4204

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/002UH/OLR/2016/0031**
Property	:	**Flats 1-6, 94-96 High Road, North Weald, Epping CM16 6BY**
Applicant	:	**Orcourt Freehold (North Weald) Limited**
Representative	:	**Mr Robert Bowker Counsel**
Respondent	:	**Mr Michael Leigh Osborne**
Representative	:	**Mr Richard Murphy Valuer**
Type of Application	:	**Section 24 Leasehold Reform, Housing and Urban Development Act 1993 – determination of terms of acquisition in dispute and the costs payable by the applicant**
Tribunal Members	:	**Judge John Hewitt** **Mr Roland Thomas MRICS** **Mr Gerard Smith MRICS FAAV**
Date and venue of Hearing	:	**23 May 2016** **The Bell Hotel, Epping CM16 4DG**
Date of Decision	:	**24 June 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The price payable by the applicant to the respondent for the freehold interest in the subject property is £4,335.00;

   1.2 There is no value to be attributed to the development potential of the roof space of the subject property;

   1.3 The valuation costs payable by the applicant to the pursuant to section 33(1)(d) Leasehold Reform, Housing and Urban Development Act 1993 (the Act) amount to £1,440.00; and

   1.4 The legal costs payable by the applicant to the respondent pursuant to section 33(1)(a), (b), (c) and (e) of the Act amount to £1,459.80.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. The subject property is a block of six flats, the freehold title to which is registered at Land Registry with title number EX532185. On 16 January 2008 the respondent (Mr Osborne) was registered at Land Registry as the proprietor [126].

   Mr Osborne is thus the reversioner for the purposes of section 9 of the Act.

4. On 31 October 2007 a long lease of each of the flats was granted for a term of 125 years from 1 March 2007. Each lease was granted by Lakewater Estates Limited to Mr Osborne. A sample lease, that of flat 5, was handed to us at the hearing. Each lease demised a specific parking place to the lessee.

5. In January 2014 Mr Osborne assigned the leases of the six flats to a combination of various members of the Mackay-Macdonald family who thereby between them became the qualifying tenants for the purposes of section 5 of the Act.

6. By an initial notice dated 28 August 2015 [11] all six long lessees, as participating qualifying tenants, claimed to exercise the right to acquire the freehold interest in the property pursuant to section 1 of the Act. The notice proposed a total of £2,225 for freehold interest. The notice named the applicant as the nominee purchaser.

7. By a counter-notice dated 29 October 2015 [21] Mr Osborne admitted that when the initial notice was given the participating qualifying

tenants were entitled to exercise the right to collective enfranchisement. The proposed price was not accepted and Mr Osborne counter-proposed a total price of £175,000.

8. The parties were not able to agree all the terms of acquisition and on 13 February 2016 the applicant made an application to the tribunal pursuant to section 24 of the Act [1]. Directions were given on 26 February 2016 [25].

Inspection and hearing

9. The application came on for hearing before us on 23 May 2016.

10. On the morning of 23 May 2016, but before the commencement of the hearing, the members of the tribunal had the benefit of a site visit.

    Present were Mr Andrew Macdonald, one of the qualifying tenants, and Mr Robert Bowker of counsel instructed on behalf of the applicant.

    Mr Osborne had been notified of the arrangements for the inspection but chose not to attend or to be represented.

11. The tribunal was able to carry out an external visual inspection of the development, its grounds and the car parking areas. Helpful photographs are at [91-93].

    We were also able to carry out an internal inspection of flat 3, one of the first floor flats.

12. The hearing commenced at 11:05 and concluded at 17:05.

13. The applicant was represented by Mr Bowker of counsel and he called Mr David Parish FRICS as an expert valuer witness.

    Mr Osborne was represented by Mr Richard Murphy MRICS who also gave evidence as an expert valuer witness.

14. First we have to deal with some house-keeping points and clarification of the issues.

15. The main issue between the parties was the development value, if any, to be attributed to the roof space of the development.

16. The directions gave permission for each party to rely on the evidence of one expert surveyor/valuer whose report was to be served by 4:00 18 March 2016.

    Mr Parish sought and obtained an extension of time and his report is dated 4 April 2016 [32].

Mr Murphy did not seek an extension of time. His report is dated 6 May 2016 [72]. It is not known when it was served.
Mr Murphy's report also contained documents prepared by others, namely:

1. A development appraisal carried out by AH Surveyors Ltd [109], concerning the alleged financial case for a development of the roof space; and

2. An 'Expert Report' prepared by a Mr Alan Simmons of Archiplan Architectural and Design Consultants who makes observations about the prospects of obtaining a planning permission to carry out a development of the roof space.

17. Mr Murphy was not able to give a convincing explanation for the delay in his report being served. He made an application for an extension of time. Following some discussion Mr Bowker did not oppose that application as regards Mr Murphy's expert opinion on valuation matters but was concerned as to the status and import of the AH Surveyors' appraisal and Mr Simmons' 'Expert Report' and sought clarification.

18. It turned out that Mr Simmons is the architect who has been advising Mr Osborne on the planning application. AH Surveyors is a firm that works closely with Mr Simmons on projects he undertakes and, according to Mr Murphy, are effectively the same people.

19. Mr Osborne did not propose to call Mr Simmons or someone from AH Surveyors to give oral evidence on the documents produced by them because he did not wish to incur the cost of doing so. In considering the nature of the evidence which Mr Murphy wished to adduce he said that the AH Surveyors' appraisal was not an expert witness report, it was more like a witness statement of fact, or more like a letter or a document.

    Given that the maker of the document was not being called Mr Murphy appreciated that not much weight could be given to it. He was content that the tribunal should give it as much weight as we thought appropriate and on that footing Mr Bowker did not object to it remaining in the bundle.

20. As to Mr Simmons' 'Expert Report' Mr Murphy acknowledged that it was not rule 19 compliant and that Mr Osborne did not have permission to rely upon two experts' reports. Mr Murphy suggested that the document be treated as an account of the history of the planning applications – the facts of which were not actually in dispute and that it not be regarded an expert report in the full sense. On that footing Mr Bowker withdrew his objection to it remaining in the bundle.

21. It also became clear that Mr Parish was now at £4,000 as the basic price for the freehold interest and that he considered the development value to be nil. Mr Murphy was at £4,335 as the basic price with the development value at £90,725.

22. Through Mr Bowker the applicant was prepared to agree the basic price of £4,335 for the property for reasons of expediency only and made clear that it did not concede the methodology by which Mr Murphy had arrived at his figure of £4,335. The tribunal was grateful for this concession because it enabled everyone to focus on the substantive issue which was the development value.

Development value

23. In considering the development value there are two principal issues which the hypothetical purchaser will bear in mind. The first is the prospect of securing planning permission for a scheme and the second the viability of that scheme. The viability of the scheme will depend on physical factors to implement it, any legal restraints and the costs of the scheme and the net financial rewards in doing so.

Planning

24. In the event this was not that controversial. We can take it shortly.

    The current proposal is to adapt the roof space to create one two-bedroom flat and one one-bedroom flat in the roof space of the property.

25. Initially an application was made to the council but it did not meet officers' approval and it was withdrawn on 22 January 2015. A second scheme was then lodged and was discussed with officers. As drawn officers had some minor concerns about it and suggested that if the application was withdrawn and those concerns were addressed in a further application it would be forwarded to members with a recommendation for approval. The second scheme was withdrawn on 26 June 2015.

26. A third scheme addressing the concerns raised by officers on the second scheme was duly submitted on 16 July 2015.

27. The valuation date is 28 August 2015. Mr Murphy expressed the view that knowing the planning history the hypothetical purchaser would have borne in mind that there was a reasonably good prospect of achieving a planning permission in accordance with the third scheme but would have allowed for a risk, a small risk, which he assessed at 20%. He argued that there was an 80% prospect of planning being granted. He also said that the informed hypothetical purchaser would know that about 35% of refusals are successful on appeal and that the prospects may be greater where officers have recommended approval, indicating that the application is compliant with all relevant policies, but members decided, for whatever reason, to reject the recommendation.

28. Mr Parish acknowledged that he was not a planning surveyor but said in his experience in broad terms a cautious hypothetical purchaser would assume a 50/50 prospect of achieving an acceptable planning permission.

29. The report by officers to members is at [46-65] and the recommendation is that permission be granted subject to conditions (not material for present purposes). By notice dated 14 October 2015 members refused the application [42-44]. We understand that an appeal against the refusal has been made. However, we need not consider the prospects of success of that appeal, because we have to view this from the point of view of the hypothetical purchaser as at the valuation date of 28 August 2015.

30. In so far as may be relevant we find that as at the valuation date the well informed but prudent hypothetical purchaser would have assumed there was a planning risk and that his bid should reflect that. We find that risk was not as great as Mr Parish suggested but that it would be closer to the 20% as suggested by Mr Murphy, which he quantifies at £45,363.

Viability of the scheme

31. In his evidence Mr Parish was very clear that the scheme was not viable for several reasons, including:

31.1 The proposed works involve substantial alterations and reconfigurations to flats 3 and 4 and there was no evidence that the lessees of those flats would readily agree to them.

31.2 The roof would have to be raised and that such works could not be undertaken with the lessees of the three upper flats, numbered 1,3 and 5 in occupation.

31.3 As originally constructed flats 1, 3 and 5 have loft hatches and whilst there is no express right to use the loft spaces they do provide access to services and water tanks and provide space for storage. The occupiers of those flats have enjoyed the use of the loft spaces and the long lessees may well have acquired rights in respect of the roof space.

31.4 The leases also demise parking spaces and rights to use the amenity land which precludes taking away any of those spaces or that land to create parking spaces for the occupiers of the proposed 'new flats'. Although there is a mismatch between the parking spaces as laid out on the ground and the spaces demised as shown on Land Registry title plans and (thus a case for reorganisation in any event) there is no evidence that the long lessees would readily agree to a variation of their rights in respect of the car parking spaces and amenity land.

31.5 Flats 1 and 3 are subject to mortgages and in his experience risk averse mortgagees are wary to agree any changes which might impact

on the value of their security. A question was raised as to when those mortgages were registered at Land Registry but evidence about that was put before us.

31.6 In overview Mr Parish was of the view that there were just too many practical or legal obstacles for a freeholder to have to overcome to have any realistic prospect of being able to undertake the proposed works, even if planning were forthcoming.

31.7 Mr Parish was also critical of the financial appraisal. He said that no allowance had been made for cost of relocating the lessees/occupiers whilst the works were in hand. He said that the cost of providing alternative accommodation/loss of rental income would be in the order of £900 per month for the five two-bedroom flats and £550 per month for the studio flat. In addition, there would be costs to compensate for the disturbance, relocation/moving costs, council tax and general inconvenience.

31.8 All six long lessees would need to agree and approve all of the proposed arrangements and the timings as they may affect them. At present all six flats are sub-let for various terms. Even though the flats are held in one family that does not necessarily mean that the prospect of all six agreeing to what is proposed is enhanced.

32. Mr Murphy said in his evidence that he wished to adopt the AH Surveyors financial appraisal [109] as his own. It is addressed to 'Trading Places' which he said was Mr Osborne's trading name for his estate agency business. Mr Murphy said that the appraisal had been prepared by a Mr Howard Gross who was a chartered surveyor with whom he had worked on other projects. Mr Murphy said that he had looked at the appraisal critically and evaluated it as best he could and that it looked completely reasonable to him.

33. Mr Murphy said that the appraisal assumed agreement from as many of the long lessees whose agreement is required. He said that he had allowed £90,725 to buy in as many consents as may be required. He said that he took a reasonable assumption that the hypothetical purchaser would be able to persuade the long lessees to cooperate with the scheme. His 50/50 approach was just the way he looked at it; it was his gut feeling. Also he said that the lessees of flats 3 and 4 would readily see the benefits of the enhanced space/reconfiguration of their flats.

34. In addition Mr Murphy claimed that the leases as granted are 'landlord friendly' and that paragraph 2 of Part 1 of the Schedule to the leases allows the landlord to make the rules. That paragraph grants the lessee the right to use the common parts and the gardens, in common with all others entitled, *"... subject to such reasonable rules and regulations for the common enjoyment thereof as the Lessor ... may from time to time prescribe"*. He also relied upon paragraph 10 which states: *"Provided always and subject to the Lessor having the right to close up and*

divert any of the common parts on the Property or access ways subject to leaving available reasonable and sufficient means of access to and from the Demised Premises".

Mr Murphy claimed that these provisions entitled the freeholder to reconfigure the parking spaces and amenity land as he saw fit. He did however concede that the use of the loft spaces by the lessees/occupiers of the first floor flats was a relevant point which would need to the subject of a negotiation.

35. Mr Murphy said that he had not allowed for profit in his appraisal because he has assumed the hypothetical purchaser is the developer who procures the works to be carried out and that he would take all of the profit from the scheme.

36. Mr Murphy acknowledged that the appraisal included £3,000 for fees for cost of a structural engineer checking the new roof system and to ensure that the existing foundations are adequate for the additional loads but did not include for the cost of any reinforcing works that might be required. Mr Murphy doubted that any such would be needed. He likened the project to a loft conversion in a house and in his (albeit limited) experience of those reinforcement was not generally required. Mr Murphy was also fairly relaxed about what was involved in raising the existing roof and the weather proofing required whilst that work was undertaken.

Discussion and findings

37. Mr Bowker provided us with a comprehensive file of authorities which set out the general approach we should adopt. With no disrespect to either of the parties we do not summarise or comment upon each of the authorities in any detail. The general approach is discussed in the *Arrowdell* and *2 Herbert Crescent.*

38. In his approach Mr Murphy conflates development value with hope value. In paragraph 13.1 of his report he states clearly ***"Development Hope Value £90,725".***

39. There is no doubt that on the authorities we have to take into account such matters as the potential for redevelopment. The guidance is to assess how the hypothetical purchaser would view the opportunity and what he would allow for in his bid. That much is clear from *Sherwood Hall* – paragraph 50. However, it is also clear from paragraph 53 that there has to be some evidence that the existing lessees could be bought out so as to release the property and enable the scheme to be carried out. We note the following words of Mr N J Rose FRICS:

"In the present case there was no evidence to suggest that the two leaseholders would benefit in any way from the proposed development, nor that both could have been bought out at a price which would have made the development financially viable."

That expression is broadly apt to describe the situation in the present case before us.

40. In the general approach to the viability of the scheme we prefer the evidence of Mr Parish which we considered to be measured and thoughtful of the details and problems likely to be encountered which was in contrast to the broad and more relaxed approach adopted by Mr Murphy.

41. On the financial viability of the scheme we were willing to adopt the AH Surveyors appraisal in so far as it went. However, it did not go far enough and omitted several components, for example an allowance for the cost of any works which the structural engineer might recommend, works associated with weather proofing the roof and the relocation costs/loss of rental income claims which it is realistic to assume would be made by the six long lessees. We agree with Mr Parish that the prudent hypothetical purchaser would make allowance for those heads of potential expenditure. Thus we come to the conclusion that the proposed development is not shown to be financially viable.

42. We also find that the proposed development is not viable from a practical and legal perspective. We find that Mr Murphy has misunderstood the terms of the leases, and in particular Parts 1 and 2 of the schedule to those leases. We consider that he has over-estimated the limited scope available to the freeholder as regards the rules and regulations it can make as to the use of the common parts in paragraph 2 of Part 1. All six lessees have rights over the whole of the amenity land. The freeholder cannot, during the term, deny the lessees of the use of the gardens or open space, for example by creating and demising more parking spaces.

43. In similar vein, from a practical point of view the freeholder would need to locate a contractors' compound on the front of the site – there being no nearby on street parking available. A fair part of the front of the site is devoted to car parking spaces expressly demised. All six lessees have rights over the remainder of the whole of the site and the consent of all of them would be required.

44. We also consider that Mr Murphy has over-estimated the limited scope to close up and divert any of the common parts mentioned in paragraph 10 of that Part 1.

45. Further as regards paragraph 3 of Part 2, the expression 'erect any buildings' must refer to a new or additional buildings and does not refer to the modification of the existing building. The expression 'to alter rebuild and make additions to any of the adjoining or neighbouring buildings' does not relate to or concern the existing building, but, as it says, it relates to 'adjoining or neighbouring buildings'. Thus in short we concur with Mr Bowker's submission that the freeholder's reserved rights do not contemplate a loft conversion of the existing building.

This means that the development cannot take place unless the consent of all six lessees is obtained.

46. Mr Bowker drew our attention to the implied covenant not to derogate from grant and the common law obligation not to cause a nuisance whilst any works were carried out and that these are further factors which the hypothetical purchaser would take into account

47. In his overall final submission Mr Bowker said, and we agree, that at the end of the day the hypothetical purchaser would conclude, to use Mr Bowker's expression: *"This scheme is not a runner, it is not a project for, it is not worth a candle."*

48. In these circumstances and for these reasons we determine that there is no development value or hope value attributable to the development of the roof space in the subject property. Accordingly, the price to be paid by the applicant to Mr Osborne for the freehold interest in the property is the agreed price of £4,335.

49. We were told that the terms of the draft transfer at [122-125] are agreed.

Section 33 costs
Valuation costs

50. As to the valuation costs Mr Osborne claimed £2,400 being a fee of £2,000 + VAT at 20%. Mr Murphy said there was a verbal agreement to this effect, but he was not able to provide an invoice to support the claim. Mr Murphy said that he will bill Mr Osborne in due course.

Mr Murphy said that the normally for such matters he would have charged a fee of £500 per flat, making total of £3,000 but that he had agreed a discounted fee of £2,000. Mr Murphy told us that he had visited each of the six flats and that the valuation was complex having regard to the development potential.

51. Mr Bowker was content to leave it to the tribunal to determine the amount of the valuation costs having regard to the provisions of section 33 of the Act.

52. Having regard to the issues involved and the limitation on the costs recoverable by a reversioner we find that if Mr Osborne has agreed to pay a fee of £2,000 + VAT that is not a reasonable or realistic fee. We find that the fees ought not to have exceeded £1,200 + VAT, made up as to:

Inspections £50 per flat	£ 300
Valuation work 6 hours @ £150	£ 900
	£1,200
VAT @ 20%	£ 240
Total	**£1,440**

Legal costs

53. Mr Murphy had not been briefed by Mr Osborne's solicitors on the dispute over the legal costs.

54. The respondent's schedule of costs is at [26-27], the applicant's points of dispute are at [28-29] and the respondent's response is at [30-31]

55. The only submission that Mr Bowker wished to make was that it was unreasonable for Mr Osborne to have instructed a firm of solicitors in London at a charge-out rate of £275. We reject that criticism. The solicitors were based on Woodford Green which is on the edge of Greater London and fairy close to the subject property. We find it was not unreasonable for Mr Osborne to have instructed those solicitors. Residential enfranchisement work is specialist work and a charge-out rate of £275 is within the range of what can properly be regarded as reasonable.

56. We have considered the rival written submissions on the time claimed for. We find that broadly it is within the range to be expected for a case of this type, save that we find a claim for 15 units – one and a half-hours - for drafting a relatively straightforward one page counter-notice to be unreasonably excessive. We reduce the claim to 5 units. We also reduce the attendances on the applicant's solicitors from 8 units to 2 units, preferring the applicant's submissions on this point.

    We also disallow the disbursement of £12 for Land Registry copies of the register. We note that time is claimed for the preparation of a notice requiring the applicant to deduce title and we assume that in response to the applicant's solicitors will have provided those documents. It was thus unreasonable for the respondent to have incurred the cost of further copies.

57. In the circumstances we assess the legal costs at:

Solicitors costs	£1,216.50
VAT @ 20%	£ 243.30
Total	**£1,459.80**

Judge John Hewitt
24 June 2016

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.