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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/29UQ/OCE/2013/0003**
Property	**: 3 Hungershall Park Tunbridge Wells Kent TN4 8ND**
Applicants	**: Mr. R. A. Fry and Ms J. A. J. Louden**
Representative	**: Mr. Peters of counsel instructed by ODT Solicitors LLP**
Respondents	**: Mr. D. G. S. McCall and Mrs. S. McCall**
Representative	**: Mr. Sissons of counsel instructed by Thompson Snell and Passmore Solicitors**
Type of Application	**: Enfranchisement Section 24 Leasehold Reform Housing and Urban Development Act 1993**
Tribunal Members	**: Judge R. Norman (Chairman) Mr. R. Athow FRICS MIRPM Mr. A.O. Mackay FRICS**
Dates of Inspections And Hearings	**: 24th October 2013 17th and 18th December 2013 4th April 2014 10th October 2014**
Date of Decision:	**5th May 2015**

DECISION

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Decision

1. The Tribunal has determined for the reasons set out below that the price to be paid by Mr. R. A. Fry and Ms J. A. J. Louden ("the Applicants") to Mr. D.G.S. McCall and Mrs. S. McCall ("the Respondents") for the freehold reversion in respect of 3 Hungershall Park, Tunbridge Wells, Kent TN4 8ND ("the specified premises") is £65,000 (sixty five thousand pounds).

2. The Applicants shall also pay the Respondents' costs in the sum of £18,699.60 inclusive of VAT.

3. The transfer shall be in the form annexed to this decision amended in accordance with the annexed Scott Schedule.

4. The leaseback of Marysmead, 3 Hungershall Park, Tunbridge Wells, Kent TN4 8ND shall be in the form annexed to this decision amended in accordance with the annexed Scott Schedule.

Background and Inspections

5. References to page numbers are, unless otherwise indicated, references to pages of the hearing bundle.

6. By an initial notice (pp B1 – B12) dated 17th May 2012 under Section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") the Applicants gave notice of their proposal to acquire by Section 1(1) of the 1993 Act the specified premises shown edged red on the plan (p B5) accompanying the notice. Included within the area edged red on that plan was the garage ("the garage") to the eastern side of the specified premises and shown coloured grey on the transfer plan (Revision No. 25) produced on behalf of the parties at the hearing on 4th April 2014. Also shown on the transfer plan (Revision No. 25) and coloured brown was the accessway ("the accessway"). There was also a reference at p B2 to the front garden, driveway, the garage building and the garden ground as "additional freeholds" proposed to be acquired by virtue of Section 1(2)(a) of the 1993 Act shown edged green on the accompanying plan. The plan at B5 is not entirely clear but the garage and accessway do not appear to be edged green.

7. By a counter notice (pp B13 – B20) the Respondents admitted that the Applicants were entitled to exercise the right to collective enfranchisement in relation to the specified premises (p B13) but did not accept, among other things, the extent of the additional property to be acquired by virtue of Section 1 (2)(a) of the 1993 Act. The Respondents made counter proposals to each of the proposals which were not accepted including: "The extent of the additional freehold property to be acquired by virtue of s.1(2)(a) of the Act to be all the appurtenant land except the areas shown (i) edged in green and (ii) hatched green on the plan annexed hereto ('the Retained Land')." The plan at B20 is not clear but the accessway and part of the garage do not appear either edged in green or hatched green. The Respondents also made a proposal for a leaseback of the Respondent's apartment known as Marysmead which

currently formed part of the specified premises and consisted of all those parts of the specified premises which were not demised to the Applicants.

8. This matter had been set down on the parties' estimate for hearing on one day in October 2013. In practice it took 5 days to complete the inspections and hearing over a twelve month period. On 24th October 2013 the Tribunal inspected the subject property and the property described in the transfer and leaseback as the Retained Land in the presence of the parties, their legal advisors and their valuers Mr. A. Pridell FRICS and Mr. T. Harvey BA FRICS.

9. The Tribunal had received a small bundle of papers in good time for the hearing. The statement of agreed facts had been signed by only one of the valuers: Mr. Pridell.

10. Just a few days before the hearing, the Tribunal received a large bundle of documents. This gave very little time for the members of the Tribunal to consider the bundle.

11. Counsel for the Applicants in his outline of opening submissions (p. A4) stated that "The area of freehold to be acquired by the Applicants is the area outlined in red on the plan drawn up by Trueplan at Tab E.".

12. Counsel for the Respondents in his outline of opening submissions (p. A14) stated that "The extent of the property to be acquired by A has been agreed. This is shown edged red and green on the plan attached to the report of Mr. Pridell. A's expert [D/1-24]."

13. The plan at E1 and the plan at D22 appeared to be identical. It was hoped that that plan would clarify some matters. However, it was difficult to find just which land was to be the subject of enfranchisement. At the inspection the Tribunal pointed this out and it transpired that the plan did not show the land to be acquired. The Tribunal was told that perhaps it was clearer on the lease plan. Also at the inspection a boundary, which it was understood had been agreed, turned out not to be agreed.

14. Rule 8 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 should be borne in mind. Had there been compliance with the Directions then everybody would have arrived at the hearing with papers supplied in good time and with an agreed list of matters to be decided by the Tribunal. This did not happen and the Tribunal arrived at the inspection and hearing to find that the papers, which had arrived very late, did not clarify the issues to be determined and that the parties were not in a position to inform the Tribunal what had been agreed.

15. Unfortunately, the room provided at a hotel for the hearing was not satisfactory and the Clerk to the Tribunal made extensive enquiries but nothing satisfactory was available.

16. If the hearing had started as intended little, if any, progress would have been made as time would have been needed for the parties and their advisors to clarify what they could and could not agree.

17. Mr. Steggles of Thomson, Snell and Passmore, representing the Respondents offered the solicitors' offices for the hearing. It is not ideal to have a hearing at the offices of the solicitors representing one of the parties but the parties and their advisors were content to move the hearing to that venue.

18. However, again little progress, if any, could have been made as the parties' counsel, solicitors and valuers were not in a position to tell the Tribunal what points they had not agreed, and the offer of a venue was not accepted.

19. The parties and their advisors having had the opportunity on 24th October 2013 to meet, the hope was expressed by both counsel that they could use the time wisely to formulate items which were still not agreed so that a full list of those items would be available by the next hearing. Clearly that stage had not been reached by 24th October 2013.

20. The parties and their advisors continued to discuss the case while the Tribunal waited and remained there to assist if possible, but after a period of time counsel for the parties told the Tribunal that there was nothing with which the Tribunal could assist.

21. The time spent by the parties on 24th October 2013 should have been used by them in advance of the hearing to comply with the Directions and reach a stage where they were ready for the hearing.

22. By 24th October 2013 counsel for both parties were under the impression that the extent of the land to be enfranchised and the extent of the leaseback as shown on the plans had been agreed. However, almost as soon as the inspection had commenced it became clear that that was not the case. The time taken by the inspection was not wasted as a number of issues as to the land to be enfranchised, the possibility of extensions and the extent of the leaseback emerged. It was hoped that the parties and their advisors having inspected the property together, and being together at the venue and having the opportunity to return to the subject property to carry out a further inspection together, would make use of the time to clarify what was agreed and what was not agreed.

HEARINGS

23. The hearings were attended by the Applicants, Mr. Peters of counsel and their solicitor Mr. Buckland, the Respondents, Mr. Sissons of counsel and their solicitor Mr. Steggles. Some of the hearings were attended by Mr. Pridell and Mr. Harvey.

24. During the hearing on 4th April 2014 it became clear that it was necessary for the Tribunal to carry out a further inspection of part of the

specified premises and this was carried out after the hearing on that date. It is noteworthy that the transfer plan, which the Tribunal had been told was agreed before 24th October 2013, was by the 4th April 2014 in its 25th revision and is now in its 30th Revision. The leaseback plan is in its 2nd Revision.

25. Following the hearing and inspection on 4th April 2014, the Tribunal, on 11th April 2014 issued an interim decision and further directions, a copy of which is annexed to this decision.

26. Those further directions included at direction 11 that "It is essential that it is clear from the Draft Transfer and transfer plan, the Draft Leaseback and lease plan and the Scott Schedule all the matters which remain to be determined by the Tribunal".

27. Some progress was made by the parties to that end but even by the next hearing date of 10th October 2014 the matters which remained to be determined by the Tribunal had not been clarified. During that hearing negotiations continued and some further matters were agreed. At the end of that day's hearing it was agreed to take account of those further agreed matters. The draft transfer, the draft leaseback and the respective Scott Schedules would be updated to show all the contents of the transfer and the leaseback which were not agreed, with reasons for the disagreement. Further amended copies of the draft transfer, the draft leaseback and the respective Scott Schedules were subsequently produced and sent to the Tribunal. On receipt of those documents, the Tribunal considered them and found that the draft leaseback referred to "Plan 1" and "Plan 2", but that only one agreed plan had been produced for inclusion in the leaseback. Enquiries were made of the parties' solicitors and they confirmed that Plan 1 is the Lease Plan and Plan 2 is the Transfer Plan and that there were incorrect references to the plans in the draft leaseback. The parties asked that there be a direction that the draft leaseback be amended in accordance with the email from Mr. Steggles dated 4 December 2014 and that is so directed.

28. As a result of agreed amendments and the decision of the Tribunal, the parties or their representatives will need to renumber the clauses in the draft transfer and the draft leaseback.

29. The Tribunal saw the errors concerning the references to the plans. These were matters which were not included in the Scott Schedules and we were not asked to make determinations in respect of them but, having seen them, we pointed them out. We have not checked the draft transfer and the draft leaseback for errors and omissions. The Tribunal has proceeded on the basis that everything contained in the draft transfer and the draft leaseback, if not mentioned in the Scott Schedules, is agreed by the parties.

Reasons

30. The Tribunal considered all that had been seen at the inspections, all the written evidence and submissions which had been received and the evidence which had been given and the submissions which had been made at the hearings and made findings of fact on a balance of probabilities.

31. The following matters remained to be determined by the Tribunal:

(a) As to the draft transfer and the draft leaseback, the content of those documents set out in the Scott Schedules as not having been agreed.
(b) The price to be paid for the freehold of the specified premises.
(c) The sum to be paid in respect of the Respondents' costs.

Draft transfer and draft leaseback

32. The Tribunal's decisions on the wording of the transfer and leaseback are noted in the Scott Schedules annexed hereto.

33. In respect of many of the disputed matters the parties set out their arguments in the Scott Schedules but in respect of some of the disputed matters there was little or no assistance from the parties and the Tribunal had to do the best it could with the limited or complete lack of information.

34. The Tribunal came to the conclusion, on the evidence presented, that while the Respondents accepted that the Applicants had the right in law to enfranchise, the Respondents sought to delay and frustrate the enfranchisement process. An example was provided by the evidence of Mr. Harvey when he stated that he had not signed the statement of agreed facts because he had been instructed not to do so. Had he been allowed to co-operate then in all probability these proceedings would have been brought to a conclusion much earlier and time and money would have been saved.

The price to be paid for the freehold of the specified premises

35. For the purpose of the counter-notice, Mr. Harvey, on behalf of the Respondents, valued the freehold at £855,000. This was on any view an unrealistic figure. As evidence of that, is the fact that when Mr. Harvey provided a proof of evidence he valued the freehold at £270,000. That was an astonishing reduction of £585,000 which represented 68.4% of his original figure. His explanation for this was that he had in a short period of time provided the original figure to protect his clients' position and that it had taken him a long time to collect the evidence for the revised figure. The Tribunal considered that such a wide variation in the two figures could be said to cast doubt on the reliability of the revised figure. However, setting that aside, the Tribunal considered Mr. Harvey's evidence to support the revised figure. There was an arithmetical basis for his figure but the Tribunal was not satisfied with the overall valuation in the sum of £270,000.

36. Mr. Pridell, on behalf of the Applicants, submitted that the freehold had no value at all. The Tribunal considered the evidence of Mr. Pridell in support of his valuation but was not satisfied that attributing a nil value to the freehold could be justified.

37. Mr. Pridell and Mr. Harvey agreed that there was no value to be attributed to the reversion to the freehold with vacant possession, loss of ground rents or marriage value.

38. It appeared to the Tribunal that both valuers were to a greater extent acting on instructions from their respective clients, which gave the result that neither of the valuations could be relied upon in its entirety, if at all, by the Tribunal.

39. By the time Mr. Harvey presented his proof of evidence he described the following heads of valuation which were in dispute and applied his valuation to each as:

	£
(a) Development potential, 2nd floor.	80,000
(b) Development potential, main roof.	15,000
(c) Development hope value.	95,000
(d) Weakening of restrictive covenant.	40,000
(e) Loss of value to retained freehold	40,000
Total	270,000

40. Mr. Pridell described the heads of valuation differently but agreed that to all intents and purposes they were similar. Again in summary Mr. Pridell submitted all heads of valuation to be of no value at all.

41. As to the development potential 2nd floor, see paragraph 39(a) above, which concerned the possible extension of Marysmead above the dining room, it was agreed by both parties during the course of the hearing that the Respondents would retain the ability to extend above the dining room of Marysmead and therefore no value should be attributed to it. The Tribunal therefore made no decision on this particular issue

42. In respect of the remaining four heads of claim, the Tribunal determined that the following sums should be paid:

	£
Development potential, main roof.	0
Development hope value.	25,000
Weakening of restrictive covenant.	0
Loss of value to retained freehold	40,000
Total	65,000

Development potential, main roof

43. This concerned the possibility of extending Marysmead into the main roof. The evidence of Mr. Harvey and Mr. Pridell was considered. On this particular issue the Tribunal preferred the evidence of Mr. Pridell. The Tribunal was satisfied that if Marysmead were to be extended into the main roof, the accommodation would become oversized to the extent that it would be most unlikely that such an extension would be a viable financial proposition. On this basis the Tribunal decided that no value should be ascribed to this head of claim.

Development hope value

44. This concerned the possible combination of the two flats Lawnside and the Basement Flat into a single dwelling. Both expert valuers agreed that the leases provided that they could not be joined together without the consent of the freeholder. The Tribunal reminded itself that in 2011 when the previous owner of the two flats tried to market them as one, the Respondents objected and the flats were then marketed as two separate flats. The right of the Respondents was not challenged. It was accepted that the Respondents could refuse consent.

45. The Tribunal considered the arguments advanced by the expert valuers. The Tribunal could not accept that there was no value to be attributed to the loss of that right. It was noted that Mr. Harvey had increased his original figure of £75,000 to £95,000. While the Tribunal accepted that Mr. Harvey's computation at Tab 10 to his proof of evidence dated 7th October 2013 was arithmetically correct, it was not satisfied that this took account of the situation in the real world. The Tribunal was not satisfied that someone would pay £1,200,000 for a flat in this location; part of which was in a basement. For that sum a purchaser would be more likely to buy a house. However, in order to obtain consent and bearing in mind that the person requesting consent would want to get back on a sale the money paid for consent, the Tribunal, based on its members' considerable experience and expertise, decided that the market would not withstand a figure of the magnitude of £95,000 but would sustain a price of £25,000 to obtain such a consent.

Weakening of the restrictive covenant

46. The Respondents say they would suffer a loss of value of a restrictive covenant over the land and cottage to the south of 3 Hungershall Park beyond Cabbage Stalk Lane if the owner of the cottage ever wanted to build on its land. Mr Harvey valued this at £150,000 in the counter-notice, but reduced this to £40,000 in his proof of evidence. Again, this considerable variation did not assist the Tribunal in arriving at its decision.

47. It is certain that, if the covenant is capable of being enforced, then after enfranchisement the Respondents will no longer have absolute control of the situation. However, we were referred to conflicting authorities. It is by no means certain that the covenant is capable of being enforced. Neither is it certain that after the enfranchisement and leaseback the Respondents will retain the benefit of the restrictive covenant for the Orangery and the garden which form part of the retained lands so that if the consent of both the Applicants and the Respondents were required then the Respondents would have a veto and so would not have lost control. We accepted the evidence that at the present time it is unlikely that planning consent would be granted for building on that land.

48. The position is too speculative and the Tribunal found it impossible to reach a conclusion which could be supported by any accepted valuation method. As a result the Tribunal was not satisfied that any sum could be attributed to the weakening of the restrictive covenant.

Loss of value to retained freehold

49. The loss of value to the retained freehold concerns in the main the Orangery. Mr. Harvey in the counter notice placed a figure of £150,000 on this item. In his proof of evidence he valued it at £40,000, some £110,000 lower. For the Applicants Mr Pridell submitted that no value should be attributed to this item.

50. The Tribunal considered the points which had been advanced on behalf of the parties including whether there would be more disturbance from one family with one set of children if Lawnside and the Basement Flat were combined or from two families with two sets of children if the flats remained separate. We noted that the Respondents would still have the benefit of a covenant against nuisance. Mr. Harvey in support of his figure of £40,000 conceded there were no market transactions which would provide comparable evidence but had attempted a valuation calculation based on a method set out in the case of Stokes v Cambridge from which was deduced his figure of £40,000. Again Mr. Harvey conceded this was no more than an approximate indication given the various sensitivities. On this basis the Tribunal concurred with Mr. Harvey that a hypothetical buyer would be prepared to pay a sum for the possible loss of value and that £40,000 was a reasonable sum to ascribe to this item.

51. In the light of the interim decision, the parties or their valuers were invited to place a value on the airspace above the garage. Mr. Harvey chose not to submit anything and Mr. Pridell submitted on 17th April 2014 that he could see no requirement to amend his report and valuation. The Tribunal is satisfied therefore that there is no justification to add any value in respect of the airspace above the garage.

The sum to be paid in respect of the Respondents' costs

52. The cut off point for costs payable by the Applicants is 1st August 2012, the date of the counter notice, except for costs pursuant to Section 33(1)(e).

53. The costs analysis sheets were poorly presented and difficult to marry up with the sums claimed and it took the Tribunal more than two hours just to cross check the claims.

54. The following references are to the items in the costs schedule produced on behalf of the Respondents.

Costs pursuant to Section 33(1)(a)(i) and (ii)

Client attendances. 2.5 hours @ £245 per hour is reasonable and the figure of £612.50 is payable.

Client phone calls totalling 8.5 hrs and a claim for client letters of 11.7 hours is excessive. We find that 7 hours @ £245 per hour would be reasonable giving a total of £1,715 payable.

Opponent phone calls. £24.50 is reasonable and payable.

Opponent letters._£196.00 is reasonable and payable.

Expert phone calls. 2.3 hours is excessive. We find that 1 hour @ £245 is reasonable and therefore £245 is payable.

Counsel phone calls. At this point of time when the counter-notice is prepared, the Tribunal considers that 2.5 hours is excessive. We find that 1 hour @ £245 is reasonable and therefore £245 is payable.

Counsel letters. 1 hr @ £245 is reasonable and therefore £245 is payable.

Other letters. We were not satisfied that there was evidence to justify 3.1 hours for other letters but appreciate that there would be, for example, a letter to H M Land Registry and that 1 hour @ £245 is reasonable and therefore £245 is payable.

Documents

Preparation £73.50 is reasonable and payable.

Preparing counter notice. We were not satisfied that any costs were incurred in the preparation of the document, and as a result none of the costs of preparation of the counter notice are payable.

Administration. We were not satisfied that a separate charge for administration was payable.

Expenses

Counsel Mr. Sissons. The charge of £1,725 for advice is reasonable and payable.

HMLR fees of £28 are payable.

<u>Total £5,354.50</u>

Costs pursuant to Section 33(1)(d)

We were not satisfied that any items under this heading were payable except for the expenses of Mr. Harvey but we found the claim for £24,875 to be excessive in the extreme. No evidence was provided as to how Mr. Harvey arrived at the counter notice figure of £855,000. There was no evidence he carried out any valuation work in order to arrive at that figure. We were troubled by the fact that the initial valuation report was not produced in evidence, so could not place any weight on this. The figure in the counter notice was £855,000 and yet by the proof of evidence dated 7th October 2013 a revised valuation of £270,000 was submitted. Consequently we question whether there was any value to be attached to the original report but without that evidence we are unable to express any further opinion on that. The result

is that we are left with the invoice dated 8th August 2012 for £3,500 +VAT giving a total of £4,200. That invoice was accompanied by timesheets showing an hourly rate of £250. There was no challenge to the hourly rate and putting that against the figure of £3,500 equates to 14 hours time spent which we consider to be reasonable given the complexity of this case at the outset. Consequently, we find that the total fee of £3,500 + VAT is acceptable. By comparison, it is interesting to note that Mr. Pridell obviously provided substantially more than 2 hours work but only charged £500.

Total £3,500

Costs pursuant to Section 33(1)(e)

Client attendances. £507.50 is reasonable and payable.
Client phone calls. £52.50 is reasonable and payable
Client letters. £140 is reasonable and payable.
Opponent letters. £17.50 is reasonable and payable.

Documents

Consideration of documents £563.50 is reasonable and payable.

Preparing transfer and leaseback. This was a complicated matter but we were not satisfied that it justified a total of 52.2 hours of work which could be payable by the Applicants. We found that 12.5 hours @ £175 per hour (£2,187.50) plus 12.5 hours @ £250 per hour (£3,125) giving a total of £5,312.50 was reasonable and payable.

Administration. We were satisfied that £98 was reasonable and payable.

Expenses

HMLR fees of £50 are reasonable and payable.

Total £6,741.50

Grand total before VAT: £15,596

Non-vatable: £78

VAT on £15,518 @ 20% = £3103.60

Grand total inclusive of VAT: £18,699.60

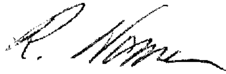
Appeals

55. 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.

56. 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.

57. 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.

58. 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.



Judge R. Norman (Chairman)