Ref LON/ENF/1610/05

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

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

Applicants:	**Mottingham Court Lease Owners Company Ltd**
Respondent:	**The Queen's Most Excellent Majesty & The Commissioners of Crown**
Re:	**Mottingham Court, Sidcup Road, London, SE9 4EF**
Application date:	**8 September 2005 by Tenant**
Hearing date:	**13 & 14 June 2006**
Appearances:	**For the Tenants:** **Mr A Radevsky** **Mr R Buckland** **Mr A Pridell** **Mr Redhead** **For the Landlord:** **Mr J Stephenson** **Mr N Thomas** **Mr P Mackintosh**

Members of the Leasehold Valuation Tribunal:

Mr I Mohabir LLB - Chairman
Mr L Jarero BSc FRICS
Mrs L Walter MA (Hons)

Date of Tribunal's decision: 22 September 2006

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/ENF/1610/05

IN THE MATTER OF MOTTINGHAM COURT, SIDCUP ROAD, LONDON, SE9 4ER

AND IN THE MATTER OF SECTION 24 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

BETWEEN:

MOTTINGHAM COURT LEASE OWNERS COMPANY LIMITED
Applicant

-and-

THE CROWN ESTATE COMISSIONERS
Respondent

THE TRIBUNAL'S DECISION

Background

1. This is an application made by the Applicant pursuant to s.24 of the Leasehold Reform, Housing and Urban Development Act 1993 (as amended) ("the Act") to collectively enfranchise. The Respondent is the freeholder and has agreed to sell the property to the participating tenants in accordance with its Parliamentary undertaking: see Hague, Leasehold Enfranchisement 4th edn. First Supplement para. 14-46.

2. On 12 February 1935, the Respondent granted a headlease for a term of 98 years from 5 January 1935 ("the headlease"). Clause 4 contains a covenant by the Lessee to keep all the buildings in repair. It is common ground that the covenant has not been complied with for many years, which has resulted in the property falling into substantial disrepair.

3. All of the 12 flats in the property are sub-let on long underleases. Between 1958 and 1960, the headlessee initially granted underleases in relation to flats 1, 3, 4 and 6 ("Type 1 leases"). In clause 2(7) of these leases the lessee covenanted to repair the demised premises. However, there is no express covenant by the lessor to repair the structure of the building and there is no service charge provision in the leases to recover the cost of such repair. The remaining 8 flats were let on periodic tenancies, where the headlessee was liable to repair the entire estate.

4. In 1983 the headlessee, then a Mr Gould, granted long underleases of the remaining 8 flats ("Type 2 leases"). Unlike the Type 1 leases, these contained at clause 3(7) a covenant by the lessor to repair the structure of the building and, the Fourth Schedule, to recover a contribution of $1/12^{th}$ of any such expenditure. Therefore, the maximum contribution the headlessee is entitled to recover for the cost of any structural repairs, as a service charge under the terms of the underleases generally is $8/12^{th}$. Save for flats 5 and 11, all of the Lessees participate in this application.

5. Prior to the hearing, both experts respectively instructed by the parties had agreed a Statement of Facts. It is not necessary to set out all of the agreed terms, as they are self-evident. It is common ground between the parties that the property was in substantial disrepair and was suffering from subsidence. This was confirmed in a survey report prepared on behalf of the Respondent by the Michael Aubrey Partnership dated 25 November 2005. In the report, the estimated provisional cost of carrying out the identified structural repairs was between £91,243 to £431,763. In the Statement of Facts it was agreed, *inter alia*, by both experts that the cost of putting the property in repair was £500,000. The substantive issue between the parties was whether the freehold should be valued under Schedule 6 of the Act on the assumption that the property was in repair or not.

Inspection

6. The Tribunal inspected the property on 13 June 2006. The property is a two storey brick built under a tiled pitched roof block of twelve self contained flats. The block is "U" shaped and each wing contains four flats with their own separate entrance and stairs. There are gardens to front and rear and there is a vehicular access to the rear with parking for vehicles.

Hearing

7. The hearing in this matter also took place on 13 June 2006. Mr Radevsky of Counsel appeared for the Applicant. Mr Thomas of Counsel appeared for the Respondent.

8. Mr Radevsky had, helpfully, provided the Tribunal with his outline opening. He said that the valuation of the freehold must be in accordance with Part II of Schedule 6 of the Act. Paragraph 3 of Schedule 6 sets out the assumptions to be made when doing so. Paragraph (1A) specifically excludes the headlessee's interest. This had to be valued separately in accordance with Part III paragraph 6 of Schedule 6. Paragraph 4(4)(b) provides that it is not to be assumed that both interests will merge. Paragraph 4(3) provides that the valuation criteria of each interest was the same. Mr Radevsky stressed that there was nothing within paragraph 3 to begin with the assumption that the property was in repair. There was nothing within Schedule 6 or the Act generally to this effect. The property had to be valued in its actual condition as at the valuation date. In addition, a purchaser would take subject to the terms of the headlease, including the repairing obligations.

9. Mr Radevsky then took the Tribunal to the provisions of Part V paragraph 14 of Schedule 6. Having valued each interest separately, if an intermediate interest had a negative valuation, then the interest which is immediately superior to the negative interest was reduced accordingly in value ultimately to nil.

10. Mr Radevsky submitted that there were three significant reasons why the intermediate value of the headlease produced a large negative amount. Firstly, despite there being no express provision in the headlease to repair the structure of the building, nevertheless, there was an implied obligation to do so: see ***Barrett v Lounova (1982) Ltd*** [1990] QB 348. Secondly, under the terms of

the Type 1 leases, in the event that the headlessee carried out any such repairs, it would not be able to recover any contribution from those Lessees. Thirdly, it was unlikely that the headlessee would be able to recover, under the terms of the Type 2 leases, the full 8/12th of the cost of carrying out the necessary repairs to the property. It was apparent that the current defects in the property had been known as long ago as 1988. Where those defects had become worse as a result of a landlord's failure to repair, the additional cost thereby incurred were not recoverable: see ***Loria v Hammer*** [1989] 2 EGLR 249. Mr Radevsky went on to say that this principle had been confirmed in the recent unreported Lands Tribunal decision in ***Continental Property Ventures Inc v White***.

11. The Applicant's surveyor, Mr Pridell, in his supplemental report dated 9 June 2006, placed a negative valuation of £451,122 for the headlesse's intermediate interest. This had been arrived at by deducting the irrecoverable service charge contribution for the cost of the repairs to the property, including future maintenance costs, and the additional cost thereby incurred as a result of the headlessee's failure to carry out the repairs. Ultimately, when deducted from the freeholder's interest of £116,993, it provided an overall negative valuation of £334,129. Nevertheless, he was prepared to place a nominal value of £50,000 for the freehold interest on the basis that he did not consider that a property had a nil value in the market.

12. Mr Pridell said that he had valued the flats in their present condition at £40,000. Had they been in full repair, they would be valued at £140,000. His

valuation was on the basis of "what a landlord would be getting". The flats would be in disrepair and there was no means of funding the necessary works. He was unable to give any evidence as to the condition of the property in 1988 but had assumed that the condition of the property had deteriorated in the interim.

13. In cross-examination, Mr Pridell did not accept the suggestion that the cracking to the external walls could have been caused by some other factor other than subsidence. He accepted that he could not comment on when the damage had occurred or the actual condition of the property in 1988. He had taken a balanced judgement on the condition of the property in 1988.

14. As to the headlessee's repairing obligations, Mr Pridell accepted that the underleases of the first floor flats required the Lessees themselves to maintain the roof. He did not comment on this in his report because the underleases were broadly similar. It was then put to Mr Pridell that clause 2(8) and (9) of the Type 1 leases may allow the headlessee to recover service charge contributions for effecting repairs to the property. Mr Pridell accepted that the clause was ambiguous but, on his construction of the clause, he did not consider that it allowed the headlessee to recover service charge contributions for effecting repairs.

15. Mr Pridell accepted that there were two ways of valuation. One could either take the value of the short lease and apply a relativity figure to it or take the value of the long lease and discount the relativity. Mr Pridell said that, in

adopting the former approach, his valuation did not give undue weight to the disrepairs. In adopting the unimproved short lease value of £40,000, he was looking to see what value a landlord would receive. Mr Pridell accepted that there were a number of mathematical errors in his report but maintained that his valuation principles were correct.

16. The Tribunal then heard evidence from the Respondent's surveyor, Mr Millinship. His initial valuation report dated 5 June 2006 valued the freehold interest at £432,662. At the hearing he provided an amended valuation of £441,624. The main reason why he had produced a positive valuation was because he had adopted the extended lease value of £140,000 with the assumption that the property was in good repair. Mr Millinship had valued the freeholder's interest as being £21,408 and the headlessee's interest as being nil for the reversion. The marriage value calculation produced a figure of £39,871. Mr Millinship then went on to value the property as a whole by multiplying those figures respectively by the number of non-participating and participating tenants.

17. In cross-examination, Mr Millinship accepted that the cost of putting the property in repair would be difficult to recover under the four Type 1 leases as the terms of the leases did not allow the cost of major structural work to be recovered as a service charge. He also conceded that his assumption, at paragraph 7.4 of his valuation report, that the headlessee would be able to recover any such costs as a service charge was incorrect. This should properly be reflected in a reduction of the value of the freehold, but he was unable to

quantify this figure. Mr Millinship also accepted that a purchaser would make a downwards adjustment of the purchase price to reflect the difficulty in recovering repair costs as a service charge under the Type 1 leases and that he had not done so in his valuation.

18. Mr Millinship explained that it was not normally his approach to value the freehold and headlesee's interest separately. He had never carried out a valuation of a freehold by applying a relativity figure to a short leasehold value. As to the deterioration caused by the headlessee's failure to effect any repairs since 1988, Mr Millinship did not accept the suggestion that this had necessarily occurred. It would depend on the circumstances. He conceded that there may have been more cracking and that would have increased the repair costs. He further conceded that the BCI Index used by Mr Pridell to quantify the additional costs was a valid way of doing so.

19. In closing, Mr Thomas submitted that clause 2(8) and (9) of the Type 1 leases did allow the headlessee to recover a service charge contribution from those underlessees. In addition, the underleases granted in relation to the maisonettes provided that the repairing obligation for the roof fell on the tenants. Clause 2(8) and (9) had to be read together with clause 3(iv). Under these terms of the leases, the major works costs would be recoverable as a service charge contribution. Mr Thomas further submitted that there was no evidence before the Tribunal for increased costs having been incurred as a result of the headlessee failing to effect repairs in 1988. Paragraph 2(ii) of Mr Pridell's valuation was, therefore, incorrect. A discount, if any, for failing to

carry out repairs in 1988 should be minimal. In closing, Mr Radevsky largely repeated the same points made by him when he opened the case for the Applicant.

Decision

20. The Tribunal firstly considered the correct approach that should be adopted when valuing the various interests in this matter. Paragraph 4(3) of Schedule 6 provides that the valuation approach is the same for both the freehold and headlesee's interests.

21. The Tribunal did not accept the submission made by Mr Radevsky, on behalf of the Applicant, that the correct approach was to value the various interests in disrepair. It did so for the following reasons. Whilst Mr Radevsky is correct in arguing that there is no expressly stated assumption within paragraph 3(1) of Schedule 6 that the property had to be valued in repair, equally there is nothing within paragraph 3(1) to say that the property should not be valued in repair. As Mr Radevsky is well aware, the assumptions set out in paragraph 3(1) are general principles and not meant to be prescriptive or exhaustive. Indeed, paragraph 3(2) expressly provides that the assumptions set out in paragraph 3(1)(a) to (d) does not preclude the making of assumptions as to other matters where those assumptions are appropriate to determine the value of the various interests. This provision was included in the Act to prevent precisely the same argument advanced by Mr Radevsky. In other words, the Tribunal is not limited to or fettered by the assumptions set out in paragraph 3(1) of Schedule 6.

22. The Tribunal considered that the correct approach to be adopted was to value the property in repair. Mr Pridell's approach to value the property in disrepair on the basis that "this was what the landlord would be getting back" was incorrect for two reasons. Firstly, he makes an incorrect assumption that, in view of the historic neglect, the property will remain in disrepair. Whilst, the Respondent has not sought, so far, to enforce the repairing covenant in clause 4 of the headlease against the Headlessee, it did not preclude the possibility of doing so, making a "no Act" world assumption. In addition, whilst the underleases of flats 1, 3, 4 and 6 contained no express covenant by the Lessor to repair the structure of the building, it is now settled law that this obligation is readily implied by the courts: see ***Barrett*** above. The Tribunal was told that the headlease has been vested in a company called Refal 82 Limited since 1984. There is no evidence before the Tribunal that this company no longer exists and that any such repairing obligation could, therefore, not be enforced against it by the lessees of flats 1, 3, 4 and 6. The issue of the irrecoverability of this expenditure as against these four lessees is a separate matter, which is dealt with below.

23. Secondly, and perhaps more importantly, Mr Pridell's valuation of the reversion amounts to double counting on the matter of the cost of £500,000 for the major repairs. By adopting the agreed short lease value of £40,000 as his starting point and then applying a relativity figure of 62%, Mr Pridell has already claimed the benefit of the value of the major repairs, as this is the value of the property in disrepair. He cannot than also seek, as he does when

valuing the headlessee's interest, to deduct yet again a third of the cost of the major repairs that he alleges cannot be recovered from the lessees of flats 1, 3, 4 and 6.

24. The Tribunal then considered the deductions claimed by Mr Pridell at paragraph 2(ii) of his report in relation to the cost of the major works, when valuing the headlessee's interest. The first deduction made by Mr Pridell was the proportion of the £500,000 cost that was irrecoverable from the lessees of flats 1, 3, 4 and 6 under the Type 1 leases. On any view, the Type 1 leases were badly drafted by omitting an express covenant by the Lessor to repair the building. Nevertheless, as stated above, it is settled law that such an obligation is implied by the courts. The Tribunal did not accept Mr Thomas' submission that clauses 2(8) and (9) and clause 3(iv) when read together provided for the Headlessee to recover any expenditure incurred in repairing and maintaining the building. At best, those clauses were ambiguous and disclosed no ***prima facie*** liability on the part of the lessees for those costs. It is a well known rule of construction that in the event of such ambiguity, the relevant provision is to be construed again the person seeking to rely on it, that is, ***contra proforentem***. Although, the Tribunal also heard evidence from Mr Millinship that communal repairs had been carried out by the headlessee between 1950-1980s and the cost of these works had been recovered from all of the underlessees by way of service charge contributions under the terms of their respective leases. The works had apparently included external repairs and redecorations. However, there was no evidence of this before the Tribunal. The Tribunal concluded, on balance, that the headlessee could not

recover any contribution from the leaseholders of flats 1, 3, 4 and 6 under the Type 1 leases for the cost of the major works. Nevertheless, the headlessee would be obliged to carry out those works. The inability to recover a proportion of these costs would prove unattractive for any prospective investor. The Tribunal, therefore, concluded this deduction was properly made by Mr Pridell. It follows from this finding that the further deduction made by Mr Pridell for the ongoing cost of maintenance for the four flats for the unexpired term of the leases that would be incurred by the headlessee was also properly made and for the same reasons set out above. Mr Pridell's figure of £500 per flat per annum was not challenged by the Respondent.

25. With regard to the further deduction made by Mr Pridell for the reduced contributions for the cost of the major works from the other 8 leaseholders, the Tribunal considered that this deduction was also properly made. It was common ground that, as long ago as 1988, the headlessee was on notice as to the existence of subsidence at the property. It was also common ground that no repairs had been effected in the interim and that the cost of effecting the necessary repairs at the present time was £500,000. The Respondent did not seriously challenge Mr Radevsky's submission that the headlessee would be unable to recover all of the cost of the work. Any additional costs incurred as a result of the landlord's default were irrecoverable: see ***Loria*** and ***Continental Property Ventures Inc*** above. The Tribunal accepted that submission. Although, there was no evidence before the Tribunal as to the actual amount of the additional cost incurred by the landlord's default, Mr Millinship accepted that Mr Pridell's methodology in quantifying the amount

by using the BCI Index was a valid way of doing so. The Tribunal, therefore, accepted Mr Pridell's figure for the deduction made by him.

26. Accordingly, for the reasons stated above, the Tribunal determines that the purchase price to be paid for the freehold interest is £214,238. The Tribunal's valuation is annexed to this Decision.

Dated the 22 day of September 2006

CHAIRMAN..... I. Mohabir .....

Mr I Mohabir LLB (Hons)

Leasehold Valuation Tribunal

VALUATION IN ACCORDANCE WITH SCHEDULE 6 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 (AS AMENDED)

Ref: LON/ENF/1610/05

Valuation of Mottingham Court, Sidcup Road, Eltham, London SE9 4ER

Valuation Date 29 March 2005
A head lease was granted from 5 January 1935 for a term of 98 years

Ground rent payable (without review)	£45 pa		
Length of outstanding lease	27.77 years		
Underleases granted on flats 1,3,4 & 6 Mottingham Ct on various dates between 1958 and 1960 for a term of 98 years less 10 days for a term of 98 years from 5 January 1935			
Length of outstanding leases	27.74 years		
Ground rent payable (without review)	£10.50 pa		
Underleases granted in 1983 on flats 2,5,7,8,9,10,11 & 12 Mottingham Ct for a term of 50 years less 1 day from 5 January 1983			
Length of outstanding leases	27.77 years		
Ground rent payable (without review)	£50 pa		
Non-participating flats	N^{os} 5 & 11		
Matters agreed between the parties			
Yield for term and reversion	7%		
Capitalisation of ground rent income:			
Headlessee's interest	£4,818		
Freeholder's interest	£546		
Value of all flats in existing condition subject to existing leases	£40,000		
Value of long leasehold/freehold of all flats in good repair (as per covenants in leases)	£140,000		
Relativity between existing lease value and virtual freehold value	62%		
Value of existing leases of all flats in good repair (as per covenants in leases)	£86,800		
Cost of structural repairs	£500,000		
Value of freeholder's interest			
Capitalised ground rent as agreed between parties		£546	
Reversion to open market value (12 x £140,000)	£1,680,000		
Present value of £1 in 27.77 years @ 7%	0.1528	£256,704	
			£257,250
Value of headlesses's interest			
Capitalised ground rent as agreed between the parties		£4,818	
Reversion of 10 days and 1 day		£0	£4,818
Deductions for disrepair and future maintenance deficits			
Proportion of cost of works non-recoverable from flats 1,3,4 & 6			-£166,666
Reduced contribution from remaining flats	(£500,000x8/12) x £235,000/£500,000		-£156,650
Deficit on future maintenance contributions			-£24,275
			-£342,773
Marriage value (participating flats only)			
Value after enfranchisement			
Freeholder's interest	£0.00		
Headlessee's interest	£0.00		
Tenant's interest (10 flats @ £140,000)	£1,400,000		
		£1,400,000	
Value before enfranchisement			
Freeholder's interest	£257,250		
Headlessee's interest	-£324,773		
Tenant's interest (10 flats @ £86,800)	£868,000		
		£800,477	
Marriage value		£599,523	
Divide equally between parties			£299,761
Enfranchisement value assuming lease covenants have been complied with			£214,238
Premium payable in accordance with Sch 6 para 6.2			**£214,238**