LIB

LON/ENF/843/03

THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S24 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Re 1 - 11 Rutherford Close, Sutton, Surrey

Applicant: Mr Malcolm James Girdler (nominee purchaser)

Respondent: Terrace Investments Limited (freeholder)

Appearances:

Mr Girdler (the nominee purchaser)

Mr Abraham Reifer (director, Terrace Investments Limited)

Mr Alan L Smith FRICS (Symon Smith, chartered surveyors) (for the freeholder)

Date of hearing and inspection: 22 and 23 June 2003 (and later written representations)

Members of the leasehold valuation tribunal:

Lady Wilson
Mrs E Flint DMS FRICS IRRV
Mr J M Deaner LLB MPhil

Date of the tribunal's decision: 1 August 2003

Background

1. 1 - 11 Rutherford Close is a three storey block of two flats and four two-storey maisonettes, Nos 1, 3, 5, 7, 9 and 11 Rutherford Close, on an estate of 54 houses, maisonettes and flats, built in the 1960s and bounded by Eaton Road, Hillcroome Road and a railway line. Each unit in the block has its own garage on a forecourt which is shared with six other garages belonging to nearby flats or maisonettes. This is an application, in which all six leaseholders participate, for the collective enfranchisement of the block, the six garages let with the maisonettes, the paths and garden for the block, and the garage forecourt and drive, but excluding the six garages on the forecourt which are let with properties on another part of the estate.

2. The leases of Nos 1, 3, 5, and 11 are for terms of 99 years from 29 September 1965, with a little over 61 years unexpired at the valuation date, which we have taken to be the date of the hearing, 22 July 2003, each at a ground rent of £15.75 per annum. The lease of No 7 is for a term of 99 years from 24 June 1997, with just under 93 years unexpired at the valuation date, at a ground rent of £100 per annum, rising by £100 every 33 years. The lease of No 9 is for a term of 99 years from 2 July 1996, with approximately 92 years unexpired at the valuation date, also at a ground rent of £100 per annum, rising by £100 every 33 years.

3. The parties had agreed that the valuation date was 12 November 2002, the date of the initial notice, but since the provisions of the Commonhold and Leasehold Reform Act 2002 relating to the valuation date in collective enfranchisement cases were not in force at the date of this application, (and, indeed, are still not in force), and since the identity of the freehold to be acquired was not agreed between the parties, we decided, and the parties accepted, that the agreed valuation date did not accord with Schedule 6 to the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") and was thus bad in law, and that it should be taken to be the date of the hearing.

4. Mr Girdler, the nominee purchaser, appeared in person. The landlord was represented by its director, Mr Reifer, and by Mr A L Smith FRICS of Symon Smith, chartered surveyors who is the landlord's managing agent of the estate . The hearing occupied one full day and we inspected the block and the estate on the following day in the presence of Mr Girdler.

5. It was agreed that the nominee purchaser should acquire the block, the paths and garden for the block (coloured green on the lease plan), and the garages let with the block (coloured orange on the plan), but not the garages let with properties on other parts of the estate (coloured yellow on the plan). It was also agreed that the extended 999 year leases with a share of the freehold each had a value of £125,000 at the valuation date, that, subject to lease length, each of the six flats and maisonettes were of equal value, and that no marriage value arose in the case of Nos 7 and 9.

6. The issues were (i) the nature of the interest to be acquired by the nominee purchaser in the garage forecourt and drive (coloured blue on the plan); (ii) whether the nominee purchaser and the leaseholders of flats in the block could be released from the obligations in their leases to leaseholders of other properties on the estate; (iii) yield; and (iv) the values of the existing leases of Nos 1, 3, 5, and 11. Costs may also be an issue but no submissions on them have yet been addressed to the tribunal.

Decision

(i) the nature of the interest to be acquired in the garage forecourt and drive

6. Mr Girdler invited the tribunal to transfer the freehold of the forecourt to the nominee purchaser, subject to appropriate rights of way being granted to the landlord and the leaseholders

of the six garages which were not being enfranchised, the rights of way being subject to the payment of a fair proportion of the cost of maintaining the forecourt and to a covenant to repair the garages retained by the freeholder. He said that this proposal was clearly set out in the initial notice under section 13 to the Act, and was accepted by the landlord in its counter-notice, and its acceptance was repeated in the Memorandum of Agreed Facts to which Mr Smith had specifically agreed on the landlord's behalf. He said that the tenants of Block 1 - 11 had always looked after the forecourt and, since their block was adjacent to it, they had the greater incentive to do so in the future. The forecourt had no intrinsic value, other than as an access way to the garages and to the maisonettes, and no development value. He maintained that once the freehold of the block had been acquired, the participating tenants' contractual links with the landlord would be at an end. He proposed that each tenant of a flat or maisonette being acquired and each tenant of one of the other six garages not being acquired should pay one twelfth of the cost of maintaining the forecourt, and he produced a written statement, signed by the tenants of the five of the six owners of the garages on the forecourt which were not being acquired, that they would be happy for the residents of the block to look after and maintain the forecourt.

7. Although the issue does not appear to have been grasped until very shortly before the hearing, at the hearing the landlord contended that it would need to retain control of the forecourt for management and maintenance reasons.

8. It appeared to the tribunal that, since the forecourt was clearly property which the qualifying tenants were entitled to use in common with the occupiers of other premises within the meaning of subsection 1(3)(b) of the Act, their right of acquisition of the freehold of the forecourt was, by subsection 1(4), to be *"taken to be satisfied ... if on the acquisition of the [block] ... , either (a) there are granted by [the landlord] - (i) over that property, or (ii) [irrelevant], such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to the property*

on the relevant date [ie the date of the notice of claim] by the qualifying tenant under the terms of his lease; or (b) ... [irrelevant]". This provision appears to mean that, provided the landlord can ensure that the qualifying tenants retain permanent rights to use the forecourt, the tribunal has no discretion to transfer its freehold to the nominee purchaser without the landlord's consent. The landlord indicated that it was willing to ensure that the qualifying tenants and their successors in title were granted permanent rights to use the forecourt. Because neither of the parties was legally represented, we offered them, and they accepted, the opportunity to obtain legal advice on this and on the issues considered at (ii) below and to submit written representations to us when they had done so.

9. Mr Girdler first wrote to the tribunal a letter dated 30 July 2003 saying that he had put a proposal to the freeholder and that he hoped that negotiation would be an acceptable alternative to the formal submissions we had directed. Mr Martin Reifer, the landlord's Office Manager, replied to Mr Girdler, by a letter dated 6 August 2003 and copied to the tribunal, that the proposals were unacceptable and that formal legal submissions should be sent as directed, for consideration by the landlord's lawyers.

10. The nominee purchaser's submissions took the form of a letter from Mr Girdler to the landlord's solicitors dated 11 August 2003 and copied to the tribunal.

11. Mr Girdler said, first, that by accepting in its counter-notice the nominee purchaser's proposals in relation to the forecourt the landlord had lost its right to rely on the provisions of section 1(2)(a) of the Act. From the date of service of the counter-notice to the date of the hearing, he said, the landlord gave no indication that it intended to take issue with the nominee purchaser concerning the transfer of the garage and forecourt.

12. Mr Girdler continued that in any event the nominee purchaser's proposals were reasonable

because:

a. Rights of access would be granted to the landlord and would enure for the benefit of the garage owners who did not live in the block.

b. The nominee purchaser would covenant to repair the forecourt.

c. The landlord had the right under the leases to demand a contribution from other garage owners towards the repair of the forecourt.

d. The nominee purchaser would enforce payment of contributions from other garages by mutually enforceability clauses in the transfer, including a proviso that the landlord's costs would be paid by the nominee purchaser on a full indemnity basis.

e. The mutual enforceability clause would contain a covenant by the landlord to enforce the other tenants' repairing covenants, subject to an indemnity for its costs.

f. The transfer should provide that the nominee purchaser and the landlord should covenant to observe the covenants in then transfer upon sale of the respective freehold interests.

g. The parties would agree to register against each freehold title a restriction preventing sale until it had been confirmed that the terms of the deed of transfer had been complied with.

13. Mr Girdler also said that section 24 of the Act gave time limits for applications to the tribunal in respect of disputed terms of acquisition, so that the landlord was out of time to dispute the terms of acquisition contained in the initial notice.

14. Finally, Mr Girdler said, the block could stand independently of the rest of the estate save for the issue about the forecourt.

15. By a letter to the tribunal dated 2 September 2003, copied to the nominee purchaser, the landlord's solicitors, D'Angibau Willmot, said that it was not correct that the landlord had until the day of the hearing accepted the nominee purchaser's proposals. The initial notice was unclear, and the Symon Smith had raised objections to the proposals in correspondence. It was not agreed that the nominee purchaser's proposals were reasonable, because it was necessary for the landlord to retain the forecourt for management purposes; and, for the same reason, it was not accepted that the block could stand independently of the rest of the estate, because of the garages owned by residents of other properties.

16. Mr Girdler responded by a letter dated 10 September 2003 which the landlord, by a letter to the tribunal dated 19 September 2003, invited us to disregard because the tribunal's direction had been for one written submission from each party. However, in the interests of a fairness, we have decided to consider Mr Girdler's further letter.

17. He said, first, that it could be assumed that the landlord agreed with the nominee purchaser on matters on which it had chosen not to comment. He said that the initial notice was clear, and its clarity was never questioned. The correspondence with Symon Smith related to a different issue because they thought that the nominee purchaser wanted to acquire the six garages owned by leaseholders of accommodation on another part of the estate. The Memorandum of Agreed Facts, prepared for the hearing, confirmed that the transfer of the forecourt was agreed. The tribunal's pre-trial directions indicated that surprise submissions on the day would not be permitted. The nominee purchaser had repeatedly sought a draft transfer before the hearing, and such a document was specifically directed to be lodged in the pre-trial directions, but it had not been produced. The nominee purchaser had made equitable proposals, and none of the six non-

participating garage owners objected to the forecourt being maintained by the nominee purchaser. The issue regarding the freehold of the forecourt had no bearing on the maintenance responsibilities in respect of the other forecourts on the estate. Any outgoing in respect of a particular garage forecourt was shared between the owners of garages on that forecourt because the nature of each forecourt was different. The leases provided for independently determined proportionate contributions rather than equal contributions. He invited the tribunal to reconvene the oral hearing to consider the issues arising from his submissions.

18. In a letter to the tribunal in response to Mr Girdler's letter, Mr Martin Reifer said that certain matters had not been commented upon because of the tribunal's comments at the time that directions for further submissions were made. The landlord did not consider a further oral hearing to be necessary.

19. We are satisfied, first, that the landlord is not, by reason of the counter-notice or by its conduct prior to the hearing, legally bound to accept the nominee purchaser's proposals relating to the forecourt contained in the initial notice. We do not read section 21, or any other part of the Act, as binding the parties to accept terms in the initial notice which are not disputed in the counter-notice. It is not infrequently the case that the parties, and particularly parties who are not legally represented, become aware, after the counter-notice, of factors which make unworkable proposals to which they have indicated that they will agree, and there is no statutory provision for amendment of the counter-notice. In our view, neither of the parties can be bound by the proposals in the initial notice until the terms of the transfer have been agreed between them or determined by the tribunal. Obviously it is desirable in the interests of fairness and case management that the parties should know before the hearing where they stand, but there may occasionally be circumstances when this is not possible, and the issues in dispute are more extensive that had previously been indicated.

20. That being our view, we consider that, in the absence of agreement between the parties, we are bound by the provisions of section 1(4)(a) of the Act to accept the freeholder's proposals to grant the nominee purchaser and the participating tenants the same rights to use the forecourt as they now have, but on a permanent basis. Indeed, Schedule 7 to the Act, and in particular paragraphs 4 and 5, appears to make the continuance of the existing rights of the participating tenants and the owners of the other garages on the forecourt a necessary term of the conveyance to the nominee purchaser. In our view that disposes of this question, and the reasonableness or otherwise of the nominee purchaser's proposals is irrelevant. The Lands Tribunal has recently reached a similar conclusion in *Lynari Properties Limited v Shortdean Place (Eastbourne) Residents Association Limited* (LRA/45; 4 August 2003).

(ii) can the nominee purchaser and the leaseholders of flats in the block be released from their obligations to leaseholders of other properties ?

21. Mr Girdler appeared to have assumed that, on enfranchisement, the tenants of properties in the block would cease to be contractually liable in any respect to the freeholder or to the other lessees on the estate, and neither the freeholder nor Mr Smith appeared to have considered the point. Again, since neither party was legally represented and because it appeared to the tribunal that Mr Girdler's assumption was likely to be wrong, we gave the parties the opportunity to seek legal advice on this point also, (with particular reference to the participating tenants' continued liability to contribute to the maintenance of common areas on other parts of the estate) and to submit written representations in due course. Neither party's further submissions really assisted us on this point, but we propose to address them in this decision so that the parties an bear our views in mind when they attempt to agree the terms of transfer.

22. By clause 2 of the leases of Nos 1, 3, 5 and 11, the tenant covenants not only with the

landlord but also with the lessees of the other flats and maisonettes on the estate to observe the restrictions in the fifth schedule. Clause 4 contains a number of covenants by the tenant with the landlord and also with the owners of the other flats and maisonettes, including a covenant at clause 4(4) to pay the amount certified to be due under Part II of the sixth schedule. Clause 5 (B) contains a covenant by the landlord to require every other lessee on the estate to covenant to perform covenants similar to those in clauses 2 and 4. The third schedule contains easements and other rights granted to the tenant which include rights to go on the reserved property as defined in the second schedule (ie the forecourts, drains, etc). The fourth schedule gives the landlord and the owners of other flats on the estate easements and rights corresponding to those granted to the tenant by the third schedule. The fifth schedule contains restrictions on the tenant, most of which are arguably for the benefit of all the lessees on the estate. Part II of the sixth schedule contains the charges of which clause 4(4) entitles the landlord to charge the tenant a proportionate amount, certified by the landlord's accountant, of repairs to the reserved property. The reserved property is defined by the first schedule to mean "All those roads drives paths forecourts and gardens and the ground forming part of the Estate and all sewers drains pipes wires ducts and conduits thereunder not used solely for the purpose of one flat maisonette or garage". The new leases of Nos 7 and 9, which have been extended outside the Act, contain mutual covenants by the landlord and the tenant to perform all the covenants in the original leases.

23. By section 34(5) of the Act, any conveyance executed for the purpose of Chapter I shall be made subject to *burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourse*. And by section 34(9), except where the parties agree otherwise, the conveyance must conform with the provisions of Schedule 7. It seems to us that the effect of Schedule 7, and, in particular, paragraphs 2, 4 and 5, is to require the inclusion in the conveyance of many of the provisions summarised in paragraph 22 above. Essentially, in our view, the conveyance to the nominee purchaser must not prejudice

the rights of other tenants on the estate, all of whom have mutually enforceable covenants which operate for the benefit of all the residents of properties on the estate.

(iii) yield

24. Mr Girdler proposed a yield of 11% for capitalisation and deferment. He relied on a report prepared two years ago by the College of Estate Management. The report analysed decisions of leasehold valuation tribunals and concluded that, for properties in Outer London, the mean average yield adopted was 11.01 %, for properties in Inner London, the average was 7.96%, and for properties in the rest of England and Wales, the average was 9.2%. The average yield for collective enfranchisements was higher than the average yield for lease extensions. Mr Girdler referred us to a decision of a leasehold valuation tribunal in which the same report of the College of Estate Management had been accepted as relevant. He agreed that yields might be lower than they were when the report was prepared, but considered that any reduction was temporary and should be ignored.

16. Mr Smith proposed a yield of 6%. He said that he considered 6% to be standard for an investment of this type in today's market, but he accepted that the tribunal might prefer to adopt a higher yield for this suburban property.

17. We have come to the conclusion that the appropriate yield is 9%. Although, historically, 11% may have been the prevailing yield for Outer London properties of this type, we are satisfied that the lower yield we have adopted is now appropriate for this type of suburban development with low ground rents.

(iv) the values of the existing leases of Flats 1,3, 5 and 11

18. Mr Girdler again based his submissions on the analysis of leasehold valuation tribunal decisions in the College of Estate Management's report. This showed a relativity between a 61 year lease and a freehold of 90.97% in all cases, of 88.29% in Inner London cases, and of 91.35% in the rest of England and Wales. (He had in fact taken the figures for 62 year leases but his acceptance of the later valuation date requires a different relativity to be considered.) Based on these figures, he proposed a relativity of 94%, which he considered to be conservative. He accepted that a lease of this length "needs to be extended".

19. Mr Smith proposed existing lease values of £100,000, equivalent to a relativity of 80%. Like Mr Girdler, he had no market evidence, but based the figure on his experience as a valuer, and on discussions with the trustees or estate agents of three other properties on the estate the leases of which had been extended by agreement.

20. Mr Reifer produced a schedule of agreements for lease extensions on the estate. In the case of five voluntary lease extensions where the tenants had not given notices under the Act, the agreed premium for new leases of 99 years, at ground rents rising from £100 to £300, was £7500. In the case of eight lease extensions where the tenants had given notices under the Act and the freeholder had not served valid counter-notices, the tenants were professionally represented by the same valuer, and the existing leases had 62/63 years unexpired, the premiums for 90 year lease extensions at a peppercorn were £7000 for each of two flats with garages, £7500 for each of five maisonettes with garages, and £8000 for one maisonette with garage. In the case of eight lease extensions where the tenants had given notices under the Act and the freeholder had served valid counter-notices, premiums for 90 year lease extensions at a peppercorn were either £8000 or £8250.

21. We have concluded that each of the existing leases had a value at the valuation date of £110,000, equivalent to a relativity to the flats with a share of the freehold of 88%. In the

market, anyone buying a lease of 61 years of this type of property will tend to look at the value of the extended lease and deduct the cost of extending the lease, which, for this type of property, will be of the order of £7000 to £8000. But that will give only the value of the flat with rights under the Act, which we are required to ignore. We therefore make a further allowance and arrive at the reduced value given above. We are aware of similar decisions on other leasehold valuation tribunal decisions relating to similar properties in suburban London, and our chosen relativity is also consistent with the settlement evidence. Moreover, having inspected one of the units internally, we are satisfied that the value we have adopted is appropriate.

Determination

22. Accordingly, and on the basis that the transfer will provide for the continued observance of the participating tenants' covenants with the other leaseholders on the estate as outlined above, we determine that the price payable for the freehold is £34,500, as set out in our valuation which is attached to this decision.

23. We will determine the terms of transfer and recoverable costs if the parties cannot agree them. It may be that a further oral hearing will be necessary.

CHAIRMAN.....

DATE.....1 March 2013.....

1 - 11 Rutherford Close Sutton Surrey **LON/ENF/843/03**

Valuation Date 22 June 2003
Extended Leasehold Value £125,000 (agreed)
Virtual Freehold Value £110,000 (88%)

		£	£	£
Nos. 1, 3, 5 & 11				
Leases for 99 years from 29 September 1965				
Present Ground Rent		63		
YP 61 years @ 9%		11.053	696.34	
Reversion				
Nos. 1, 3, 5 & 11 @ £125000 each		600,000		
PV 61 years @ 9%		0.0052	3120.00	3816.34
No. 7				
Lease for 99 years from 2 July 1996				
Present Ground Rent		100		
YP 26 years @ 9%		9.929	992.90	
Next 33 years		200		
YP 33 years @ 9%	10.4644			
PV 26 years @ 9%	0.1064	1.1134	222.68	
Next 33 years		300		
YP 33 years @ 9%	10.4644			
PV 59 years @ 9%	0.0062	0.0649	19.46	
Reversion		125,000		
PV 92 years @ 9%		0.00036	45	1,280.05
No. 9				
Lease for 99 years from 24 June 1997				
Present Ground Rent		100		
YP 27 years @ 9%		10.0266	1,002.66	
Next 33 years		200		
YP 33 years @ 9%	10.4644			
PV 27 years @ 9%	0.0976	1.0213	204.27	
Next 33 years		300		
YP 33 years @ 9%	10.4644			
PV 60 years @ 9%	0.0057	0.0596	17.89	
Reversion		125,000		
PV 93 years @ 9%		0.00033	41.25	1,266.07
Value of Landlord's existing interest				6,362.46

Marriage Value Calculation

Nos. 1, 3, 5 & 11

Virtual Freehold Value @ £125000 each		500,000.00	
Less			
Existing F/hold value	3,816.34		
Existing L/hold Value @ £110000 each	440,000.00		
		443,816	
Gain on Marriage		56,183.66	
Split 50:50			28,091.83
			34,454.29
Price for purchase of freehold			**£34,500**