Ref: LON/ENF/2086/06

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

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

Applicants:	**33 Whitely Road No. 33 Limited**
Respondents:	**Sinclair Gardens Investments (Kensington) Limited**
Re:	**33 Whitely Road, London SE19 1JU**
Application date:	**23rd October 2006 by Tenants**
Hearing date:	**06th February 2007**
Appearances for Applicants:	**Mr. T O'Keeffe of Buy your Freehold Limited**
Appearances for Respondent:	**None**

Members of the Leasehold Valuation Tribunal:

Mr. J Hewitt	**Chairman**
Mrs. S Redmond	**BSc (Econ) MRICS**
Mr. P Roberts	**DipArch RIBA**

Date of Tribunal's Decision: **14th February 2007**

Decision

1. The decision of the Tribunal is that:

   1.1 The price payable by the Applicant to the Respondent for the Specified Premises shall be the sum of £7,300

   1.2 The price payable by the Applicant to the Respondent for the amenity land shown edged green on the plan attached to the notice given under s13 of the Act shall be the sum of £1,000

   1.3 The transfer of the freehold interest in Specified Premises and the amenity land by the Respondent to the Applicant shall be in the form of the draft form TR1 attached to the Decision.

   1.4 The costs payable by the Applicant to the Respondent pursuant to s33 of the Act is the sum of £1,602.70 (inclusive of VAT).

2. The findings of the Tribunal and the reasons for its decisions are set out below.

Background

3. The Property which was not inspected by the Tribunal is described in representations as built some 100 years or so ago on the east side of Whiteley Road in south-east London. It is a mid-terrace building laid out over lower ground, ground and two upper floors. Evidently the Property was originally built as a single family residence but it has subsequently been converted into three self-contained flats.

4. Each of the three flats is let on a lease granted for a term of 99 years from 23rd March 1986.

5. By notice dated 8th June 2006 given pursuant to s13 of the Act the current lessees of the three flats as participating tenants gave notice to the Respondent reversioner that they wished to exercise the right to collective enfranchisement of the freehold reversion. By that notice:

   5.1 The Specified Premises of which the freehold was sought to be acquired was the premises known as 33 Whiteley Road, Gipsy

Hill, London SE19 1JU as shown edged red on a plan accompanying the notice.

5.2 The amenity land to be acquired pursuant to s 1(2)(a) of the Act was described as gardens and amenity land at the Property, as shown edged green on a plan accompanying the notice (the amenity land).

5.3 The price proposed for the Specified Premises was £4,650.

5.4 The price proposed for the amenity land was £100.

5.5 The Applicant was named as the nominee purchaser.

6. By counter-notice dated 20th July 2006 the Respondent admitted that on the relevant date the participating tenants were entitled to exercise the right to collective enfranchisement in relation to the Specified Premises. The Respondent accepted the proposal that the Specified Premises and the amenity land were as shown edged respectively red and green on the plan accompanying the initial notice. The Respondent did not accept the proposed price of £4,650 for the Specified Premises or the proposed price of £100 for the amenity land. By paragraph 4 of the counter-notice the Respondent:

> *'4. The Reversioner makes the following counter-proposal to each of the proposals which is not accepted :-*
>
> *4.1 A purchase price of SEVEN THOUSAND THREE HUNDRED POUNDS (£7,300) for the interest in the Specified Premises.*
>
> *4.2 A purchase price of £1,000 for the freehold interest in the additional freehold within Paragraph 2 of the Initial Notice.'* (There is no issue between the parties that this is the amenity land edged green on the plan that accompanied the Initial Notice.)

7. On 23rd October 2006 the Applicant made an application to the Tribunal pursuant to s24 of the Act. As originally typed that application required there to be determined:

> *'(a) Price of freehold pursuant to Schedule 6 of the 1993 Act.*

(b) *Freeholder's reasonable costs pursuant to Section 33 of the 1993 Act.*

(c) *The terms of the transfer pursuant to Section 34 of the 1993 Act.'*

However the words at (a) above were crossed through in manuscript and that amendment appears to have been initialled.

8. On 28th November 2006 the Applicant's representative (Mr T O'Keefe of Buy your Freehold Limited) claims to have written to the Respondent's solicitor P Chevalier & Co) a letter in the following terms:

'I have now consulted with the leaseholders who accept the price contained in your counter notice, £7300 for the Specified Premises and the £1000 for the additional freehold.

What remains in dispute are the Reversioner's section 33 costs and the terms of the TR1.'

9. P Chevalier & Co replied by letter dated 12th December 2006 as follows:

'We thank you for your letter dated 28th November 2006.

The Counter Notice is merely the prelude to the determination of the terms of acquisition of an interest from a landlord and the figure in the Counter Notice is not a final figure. The common purpose of the Notice of Claim and the Counter Notice, as the general scheme provided by Chapter 1 indicates, is to set the scene for a process of negotiation, not in general a definition of issues for final determination of the matter by litigation.

Since service of the Counter Notice our clients have considered the Lands Tribunal decision in Sportelli with their Valuer. On the basis of a reversionary rate of 5% our client's valuation has increased. Our client therefore does not agree a Price of £7300 for the Specified Premises and £1000 for the additional freehold.

If, which is not admitted, any offers have been made by our clients which are capable of acceptance they are hereby withdrawn.

The Application to the Leasehold Valuation Tribunal by the Nominee Purchaser further evidences that no agreement has been reached between the parties.'

10. The Tribunal has received written representations from the parties as follows:

10.1 Applicant's statement of case and TR1 dated 11th January 2007.

10.2 Respondent's statement in reply dated 30th January 2007.

10.3 Applicant's additional statement of case dated 31stJanuary 2007.

10.4 Respondent's submissions as to Counter Notice dated 2nd February 2007.

10.5 Respondent's submissions as to Section 33 Costs dated 2nd February 2007.

11. The hearing of the application was scheduled for 6th and 7th February2007. Mr Tim O'Keefe of Buy your Freehold Limited appeared on behalf of the Applicant. The Respondent was neither present nor represented. Mr Chevalier had written to the Tribunal in advance to say that there would be no attendance by the Respondent in order to save costs.

The Issues to be Determined

12. From the written submissions it is clear that the issues to be determined by the Tribunal, insofar as it may have jurisdiction are as follows:

12.1 The price to be paid for the Specified Premises.

12.2 The terms of the transfer in form TR1.

12.3 The legal costs payable pursuant to s33 of the Act. (The parties have agreed the valuation costs at £846 inclusive of VAT.)

The Price

13. It appears that the parties are agreed on the price of £1,000 for the amenity land, edged green on the plan accompanying the initial notice.

14. The Applicant contends that in the counter notice the Respondent offered the Specified Premises for the price of £7,300 and that that offer was accepted by the letter dated 28th November 2006.

15. The Respondent denies that the counter-notice constitutes an offer which is capable of acceptance and denies that the parties have agreed the price. It now seeks a price of £15,122 for the Specified Premises.

16. The Applicant is prepared to agree a price of £15,122 for the Specified Premises if the Tribunal finds that no agreement on the price of £7,300 was arrived at.

17. The jurisdiction of the Tribunal is set out in s91 of the Act. S91(2) provides:

'91(2) Those matters are-

(a) the terms of acquisition relating to –

(i) any interest which is to be acquired by the nominee purchaser in pursuance of Chapter I, or

(ii) ...

Including in particular any matter which needs to be determined for the purposes of any provision of Schedule 6 or 13;

(b) ...

(c) ...

(ca) ...

(cb) ...

(d) the amount of any costs payable by any person ...by virtue of any provision of Chapter I or II ...

(e) ...'

Ss 24(8) and 38(1) of the Act define the expression *'terms of acquisition'* to be

(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 amounts payable as the purchase price for such interests,*

(d) *the provisions to be contained in any conveyance.'*

S24(1) of the Act provides that where a counter-notice has been served *'...but any of the terms of acquisition remain in dispute at the end of two months beginning with the date on which the counter-notice was so given, a leasehold valuation tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute.*

S24(3) goes on to provide that:

'Where –

(a) *the reversioner has given the nominee purchaser such a counter-notice...and*

(b) *all of the terms of acquisition have been either agreed between the parties or determined by a leasehold valuation tribunal under subsection (1)*

but a binding contract incorporating those terms has not been entered into...the court may...make such order...as it thinks fit.'

18. Our jurisdiction in s24(1) is to *'determine matters in dispute'*. S24(3)(b) refers to *'the terms of acquisition have either been agreed between the parties or determined by the leasehold valuation tribunal.'* Reading the two provisions together and applying the appropriate test of construction we find that a term in dispute is a term which has not been agreed. To put it the other way round, a term which has been agreed ceases to be a term in dispute.

19. The question for us in this case is whether the counter-proposal of £7,300 for the Specified Premises set out in the counter-notice and the apparent acceptance of that price in the letter dated 28th November

2006 has resulted in an agreement on the price so that it is no longer a matter in dispute.

20. If the price has been agreed so that it is not in dispute we have no jurisdiction to determine it. If it has not been agreed so that it is in dispute we do have jurisdiction to determine it. In order for us to determine whether we have jurisdiction to determine the price we have to determine whether it is a matter in dispute.

21. The Respondents solicitors have submitted that whether the price has been agreed so that there is a binding offer and acceptance is not within the jurisdiction of this tribunal. They appear to submit that it is a question for the court. We reject that submission for two reasons. First the question is not whether there has been a binding offer and acceptance in the sense of the law of contract, but whether the price has been agreed so that it is not a matter in dispute. Secondly, s90(2) of the Act makes it clear that the jurisdiction of the county court is limited to any question *'..which is not a question falling within ...the jurisdiction of a leasehold valuation tribunal by virtue of section 91.'*

22. We find that the question of price is a term of acquisition and whether it is or is not a matter in dispute is within our jurisdiction to determine.

23. We find that a matter ceases to be in dispute when it has been agreed. This arises where one party makes a clear and plain proposal and there is unequivocal acceptance of it. A proposal having been accepted becomes agreed. Once a term has been agreed neither party may resile from it. If this were not the case the scheme proposed by the Act would be unworkable. A party that wishes to refer matters in dispute to a tribunal must do so within six months beginning with the date the counter-notice was given. If a matter was agreed, so that it was not a matter in dispute, and the six months period passed and a party then resiled from what had previously been agreed, the opposite party

would have no means by which that agreed matter but one now in dispute could be referred to the tribunal.

24. We have considered carefully the commentary in *Hague on Leasehold Enfranchisement* fourth edition [2003] paragraphs 26-10 and 26-11 which the Applicant relies upon we prefer this submission to that of the Respondent.

25. We have also considered carefully the detailed submissions made on behalf of the Respondent in relation to proposal and acceptance. In essence it is argued that the expression *'proposed purchase price'* used in ss13 and 21 should be construed differently. We reject that submission. We also reject the Respondent's submission that the counter-notice and any counter-proposals within it are not capable of acceptance by the nominee purchaser. The initial notice must set out the realistic proposals as to price of the participating tenants. It is clear from the requirements of the counter-notice that those proposals are capable of acceptance or rejection by the reversioner. Where proposals are rejected the reversioner is obliged to set out its counter proposal. S21(3) provides:

'(3) If the counter-notice complies with the requirement set out in subsection (2)(a), it must in addition-

(a) state which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which (if any) of those proposals are not so accepted, and specify-

(i) in relation to any proposal which is not so accepted, the reversioner's counter-proposal, and

(ii) any leaseback proposals by the reversioner.'

26. We cannot see any reason or principle why any counter-proposals put forward by a reversioner should not be capable of acceptance by the nominee purchaser in the same way as proposals put forward by the participating tenants are capable of acceptance by the reversioner. We considered carefully the passages from the decision in *9 Cornwall*

Crescent London Limited v Royal Borough of Kensington and Chelsea [2005] EWCA Civ 324, relied upon by the Respondent. That case was concerned with a very different point; the validity of the counter-notice itself. We accept that the counter-notice might be a prelude to negotiations. We accept that a reversioner might choose to revise his price as the process goes on and for so long as it has not been accepted unequivocally by the nominee purchaser. Once it has been so accepted we find that the reversioner cannot revise the price..

27. We agree with the submissions made on behalf of the reversioner that the underlying scheme of the process is to get negotiations underway and to promote the making of proposals and counter-proposals. It seems to us that at any stage a proposal or counter-proposal is capable of acceptance if is it clearly formulated and it seems to us to matter not whether such proposal or counter-proposal is made within a notice or counter-notice or any subsequent correspondence or document. Indeed, as *Hague* comments an oral proposal may well be capable of acceptance.

28. Having made our findings on construction and the approach we need to consider whether in the circumstances that arose in this case the price was agreed so that it was no longer in dispute.

29. We have cited in paragraph 6 above the Respondent's counter-proposals in paragraph 4 of its counter-notice. We have also cited in Paragraph 8 the text of a letter apparently sent by the Applicant's representative purporting to accept those counter-proposals. We need to say a little more about this letter. We have not seen the original of the letter or a file copy of it. The original is or should be in the possession of the Respondent's solicitors. Prior to the start of the hearing the Tribunal's case officer called those solicitors and requested a copy to be sent over by fax. This request was accepted but a copy has not been sent over to us.

30. Mr O'Keefe did not have the original file copy in the file with him. He thought the original file copy might be in his office. The Tribunal adjourned so that he could go to his office to check. On his return and the resumption of the hearing Mr O'Keefe explained that the original file copy could not be found. He recalled it was taken off the file for copying and seems to have been misplaced. He explained that his correspondence is typed on a computer and copies are held in the computer. Mr O'Keefe said he had printed off a copy of the letter from his computer which he gave to us. He said that it was a true copy of the letter he had sent out to the Respondent's solicitors on 28th November 2006. Mr O'Keefe also referred to a separate transaction involving the same Respondent and/or Respondent's solicitors as here and he produced to us a letter in similar terms as that dated 28th November 2006 and the response of P Chevalier & Co to it.

31. Mr O'Keefe also explained to us that he had completed the application form to the Tribunal. It had been typed to include reference to the price. It then became apparent that his clients might accept the Respondent's counter-proposals and that price might not be a matter to refer to the Tribunal. Accordingly he crossed through the reference to price in manuscript and initialled the amendment. He said that if in the event his clients did not accept the counter-proposal he could amend the application because he was well within the 6 months time period.

32. We found Mr O'Keefe to be a truthful and accurate witness doing his best to assist us without exaggeration. We find also that the gist of P Chevalier & Co's letter dated 12th December 2006 is to the effect that the proposal contained in the counter-notice is not an offer capable of acceptance. We infer from this that the letter under reply was a letter purporting to accept the counter-proposals. For these reasons we find, as a fact, that the terms of the letter sent to P Chevalier & Co on 28th November 2006 are as set out in paragraph 8 above.

33. In these circumstances we find that paragraph 4 of the counter-notice sets out a clear proposal by the Respondent that it would accept the sum of £7,300 for the freehold interest in the Specified Premises and that the Respondent would accept the sum of £1,000 for the freehold interest in the amenity land and that the letter dated 28th November 2006 was an unequivocal acceptance of both proposals.

34. Accordingly we find that the prices to be paid for the Specified Premises and the amenity land had been agreed by the parties so that they were no longer in dispute between them and thus the Tribunal does not have jurisdiction to determine those prices.

The Form of Transfer

35. The Applicant has submitted a draft transfer in form, TR1.

36. The Respondent's solicitors have not raised any objections to that draft and have not made any submissions in respect of it. We infer from this that they have no objections to it.

37. In the experience of the Tribunal we find that the draft submitted is in a form appropriate to the circumstances of this straightforward case and we approve it. Accordingly we have decided that the transfer of the freehold interest in the Specified Premises and the amenity land by the Respondent to the Applicant shall be in the form of the draft form TR1 attached to this Decision.

Costs

38. S33 of the Act entitles a reversioner to recover certain legal and valuation costs.

39. The Respondent has submitted a claim for £846 (inclusive of VAT) in respect of valuation costs incurred. This claim has been accepted by the Applicant.

40. The Respondent has submitted a claim for legal costs. The claim was for £1,473.45 (inclusive of VAT) in respect of matters covered by s33(1)(a) – (c) of the Act and details of the work said to have been carried out have been given. In addition an estimate of the costs likely to be incurred in connection with the transfer and recoverable under s33(1)(e) of the Act is put at £775.50 (inclusive of VAT) . A letter written by the Respondent was produced to the effect that the Respondent was committed to pay costs of £1,473.45 (inclusive of VAT and £775 plus VAT for the conveyancing work to the extent as they may not be recoverable from the participating tenants.

41. The Respondent's solicitor is Mr P Chevalier, a sole practitioner practising in Chessington Surrey. Mr Chevalier is very experienced in residential enfranchisement case work and he has agreed with his client (for whom evidently he carries out a good deal of property work) a rate of £220 per hour which reflects his status and experience and the nature of his practice. Evidently Mr Chevalier does not employ staff who might carry out routine work at a lower charge out rate and the Respondent recognises that all work carried out by Mr Chevalier (routine or otherwise) will be charged at £220 per hour.

42. Mr O'Keefe did not challenge the hourly rate claimed for. This was a generous concession given that the generally accepted charge out rate for a Grade A solicitor in Band One was £184 from January 2005 increasing to £195 from January 2007. Mr O'Keefe did challenge some elements of the time claimed and the extent of the work now reasonably required to effect the transfer of the freehold interest to the Applicant. He also submitted that it was unreasonable to allow a charge out rate of £220 per hour for all work carried out.

43. In his very detailed submissions on costs Mr Chevalier asserts that costs should be assessed on the indemnity principle and that the onus

of proof is on the paying party. He relied upon some previous decisions of LVTs to support his argument.

44. S33(2) of the Act provides that:

'For the purposes of subsection (1) any costs incurred by the reversioner ...in respect of professional services rendered by any person 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.'

45. The test to be applied is thus different from the test that is often applied to differentiate between standard basis costs and indemnity basis costs when costs payable within the framework of the Civil Procedure Rules 1998 are the subject of assessment.

46. We find that the onus is on the party claiming costs to show that the costs were reasonably incurred and reasonable in amount and payable within the meaning of s33 of the Act.

47. In his schedule of costs Mr Chevalier lists 9 claims, those numbered 1-8 and B. Item 6 claims time spent of 1 hour 15 minutes. We find this to be an unreasonable amount of time given the time claimed under items 1-5, that there appears to be some overlap and that Mr Chevalier is very experienced in this work and can thus complete work more quickly than a less experienced lawyer with a lower charge out rate. We thus reduce item 6 by 45 minutes.
For much the same reasons we reduce item 8 from 45 minutes to 30 minutes.
Having made these adjustments we calculate the costs payable under this head to be £1,034 plus VAT.

48. With regard to the costs of the transfer Mr Chevalier has given an estimate of 2 hours 30 minutes work. He details the work to be carried

out to include drafting a contract, deducing title, exchanging contracts, approving the transfer, preparing a completion statement and attending to completion. We see no reason why a contract is required and this matter can be concluded by going straight to transfer. The Tribunal has settled the form of the transfer in form TR1 so that no work will be required approving it. Deduction of title will not be required under this head. For these reasons we find the estimate of time at 2 hours 30 minutes to be unreasonable and excessive. We reduce it to 1 hour 30 minutes. At £220 per hour this produces £330 plus VAT. We find this is the sum payable within the meaning of s33 of the Act whether or not the Respondent is committed to paying £775 plus VAT for this work.

49. Putting the two sets of legal costs together:

£1,034.00
330.00
£1,364.00
238.70 VAT (17.5%)
£1,602.70

Which is the sum we have decided is payable by Applicant.

John Hewitt

John Hewitt
Chairman
14th February 2007