RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LEASEHOLD REFORM, HOUSING & URBAN DEVELOPMENT ACT 1993: SECTION 26

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case No:	CHI/21UG/0CE/2003/0015
Property:	**91 London Road** **St Leonards-on-Sea**
Applicant:	Seven Sisters Investments Ltd
Respondent:	Mr Colin Roger Bibby
Date of Application:	2 April 2003
Hearing:	21 July 2003
Members of the Tribunal:	Mr P B Langford MA LLB (Chairman) Mr R A Wilkey FRICS FICPD Mr B H R Simms FRICS MCIArb
Date decision issued:	21 August 2003

91 LONDON ROAD, ST LEONARDS-ON-SEA

1. The Reference

This case has been referred to us, following an order by Brighton County Court dated 28 March 2003, in the following terms...

"1. The Defendant (i.e. the Landlord, Colin Roger Bibby) do transfer the freehold title to 91 London Road, St Leonards-on-Sea, East Sussex ("the Property") to Seven Sisters Investments Ltd (i.e. the Leaseholder of Flat 3 in the Property) on terms to be fixed by the Court or the Leasehold Valuation Tribunal.

2. The Defendant do pay the costs of this application. 3. The costs assessed in the sum of £1,000 to be set off against the price of the freehold".

As a result of that order, Seven Sisters Investments Ltd ("the Nominee Purchaser") has applied to this Tribunal to determine the terms of the transfer i.e. the terms of the vesting order which the Court has made under Section 26 Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") and the Nominee Purchaser has also asked that we approve the form of transfer, in accordance with Section 27(3) of the 1993 Act. Brighton County Court made the vesting order because it was satisfied that the whereabouts of Colin Roger Bibby could not be ascertained and it follows that Mr Bibby has had no notice of these proceedings.

2. Inspection

We attended at the property on 21 July 2003 and inspected it in the presence of Mr Anton Bree, the Chairman of the Nominee Purchaser Company. We saw a substantial semi-detached house, built during the second half of the 19th century, which showed cracks on all three elevations (west, south and east). Stitching of cracked brickwork on the east (rear) elevation was seen to be necessary. The most obvious problem was on the front (west) elevation, where the north to south movement of the building had resulted in intervention by the local authority leading to the installation of Acrow-props in the front bay windows of the semi-basement and ground floor flats. We did see each of the three flats in the property from inside and noted that the Acrow-props were in position. Each of the three flats provided spacious accommodation, with

Flats 1 and 2 each having a sitting room, a bedroom, kitchen and bathroom/wc. Flat 3, the maisonette, had a second bedroom and its kitchen was large enough to be a kitchen/diner.

3. The Hearing

At the hearing at Hastings Town Hall, which immediately followed the inspection, the nominee purchaser was represented by Mr Anton Bree FRICS. There was of course no representation on behalf of the Landlord.

Mr Bree had already written a number of letters to the Tribunal and, amongst the points he had made, he has said that he was a Chartered Surveyor specialising in residential block management. The owners of the Basement Flat and the Ground Floor Flat at the property had agreed to his company taking over the freehold, as there was about £60,000 to be spent on essential repairs. The bay window was collapsing and, as a result, he had been unable to let his maisonette for 18 months and the other flats had Acrow-props in their front rooms. The Leaseholders of the semi-basement flat, Mr and Mrs Near, had acquired their flat in December 1987 and were still in residence. They had intimated to him that the Landlord, Mr Bibby, had disappeared sometime in 1988. His company had been the leaseholder of the Upper Maisonette for about 3 years and, while he could not be exact, he thought that Miss Marcel had been the leaseholder of the Ground Floor Flat for much the same period. So far as he was aware, no ground rent had ever been paid to the Landlord. With regard to the structural repairs and redecorations that were required, he submitted to us a "Specification of Works" prepared by Stuart Radley Associates, who were chartered building surveyors based in Hove. He also submitted correspondence he had had with Stuart Radley Associates, which showed that tenders had been received from three contractors in respect of the specification, which ranged between £29,231.69 at the bottom end and £41,706.63 at the top end. These tenders related purely to the contractor's work and did not include any necessary supervision fees. He was still waiting to hear from his valuer with an account for his fee for the valuation and he would like this to be set off against the acquisition price. He also asked us to bear in mind that he and the other leaseholders considered the Landlord to be in breach of his repairing covenant and this had caused them damages.

4. **Nominee Purchaser's Valuation**

Mr Bree submitted to us valuation prepared by Stewart Gray FRICS of Messrs Austin Gray. This valuation had been undertaken at his request and was specifically for the purpose of the enfranchisement of the leases. Mr Gray in his report pointed out that under Schedule 6 of the 1 993 Act, the valuation had to take into account three different elements. One was the loss of the Freeholder's share of marriage value. A second was compensation for loss occasioned to the Freeholder in respect of any adjoining property owned by the Freeholder. The third element was the value of the Freeholder's present interest. So far as the first point was concerned, there was no marriage value since the leases had 83 years to run. On the second point, since the Freeholder had no adjoining property of which he was aware, the valuation would be nil. That left only the value of the Freeholder's present interest to be assessed. He noted that the total rental income was currently £90 rising in 17 years to £180, then rising again in a further 50 years to £270. In assessing the value of this stream of income, he had adopted a yield of 7.5% for the term and 8% on the reversion. On reversion, he assessed the flats are currently worth a total £210,000. He had arrived at the following valuation:-

Term 99 yrs from 29.09.1987 – 2086 – 83 yrs remaining	
Term 2003 – 2020 17 yrs	
£90 x YP/SR 17 yrs @ 7.5% (9.4340)	£ 849.06
Term 2020 – 2053 33 yrs	
£180 x YP/SR 33 yrs 7.5% (12.1074) x PV £1 def. 17 yrs 7.5% (.2924530)	£ 637.35
Term 2053 – 2086 33 yrs	
£270 x YP/SR 33 yrs 7.5% (12.1074) x PV £1 50 yrs 7.5% (.268891)	£ 87.90
Reversion to say £210,000 def 83 yrs 8% (.0016820)	£ 353.22
	£1,927.53
But say	**£1,900.00**

Mr Bree said that he though Mr Gray's valuation was very fair and he stood by it. However, under questioning from the Tribunal, he did say that he

thought that in the valuation account should be taken of the repairing liability on the Landlord.

5. Consideration

The Law

The main provisions affecting our jurisdiction in the case of a vesting order are to be found in Section 27(3) and Section 27(5) of the 1993 Act, as follows:-

(3) Where any interests are to be vested in any person or persons by virtue of a vesting order under section 26(1), then on his or their paying into court the appropriate sum in respect of each of those interests there shall be executed by such person as the court may designate a conveyance which –

(a) is in a form approved by a leasehold valuation tribunal, and

(b) contains such provisions as may be so approved for the purpose of giving effect so far as possible to the requirements of section 34 and Schedule 7;

and that conveyance shall be effective to vest in the person or persons to whom the conveyance is made the interests expressed to be conveyed, subject to and in accordance with the terms of the conveyance.

(5) The appropriate sum which in accordance with subsection (3) is to be paid into court in respect of any interest is the aggregate of –

(a) such amount as may be determined by a leasehold valuation tribunal to be the price which would be payable in respect of that interest in accordance with Schedule 6 if the interest were being acquired in pursuance of such a notice as is mentioned in subsection (1)(b); and

(b) any amounts or estimated amounts determined by such a tribunal as being, at the time of execution of the conveyance, due to the transferor from any tenants of his of premises comprised in the premises in which that interest subsists (whether due under or in respect of their leases or under or in respect of agreements collateral thereto)

6. It will be seen that this Tribunal therefore has to determine "the appropriate sum", which is to be paid into court and also to approve the form of conveyance or transfer which is to be used.

7. **"The appropriate sum"**

Under the terms of Section 27(5) of the 1993 Act, there are two elements to this. The first element is the Schedule 6 valuation of the price to be paid by the nominee purchaser. We see no reason to disagree with Mr Gray's valuation, so far as it goes. We accept the yield he adopted of 7.5% with 8% on the reversion and we accept his assessment of the current worth of the flats at £210,000. However in our view this valuation has not taken adequate account of the heavy repairing obligation which would immediately confront any person buying the freehold of these premises. We have already referred to the specification prepared by Stuart Radley & Associates and to the tenders received from building contractors. From our brief examination of the building, it appeared that there might well be jobs to be done outside the existing specification and that the figures referred to in the tenders were a conservative estimation of the amounts which a freeholder might have to spend. Even taking the lowest tender figure of £29,231.69 and adding to it an appropriate percentage in respect of supervision fees, the liability was still substantial. We have had regard to the terms of the leases, which lack any provision for payment to the landlord of interest, where service charges are for any reason not paid promptly by the contributing leaseholders. It is true that the leases do provide at Clause 3(21) for the landlord being entitled to demand on 14 days written notice the leaseholder's share of any "order costing £100 or more for any work or material". However any potential purchaser of the freehold would anticipate that with a really large demand, one or more of the leaseholders might find it difficult or impossible to comply. Indeed in the present case Mr Bree had already made the point that the leaseholders of the Basement Flat would have to pay their contribution from the proceeds of sale of their flat and they would not be in a position to sell the flat until the works had been completed. Although Mr Bree was in his particular position privy to this information, it was a situation which any prudent potential purchaser would take account of and would then set this

against his inability to recover interest for funding the cost of the building work over a period of time which was likely to last months. There was the further problem that any freeholder was likely to be engaged in a substantial period of management time, which could not be recouped under the service charge. In our view the present condition of the property, carrying with it the burden of a large repairing liability which initially would fall on the freeholder, the value of the freeholder's interest, which might otherwise amount to £1,900, would be nil. In our view a prudent purchaser would not pay anything for the freehold. Accordingly we have concluded that the appropriate valuation under Schedule 6 for the property is nil.

8. **Amounts or estimated amounts due from leaseholders to the landlord at the time of execution of the conveyance/transfer**

It was clear from the evidence provided by Mr Bree, and in particular what he had been able to glean from the leaseholders of the Basement Flat, that from the outset in 1988 no service charges had been raised by the Landlord and no demands for ground rent had been received. Mr Bree had not produced to us any receipts for ground rents and to the best of his knowledge no ground rents had been paid since 1988. Under the terms of the leases, ground rents were payable in advance on the 29th September in each year. The first payment of ground rent would have been a proportion and would in our view have been collected by the Landlord's solicitors at the time the leases were granted. The register of the freehold title showed that these three leases had come into being on 10th November 1987, 27th November 1987 and 2nd December 1987 respectively. Thus the ground rent would have been paid up to the next payment date, which would have been 29th September 1988. Therefore ground rent has not been paid for the years commencing 29th September 1988 to 29th September 2002 (inclusive) i.e. for a period of 15 years. At the current rate of £90 per annum, there is therefore due to the Landlord £1,350.

9. Clause 3(2) of the leases provides, as follows – *"If any rent properly due (whether demanded or not) or any other monetary payment due to the landlord is not paid within one month of the date on which such payment is*

due then to pay interest on such sum such interest to accrue from day to day commencing on the date when such payment is due until payment".

Clause 9 of the leases is the interpretation clause and sub-section (3) provides as follows:- *"Interest payable by the tenant to the landlord shall mean interest at five per cent (5%) above the base rate of National Westminster Bank plc from time to time or ten per cent (10%) per annum whichever shall be the greater".*

In the present case the landlord has disappeared for over 15 years without leaving any trace of his whereabouts. The Leaseholders cannot complain that they now are being forced effectively to pay the arrears of ground rent, since each of the Leaseholders would have well understood his or her responsibility and since they have had the benefit of retaining the money each year. What is however open to objection is that, through no fault of their own, they should be in a position of having to pay far more interest i.e., 5% above National Westminster Bank plc base rate, than they could have obtained for themselves on money deposited at the Bank. It is an established rule of common law that a clause in a contract in the nature of a penalty will not be enforceable. It is true that clauses are often inserted in contracts which provide for one party (e.g. a house purchaser) to pay another party (e.g. a house vendor) interest at say 3% or 4% or even 5% above some Bank's base rate if he defaults on his contractual obligations to that other party (e.g. to complete the purchase on a specified date). Such clauses are legitimate because it is within the power of the party to terminate his liability for payment of interest simply by complying with his contractual obligation. In the present case however the Leaseholders are quite unable to prevent interest accruing at this high rate of interest because they have no address to which they can send their interest payments. If the clause is not to be regarded as a penalty, then it must be subject to an implied term as follows:- *".....provided always that no interest shall accrue if the Landlord has failed to disclose his address to the tenant*". In our view this clause is to be implied. The Landlord is in breach of that implied term and no interest can therefore be claimed or is due to the Landlord.

10. We have also considered whether the calculation of outstanding ground rent is affected by the operation of the Limitation Acts. The limitation period for a

debt arising from a deed e.g., ground rent, is 12 years. Our calculations are carried out over a period of 15 years. However the effect of the Limitation Acts is not to make money which is contractually due from one party to another not due. It is to make such money irrecoverable by action through the Courts. If, as in this case, a landlord has no need to take action through the Courts to obtain the money, then the statutory bar is of no effect. Thus ground rent is payable for the full 15 year period.

11. **The form of transfer**

Mr Bree's solicitors, Osler Donegan Taylor, have submitted a form of transfer for our approval, which is attached at Appendix 1. The only point we take on that transfer is that at Clause 10 the transferor transfers with full title guarantee. We have had regard to Schedule 7 of the 1993 Act, which applies to the conveyance to a nominee purchaser on enfranchisement. Paragraph 2(2) provides that the freeholder shall not be bound ".....(b) to enter into any covenant for title beyond those implied under Part 1 of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee".

That being the case, we consider that a conveyance to a nominee purchaser must be expressed to show that the freeholder transfers with limited title guarantee.

12. **Miscellaneous**

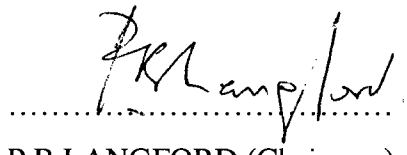
Mr Bree suggested in argument before us that he was entitled to set off his valuer's fees against the price for the freehold. In our view there is no statutory authority for this. Secondly, Mr Bree suggested that in some way his (and the other lessees) loss for the Landlord's breach of the repairing covenant should provide some further set off. We certainly have no authority to determine an action for breach of covenant and no such action has yet been brought in the Courts. There is no scope for us to make a further set off.

13. **Decision**

For the reasons we have given, we have determined that:-

A. The appropriate sum to be paid into Court shall be £1,350. (We have noted that Brighton County Court has made an order that there shall be a set off of £1,000 against that sum).

B. The form of transfer annexed at Appendix 1 is approved, subject only to the substitution of "limited title guarantee" for the words "full title guarantee" in Clause 10 of the transfer.



P B LANGFORD (Chairman)

Transfer of whole Of registered title(s)

HM Land Registry

APPENDIX 1

TR1

1. Stamp Duty

Place "X" in the box that applies and complete the space in the appropriate certificate

[ ] I/We certify that this instrument falls within category [ ] in the Schedule to the Stamp Duty (Exempt Instruments) Regulations 1987

[X] It is certified that the transaction effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £60,000.00

2. Title Number(s) of the Property HT18196

3. Property 91 LONDON ROAD, ST LEONARDS ON SEA, EAST SUSSEX

4. Date

5. Transferor COLIN ROGER BIBBY

6. Transferee **for entry on the register** *(Give full names and Company's Registered Number if any: for Scottish Co.Reg.Nos. use an SC Prefix. For foreign companies give territory in which incorporated)*

SEVEN SISTERS INVESTMENTS LIMITED (REGISTRATION NO. 3202888)

Unless otherwise arranged with the Land Registry headquarters, a certified copy of the Transferee's constitution (in English or Welsh) will be required if it is a body corporate but is not a company registered in England or Wales or Scotland under the Companies Acts

7. Transferee's intended **address(es) for service in the U.K.** *(including postcode)* **for entry on the register**

PO BOX 2842, EASTBOURNE, EAST SUSSEX BN21 4HN

8. The Transferor transfers the property to the Transferee.

9.Consideration *(Place "X" in the box which applies. State clearly the currency unit if other than sterling. If none applies, insert an appropriate memorandum in the additional provisions panel)*

[X] The Transferor has received from the Transferee for the property the sum of

[ ] The Transfer is not for money or anything which has a monetary value.

10. The Transferor transfers with *(place "X" in the box which applies and add any modifications)*

[X] full title guarantee [ ] limited title guarantee

11. Declaration of trust *(where there is more than one transferee place "X" against which applies)*

[ ] The transferees are to hold the property on trust for themselves as joint tenants

[ ] The transferees are to hold the property on trust for themselves as tenants in common in equal shares

[ ] The transferees are to hold the property on trust for themselves as tenants in common in the shares set out in the attached Declaration of Trust

12. Additional Provision(s)Insert here any required or permitted statement, certificate or application and any agreed covenants, declarations etc.

This Transfer is executed for the purposes of Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act (1993)

13. The Transferor and all other necessary parties should execute this transfer as a deed using the space below. *Forms of execution are given in Schedule 3 to the Land Registration Rules 1925. If the transfer contains transferees' covenants or declarations or contains an application by them (e.g. for a restriction), it must also be executed by the Transferees.*

Signed as a Deed by the said)
COLIN ROGER BIBBY)
In the Presence of :-

Signed as a Deed by the said)
SEVEN SISTERS INVESTMENTS LIMITED)
Acting by 2 Directors or by one)
Director and its Secretary :-)

)..... DIRECTOR

..... DIRECTOR/SECRETARY