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Ref LON/00AC/OLR/2007/0381

**LEASEHOLD VALUATION TRIBUNAL
FOR LONDON RENT ASSESSMENT PANEL**

DETERMINATION

RE

**APPLICATION UNDER SECTION 91 OF THE LEASEHOLD REFORM,
HOUSING AND URBAN DEVELOPMENT ACT 1993**

Premises: Flat 1, St Edwards Court, Finchley Road, Golders Green,
London W2 2LZ

Applicant: Acestar Consultants Ltd [Intermediate Landlord]

Represented by: Mr N Berlinger of Hanover West Asset Management Ltd

Respondent: Trustee of Westminster Roman Catholic Diocese [Landlord]

Represented by: Mr Paul Clarke of Counsel with Miss Jennifer Ellis FRICS
also Mr A Georgiou observing

Hearing: Tuesday 15 January 2008

Members of Tribunal:

Professor J T Farrand QC LLD FCI Arb Solicitor

[Chairman]

Mr F W J James FRICS

Mr P J Korn

1. Following a notice of claim and an originating application by the Tenants of the Premises, Mr and Mrs R Hanouka, for a new/extended lease under ss.42 and 48 of the 1993 Act, all proceedings were conducted by the Respondent Landlord on behalf of itself and the Intermediate Landlord, the present Applicant, in accordance with s.40 of the 1993 Act. No notice of intention to be separately represented was ever given by the Intermediate Landlord under para.7 of Sched.11 to the 1993 Act. Those proceedings were settled by agreement between the Tenants and the Landlord in particular that the sum of £40,750 was payable by the Tenants for the grant of a new lease. This agreed sum included both the premium payable to the Landlord and the amount payable to the Intermediate Landlord under s.56 and Sched.13 of the 1993 Act but did not specify any apportionment or amounts.

2. The Landlord proposed paying an amount of £1,394 as an appropriate apportionment but this was not accepted by the Intermediate Landlord which therefore applied to the Tribunal to determine the matter. However, the Landlord challenged the Tribunal's jurisdiction, in effect, to reconsider the agreed settlement.

3. The Tenants were in principle and practice not concerned with or parties to this application by the Intermediate Landlord.

4. At a Preliminary Hearing, dated 19 December 2007, a differently constituted Tribunal decided that, despite the provision making the agreement between the Landlord and the Tenants binding on the Intermediate Landlord (see para.6(1)(b) of Sched.11 to the 1993 Act), there was jurisdiction "to determine what proportion of the purchase price of £40,750 should be paid to [the Intermediate Landlord]". Although that Tribunal referred only to this as being a matter needing to be determined under Sched.13 to the 1993 Act and so within s.91(2)(b) the present Tribunal respectfully considers that the position may have been rendered even clearer by the provision that there is jurisdiction to determine "the apportionment between two or more persons of any amount (whether of costs or otherwise) payable by virtue of any [provision in Chapter II]" (see s.91(2)(e)). Nevertheless, the present Tribunal would also observe that had the agreement between the Landlord and the Tenants expressly specified, as with hindsight it plainly should have, the amount actually payable to the Intermediate Landlord, this would have been binding and therefore not open to (re)determination by a Tribunal.

5. In support of the amount of £1,394 previously proffered, Mr Clarke for the Landlord relied on a Valuation Report, dated 26 September 2007, submitted by Miss Ellis who also gave explanatory oral evidence at the Hearing. The crucial element in her calculations related the diminution of value of the Intermediate Landlord's interest because of the grant of a new lease to the Tenants at a peppercorn rent instead of an annual rent of £36. The annual rent treated as payable to the Landlord in respect of the Premises is £33 so that the Intermediate Landlord's profit rent was £3. She confirmed that, in the light of recent LVT decisions and notwithstanding pending appeals, the simple, not to say simplistic, approach had been adopted of valuing the rent lost rather than any otherwise preferred approach of considering negative market values and reverse premiums. The simple approach had been adopted by her for the negotiations leading to agreement by the Tenants but at different rates and was now included in the assessment attached to her Report by taking 52.66 years purchase @ 4.317% to produce the higher sum of £744. To this was added £650 as an equivalent share of the marriage value to

arrive at the total proportion of £1,394.

6. Mr Berlinger for the Intermediate Landlord had written a letter, dated 30 October 2007, with a Valuation attached which showed a Lease Extension Price of £41,279 a total amount payable to the Intermediate Landlord of £8,522. He had achieved this by, first, adopting a different but still simple approach to the diminution in value of the Intermediate Landlord's interest by (i) calculating the lost profit rent at £62; (ii) multiplying the net rent lost of £33 times the unexpired term of 52.68 years as equalling £1,738; and (iii) totalling these sums at £1,800. To this total he then added (i) £1,459 as an increased share of marriage value; (ii) £3,500 as an investor's reverse premium; and (iii) £1,763 as professional fees including VAT.

7. In his letter, Mr Berlinger explained the difference in his approach from that adopted by Ms Ellis as follows:

"We are not in agreement with the First Respondents valuation JE1 Section B Diminution in value of Headlessee's Interest. The valuation has not taken into account the fact that after the lease extension there will be a liability to pay £33 for 52.68 years which equates to -£1,738. In the marketplace an investor would be looking for a solid guarantee that he will have the funds to pay the £33 for the next 52.68 years as well as a reverse premium for taking on a headlease for 52.68 years with potential liabilities. Accordingly, he will require the full amount of £1,738 (£33 x 52.68 years) up front plus a premium of £3,500 which along with the relatively low interest rate that these small amounts of money attract, is his profit for taking on board a known and potentially unknown liability with the administration that might ensue for the next 52.68 years."

8. At the Hearing, Mr Berlinger asserted that his valuation was not designed to affect the agreed sum of £40,750 which had to be apportioned but that his slightly higher sum of £41,279 meant that there would have to be pro rata adjustments affecting figures with which he was otherwise in agreement. He also contended that Ms Ellis had been wrong as a valuer to adopt an approach other than her preferred one because of other LVT decisions. However, he also conceded that he had no market or other valuation evidence to support his approach.

9. The basis for Mr Berlinger's approach, although not stated by him, must be derived from the language of Sched.13 to the 1993 Act: para.8 about valuing intermediate interests cross-refers to para.3 about valuing a landlord's interest where there is reference to the amount which an interest might be expected to realise if sold in the open market by a willing seller. His approach would mean that an intermediate landlord deprived of an annual rent apportioned to one of several flats at £36 payable over 52 years and totalling just over £1,800, instead of having his real loss valued at a discounted sum (Miss Ellis suggested that £850 invested at 3½% would be ample) and being compensated accordingly, should receive the windfall payment of the total sum plus an imaginary reverse premium of £3,500 at the expense ordinarily of the tenant extending his lease. The intermediate interest itself in one only of a number of flats included in the intermediate lease would, in practice, probably be unsalable but even a willing seller ought to be supposed to act rationally and assumed, in effect, to try to sell his intermediate interest to the freeholder by paying a sum to commute future payments of

rent in preference to giving away sums substantially in excess of his real liability.

10. The previous LVT decisions cited by Ms Ellis rejected the approach favoured by Mr Berlinger as contrary to common-sense to absurdly and liable to lead to unfair results. They were able to do so by applying the one relevant decision of the Lands Tribunal: *Visible Packaged Systems Ltd v Squarepoint (London) Ltd* [LRA/37/1998] – 16 February 2000. This decision is plainly incompatible with Mr Berlinger's approach. Thus the Member (P R Francis FRICS) stated (at para.19):

“In the present case – as no doubt in many others – the intermediate leaseholder's interest is a single lease for a number of flats, of which number 22 is but one, as pointed out in Mr. Shepherd's evidence. It is this interest that has to be valued, and not a notional lease of number 22 alone. The diminution in the value of this interest is in my judgment properly to be measured on a before and after basis (as set out in para 7(1)(a) and (b) of [Sched.13 to] the 1993 Act), taking into account the gross rental of the premises.”

He then determined the premium payable in accordance with a valuation in which the diminution in value of the intermediate leasehold interest was ascertained simply by capitalising the ground rent payable before the new/extended lease (para.27 and Appendix 2).

11. In the opinion of the present Tribunal, pending the outcome of forthcoming appeals, this approach was properly and sensibly adopted and applied by Miss Ellis in her Valuation Report. The Tribunal also considered that she had dutifully undertaken the apportionment exercise required following the Preliminary Hearing whereas Mr Berlinger had, as objected by Mr Clarke, endeavoured to persuade the Tribunal to re-open the agreement reached between the Landlord and the Tenants.

12. It should also be stated that the Tribunal rejects Mr Berlinger's inclusion of a sum for professional fees in his calculation of the diminution in value of the Intermediate Landlord's interest. This is not an element included in the Sched.13 valuation provisions. It is possible for the Intermediate Landlord to seek to recover reasonable costs incurred in connection with the new lease from the Tenants under s.60 of the 1993 Act. However, those costs would have to be substantiated and cannot be treated as part of the apportionment of the sum paid by the Tenants for the new lease.

13. Accordingly, the Tribunal determines that the amount of £1,394 does represent the correct proportion payable to the Intermediate Landlord by the Landlord out of the agreed premium or price of £40,750.

14. At the conclusion of the Hearing, Mr Clarke applied for a costs order against the Intermediate Landlord to be made by the Tribunal under para.10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. Such an order may be made for costs, capped at £500, to be paid by a party to proceedings to another party where the first party has “in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.”

15. Mr Clarke did not suggest that anyone had behaved so extremely on behalf of the Intermediate Landlord that they could be regarded as having acted frivolously, vexatiously, abusively or disruptively but he submitted that there had been unreasonable

actions. In substance, he contended that it had been unreasonable for the Intermediate Landlord not to have given a notice so as to be separately represented which would have avoided two additional hearings with consequent costs.

16. However, the Tribunal does not consider that the failure to give such a notice could justifiably be treated as acting unreasonably within the contemplation of para.10 of Sched.12 to the 2002 Act, given the otherwise extreme context within which the word is used. Further, the Tribunal would observe that the Intermediate Landlord was entitled to expect the Landlord to conduct the proceedings to a final conclusion whereas, in fact, the proceedings concluded with an agreement with the Tenants which failed to specify the amount payable to the Intermediate Landlord under s.56(2) of the 1993 Act. It appears to the Tribunal that it was essentially this failure coupled with an unsuccessful challenge by the Landlord to the Tribunal's jurisdiction which caused there to be two additional hearings and wasted costs.

17. Accordingly, the Tribunal declines to make the costs order sought.

Julian Forward

CHAIRMAN

17 January 2008