FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**KA/LON/00AC/OCE/2019/0076**
Property	**:**	**Queensborough Court, North Circular Road, London N3 3JP (“Queensborough Court”)**
Applicant	**:**	**Queensborough Court (Freehold) Ltd (“the nominee purchaser”)**
Representative	**:**	**Child & Child**
Respondent	**:**	**Aorangi Properties Ltd (“the landlord”)**
Representative	**:**	**McMillan Williams Solicitors Ltd**
Type of application	**:**	**A collective enfranchisement claim**
Tribunal members	**:**	**Judge Angus Andrew** **Neil Martindale FRICS**
Date and venue of hearing	**:**	**13 & 14 August 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision:	**:**	**30 October 2019**

DECISIONS

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Note: in this decision figures in [ ] are reference to page numbers in the document bundles

Decisions

1. We determine: -

   - The gross development value at £3,289,200; and
   - The estimated cost of the proposed development at £3,507,885; and
   - That £10,000 is payable in respect of the roof space; and
   - The covenant (as defined below) cannot be enforced by the lessees of Queensborough Court; and
   - The lessees of the top floor flats in Queensborough Court may not object to the re-location of the six water tanks in the roof void.

The application and hearing

2. On 25 April 2019 the tribunal received the nominee purchaser's application under section 24(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid and the other terms remaining in dispute on its acquisition of the freehold interest in Queensborough Court

3. We heard the application on 13 & 14 August 2019. The nominee purchaser was represented by James Fieldsend and the landlord by Stan Gallagher. Both Mr Fieldsend and Mr Gallagher are barristers. Mr Andrew Cohen MRICS gave expert evidence on behalf of the nominee purchaser and Daniel Grove AssocRICS gave expert evidence on behalf of the landlord. Having regard to the extensive photographic evidence contained in the hearing bundles we did not consider it necessary to inspect Queensborough Court and neither party requested an inspection.

4. During the first day of the hearing we were interrupted by our clerk who informed us that "papers" had been delivered by solicitors acting for one of the parties. After a short adjournment Mr Gallagher informed us that his instructing solicitors had delivered a quotation for a restrictive covenant indemnity policy and he requested our permission to admit it in evidence. The covenant is explained in paragraph 7 below.

5. Mr Gallagher accepted that if we granted the request we would have to postpone the hearing to allow the nominee purchaser to adduce rebuttal evidence. The request was opposed by Mr Fieldsend. We refused the

request for each of the following reasons notwithstanding the landlord's offer to pay the nominee purchaser's reasonable wasted costs: -

- The covenant is recorded in the charges register of the landlord's title. Both the landlord and its professional team had knowledge of the covenant from the outset and had ample opportunity to obtain a quotation: in short, the request was made to late in the day; and

- The quotation itself was of no evidential value without a copy of both the proposal form and the policy document; and

- The overriding objective requires us to avoid delay and to have regard to the resources of both the parties and the tribunal; and

- The offer to pay the nominee purchaser's reasonable costs might not offer it a full indemnity; and

- An adjournment to an indeterminate date would result in an unjustifiable waste of the tribunal's limited resource that deprives others of their proper entitlement; and

- The request should have been made at the start of the hearing and not after Mr Cohen had started his evidence. Mr Cohen would have to go "part heard" for what was bound to be a considerable period: a situation that was inherently unsatisfactory.

6. Given our finding that the covenant cannot be enforced by the lessees of the flats in Queensborough Court we do not in any event consider that anything hangs on this because, even if insurance was available, the conceded 10% discount would still have been appropriate to reflect the risk of enforcement by the Arden Estate and its successors in title.

Background

7. We were told that the land on which Queensborough Court now stands was previously owned by the Arden Estate. By a conveyance dated 19th November 1934 [496-502] Edward Cooper Arden conveyed that land to George Edward Green. By the conveyance Mr Green and his successors in title were bound by a number of restrictive covenants. One covenant restricted the development of the land to a three-storey block or blocks of no more than 36 residential flats with a caretaker's flat ("the covenant").

8. Queensborough Court was built following the 1934 conveyance. It is a mansion block and it was built in compliance with the covenant although we understand that the caretaker's flat is no longer occupied as such. From about 1974 all the flats were sold on residential leases initially at least for terms of 125 years from 25 December 1974. Three of the flats are

subject to overriding leases granted to Hurstway Investment Company Limited. That company played no part in the proceedings and we were told that the parties had agreed the division of the premium between Hurstway Investment Company Limited and the landlord.

9. Queensborough Court fronts the northern side of the North Circular Road at its intersection with the Great North Road and will be instantly recognisable to anyone using the intersection on a regular basis. The site is bounded on the south by the North Circular Road, on the west by Tillingbourne Way, on the East by Tillingbourne Gardens and on the north by the fenced rear gardens of a number of large detached houses.

10. Queensborough Court itself consists of six interlinked blocks each comprising six flats together with seven garages and the old caretaker's flat above three of the garages. The building is "L" shaped. Four of the blocks front directly onto the North Circular Road: a fifth fronts Tillingbourne Gardens whilst the sixth block spans both frontages. A terrace of six garages with the old caretaker's flat above occupies the remainder of the Tillingbourne Way frontage. The seventh garage occupies the remainder of the Tillingbourne Garden frontage. Consequently, the gardens behind the six blocks of flats have no vehicular access.

11. Apart from the seven garages that are individually demised, there is no onsite parking available to the residents. A public "layby" runs along the northern side of the North Circular Road and provides parking for up to nine cars. However, parking in the layby is available to the public at large although we understand that is predominately used by the residents of Queensborough Court.

12. On 1st November 2018 the participating tenants gave notice of their claim to acquire the freehold and overriding leasehold interests in Queensborough Court. On 9th January 2009 the landlord served a counter notice admitting the claim.

Proposed development

13. In 2018 Queensborough Court was about 70 years old and the landlord had owned the freehold reversion for 14 years. However, as so often happens in enfranchisement cases, the latent development potential was only identified after the claim notice was served. The landlord took professional advice and discovered that it might be possible to add an additional storey to Queensborough Court, which would accommodate a number of flats that could then be sold on the open market at a profit.

14. A planning appraisal was obtained: a specialist barrister was instructed to advise on the terms of the flat leases: a structural engineer's report was obtained and architects and quantity surveyors were consulted. The appraisals and reports were all included in the document bundle.

15. A number of risks emerged. Although the structural engineer's report is largely positive it identifies risks associated with the foundations and structure of Queensborough Court and their load bearing capability. The largely positive planning appraisal recommended a two-stage approach with pre-application submissions being followed by planning application submissions. The opinion of Piers Harrison [615-626] highlights two areas of concern: the possibility that all or part of the roof void might be included in the demises of the top floor flats and the possibility that the flat lessees could prevent the re-location of the six water tanks in the roof voids.

16. The architects in consultation with the quantity surveyors prepared a pre-application twelve-unit scheme that was submitted to Barnet Council on 12 June 2019. The councils written response is *"currently awaited"* but Mr Grove told us that the case officer had indicated that the proposed development would be supported in broad terms. Notwithstanding this positive response a revised nine-unit scheme was then worked up and this was the development relied on by the landlord at the hearing. It comprises four one-bedroom flats and five two-bedroom flats with GIAs ranging from 705 to 1,108 square feet.

Issues agreed and in dispute

17. At the hearing we were told that with one exception all the terms of acquisition, including the terms of the transfer, had been agreed between the parties. The only remaining term in dispute was the sum *"payable in respect of the roof space"* [348-353].

18. The parties' experts agreed that the sum payable in respect of the roof space should be ascertained using the residual valuation method. The residual value of the proposed development is calculated by deducting the estimated cost of the development from gross development value, which is the aggregate value of the completed development. The residual value is then discounted to reflect the risks inherent in the proposed development to produce the net-development value that equates to the sum payable in respect of the roof space.

19. Within this agreed methodology the experts had also agreed a risk discount of 60% to the residual value to reflect what they described as *"the planning and engineering risk"*: that is the risk that planning consent might not be forthcoming for the proposed development and the risk that on full investigation the existing structure of Queensborough Court might not accommodate the proposed development, at least not without extensive structural work.

20. Those agreements apart the following issues remained in dispute: -

- The market values of the proposed nine flats, the aggregate of which would equate to the gross development value. In round terms Mr

Cohen (on behalf of the nominee purchaser) contended for a gross development value of £3,060,000, whilst Mr Grove (on behalf of the landlord) contended for a gross development value of £3,665,000.

- The estimated cost of the development. Mr Cohen contended for an estimated cost of £3,654,201 [447-replacement]. Consequently, on his estimate the cost of the development would exceed the return. Mr Cohen however conceded that a buyer would offer £10,000 for the opportunity, which has been referred to elsewhere as a "gambling chip".

- Mr Grove contended for an estimated cost of £2,788.919.65 giving a residual value of £876,080.35 [793]. He estimated that it would take two years to complete the development. Applying a deferment rate of 6%, the agreed risk discount of 60% and a deduction for stamp duty land tax he estimated a rounded net gain of £297,000 that he said should be paid by the nominee purchaser in respect of the roof space.

- Unfortunately, the items listed in the two schedules of estimated costs were entirely different. One valuer had included items that had been entirely omitted by the other. One valuer had included composite items that could not be reconciled with separate items on the other valuer's schedule. At the hearing we found it impossible to adequately compare the two schedules. Both Mr Fieldsend and Mr Gallagher acknowledged our difficulty and indeed Mr Fieldsend had attempted to prepare a comparative table for his own use. They volunteered, in consultation with the experts, to prepare an agreed Scott Schedule of the estimated costs of the development and we directed that it be sent to the tribunal by 27 August 2019. We did not receive the Scott Schedule until 25 September 2019 and we reconvened on 9 October 2019 to consider it: hence the delay in issuing this decision. We thank both Mr Fieldsend and Mr Gallagher and the two experts for their assistance in the preparation of the Scott Schedule.

- In addition to the agreed 60% discount for the planning and engineering risk Mr Cohen contended for a further 30% discount for legal risk. The term "legal risk" became somewhat elastic as the hearing progressed. As originally explained it was a discount to reflect the risk that the covenant could be enforced to prevent the proposed development. Mr Cohen assessed the risk at 30% on the assumption that the covenant could be enforced not only by the Arden Estate and its successors in title but also by the Queensborough Court lessees.

- Mr Gove did not initially discount for legal risk because he was unaware of the covenant. Under cross examination he accepted that

it would be appropriate to discount by 10% to reflect his understanding that the covenant could only be enforced by the Arden Estate and its successors in title (and not be the lessees of Queensborough Court).

- As indicated above the term "legal risk" assumed a degree of elasticity during the hearing. Under cross examination Mr Grove accepted two further discounts of 5%, under this head. Both were based on Mr Harrison's written opinion. He agreed a discount of 5% to reflect the risk that the development could be prevented because all or part of the roof space might be included in the demises of the top floor flats. He agreed a second discount of 5% to reflect the risk that the developer might have to pay compensation to the individual lessees to secure their agreement to the re-location of the water tanks in the roof space.

- Although on the first day of the hearing Mr Gallagher had endorsed Mr Harrison's opinion, he resiled from that endorsement in his closing submissions when he sought to persuade us that under the terms of the flat leases the lessees could not object to the re-location of the water tanks. In answer to our question Mr Fieldsend agreed that Mr Gallagher could indeed resile from his previous endorsement of Mr Harrison's opinion and he accepted that we must determine the issue, which was one of lease interpretation.

- Finally, it should be said that in answer to our question Mr Cohen agreed that whatever might be included in the term "legal risk" he contended only for a maximum total risk discount of 90% and that in consequence 10% of any net gain would be payable by the nominee purchaser in respect of the roof space.

- In summary we must therefore answer the following risk questions:-

  (i) Can the covenant be enforced by the lessees of the flats in Queensborough Court?

  (ii) Can the lessees of the flats in Queensborough Court object to the re-location of the six water tanks in the roof void?

  For reasons that will become apparent it is unnecessary for us to answer these two questions but we have done so to avoid any unnecessary delay in the event that the matter is referred to the Upper Tribunal.

Reasons for our decisions

The gross development value

21. In contending for a gross development value of £3,060,000 Mr Cohen principally relied on the values of the top floor flats that he had agreed with Mr Grove for the purpose of calculating and subsequently agreeing the marriage value. Those agreed values gave Mr Cohen an average area rate of £472 psf. Applying that average (with some minor adjustments) to the nine flats in the proposed development gave Mr Cohen his gross development value of £3,060,000.

22. As a check he had regard to six market sales: three in Queensborough Court itself and three others in the locality. Mr Cohen considered that these six transactions supported his gross development value of £3,060,000.

23. In contending for a gross development value of £3,665,000 Mr Grove relied entirely on market sales. He disregarded the three sales in Queensborough Court because they predated the valuation date by more than six months.

24. In his written report Mr Grove relied on nine sales of one-bedroom flats and 13 sales of two-bedroom flats although under cross examination he accepted that a substantial number of these sales were not realistically comparable. Mr Grove's analysis of this market evidence gave him area rates of between £5,163 psm and £7,500 psm that, when applied to the nine flats in the proposed development, resulted in a gross development value of £3,665,000.

25. The primary evidence relied on by Mr Cohen is a form of settlement evidence in that it is not based on market sales. It has become a truism to say that market evidence is to be preferred to settlement evidence. However, in this case we prefer the values agreed between Mr Cohen and Grove for each of two reasons.

26. Firstly, because and in contrast to the usual settlement evidence relied on, the values not only relate to flats in the subject property but they were agreed by the two experts appearing before us. It should have been within their contemplation that the values could be applied not only in the calculation of the marriage value but in the calculation of any other component of the valuation.

27. Secondly, because except for the three Queensborough Court sales, the transactional evidence relied on by both valuers was unsatisfactory. Without going through each sale in detail it is sufficient to say that none of the flats were comparable to the flats in Queensborough Court. They were on different floors: some were in new-build properties whilst others were

in converted residential buildings: most had on-site parking: some had lift access whilst others had more convenient public transport connections. Above all, the buildings containing the flats were in preferable locations. Queensborough Court fronts an eight-lane highway. As Mr Cohen pointed out with some justification: *"It is actually quite quite hard to see who the new development would appeal to as no one would reasonably choose to live on the North Circular Road"*.

28. Neither valuer had made any adjustments to reflect these differences. Indeed, Mr Cohen had made no adjustment to his comparable at all whilst Mr Grove had only adjusted for time using the relevant Land Registry Index.

29. That said, Mr Cohen's analysis of the agreed values [367] is not without criticism. The agreed values record a marked reduction in the area rate as the area of the flat increases. The smallest flats at 705 square feet have an area rate of £532 psf whilst the largest flats of 1,108 square feet have an area rate of £406 psf. With one exception all the flats in the proposed development are small and four of the nine flats are markedly smaller than any of the existing flats in Queensborough Court. Consequently, by using the average area rate of all the agreed values Mr Cohen had understated the gross development value.

30. In the following table we have recast Mr Cohen's table at [369] applying what appears to us to be the correct area rates having regard to the size of the proposed flats. As will be seen it produces a rounded gross development value of £3,289,200 that we adopt.

Flat	**Size ft2**	**Our unit rate per ft2**	**Value**
A	538	600	322,800
B	592	575	340,400
C	990	415	410,850
D	570	575	327,750
E	592	575	340,400
F	775	500	387,500
G	773	500	386,500
H	773	500	386,500
I	773	500	386,500
Gross development value			**£3,289,200**

31. We turn briefly to the three sales of flats within Queensborough Court relied on by Mr Cohen. The sales pre-dated the valuation date by one year, one year and six months and two years and ten months. That said the evidence before us indicates that there had been little movement in the market during the relevant period [515]. We agree with Mr Grove that these three sales should not be used as primary evidence but nevertheless

they are a useful check. The sale prices are broadly consistent with the values agreed between Mr Cohen and Mr Grove and confirm our determination of the gross development value.

The estimated cost of the proposed development

32. Notwithstanding the helpful Scott schedule, we faced formidable difficulties in determining the cost of the proposed development. By way of an example the experts were unable to agree the extent, if any, to which VAT might be payable. They had based their assessments on information provided by third parties, who were not before us for cross examination. We are not tax experts and we are unable to assess the VAT (if any) that might be payable on the building costs. Similar remarks relate to the finance cost that might be incurred in funding the development. The valuers had agreed interest at 7% for 12 months in respect of certain heads of expenditure. However, Mr Cohen went beyond that and said that in addition a lender would require a facility cost of 1% of the loan whereas Mr Grove assumed that a lender would not seek an additional facility cost.

33. Standing back and with one exception we have considerably more confidence in Mr Cohen's evidence for each of the following three reasons.

34. Firstly, because Mr Cohen's estimate of the build costs (that was the major component of the total estimated costs) was based on an estimate received from Halstead Associates, local and apparently reputable quantity surveyors and project coordinators who have experience of similar developments [453]. Mr Grove had also sought assistance from a quantity surveyor who had provided a brief estimate [742] that indicated a build cost per square foot that was significantly higher than that projected by Halstead Associates. Mr Grove had however placed greater reliance on the BCIS average build cost rates published by the RICS in contending for a build cost that were about 60% of those estimated by his own quantity surveyor.

35. The best estimate of the build cost is to be obtained from a qualified quantity surveyor who has applied his or her mind to the proposed development taking into account the complexities of the proposed development. In this case those complexities include the location of the development adjacent to the North Circular Road and the absence of vehicular access to the site.

36. Secondly, because Mr Cohen's estimate of professional fees in the sum of £329,124 [Scott Schedule] was far more realistic than Mr Grove's estimate of £167,857 [Scott Schedule]. Architects, planning consultants, quantity surveyors, party wall surveyors, structural engineers and lawyers will all have to be employed and Mr Grove's estimate of the professional fees is in our view inadequate.

37. Thirdly and finally because in estimating the cost of the development and in particular when considering VAT and finance facility costs a proposed developer would adopt a risk adverse approach. That is the developer would "play safe" by assuming that these costs would be incurred when bidding for Queensborough Court.

38. The one exception referred to above is the developer's profit. Mr Cohen had assumed developer's profit of 20% of the gross development value whilst Mr Grove had assumed 15%. A profit of 20% is excessive and we are satisfied that Mr Grove's assumption of 15% is more realistic. Having determined the gross development value at £3,289,200 the developer's profit is therefore £493,380 rather than the £612,000 estimated by Mr Cohen. This results in a downward adjustment of £118,620 to Mr Cohen's estimated cost of £3,626,505. Consequently, we determine the estimated cost of proposed development at £3,507,885.

Can the covenant be enforced by the lessees of the flats in Queensborough Court?

39. It was common ground between Mr Fieldsend and Mr Gallagher that the Arden Estate and its successors in title could enforce the covenant although both the extent of the land having the benefit of the covenant and the identity of its owners is not known. It is nevertheless the sort of covenant for which restrictive covenant indemnity insurance is commonly available in the market. However, insurance is not a panacea.

40. The development could still be frustrated or delayed: the insurer would almost certainly insist on an application to the Upper Tribunal to modify or discharge the covenant: it is not unknown for insurers to decline payment, for example on the grounds of none disclosure. In that context we agree with Mr Grove's assessment of a 10% risk discount for what Mr Fieldsend described as a freehold covenant: that is, one enforceable by the Arden Estate or its successor entitle.

41. Mr Fieldsend however argued that the covenant could also be enforced against the freehold reversioner by every lessee in Queensborough Court. If correct, then it seems to us that the risk would have deterred any prospective investor from purchasing the reversion because every lessee would have an obvious incentive to enforce the covenant. Nevertheless, Mr Cohen had assessed the risk at 30% and we cannot go beyond the parameters of the evidence before us.

42. Mr Fieldsend's submission that the covenant was enforceable, by the lessees of the Queensborough Court, flows from his interpretation of the habendum in the flat leases. It reads as follows:

"TO HOLD the demised premises UNTO the Lessee from twenty-fifth day of December One thousand nine hundred and seventy-four for the term of

ONE HUNDRED AND TWENTY FIVE YEARS SUBJECT to but with the benefit of (so far as the Lessor can lawfully grant the same and in common with all in others entitled thereto) the covenants conditions rights easements and stipulations contained mentioned or referred to in the Charges Register of the title number MX259035".

43. Mr Fieldsend submitted that because each flat was demised *"with the benefit of"* the covenant the habendum created, if only by implication, a covenant on the part of the freehold reversioner to observe the covenant. As he put it the habendum created a new "leasehold covenant" that was enforceable by each of the lessees, in contrast to the freehold covenant that was enforceable by the Arden Estate and its successors in title.

44. We are not persuaded by Mr Fieldsend's submission. The words included in the habendum can be found in any conveyancing precedent book and are generally adopted as part of a "belt and braces" approach when the draughtsperson wishes to ensure that a transferee or lessee is obliged to observe covenants or obligations that are binding upon a transferor or lessor.

45. In our view it is not possible to interpret the words relied on as imposing a fresh leasehold covenant on the part of the lessor, enforceable by the lessees of the individual flats. If the original parties to the leases had intended such a covenant they would have included an express lessor's covenant in clause 4 of the leases but they did not.

Can the lessees of the flats in Queensborough Court object to the re-location of the six water tanks in the roof void?

46. It will be recalled that Mr Harrison's opinion [615-626] had raised the possibility that the individual lessees could prevent the relocation of the six water tanks in the roof void. However, we agree with Mr Gallagher that it would appear that Mr Harrison had overlooked the following reservation at clause 2(3) of the leases: -

"The right of the Lessor or their tenants at any time hereafter to reconstruct or alter any of the other parts of the said buildings or any adjoining or adjacent premises belonging to Lessor notwithstanding any interference thereby occasioned to the access of light or air to the demised premises".

47. Mr Fieldsend argued that the reservation was limited to situations in which a reconstruction or alteration might interfere with the access of light or air to the flats. As the relocation of the water tanks would not result in an interference, the reservation was not engaged.

48. Again, we must disagree with Mr Fieldsend. Although no relevant authorities were drawn to our intention we consider that the word

"notwithstanding" equates to the words *"even if"*. That is, the final phrase of the reservation does not limit the reservation but rather it makes it clear that the reservation will still apply *"even if"* the lessee's right to light or air is compromised.

49. Consequently, we agree with Mr Gallagher that the reservation is sufficient to permit the relocation of the water tanks and it would not therefore be appropriate to apply the 5% risk discount initially conceded by Mr Grove.

Conclusions

50. The estimated cost of the proposed development exceeds the gross development cost by £218,685. On a strict application of the residual valuation method there is therefore no development value and we therefore adopt Mr Cohen's "gambling chip" of £10,000.

Name: Angus Andrew **Date: 30 October 2019**

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).