spaces available and let to several of the lessees of the 64 flats. Neither party requested an inspection and the tribunal did not consider that one was necessary.

The issues

5. At the start of the hearing the parties identified the relevant issues for determination by the tribunal and as set out in the parties Statement of Agreed Facts and Disputed Issues dated 23 February 2016. The disputed issues are as follows:
 - (i) The freehold valuation pursuant to Part II of Schedule 6 of the 1993 Act of the subject property being 64 leasehold flats located at: Flats 1-37, 8 Bird Street, flats 38-65, 19 Barrett Street and 10 Bird Street and collectively known as "The Phoenix 8-13 Bird Street".
 - (ii) The appropriate ground rent income capitalisation rate.
 - (iii) The value of the 25-year lease of roof space at £19,500 per annum dated 23 January 2013 made between The Kazan Investment Company Limited and "Phoenix" Management company
 - (iv) The value of the Porter's office.

- (v) The value of the store-room/cleaning cupboard.
- (vi) The value of the accessible Pavement vault below the Bird Street frontage and the other undemised basement storage areas within basement Levels 1, 2 and 3.
- (vii) The value of the available car parking space (No. 38) in the basement (*agreed by the parties not to be subject to a leaseback*).

The parties' areas of dispute

Ground rent

6. Mr. Radevsky asserted that the appropriate capitalisation rate of the ground rental income of £22,400 is the 6.5% utilised by Mr. Asbury and the principal value of the freehold is £345,000 as stated in Mr. Asbury's report. Mr. Radevsky submitted that Mr. Asbury's capitalisation rate is to be preferred to that of Mr. Leedham who utilised a rate of 5% thereby providing a freehold value of £448,000. The Applicant asserted that whereas Mr. Leedham had relied on only one comparable property in his report for the purposes of the calculation of the appropriate capitalisation rate, Mr. Asbury had considered a number of freehold ground rent investment comparable properties as set out in Appendix 5 of his report (as revised).
7. In his argument Mr. Furber relied upon *Nicholas v Gough* [2007] 1 EGLR 83 where the Upper Tribunal stated there are five factors to be considered in the application of the appropriate capitalisation rate of ground rent. These included the length of the lease term; security of recovery; size of the ground rent; provision for review of ground rents and if there was such a provision, the nature of it. Mr. Leedham asserted that in this matter, the first three factors applied and would be properly reflected in a capitalisation rate of 5%.
8. Mr. Furber challenged Mr. Asbury's averaging approach as 'flawed'. He asserted that the approach taken by Mr. Leedham and his reliance on a single comparable transaction in *Acre House, 69-76 Long Acre, London WC2 9JS*, which contained eleven self-contained flats and achieved a yield of 4.91% in July 2014 should be preferred to the evidence of Mr. Asbury.

Roof space rental

9. The roof space lease dated 23 January 2013 for a term of 25 years (terminable by the Tenant anytime after 5 years on 12 months written notice) was entered into in order to prevent communications equipment being placed on the roof of the subject premises. As the lease is not registered at the Land Registry a purchaser would take free of it. A prior agreement for the (Roof space) lease dated 19 December 2012 was the subject of a unilateral notice and registered on 29 January 2016 and after the valuation date. Therefore, a purchaser would also take free of that notice.

10. Mr. Radevsky submitted that a reversionary yield of 10% until the break date as utilised by Mr. Asbury demonstrates the correct valuation approach in contrast to the approach adopted by Mr. Leedham in capitalising the (roof) rent in perpetuity. Mr. Radevsky also asserted that in reliance on Mr. Asbury's report there is a relatively small amount of additional value in the subject premises, totalling £51,000 relating to the rental of the roof. Mr. Radevsky asserted that this sum is in contrast to Mr. Leedham's approach, which relies in part, on a second roof space lease being granted in the future to a communications company and thereby massively increases the price payable for the premium sought by the Respondent by £222,996 (existing roof lease) and £233,346 (for a proposed additional 2nd lease of roof space).

11. In contrast to Mr. Asbury's approach the Respondent submitted that Mr. Leedham's is to be preferred and that the tribunal should accept that the lease would run for the full 25 years in order to achieve its purpose of limiting if not preventing the installation to communications equipment on the roof space. Further, as there is nothing to prevent the Landlord from granting a second lease of any remaining and available roof space this factor should also be taken into account for the purposes of valuation.

Porter's office

12. The Applicant contends that the porter's office, which is carved out of space in the foyer to provide a reception desk and office behind, forms part of the common parts and therefore is not available for the freeholder to let out or by reason of s.19 of the Act could not grant a lease of it. Mr. Radevsky relied upon clause 1(13) of the specimen (Flat 1) lease, which states as follows:

"the Common Parts" means all main entrances passages landings walkways staircases (internal and external) gates

access yards courtyards roads and footpaths passenger lifts means of refuse disposal gardens and other areas included in the Estate provided for the common use of the Flat Owners and their visitors and not subject to any lease or tenancy to which the Landlord is entitled to the reversion."

13. The Applicant also asserted that the Porter's office cannot be removed by the freeholder as this office as always been provided to the tenants having been constructed at the time of the buildings original construction. and in any event the porter's area is shown as a common part of the lease plan.
14. It is the Respondent's case that the porter's office does not form part of the common parts. In accordance with Mr. Leedham's valuation a value of £69,170 can be placed upon the porter's office by capitalising in perpetuity a rent calculated at £50 per square foot.

The cleaner's closet

15. The Applicant asserted that this windowless room of 39 sq. ft. utilised for the storage of cleaning equipment forms part of the common Parts and is not capable of being let by the freeholder. In contrast Mr. Leedham ascribes a value of £3,900 to this storage cupboard.

Basement stores level 3 (under the ramp and small store).

16. The parties agreed the value of these areas at £37,000.

Under pavement vaults

17. It is submitted by the Applicant that these vaults are in very bad condition and unused and therefore have a negative value. This negative value is offset by the agreed value of two basement stores at £37,000. Mr. Leedham accepted that the value of accessible pavement vaults is nil as they are inherently damp however Mr. Furber asserted that Mr. Asbury now appeared to resile from this agreed valuation of the basement stores level 3 (under the ramp and small store)_or negate its effect by asserting that other parts of the basement vaults, had a negative value.

Parking space 38

18. The Applicant submits that the evidence of Mr. Asbury on this issue is to be preferred and that this space can accommodate 3 large cars and 1 small vehicle and values it at £80,000. This is contrast to the £120,000 value placed upon this space by Mr. Leedham.
19. Mr. Furber asserted that the tribunal should accept Mr. Leedham's evidence of the comparable found in *Jacob Wells Mews London W1U* where a Garage H (suitable for 2 cars) was purchased on 19 December 2014 for the sum of £240,000 as a leasehold property with an unexpired term of 60 years at a ground rent of £25 per annum. Mr. Leedham asserted in his report that by diving this figure in two, a sum of £120,000 was payable for the single car parking space at No.38.
20. Mr. Radevsky challenged Mr. Leedham's evidence on this point and submitted he did not provide any particulars to support his reliance on the letting of the *Jacob Wells Mews* garage space. Further, the Applicant submitted the sale particulars show that four cars could be accommodated in this space that Garage H was large enough for four cars (60sqm) not simply the one that could be accommodated at the parking space No.38.

The valuation evidence

21. Mr. Radevsky submitted that the tribunal should prefer the evidence of Mr. Asbury to that of Mr. Leedham as the latter was formerly employed as 'in house surveyor' for the Respondent company and was currently actively involved marketing the subject property on behalf of the property. These were not matters, which had been disclosed in Mr. Leedham's report and therefore cast doubt on his objectivity and independence when providing evidence to the tribunal in this matter. In contrast, Mr. Asbury provides comparables to support his valuation.

The tribunal's decision

22. In reaching its decision the tribunal took into account all of the written and oral evidence provided to it for the purposes of this application. Applying paragraph 3(1) of Schedule 6 of the Act the tribunal makes the following findings in assessing the price payable by assuming an open market sale of the freehold, with no-one with an existing interest in the building being in the market, and on the assumptions of paragraph (a) – (d) of paragraph 3(1) of Schedule 6. *

Porter's office

23. The tribunal accepts the Applicant's argument that this space forms part of the common parts. Having considered also the photographic evidence, the terms of the (specimen) lease and considered the role of the Porter in this building and the expectations of the leaseholders from the building's original construction, the tribunal finds that the role can only be properly fulfilled if there is a designated work space from which the Porter's duties can be carried out. Consequently, as this area is a common part the value to be attributed to it for the purposes of this application is nil.

Store/cleaner's cupboard

24. The tribunal find that this area forms part of the common parts. The cleaning cupboard is a necessary space for the purposes of carrying out the obligations owed to the lessees in respect of the cleaning of common parts. Therefore the value to be attributed to it for the purposes of this application is nil.

Basement level 3 - under ramp store & Porter's store combined.

25. The tribunal notes the £37,000 value agreed. The tribunal accepts the evidence of the applicant that any other basement storage areas have a nil value being in a damp and dilapidated condition.

Under pavement vaults

26. The tribunal accepts the parties' evidence and submissions on this issue and finds that there is no additional value attributable to this area as there is no natural or electric light and no ventilation to these damp and disused remnants of C19th buildings that once stood on this site. The tribunal finds that there is however, no negative value to be attributed to these areas, which requires a deduction from the premium payable for the freehold of the subject premises.

Roof lease

27. The tribunal prefers the arguments of the Respondent to those of the Applicant on this issue and finds that on the balance of probabilities the current roof lease can only be regarded as providing a fully secure income for a five-year period. The Tribunal accepts Mr. Leedham's report in so far as it concerns the first five-year period of the roof lease and determines that the capitalisation rate should be lower than the 10% suggested by the Applicant. The tribunal accepts the valuation by the Mr. Leedham in so far as it provides for a 5% capitalisation rate on the secure rental income up to the break clause.

28. However, the tribunal finds and accepts the Applicant's assertions that there was no evidence that anyone would be interested in the future use of the roof space. The tribunal also finds there is no evidence to suggest that it is likely that planning consent would be granted or a telecommunications tenant found as there already exists in the vicinity a dense network of telecommunications masts, as there is now less demand for these sites. Therefore, the tribunal does not accept the Respondent's assertion that the capitalisation of the rent for the roof lease should be calculated 'in perpetuity'.

Car parking space

29. The tribunal accepts the Applicant's submissions in respect of this space and finds that having regard to its size, shape and location that it is able to provide space for up to four vehicles. In the absence of any persuasive evidence to the contrary, the tribunal accepts the figure of £240,000 reached for Garage H at *Jacob Wells Mews* and divides this by four, thereby providing a valuation of £80,000 for the single car parking space.

Ground rent/premium valuation

30. The tribunal accepts the Applicant's evidence on this issue and finds that 6.5% utilised by Mr. Asbury, which is based on several comparable transactions, is the appropriate rate of capitalisation to be applied. The tribunal accepts that the ground rent is well secured as it is fixed for the entire term i.e. the next 981 years, the lease does not provide for any increase during this entire period. Although the total amount receivable is attractive, each separate flat must be invoiced, this will mean sending out 64 individual accounts. The Applicant provided several comparables* of both rising and fixed ground rents which he averaged. The respondent used only one comparable namely *Acre House*, as he did not consider the other comparables relevant. Both valuers agreed that a rising ground rent was of more interest to an investor than a fixed ground rent.

**Appendix 5 in Mr. Asbury's report (as revised)*

Conclusion

31. In conclusion, applying the criteria as set out in Schedule 6 of the Act, the tribunal determines the freehold purchase price to be as follows:

Value of ground rent income.....	£345,000
Value of roof lease.....	£ 56,054 (say £56,000)
Under ramp stamp and porter's store.....	£ 37,000

Car park space No. 38.....£ 80,000

Total: £518,054 (say £518,000)

Signed: Judge LM Tagliavini Dated: 8 May 2016