LON/NL/3583, 3584 and 3585/04

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER S48 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Premises: Flats 10, 12 and 15 Chandler Court, Tolworth Rise South, Surrey KT5 9NN

Applicants: Mr Y Chawdhary and Ms S Chawdhary (tenants, Flat 10)
Mr Y Chawdhary and Mr R M Rega (tenants, Flat 12)
Mr D and Mrs G Hayward (tenants, Flat 15)

Respondent: H C Jones & Co (Surrey) Limited (freeholder
Intermediate landlord: Sinclair Gardens Investments (Kensington) Limited

Date of hearing: 9 August 2005

Appearances: Mr R D S Heald FRICS, Wallakers, chartered surveyors, for the applicants
Mr R J Inniss BSc FRICS FCIArb, South East Surveys, chartered surveyors, for the respondent
Mr L A Nesbitt BSc (Hons) FRICS MCIArb, Nesbitt and Mire, chartered surveyors, for the intermediate landlord

Members of the leasehold valuation tribunal:

Lady Wilson
Mr P A Copland BSc FRICS

Date of the tribunal's decision: 27 October 2005

Background

1. These are applications under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") to determine the terms of acquisition and the premiums to be paid for new leases of Flats 10, 12 and 15 Chandler Court. Chandler Court is a three storey block of eighteen flats, with two blocks housing eighteen garages. The freeholder of the block is H C Jones & Co (Surrey) Limited; Sinclair Gardens Investments (Kensington) Limited holds a headlease dated 20 August 1968 for a term of 99 years from 20 August 1968 at a rent which was £1500 per annum but which was varied by a deed dated 22 January 1969 to £1525 per annum. Each of the flats which are the subject of these applications is held on an underlease for a term of 99 years less three days from 20 August 1968 at a ground rent of £90 per annum. Approximately 63 years remained unexpired on the leases at the valuation dates.

2. At the hearing the applicants were represented by Mr R D S Heald FRICS, of Wallakers, chartered surveyors, the respondent freeholder by Mr R J Inniss BSc FRICS FCIArb, South East Surveys, chartered surveyors, and the intermediate landlord, who has given notice of separate representation, by Mr L A Nesbitt BSc (Hons) FRICS MCIArb, of Nesbitt and Mire, chartered surveyors. It was agreed that the tribunal would not be assisted by an inspection of the premises.

3. It was agreed:

i. that the valuation date for Flats 10 and 12 was 19 October 2004 and the valuation date for Flat 15 was 20 July 2004 but that the different valuation dates had no valuation implications;

ii. that the value of each of the extended leases was £154,000; however, it subsequently emerged that, whereas Mr Nesbitt had assumed that the new leases would be in the same terms as the existing, ie without a mutual enforceability clause, Mr Inniss and Mr Heald had assumed that such a clause would be included.

iii. that the value of each existing lease was £135,333.

4. The issues were:

i. whether a landlord's covenant to enforce the covenants in the leases of the other flats in the block, not in the existing leases, should be inserted in the new leases;

ii. the approach which should be taken in the valuation of the intermediate leasehold interests.

iii. whether the freehold values of the flats exceeded the extended lease values

The issues

i. Mutual enforceability

5. Mr Heald submitted that the absence of a mutual enforceability clause in the existing leases was a defect within the meaning of section 57(6)(a) of the Act which rendered the insertion of such a clause necessary. He said that a leasehold valuation tribunal which had determined premiums in respect of *Flats 2, 7, 8 and 9 Chandler Court* (LON/NL/2141-4 and 2167/03) had concluded that such an absence was a defect within the meaning of the Act and had determined that mutual enforceability clauses should be included in the new leases.

6. Mr Nesbitt submitted that the absence of a mutual enforceability clause was not a defect within the meaning of the Act and referred to a decision of a different leasehold valuation

tribunal which had so concluded. Mr Inniss also submitted that the absence of such a clause was not a defect, although he considered that its absence would be likely to have an adverse effect on value.

7. We are quite satisfied that the lack of a mutual enforceability clause is not a defect within the meaning of section 57(6)(a). While the absence of such a clause may be unsatisfactory and its inclusion desirable, it cannot in our view be reasonably argued that its absence from a lease renders the lease defective, the remedy of which is “necessary”.

8. As to the effect, if any, upon the value of the new leases without mutual enforceability clauses, Mr Heald submitted that the absence of such a clause might affect value by around £1000, and said that, as far as he was concerned, the agreed values of the new leases had assumed that the new leases would contain such a clause, as had been determined in relation to *Flats 2, 7, 8 and 9 Chandler Court.* Mr Inniss submitted that the absence of such a clause could be covered by an insurance policy which would cost between £300 and £600, and said that he, like Mr Heald, had agreed the values on the basis that the new leases would contain mutual enforceability clauses. Mr Nesbitt said that he considered that the agreed values had assumed that there would be no mutual enforceability clause in the new leases, and that no deduction from the agreed values of the new leases was required.

9. In our view the lack of a mutual enforceability has some but a small effect on the value of the long lease, in that most leaseholders would wish the new leases to be varied, and although no market evidence was put before us on this issue, doing the best we can, we agree with Mr Inniss that the purchaser of a lease without such a clause would reduce his bid by £500 to allow for the purchase of an insurance policy to cover this risk.

ii. The valuation of the intermediate leasehold interests

10. Mr Nesbitt said although the intermediate leasehold interests had an expectation of possession of less than a month, the profit rent in respect of the intermediate leases was £5.28, and the intermediate leases were thus not "minor intermediate leasehold interests" within the meaning of Schedule 13 to the Act. He said that in the light of the decisions of leasehold valuation tribunals in *Portman v Blackmun (Re flats at Wendover Court, W1)* (number not given in decision) and *Cadogan v Newman (Re Flat D, 9 Tite Street)*, LON/NL/2275/03, he had concluded that the correct approach to valuing the intermediate interest was to provide for a fund which, with interest, would meet the intermediate landlord's continuing obligation to pay the head rent to the freeholder. He said that the tribunal in *Wendover Court* had assumed an interest rate of 3% and had not allowed for costs or tax. He had calculated the necessary fund on that basis at £2409.76, say £2410. He said that, in his experience, the best rate likely to be achieved on deposit was 4.85%, but there was no guarantee that such a rate would prevail for the next 63 years, and it was his view that 3% should be assumed, as it had been in previous decisions of the tribunal. He said that he had made no specific allowance for costs or tax, but that his proposed interest rate made some small allowance for any tax which might be payable.

11. Mr Heald agreed that the negative rent required to be valued and that the approach adopted in the *Wendover Court* and *9 Tite Street* cases was correct. He submitted, however, that it was unnecessary to assume a rate of interest on the fund as conservative as that proposed by Mr Nesbitt, and that the intermediate landlord could realistically expect to borrow at between 5 and 6%.

12. Mr Inniss complained that Mr Nesbitt had been inconsistent in his approach, in that in relation to *Flats 2, 7, 8 and 9 Chandler Court* and in another case, not yet before the tribunal, he had proposed to adopt a different approach to the valuation of the intermediate interests from

that which he was now adopting. Mr Inniss said that his own view was that the approach adopted in *Wendover Court* and *9 Tite Street* unfairly penalised underlessees because, in most cases, it resulted in higher premiums where there was an intermediate interest, and that it was unlikely that Parliament had intended underlessees to be so penalised. Of the three methods of valuing negative rents adopted in other cases (what he described as "the traditional method", of applying a higher yield than that applied to value the freehold interest and allowing for a sinking fund; the application of a single rate to both types of interest, which was the approach adopted in *Flats 2, 7, 8 and 9 Chandler Court*; and the "fund" method), he had come to favour the application of a single rate, although he left to the tribunal in the present case the choice of the method to adopt. If it determined that the "fund"approach should be adopted, he said that a rate of 3% was unduly conservative, and that a rate of over 5% could easily be obtained in the market.

13. We are satisfied that the correct approach to the valuation of the intermediate interests under Schedule 13 to the Act is the approach which was adopted in *Wendover Court* and *Flat D, 9 Tite Street*, and that the negative rent which the intermediate landlord is required to continue to pay after the grant of new leases at a peppercorn should be provided for by means of a fund. As to the rate of interest to be assumed in arriving at the fund required, although we accept that, a yield in excess of 5% might be obtainable for a relatively short term in today's market, it has to be borne in mind that interest rates fluctuate quite widely. Given that it may be difficult to invest capital to produce income at a specified rate for a term as long as that required in this case, we consider that a more conservative approach is required. Although Mr Nesbitt said that he had made some allowance for tax, no evidence was presented as to the effect of tax on the income generated by such a fund. In the absence of any information about the tax status of the intermediate landlord, and about how that or tax rates might change during the term, it is not possible for us to form a view about the incidence of tax. However, we consider that in these circumstances it would be prudent to assume a low rate of interest, although not quite as low as

that suggested by Mr Nesbitt. We have concluded that an interest rate of 3.5% should be assumed, and we attach as Appendix B a calculation indicating that the fund required on this assumption would be £2142.

14. We do not regard Mr Nesbitt has having been inconsistent in his approach as Mr Inniss asserted. Indeed, he would in our view have failed in his duty to his client had he not proposed in this case a method of valuation which has been approved in other cases and which, in our view, accords with the Act.

iii. Freehold value

15. Neither Mr Heald nor Mr Inniss had assumed in their valuations any difference between the value of the extended leases and the value of freehold interests in the flats, but Mr Nesbitt suggested that the freehold value of each flat was £155,556, an uplift of 1% from the extended lease value. No market evidence was produced by any of the valuers on this issue, and we are satisfied that it has not been established that there would be such a difference in the present case.

Determination

16. Accordingly, the prices to be paid for the new leases are £10,272 for each flat in accordance with our valuation which is attached to this decision as Appendix A.

CHAIRMAN..

DATE....27 October 2005....

APPENDIX A

The tribunal accordingly makes the following valuation:-

Flats 10, 12 & 15 Chandler Court Tolworth Rise South, Tolworth Surrey

Valuation applicable to each flat

DIMINUTION IN VALUE OF FREEHOLDER'S INTEREST

No reduction in rent receivable during term of headlease

Reversion to vacant possession value	£154,000		
PV of £ after 62.835 yrs @ 9%	0.00445		
		685	
Less value of proposed interest			
Reversion in 153 years @ 9%			NIL
Value of Freeholder's Interest			£685

DIMINUTION IN VALUE OF INTERMEDIATE LEASEHOLDER'S INTEREST

Present term	Ground rent receivable	£90		
	Ground rent payable	£84.72		
	Profit rent	£5.28		
	YP 62.835 yrs @ 10 & 3%	9.47		
			50	
Proposed term				
	Ground rent receivable	Nil		
	Ground rent payable	£84.72		
	Profit rent	-£84.72		
	Fund @ 3.5% needed to pay rent (see Appendix B)		2142	
Diminution in value of Intermediate Leaseholder's interest				£2192

c/f £2877

		b/f	£2877	
Calculation of Marriage Value				
Proposed Interests				
Freeholder	Nil			
Intermediate Leaseholder	-2142			
Under lessee	£153500			
(Agreed value of £154,000 less insurance premium of £500 re mutual enforceability clause)		151358		
LESS Present Interests				
Freeholder	685			
Intermediate Leaseholder	50			
Underlessee as agreed	£135833			
		136568		
MARRIAGE VALUE			14790	
50% thereof			7395	
Therefore Price payable (for each flat)			**£10272**	

APPORTIONMENT OF MARRIAGE VALUE

(i) Freeholder	685/2877 x7395	=	1761
(ii) Intermediate Leaseholder	2192/2877 x7395	=	6534
			7395

Premium payable to Freeholder		
Diminution in Freehold Interest	685	
Share of Marriage Value	1761	
		2446
Premium payable to Intermediate Leaseholder		
Diminution in Value	2192	
Share of Marriage Value	5634	
		7826
Total payable (for each flat)		**£10272**

Chandler Court "Duxbury" Fund

APPENDIX B

Head Lease 99yrs from 20th August 1968 expires 19th August 2067

Valuation date 19th October 2004 unexpired term 62.835 yrs

		fund	Int 3.5%	rent	reduction in fund	fund c/f
balance of 2004/05	0.84	2141.76	62.59	70.6	-8.01	2133.75
to 19/8/06	1	2133.75	74.68	84.72	-10.04	2123.71
to 19/8/07	1	2123.71	74.33	84.72	-10.39	2113.32
to 19/8/08	1	2113.32	73.97	84.72	-10.75	2102.57
to 19/8/09	1	2102.57	73.59	84.72	-11.13	2091.44
to 19/8/10	1	2091.44	73.2	84.72	-11.52	2079.92
to 19/8/11	1	2079.92	72.8	84.72	-11.92	2068
to 19/8/12	1	2068	72.38	84.72	-12.34	2055.66
to 19/8/13	1	2055.66	71.95	84.72	-12.77	2042.89
to 19/8/14	1	2042.89	71.5	84.72	-13.22	2029.67
to 19/8/15	1	2029.67	71.04	84.72	-13.68	2015.99
to 19/8/16	1	2015.99	70.56	84.72	-14.16	2001.83
to 19/8/17	1	2001.83	70.06	84.72	-14.66	1987.17
to 19/8/18	1	1987.17	69.55	84.72	-15.17	1972
to 19/8/19	1	1972	69.02	84.72	-15.7	1956.3
to 19/8/20	1	1956.3	68.47	84.72	-16.25	1940.05
to 19/8/21	1	1940.05	67.9	84.72	-16.82	1923.23
to 19/8/22	1	1923.23	67.31	84.72	-17.41	1905.83
to 19/8/23	1	1905.83	66.7	84.72	-18.02	1887.81
to 19/8/24	1	1887.81	66.07	84.72	-18.65	1869.16
to 19/8/25	1	1869.16	65.42	84.72	-19.3	1849.86
to 19/8/26	1	1849.86	64.75	84.72	-19.97	1829.89
to 19/8/27	1	1829.89	64.05	84.72	-20.67	1809.21
to 19/8/28	1	1809.21	63.32	84.72	-21.4	1787.82
to 19/8/29	1	1787.82	62.57	84.72	-22.15	1765.67
to 19/8/30	1	1765.67	61.8	84.72	-22.92	1742.75
to 19/8/31	1	1742.75	61	84.72	-23.72	1719.03
to 19/8/32	1	1719.03	60.17	84.72	-24.55	1694.47
to 19/8/33	1	1694.47	59.31	84.72	-25.41	1669.06
to 19/8/34	1	1669.06	58.42	84.72	-26.3	1642.75
to 19/8/35	1	1642.75	57.5	84.72	-27.22	1615.53
to 19/8/36	1	1615.53	56.54	84.72	-28.18	1587.35
to 19/8/37	1	1587.35	55.56	84.72	-29.16	1558.19
to 19/8/38	1	1558.19	54.54	84.72	-30.18	1528.01
to 19/8/39	1	1528.01	53.48	84.72	-31.24	1496.77
to 19/8/40	1	1496.77	52.39	84.72	-32.33	1464.44
to 19/8/41	1	1464.44	51.26	84.72	-33.46	1430.97
to 19/8/42	1	1430.97	50.08	84.72	-34.64	1396.34
to 19/8/43	1	1396.34	48.87	84.72	-35.85	1360.49
to 19/8/44	1	1360.49	47.62	84.72	-37.1	1323.38
to 19/8/45	1	1323.38	46.32	84.72	-38.4	1284.98
to 19/8/46	1	1284.98	44.97	84.72	-39.75	1245.24
to 19/8/47	1	1245.24	43.58	84.72	-41.14	1204.1
to 19/8/48	1	1204.1	42.14	84.72	-42.58	1161.52

to 19/8/49	1	1161.52	40.65	84.72	-44.07	1117.46
to 19/8/50	1	1117.46	39.11	84.72	-45.61	1071.85
to 19/8/51	1	1071.85	37.51	84.72	-47.21	1024.64
to 19/8/52	1	1024.64	35.86	84.72	-48.86	975.79
to 19/8/53	1	975.79	34.15	84.72	-50.57	925.22
to 19/8/54	1	925.22	32.38	84.72	-52.34	872.88
to 19/8/55	1	872.88	30.55	84.72	-54.17	818.71
to 19/8/56	1	818.71	28.65	84.72	-56.07	762.65
to 19/8/57	1	762.65	26.69	84.72	-58.03	704.62
to 19/8/58	1	704.62	24.66	84.72	-60.06	644.56
to 19/8/59	1	644.56	22.56	84.72	-62.16	582.4
to 19/8/60	1	582.4	20.38	84.72	-64.34	518.06
to 19/8/61	1	518.06	18.13	84.72	-66.59	451.48
to 19/8/62	1	451.48	15.8	84.72	-68.92	382.56
to 19/8/63	1	382.56	13.39	84.72	-71.33	311.23
to 19/8/64	1	311.23	10.89	84.72	-73.83	237.4
to 19/8/65	1	237.4	8.31	84.72	-76.41	160.99
to 19/8/66	1	160.99	5.63	84.72	-79.09	81.9
to 19/8/67	1	81.9	2.87	84.72	-81.85	0.05