RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

CASE NUMBER CAM/38UD/OCE2006/0009

In the matter of:

1 River Terrace, Henley-on-Thames, Oxfordshire RG9 1BG

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Parties:	**River Terrace Henley-on-Thames Limited**	**Applicant**
	Mr Rainer Pannier	**Respondent**
Appearances:	**Mr J Clargo – Counsel**	**For the Applicant**
	Mr S P Hazel of Messrs Derby's	**Solicitors for Applicant**
	Mr Rainer Pannier in person	
Tribunal:	**Mr A A Dutton**	**Chair**
	Mrs H C Bowers	**MRICS**
	Mr R V N Auger	**FRICS**
Hearing Date:	**30 May 2006**	
Decision Date:	20th June 2006	

DECISION

A. BACKGROUND

1. On the 2 November 2004 the Applicant Company being the nominee purchaser made application to the Tribunal for the purposes of determining the price for the acquisition of the freehold pf 1 River Terrace, Henley on Thames ("the Property") under s24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). The application to the Tribunal indicated that the Respondent, Mr Rainer, had admitted the Applicants' right to the collective enfranchisement. It had been agreed that the Respondent was entitled to a leaseback of the flat which he currently occupies (Number 4) and that he may retain the benefit of such mooring rights as there may be. The terms in dispute were the purchase price and the use by the Respondent of the loft space immediately above his flat.

2. Unfortunately the parties were not able to agree the terms of the leaseback and the transfer of the freehold and there remained a dispute as to the retention of the mooring rights by the Respondent.

3. An application was made to the Reading County Court, and on the 9 January 2006, at the hearing attended by Mr Clargo for the Applicant and the Respondent in person, it was ordered as follows:

   1 *Application adjourned generally with liberty to restore. If not restored by 31 December 2006 the Application to be struck out.*

   2 *Matters not agreed by the parties in May 2005, namely*

   (a) *lease plan*

   (b) *Extent of demise, repairing obligation and indemnity in respect of works done by freeholder with regard to new lease;*

   (c) *Retention of mooring rights*

   shall be referred to the Leasehold valuation Tribunal for determination.

   3 *Respondent to application believes that reference to the Leasehold Valuation Tribunal shall also with side passage and price. The Applicant does not accept this.*

4. On the 10 March 2006 the Leasehold Valuation Tribunal issued Directions to determine the matters listed in paragraph 2 of the Court Order and the matter came before the Tribunal on the 30 May 2006 for that purpose.

5. At the hearing Mr Clargo was able to confirm that the plans which had been produced by Mr Rainer were now acceptable and there was accordingly no issue before the Tribunal in that regard

B. EVIDENCE

6. Mr Clargo on behalf of the Applicants took us to certain items of correspondence in which it was conceded on behalf of the Applicant that the loft space should be retained by Mr Pannier, that he would have rights over the side passage and that he should retain such interest as he may have in the moorings to the front of the Property. He told us there were three matters to be dealt with.

7. The first issue was the extent of the demise. There was no dispute between the parties as to the physical extent but there was a difference as to how the demise should be described within the draft deed of variation which was contained in the bundle. The existing lease was also within the bundle and was dated 18 August 1978 between Mr Galley (1), 1 River Terrace Limited (2), the Company set up for the purposes of managing the building and the Applicant (3). The description of the flat was by reference to a plan and referred in the original lease to the third floor which only showed a flat consisting of a hall, bathroom with W.C. kitchen, living room and bedroom.

8. It was intended, on the Applicants part, that the description of the premises in the existing lease should be varied to contain the following wording:
"...and the loft space on the upper floor above the third floor edged blue on plan 6 annexed hereto to include the floor and joists between the two floors and all plaster or other decorative finish applied to any wall within the loft space, the whole of all doors, door frames, windows and window frames within the loft space and all ceiling within the loft space and including the staircase between the third floor and the upper level floor."

9. Mr Clargo took us to various clauses of the existing lease to show the repairing obligations and we noted all that was said and will refer to same in the decision section of these reasons. In essence his case was that the additional wording did not seek to change Mr Pannier's repairing obligations and that the terms of the deed of variation were consistent with the Act.

10. The Applicant also sought an indemnity from Mr Pannier for the works that were done to create the living accommodation on the upper floor level. We were referred to various

items of correspondence. We were told by Mr Clargo that the four-year limitation which might ordinarily operate in respect of planning matters, did not apply in relation to listed buildings where he thought there was no limit on the enforcement and therefore no limitation period for any action which the local authority might take.

11. Within the draft Transfer for the freehold the Applicant sought at clause 12.4 the following wording for the indemnity clause:
"*The Transferor so as to bind the property ON55684 into whomsoever's hands it may come hereby covenants to keep the Transferee fully and effectively indemnified from and against all expenses, costs, claims, demands, damages and any other liability whatsoever in respect of the works carried in the loft space for living accommodation arising directly or indirectly out of the state of repair and condition or any alternation or addition thereto or the electrical installation therein or the user thereof all works carried out or in the course of being carried out to the loft space.*"

12. The final matter that the Applicant raised was the retention of the mooring rights by Mr Pannier. Again in the Transfer, at clause 12.1, the following wording was to be found:
"*Reserving unto the Transferor for the benefit of flat 4 all rights and interests enjoyed or that may arise in respect of the moorings adjoining River Terrace and the mooring rights referred to in entry 4 of the property register.*" Mr Clargo confirmed that on behalf of the Applicants they had no interests in the mooring rights but that they were not prepared to participate in any documentation that might be required by the Respondent to assert his rights in respect of the moorings.

13. It should also be said at this stage that a right to use the passageway and to keep bicycles in a store area was agreed, but appeared in the Transfer. It was felt appropriate by the parties that the wording dealing with this right should be contained within the deed of variation and we will cover that matter later in these Reasons.

14. Mr Pannier complained that he had been required to provide plans both for the existing flat and for the floor above. He was concerned about the need for the new plan to show the existing flat space. It should in fact be noted that the Directions issued by the Tribunal at paragraph 2 required him to provide a plan of the attic area only. He made an assertion that he wished to retain ownership of the side passage but did not, in reality, pursue that to any degree. He was however concerned at the proposed wording in the deed of

variation with regard to the extent of the demise and thought that the floors and joists should remain the responsibility of the freeholders as should the staircase. He felt that the repairing obligations should continue as they were in the existing lease.

15. On the indemnity point he asserted that other Lessees had made alterations without consent and without the approval of the listed building department, the Property being a listed building although the grade was not known. He felt it was inappropriate that he as freeholder should have to accept liability for the works that he had done when the others had not. He also felt that as the freeholder he should not be giving covenants in respect of any breaches that may have arisen under the terms of his lease.

16. On the question of the moorings he told us there was to be an action in the local county court sometime in July to determine whether Mr Pannier had any rights to the moorings apparently by some form of prescriptive entitlement. His concern was that the rights flowed from his ownership of the freehold and if the freehold was subsequently vested, as it will be, in the Applicant nominee, his position to assert the rights to the moorings would be effected. He told us that he could earn something in the region of £2,000 per year from the mooring rights and he wanted to ensure that those went with his occupation of the flat. He sought comfort from the Applicants that they would not seek to prejudice his application to the court.

17. Mr Clargo made replies in relation thereto which we noted.

C. INSPECTION

18. The property is an end of terrace five-storey block with attic, probably late Georgian, overlooking the Thames. It appeared to be in reasonable external condition and we noted that there was a passageway to the side, access to which was via a gated entrance. In the passage, which appeared not to be frequently used, there were meter boxes and adjacent to the gate dustbins. There was a garden to the front with steps rising to the upper ground floor. The common parts were in reasonable decorative order and we noted that Mr Pannier appeared to make use of the landing to the floor below. We were able to inspect the subject premises on the morning of 30 May 2006. Mr Pannier's property was at the top of the building on two floors. The third floor consisted of a hallway, kitchen with open-plan eating area, living room and to the rear a bathroom/dressing room which contained a

steep flight of stairs, leading to the upper-floor. At the fourth floor level there was a small landing leading to a double bedroom having roof lights to front and rear.

D THE LAW

19. Under s24 of the Act there is provision at sub-section 4 to make application to the court where the terms of acquisition have been agreed but no binding contract has been made. The Applicants, to protect their position, made such an application and the Order was made as referred to above. In fact because all terms of acquisition had not been agreed the Leasehold Valuation Tribunal is still seized of the jurisdiction to determine these matters. Terms of acquisition at s24(8) relate to:

(a) The interests to be acquired;

(b) The extent of the property to which those interests relate or the rights to be granted over any property;

(c) The amount payable as the purchase price for such interests;

(d) The apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e) the provisions to be contained in any conveyance,

or otherwise, and includes such terms in respect of any interest to be acquired in pursuant of s1(4) or 21(4).

20. We must also consider s36 of the Act which requires the nominee purchaser to grant leases back to the former freeholder in certain circumstances. It would appear to us that Schedule 9 in this case applies. Part III indicates that flats occupied by the resident landlord would give rise to a lease back and part IV of Schedule 9 also sets out the terms of the leases to be granted. It is appropriate to also consider paragraph 7 of part III to the 9th Schedule which enables the terms of the lease to be varied if agreed between the parties or as directed by the Leasehold Valuation Tribunal. However, it goes on to say at paragraph 7 (2)

A Leasehold Valuation Tribunal shall not direct any such departure from those provisions unless it appears to the Tribunal that it is reasonable in the circumstances.

D. DECISION

21. In reaching our decision in this case it is important to note the terms of the existing Lease. The description of the property excluding the loft is contained at clause 2 and states as follows:

"The Lessor hereby DEMISES unto the Lessee ALL THAT the flat number 4 on the third floor of the building delineated and shown on the said plan edged blue (hereinafter referred to as the "premises")..."

The clause then goes on to deal with rights of protection and support, access and other matters. There is however no further description as to what constitutes the actual demise.

22. At clause 3.4 of the Lease the repairing obligations on the part of the lessee are as follows: *"...at all times during the said term to keep the interior of the premises, including glass in the doors or windows and all types of wires, heating and sanitary apparatus within the premises and all additions thereto and the Lessors fixtures and fittings therein in good tenantable repair."*

23. At paragraph 3(8) there is a prohibition against making alterations or additions without the consent of the Lessor.

24. The Lessors obligations are contained at clause 4 of the Lease and at 4(a) it states as follows:

"The Company will at all times during the term hereby granted keep the foundations main walls timbers roofs main drains and sewers and the exterior of the building and the entrance hall staircases passages and such other internal parts of the building as shall or may from time to time be used by tenants of other flats in the building in common with other tenants and all fixtures and fittings in such common parts in good and substantial repair and in clean and property order and condition."

The lease goes to deal with the obligations to maintain the front garden and to carry out decorative works as necessary.

25. Turning now to the proposed transfer and the deed of variation. There appears to be no issue with regard to the manner in which the new lease was to be dealt with and that rather by granting a new lease a deed of variation was intended to comply with the Act.

26. The first matter we need to deal with is the extent of the demise. We heard all that was said by Mr Clargo and by Mr Pannier. At the hearing we did indicate that we thought that the plan to the third floor, which was included within the deed of variation, could be omitted and that the matter could be adequately dealt with by reference to the existing lease plan. We have reconsidered our view and in fact it seems to us sensible to include

both the new plan to the third floor and the new plan to the loft area. Our reason for this is that the floor plan to the third floor shows the present living accommodation and the existence of the stairs which start in the bathroom/dressing room and then lead up to the small landing and then to the bedroom. Accordingly there should be reference to the upper floor as plan 6 and the third floor should be described by reference to plan 5 in the deed of variation. The description of the property in the interpretation clause of the draft deed of variation should be amended to clarify that the existing floor plan in the lease for the third floor is being removed and substituted by the new plan 5.

27. We agree with Mr Pannier that it is unnecessary to include the wording relating to floor and joists and all other matters set out in the draft "New Clause" contained in the deed of variation. Our Order therefore is that the addition of the new clause should read simply as follows:

"*and the loft space on the upper floor above the third floor edged blue on the plan 6 annexed hereto.*" Our reason for this is that there appears to be no such descriptive wording used in the existing lease and we do not think it is necessary. The repairing obligations should remain as contained in the existing lease and the floor joists, which must be structural timber, should remain the responsibility of the Landlord to repair. It is inappropriate to include those items within the demise to the tenant. We do not think it is appropriate that Mr Pannier's repairing obligations should be changed and although we were assured by Mr Clargo that was not the case it seems to us that to include the suggested wording could lead to some confusion and uncertainty as to who is to repair what and we prefer therefore to leave matters as set out in the original lease.

28. We then turn to the question of the indemnity. Again we found Mr Pannier's comments on this compelling. The works carried out to the flat by him do not appear to have had the benefit of listed building approval or, it would appear, planning permission. However we do not see why he, as the freeholder, should be giving covenants to the new freeholder. Mr Pannier remains a lessee and has obligations in respect of works that he has done. It is appropriate to include within the deed of variation some indication that it is not intended that in entering into such a deed any past breaches of the lease have been waived. However as it appears from Mr Pannier's evidence that other Lessees have also carried out works to their properties without consent, we do not believe he should be put in any different position than he would have been if he were just a Lessee of the property. Clearly as the freeholder he could consent to the works being carried out under the terms

of the lease and it is only a question as to whether or not the local planning authority may decide to take any point on the works. It seems to us that such a matter would be directed to Mr Pannier in his position as Lessee and not in his position as the freeholder. We do not believe therefore that the freeholders require, or indeed are entitled to request, the indemnity they sought in paragraph 12.4 of the transfer which we therefore order should be omitted in total.

29. Whilst we are dealing with the transfer the wording contained in clause 12.1 *"and the right-of-way on foot and with bicycles together with all others entitled over the passageway edged green on the plan attached hereto and to keep bicycles in the storage area hatched black on the said plan"* should be deleted and instead should be inserted at the appropriate place in the deed of variation. We believe also that the plan attached to the transfer should be utilised in the deed of variation. The plan that is numbered 2 in the deed of variation, referring to ground floor access, should be removed and substituted with the plan from the Transfer which will show the ground floor access but also clearly shows the extent of the passage way and the bicycle store area.

30. Finally we turn to the question of the mooring. This is a matter that clearly concerns Mr Pannier. However we no not believe the Applicants can be required to assist as he suggests. In the Counter-Notice at paragraph 4 he confirmed his desire to retain the benefit of the mooring rights referred to in the Property Register of title number ON52652. The entry in the Property Register states as follows:
Notice entered in pursuance of rule 254 of the Land Registration Rules 1925 on the 28 September 1987 that the Registered Proprietor claims that the land in this title has the benefit of a right to use the moorings under number 1, River Terrace.

31. The question of the moorings has never been in dispute. The Respondent sought to omit them from the enfranchisement and the Applicants conceded that should be the case. It seems to us that he could have required the Applicants to take such mooring rights by reference to s21(3)(c) and (4) and sought to claim any compensation that might have followed. He chose not to do so and it seems to us he must suffer any consequences that may arise from that. We cannot see that the Applicants can do more than they have done which is to concede such rights to Mr Pannier which is will inure for the benefit of his interest in flat 4.

32. We hope the parties can now proceed to deal with the transfer and the deed of variation. We order that the Applicants should confirm with the Tribunal within 28 days of the date of this Decision whether the documentation has been finalised and executed and if we have not heard from them then at the expiration of that period notice will be given to the parties indicating that the Tribunal considers the application to have been concluded and that all terms of acquisition have been finalised. It will then be for the parties to decide whether or not the application presently before the County Court should be resurrected.

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Chairman

Dated 20th June 2006