Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATIONS UNDER SECTIONS 24 AND 33 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Ref: LON/ENF/1535/05

Property: Fortior Court, 100 Hornsey Lane, London, N6 5LD

Applicant: Fortior Court Limited

Respondent: Greenfalls Limited

Application to Tribunal by:
Nominee Purchaser dated 11 July 2005

Hearing Dates: 6 and 7 July 2006

Appearances: Mr B Denyer-Green of Counsel
Ms A Kipalani, Solicitor, Wallace LLP
Mr E Shapiro BSc (EstMan) FRICS IRRV FCIArb, Moss Kaye Pembertons
Mr N L Lee BSc FRICS F Beng, Housecheck Ltd
for the Nominee Purchaser

Mr E Cole of Counsel
Ms S Tingley, Solicitor, Rochman Landau
Mr J F Slater, FRICS, Foster Slater
Mr A D Neale, BSc Dip Arch RIBA, Neale & Norden Limited
Mr J Pennington MRICS QS, Burke Hunter Adams
for the Landlord

Members of the Leasehold Valuation Tribunal:

Mrs J S L Goulden JP (Chairman)
Mr W J Reed FRICS
Mr C White FRICS

JG

LON/ENF/1535/05

PROPERTY: FORTIOR COURT, 100 HORNSEY LANE, LONDON, N6 5LD

BACKGROUND

1. The application before the Leasehold Valuation Tribunal dated 11 July 2005 was in respect of a collective enfranchisement under Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 (hereinafter referred to as "the Act") of Fortior Court, 100 Hornsey Lane, London, N6 5LD (hereinafter referred to as "the property").

2. Following a preliminary hearing held on 15 November 2005, and directions issued on the same date, the Respondent, Greenfalls Limited was directed to send to the Applicant, Fortior Court Limited, a statement setting out its case "*in particular relating to the development potential of the roof space at the property ...*"

3. The Tribunal was advised that an application for planning permission had been made on 30 April 2004 to develop the roof space of the property, together with the space above the building for a penthouse flat as a new top (7^{th}) floor.

4. Conditional planning permission in respect of the above application was granted on 9 September 2004.

5. The hearing was limited to the sole issue of the value of the rooftop development to add a penthouse flat, the other components of the valuation having been agreed. It transpired, however, that the Respondent's legal costs under Section 33 of the Act were also challenged, and the Tribunal dealt with that issue also.

HEARING

6. The hearing took place on 6 and 7 July 2006.

7. The Applicant, Fortior Court Limited, was represented by Mr B Denyer-Green of Counsel and Ms A Kipalani, Solicitor, Wallace LLP. Expert evidence was provided by Mr E Shapiro BSc (EstMan) FRICS IRRV FCIArb of Moss Kaye Pembertons and Mr N L Lee BSc FRICS FBeng of Housecheck Ltd.

8. The Respondent, Greenfalls Limited was represented by Mr E Cole of Counsel and Ms S Tingley, Solicitor, of Rochman Landau. Expert evidence was provided by Mr J F Slater FRICS of Foster Slater. In addition, Mr A D Neale BSc Dip Arch RIBA of Neale & Norden Limited and Mr J Pennington MRICS QS of Burke Hunter Adams attended the hearing, but neither gave evidence.

9. The Tribunal deals with the matters in issue in two parts namely –

   (1) The legal issues;

(2) The valuation issues.

The legal issues

10. Mr Denyer-Green, in his written submissions on behalf of the Applicant, said that to establish any value in the roof space to add a penthouse flat it was necessary to show –

(1) That there was no legal impediment to such work;

(2) That there was no building regulation impediment

(3) That there was some residual value.

1. Was there legal impediment to such work?

11. Mr Denyer-Green suggested that the two aspects to be considered by the Tribunal were (a) whether the scheme of the leases set up a letting scheme which precluded the creation of an additional flat and (b) whether the proposed works would breach the repairing covenant and/or the covenant for quiet enjoyment.

12. The property comprises 18 flats and Mr Denyer-Green referred to the lease of Flat 1 which he said was a specimen lease. In that lease, the tenant covenanted to pay 1/18th part of the estimate of service charges for the building as a whole. Mr Denyer-Green said "*that provision, together with the impression from the original leases that a standard form was in use and offered to the initial tenants, is relevant to the existence of a "letting scheme". There is no agreement in the specimen leases reserving to the Reversioner rights to alter or develop the building*".

13. Mr Denyer-Green referred to a Lands Tribunal case of **Devonshire Reid Properties Limited v Trenaman (1997) 1 EGLR 45** in support of his contention that since the building in the lease is defined as a block of eighteen self contained flats and the service charge recovery provision is on the basis that each flat pays 1/18th share, a letting scheme exists.

14. Mr Denyer-Green referred the Tribunal to the landlord's covenant in the lease to keep in good and substantial repair and condition the roofs and said that the proposed works would amount to a breach of that covenant.

15. Mr Denyer-Green referred the Tribunal to the landlord's covenant in the lease for quiet enjoyment and said that the proposed works would breach this covenant, since there would necessarily be considerable noise, dust etc for some months and the occupation of a tenant's property would be made intolerable. Mr Denyer-Green referred to the Court of Appeal case of **Guppy's (Bridport) Limited v Brooklyn (1983) 14 HLR 1** and paragraph 11.285 of Volume 1 of Woodfall on Landlord and Tenant in support.

16. Mr Denyer-Green also referred to a Caution on the Proprietorship Register in favour of Mr Andrew David Neale at the Land Registry. This Caution related a Joint Venture Agreement dated 6 June 2002 and made between A D Neale

(1) and P J Delaney (2) which provided that the profits were to be divided between the parties to the Agreement which did not include the freeholder, and therefore as at the valuation date, namely 18 April 2005, the freeholder was not entitled to a share of the profits from any development of the roof space.

17. Mr Cole, for the Respondent, argued that there was no scheme of development which prevented the landlord from carrying out the proposed works. In the alternative, if the Tribunal considered that there was a scheme of development, any such scheme was limited to the building as presently constructed, and not to the outside roof space. There was no breach of the landlord's covenant to repair.

18. In addition, statute permitted variations in leases. Mr Cole referred specifically to the following clauses in the specimen lease:-

> **Clause 1(vi) "the Building" shall mean the building standing on the Lessor's Property which now consists of a block of eighteen self contained flats with ancillary premises meter room garages and parking spaces"**

19. In Mr Cole's view, in Clause 1 (vi) the draftsman was being "*descriptive not prescriptive ... it contemplates that the numbers might change eg extra storeys or amalgamation of flats ... there is no recital that the landlord had laid out an estate and the leases were in the same form.*"

> **Clause 3(b) "the annual contribution shall be the sum of eighty five pounds (£85:-) per annum in the first two years of the term and in respect of the year commencing on the 25 June 1972 and each subsequent year commencing on the 25 June 1972 and each subsequent year during the continuance of the said term shall be of an amount equal to one eighteenth part of the amount of the estimate for such year"**

20. Mr Cole considered that in view of the terms of Clause 3(b), if the number of flats did change, it would be expected that the parties would agree different contributions and the landlord would not insist that any extra flats would not pay service charges.

21. Mr Cole also referred to the following clauses:-

> **Clauses 4(xv) and (xvi)**
>
> **"(xv) Not to cut injure alter or divide the Demised Premises or any part thereof not make or permit to be made any structural alteration improvement or addition whatsoever in or to the Demised Premises or any part thereof and in particular not to cut alter weaken or injure the ceilings walls or floors thereof or permit the same to be cut altered weakened or injured and not to unite or annex the Demised Premises to or with any other premises**

(xvi) (a) Not to carry out or permit or suffer to be carried out any "development" to the Demised Premises within the meaning of the legislation for the time being in force as to Town and Country Planning or Betterment Levy

(b) Within four days of the receipt of the same by the Lessee to give full particulars to the Lessor of any notice or proposal for a notice or order or proposal for an order given issued or made to or on the Lessee by any Authority under or by virtue of any Town and Country Planning Acts or any Housing Acts Public Health Acts or any other Statutes affecting the Demised Premises or any part thereof and if so required by the Lessor to produce such notice order or proposal to it and without delay to take all reasonable and necessary steps to comply with any such notice order or proposal and at the request of the Lessor but at the cost of the Lessee to make or join with the Lessor in making such objections or representations against or in respect of such notice order or proposal as they or either of them shall deem expedient

22. Mr Cole, whilst accepting that Clauses 4(xv) and (xvi) these were express covenants binding the tenant, said that there was no corresponding express covenant not to alter the building which was binding on the Respondent. The clause to which he relied on in support was Clause 5(i)(a) which stated:-

"the Lessor will at all times during the said term maintain in good and substantial repair and condition order and decoration:-
(a) the main structure and in particular the foundations roofs external and load-bearing walls and concrete and breeze block floor slabs and gutters and rainwater pipes of the Building"

23. Mr Cole argued that alterations would not constitute a breach of the above covenant, and referred to the following clauses.

Clause 6(i) and (ii)

"6. THE Lessor hereby further covenants with the Lessee as follows:-
(i) The Lessor shall before carrying out any repairs or works to any part of the Building for the carrying out of which it requires access to the Demised Premises give reasonable notice (and except in the case of extreme urgency at least forty-eight hours notice) in writing to the Lessee and the Lessor shall on giving such notice be entitled to carry out the said repairs or works and in doing so to have any required access to the Demised Premises but shall act

carefully and reasonably doing as little damage as possible to the Demised Premises and making good all damage done

(ii) The Lessee paying the said yearly rents and observing and performing the covenants conditions and agreements hereinbefore contained and on his part to be observed and performed the Lessee shall and may quietly enjoy the Demised Premises and the rights set forth in the said Second Schedule during the said term without any interruption by the Lessor or any person claiming through or in trust for the Lessor"

24. Mr Cole said Clause 6(i) contemplated works being carried out to other parts of the building and 6(ii) such works would not amount to a breach of this covenant and "*in considering what a landlord might do one must consider expressly or by implication what he is entitled to do*".

25. Mr Cole referred to the Second and Third Schedules to the leases. He said that provisions therein entitled the landlord to go across the car parking spaces at the rear of the building and nothing therein expressly prevented the landlord carrying out the works.

26. Mr Cole referred the Tribunal to the case of **Hannan v 169 Queens Gate Limited [2000] 09EG179**.

27. Mr Cole said that there was no *"automatic"* scheme of development and there would have to be at least an implied promise by the landlord not to develop. In his view there was no material to support that conclusion.

28. The allegation of breach of quiet enjoyment was rejected by Mr Cole. He said that there were no witness statements from any of the tenants to say that they would either prevent the scheme from taking place or any evidence that the tenants would stand on those rights.

29. Mr Cole, in referring to the Caution on the Proprietorship Register at the Land Registry (see paragraph 16 above) provided the Tribunal with a letter to Mr P Delaney from Mr A D Neale and dated 15 April 2005 which stated, inter alia:-

> *"I have agreed with you this morning to rescind the agreement to lease, so that you can offer the roof rights to the tenants, whereupon the proceeds are to be distributed on a 50:50 basis as per the intention of the original Joint Venture.*
>
> *Martin Codd of Dawsons will write to the registry withdrawing the caution which I have registered against the title, leaving the way for the counter notice to the freeholders to take place on Monday, offering the freehold with the benefit of the roof parts."*

Mr Cole pointed out that this letter pre-dated the valuation date of 18 April 2005 and therefore the Caution should be disregarded by the Tribunal in its determinations.

The Tribunal's Decision in respect of the legal issues

30. The Tribunal has considered carefully the arguments on both sides together with the case law provided and the specimen lease.

31. The Tribunal has not been persuaded by Mr Denyer-Green's submissions that there is a scheme of development so as to prevent the Respondent carrying out works in the roof space. The Tribunal in considering the definition of **"the Building"** in the lease accepts that the words **"which now consists of a block of eighteen self contained flats ..."** is, as suggested by Mr Cole, descriptive and not prescriptive.

32. Mr Lee confirmed, in evidence for the Applicant, that the execution of the works were structurally feasible. The Tribunal accepts that the works would necessarily cause unwelcome inconvenience and disruption to the tenants for some period of time. There are bound to be difficulties, but it is considered that such difficulties could be surmountable. If the tenants are right, then no work could be carried out at any time to the block even, for example amalgamation of flats. In the view of the Tribunal, this cannot be correct.

33. As to the arguments in respect of breach of the lease covenants to repair, this is a matter of construction. It is accepted that no rights to develop have been reserved in the lease but the Tribunal follows the judgement in **Hannan v 169 Queen's Gate Limited** which states, inter alia *"that whether the implied duty not to destroy is absolute must depend on the construction of the lease and that not every alteration of the premises amounts to a breach of the covenant to repair"*. In this case, there is no express covenant in the lease which prevents the Respondent making alterations to the property.

34. With regard to the arguments in respect of quiet enjoyment the Tribunal accepts that there is potentially a breach of the covenant for quiet enjoyment, but the works could, in the view of this Tribunal, be carried out with the minimum of disruption to the tenants (see paragraphs 60-62 below). The Tribunal rejects Mr Denyer-Green's assertion that the landlord is merely entitled to discharge his repairing obligations. It is accepted that there is no reserved right to build, but neither has evidence been presented to the Tribunal that the tenants will try to enforce those rights. The Tribunal has noted and follows the judgement in the Hannan case in that it states, inter alia:-

> *"In determining this case, it is necessary to start from the proposition that prima facie a landlord is entitled to use its retained property as it pleases, even where that will be detrimental to the interest of his lessee: see Port v Griffith [1938] 1 All ER 295. The claimant has not sought to contradict, limit or distinguish this proposition. Since it is accepted that the defendant's retained property includes the roof space and roof surface, it will have a prima facie entitlement to pursue the proposed development as planned. A lessee will general be able to prevent a landlord acting in pursuance of such entitlement only where there is some express or implied covenant in the lease that will enable him to do so. As I have mentioned already, there is no express*

covenant in the lease upon which the claimant can rely. The question therefore arises of whether a covenant can be implied. This is primarily a question of construction of the lease in order to determine the actual or presumed intention of the parties …

Either in conjunction with this exercise or subsequently, it is necessary to consider whether the proposed term should be implied on the basis that its inclusion is necessary to give business efficacy to the contract. However, the courts are reluctant to imply a term where, as here, there is a long and complex legal document drawn up by the lawyers in which the parties have crystallised the terms of their relationship. The conditions that must apply before the courts will imply a term in these circumstances were set out by Lord Simon in BP Refinery (Westerpoint) Pty Ltd v Shire of Hastings (1978) 52 ALJR 20 at p26 and repeated by Sir Thomas Bingham MR in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 at p481 as follows:

for a term to be applied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

To this, the defendant has suggested that a sixth principle has been added by Hughes v Greenwich London Borough Council [1994] 1 AC 170, that the courts would imply a term into a contract only where there was a compelling reason for doing so, which I accept, although it seems to me that this may simply be another way of looking at Lord Simon's second condition."

2. <u>Was there building regulation impediment to such work?</u>

35. Mr Denyer-Green, whilst accepting that this was *"a small point"*, said in his submissions:-

"The present building contains six floors, and a seventh floor is proposed. Part B, on fire safety, of the Building Regulations 1991 is invoked. The requirements relating to fire escape are contained in Approved Document B1, section 3. Guidance is also given in clauses 9 and 10 of ES5588 fire precautions in the design, construction and use of buildings, Part 1: 1990 Code of Practice for Residential Buildings. The access arrangements to the proposed penthouse do not comply …Building regulation difficulties could either constitute a complete bar on proposals, or at least make them very expensive."

36. Mr Denyer-Green also said:-

"If the removal of the lift housing and its extension to the seventh floor is necessary, and it can be shown that such works are not a necessary

repair, two matters arise. First, an inability to recover costs through the service charges will introduce an additional cost factor that will go to value. Second, if the work will require the lift to be closed for a time, that action could put the reversioner in breach of its obligation under clause 5(i)(c) of the specimen lease. The tenants might be entitled to injunction to prevent unnecessary lift closure."

37. Clause 5(i)(c), as referred to by Mr Denyer-Green, states that it is the landlord's obligation **"to maintain in good and substantial repair and condition order and decoration ... the entrances automatic porter system halls, passages landings staircases and lift of the Building used or enjoyed by the Lessee in common with the lessees and occupiers of other parts of the Building."**

The Tribunal's decision in respect of building regulations

38. As to building regulations, if difficulties in this respect constitute a complete bar, as Mr Denyer-Green suggests, then obviously the work could not proceed. If building regulation difficulties prove expensive, then this is a judgement to be made by the Respondent.

39. In the view of this Tribunal, the building regulations would not, in themselves, be an impediment to the proposed works.

40. Having determined that the leases of the flats within the building did not constitute a letting scheme and that the terms of the leases did not prohibit the addition of a penthouse flat at seventh floor level the Tribunal considered the valuation issues following its inspection.

INSPECTION

41. The subject property was inspected internally and externally on 7 July 2006.

42. It was a 1960s detached block of 18 flats set back by way of a semi-circular drive from a busy road, which was also a bus route.

43. There were some allocated car parking spaces to the rear of the subject property, and some unallocated car parking spaces to the front. An internal garage block was also noted.

44. Access to the rear of the subject property was possible from both sides. On one side, a vehicular access lead to the refuse bins, car parking, and amenity area. The amenity area was about 5ft above the adjoining car park and with a brick retaining wall. On the other side, access to the rear was a grassed area. This access had a single open gate and although there was no hard standing, it was suitable for vehicles.

45. The members of the Tribunal inspected the common parts, lift, the lift housing/tanking and the flat roof. The flat roof showed signs of age and a number of patch repairs. The Tribunal also noted the position in the common parts on the sixth floor where the new internal staircase to the seventh floor was proposed.

46. The Tribunal inspected externally only Altior Court and Melior Court, both of which were of similar age and construction to the subject property.

3. The valuation issues

The valuation date

47. Neither Mr Shapiro nor Mr Slater mentioned the valuation date in their Expert Witness Statements, but Mr Shapiro confirmed during the hearing that the valuation date was April 2005 – the date of the landlord's counter-notice.

48. The Tribunal noted that the landlord's counter-notice was dated 18 April 2005, and that there was no apparent dispute as to the extent or quality of the interest to be enfranchised. Also, in the Applicant's Statement of Case dated 24 January 2006, the Applicant had contended that the valuation date was the date of the counter-notice, and this does not appear to have been disputed.

49. That said, and having confirmed the valuation date as April 2005, it was not clear why Mr Shapiro had then taken the Savills Index for PCL North Flats as at September 2005 for the indexation of the sale price of 38 Altrion Court.

50. Similarly, Mr Lee gave no indication in his Witness Statement of the date at which he had calculated the cost of the proposed development, whereas the elemental summary prepared by Mr Pennington of Burke Hunter Adams is clearly headed June 2006 and is based on "Current Cost 2nd Quarter 2006".

51. The Tribunal has therefore taken the date of the counter-notice, 18 April 2005, as the agreed valuation date in this case.

Evidence on valuation

52. A summary of the evidence submitted to the Tribunal and its determination is given under each head.

The practical difficulties of development

53. The bundle included a copy of a letter dated 7 July 2003 from Messrs Train & Kemp, Consulting Engineers, in which Mr Roger McLaughlin reported that from a preliminary view and from the information that had been made available he was satisfied that due to the lightweight nature of the proposed structure, the existing building construction was sufficiently robust to carry the additional loads and would not cause damage to the existing foundations.

54. Also included in the bundle were letters dated 3 and 6 February 2006 from Messrs Neale & Norden Ltd, Architects, in which Mr Andrew Neale confirmed to the landlord's solicitors that the viability of the scheme had been approved prior to the submission of the planning application, and that *"it is generally accepted that buildings of this generation can accommodate at least one more storey height from a structural point of view."*

55. Mr N L Lee, for the Nominee Purchaser, had been asked to consider four issues:-

- the feasibility of the proposed development, the time involved and the likely effect of disturbance to the tenants;
- compliance with the requirements relating to fire safety;
- whether the lift will have to be removed and/or closed for any period of time;
- an estimate of the cost of the works.

56. His conclusions were that:-

- the development of the roof space to provide additional penthouse accommodation was structurally technically feasible;
- that the minimum build time would be of the order of twenty four weeks;
- that the tenants would suffer considerable disruption throughout the contract period;
- that part of the amenity grounds would be used to provide secure storage and site facilities;
- that there would be significant periods of unacceptable and intolerable noise in the flats at sixth and possibly fifth storey levels;
- that there would be no lift for an estimated minimum period of thirteen weeks;
- that the construction of the staircase to the seventh floor would cause significant dust, damage and disruption, and would restrict the use of the existing staircase;
- that the proposed development would comply with building regulation requirements;
- that the existing traction lift would need to be replaced with an hydraulic lift, and the structure adapted to take the new lift;
- that the estimated cost of the works and attendant costs was £501,432.13;
- that the commercial developer would require a minimum margin of 20% of the gross development value or 25% of the cost for risk and profit.

57. Mr Lee had consulted The Ainscough Group Ltd – crane and hoist hire and suppliers, and Chevron Lifts – lift manufacturers and suppliers.

58. Neither Mr E Shapiro, for the Nominee Purchaser, nor Mr J Slater, for the Respondent landlord, commented on the practical difficulties of carrying out the development in their Statements, but referred to various difficulties during their evidence.

59. Mr Shapiro said that there were a lot of *"unknowns"*, such as the condition of the foundations or drainage or the condition of the services which were 40 years old. He said that there would be difficulties which could be overcome at a cost which would need to be reflected in the developer's risk and profit. Mr Shapiro said he would expect a profit of not less than 20% of the Gross Development Value.

60. The Tribunal, from its inspection, is satisfied that it would be physically possible to build a penthouse flat over the existing six storey block of flats, utilising the amenity land at the rear of the block as a secure storage area, with scaffolding and a hoist to roof level on the right hand side of the building providing access for labour and materials.

61. The Tribunal also considered that the additional car-parking space required by the planning permission could be accommodated within the existing surfaced area at the rear of the building, as indicated on layout Plan P106, and that any difficulties arising from the number and location of the waste bins could be overcome.

62. There would inevitably be considerable disruption and inconvenience to the existing lessees throughout the contract period, both inside the building in respect of the lift renewal and extension to the staircase and in their use of the parking and garage facilities, but they would be saved at least the cost of replacing the existing 40 year old lift recovering the flat roof and probably the cost of redecorating the common parts.

Market value of the completed development

63. Mr Shapiro referred for comparison to the sale of 38 Altior Court, Shepherds Hill, N6: This is a penthouse flat on an almost identical block of flats which had sold in November 2001 for £570,000. He said that it had a Gross Internal Area (GIA) of 1760 sq ft and an 18' 6" patio/terrace. The penthouse had been leased for 99 years from March 1965 at a ground rent of £60 per annum, and had 62.5 years unexpired at the date of sale. Mr Shapiro had applied a relativity of 85% to the sale price to arrive at an extended lease value of £670,000, and had applied the Savills Index for PCL North Flats as at December 2001 and September 2005 (which showed an increase of about 8%) to arrive at a capital value of £725,000, which he had rounded up to £750,000 to reflect the premium attached to a newly-built property.

64. Mr Slater had calculated the GIA of 38 Altior Court at 1598 sq ft, and had valued the extended leasehold interest in the penthouse at £850,000. He had not prepared any analysis or adjustment of the sale price of 38 Altior Court but had gone directly to a valuation of £850,000. This valuation was supported by a letter from Mr Stephen Day of Daymorris, Estate Agents, dated 23 June 2006 that in his opinion *"if the penthouse at Fortior Court were available today on a long lease ... it would not be unreasonable to expect to obtain at least £850,000 ... bearing in mind that generally one would pay a premium for something new"*.

65. The Tribunal firstly checked the GIA of 38 Altior Court using the measurements shown on the plan that had been prepared by Mr Foster. The overall measurements of 9.92 m x 16.59 m produced a total area of 164.57 sq m/1771 sq ft including the landing and the lift-well. Mr Shapiro said the GIA of the proposed penthouse development at Fortior Court was 1900 sq ft whereas Mr Slater had based his development cost on an area of 1860 sq ft.

66. It appeared to the Tribunal that Mr Shapiro had taken the overall gross internal floor areas to include the areas of the landing, lift and staircases of 1760 sq ft and 1900 sq ft whereas Mr Slater had excluded these common parts. As the cost of providing these additional areas would be included in the overall cost of the penthouse development, the Tribunal considered it correct to base its calculations on the larger areas.

67. Mr Lee did not disclose in his report the total area on which he had based his calculations, but the Tribunal noted that the total construction costs of £392,356.53 (excluding fees etc) represented a unit cost of £1,781 per sq m and that this equated to a total area of 220.30 sq m or 2371 sq ft.

68. With the limited and somewhat conflicting evidence available to it, the Tribunal determined that the market value of the proposed penthouse, if it had existed at the valuation date, would have been £800,000, as follows:-

Sale price of 38 Altior Court in November 2001	£570,000
Unexpired term 62.5 years/relativity 85%	£670,000
Adjustment for increase in value based on Savills Index for PCL North London Flats at November 2001 and April 2005 = 8.45%	£727,265
Adjustment for size of penthouses £727,265 / 1760 x 1900 =	£785,115

69. To reflect the value of the additional en-suite bathroom, and any premium attached to a newly-built penthouse on the seventh floor of an existing six-storey block of flats built in the 1960's, which is to some extent offset by the larger and better roof terrace/patio at Altior Court, the Tribunal considers that the completed development at Fortior Court at the valuation date would have been in the region of £800,000.

The costs of development

70. Mr Lee had prepared a detailed Estimate of Construction Costs of the penthouse flat as £200,802 to which he had added £59,500 for the conversion and construction of the communal structure (to replace the lift, to relocate the tank-room, to adapt the staircase area on the sixth floor and to make good the internal communal areas) and £65,968.13 for professional fees, £16,250 for sales costs and £26,857.48 for interest at 7% for three months.

71. This produced a total estimated cost of approximately £369,377. Mr Lee had also allowed 25% of the total construction costs as the contractor's profit, and a contingency sum of £28,535. Including these items, Mr Lee's total estimated cost of development was £501,432.13.

72. Mr Adams of Burke Hunter Adams had prepared an Elemental Summary of the costs of the proposed development (based on a competitive tender for another development in London NW1 on which he was currently involved)

which totalled £450,000, including an allowance of £23,500 for contingencies, but excluding professional, statutory, planning and building regulation fees. The contractor's profit had been included in the costings, and had not been separately calculated. In a covering letter dated 3 May 2006, Mr Adams had estimated the cost of building a new apartment at roof level with a gross floor area of approximately 1680 sq ft at £450,000 to £500,000, excluding VAT, consultant, statutory, legal and other fees, loose furniture, equipment and soft furnishings.

73. Mr Slater had calculated the development cost at £539,000 including a profit of 12.5% of the gross development value.

74. Mr Lee's Estimate of Construction Costs totalled £225,850.20 and not £200,802 as shown in his report.

75. The Tribunal preferred the estimates of cost which had been prepared by Mr Lee and Mr Adams, from which it seemed to the Tribunal that there was a consensus of opinion at about £500,000 inclusive of all costs and fees.

The value of the roof space for development

76. Mr Slater had arrived at the sum of £294,000, being the difference between the value of the completed development and the development costs. After allowing for acquisition costs, interest on the land value for nine months at 6.5% and a possible contingency, he considered that £250,000 represented the value of the roof space with planning permission for the penthouse apartment. In arriving at this valuation of the site, he had not allowed anything as the developer's profit from the development.

77. Mr Lee had arrived at an equivalent figure of £248,567.87, and at a negative value after deducting £3,750 for site acquisition costs and Mr Slater's site value of £250,000. In Mr Lee's opinion a developer would require 20% of the gross development value in this case, and Mr Shapiro had also said that whereas 15% was generally regarded as the norm, a developer would expect 20% in this case to reward him for the additional risks attached to this type of development.

78. The difference between the value of the completed development at £800,000, and the estimated cost of development at £500,000, is £300,000. This is the sum which is available for the purchase of the roof space and for the developer's profit on the development.

79. The Tribunal considers that in the circumstances of this case, where there are a number of unknowns a developer would expect to receive a substantial proportion of the realised development value, and that the landlord/vendor and the developer/purchaser would be likely to divide the balance of £300,000 equally between them. This would give the developer rather less than 20%, and each party would bear their own costs.

80. The Tribunal therefore determines that the value of the roof space with planning permission for a penthouse flat, at the valuation date, was £150,000.

Application for costs under Section 33 of the Act

81. The costs in issue related solely to the fees of the Respondent's solicitor, Rochman Landau, in the sum of £2,578.54 (£2,194.50 plus VAT), the fees of the valuer having been agreed in the sum of £2,398.76. The legal costs were challenged both as to the charging rate and the number of hours spent.

82. A schedule of the Respondent's solicitors' costs was provided to the Tribunal on the second day of the hearing and indicated that the work had been undertaken by a Grade A fee earner at a charging out rate of £285 plus VAT. No narrative invoices were supplied.

83. The schedule stated, inter alia:-

"Work undertaken the cost of which is recoverable under Section 33(1) (a)-(e):

CORRESPONDENCE		
Letters out to client	*1 hour and 18 min*	*£370.50*
Letters out to Wallace LLP	*1 hour and 12 min*	*£342.00*
Letters out to John Slater of Foster Slater Chartered Surveyors	*54 min*	*£256.50*
TELEPHONE ATTENDANCES		
Telephone attendances on client	*1 hour*	*£285.00*
Telephone attendances on Wallace LLP	*36 min*	*£171.00*
OTHER		
Meeting with client	*30 min*	*£142.80*
Considering documents and investigating title	*1 hour*	*£285.00*
Preparing Counter-Notice	*48 min*	*£228.00*
Drafting Transfer Deed	*24 min*	*£114.00*
Time Engaged: 7 hours and 42 mins	*£2194.50 + VAT*	*£2578.54"*

84. Mr Denyer-Green said that an appropriate rate for a Grade A fee earner for this type of work should be no more than £250 per hour. He questioned whether a partner was necessary for continuous supervision or management of the work which involved a not particularly large sum. In addition, Mr Denyer-Green said that no details had been supplied as to the nature of the correspondence and, in any event, in his view only four letters in total needed to be sent to the Client. A copy of a previous LVT decision was provided where costs in connection with the preparation of the Counter-Notice were disallowed.

85. Mr Cole said that the case had involved a large sum of money and significant property rights and therefore it was not surprising that a partner had been involved. In his view, the costs were modest.

86. It is unfortunate that no narrative invoices were supplied to the Tribunal. Exactly what work was carried out and for what period of time is therefore unknown. The Tribunal has therefore used its own knowledge and experience of other similar enfranchisement cases.

87. The relevant part of Section 33 of the Act provides –

> **"(1) Where a notice is given under section 13, then (subject to any provisions of this section and sections 28(6), 29(7) and 31(5)) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or by any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely –**
>
> **(a) any investigation reasonably undertaken –**
>
> **(i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or**
>
> **(ii) of any other question arising out of that notice;**
>
> **(b) deducing, evidencing and verifying the title to such interest;**
>
> **(c) making out and furnishing such abstracts and copies as the nominee purchaser may require;**
>
> **(d) any valuation of any interest in the specified premise or other property …**
>
> **(2) For the purposes of subsection (1) any costs incurred by the reversioner or any other relevant landlord in respect of professional services shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs."**

88. Although it was argued by Mr Denyer-Green that, following the decision in a previous LVT case, solicitors' costs in connection with the preparation of the Counter Notice should be disallowed, this decision of one Tribunal is, of course, not binding on another Tribunal.

89. This Tribunal is of the view that until the Counter Notice is served, the parties' positions have not crystallised, and it is only when the Counter Notice is served that both sides are aware of whether any or all of the terms are agreed or are to be challenged. This Tribunal does not consider that the spirit and/or intention of the statute was such that the very narrow construction of Section 33(a), (b) and (c) should be adopted. The wording of the Act clearly refers to matters "incidental to" the specific matters therein referred to.

90. Accordingly, this Tribunal considers that the preparation of the Counter Notice falls within the provisions of the Act.

91. Although on the high side, the Tribunal considers that neither the number of hours spent by the Respondent's solicitors nor the hourly charging out rate for a Grade A fee earner appear unduly excessive.

92. The Tribunal determines that Rochman Landau's fees of £2,578.54 under Section 33 of the Act are allowed in full.

CHAIRMAN .....

DATE ..... 13 September 2006.

JG