

2786



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : LON/00BE/OCE/2013/0057

Property : New British Wharf, Clink Street,
London SE1 9DG

Applicant : NB and Clinks Wharfs Freehold
Limited

Representative : Mr Sefton counsel instructed by

Respondent : Coles Holdings Limited

Representative : Mr Tanney counsel, instructed by

Type of Application : Determination of the terms of
acquisition in collective
enfranchisement

Tribunal Members : Judge Tagliavini
H C Bowers BSc(Econ) MSc MRICS

Date and venue of PTR : 10 Alfred Place, London WC1E 7LR

Date of Decision : 22 January 2014

DECISION

Decisions of the tribunal

- (1) The Tribunal determines that a purchaser is required to pay £1 per flat and the agreed £1500 for the basement area totalling £1504 for the basement area.

The application

1. The Applicant seeks a determination pursuant to s.24 of the Leasehold Reform Housing & Urban Development Act 1993 for a determination of:

“...the amount which at the relevant date [the freehold] interest might be expected to realise if sold on the open market...”

The hearing

2. The Applicant was represented by Mr Mark Sefton, counsel at the hearing and the Respondent was represented by Mr Tanney, counsel.
3. The Tribunal was provided with two large level arch files of agreed documents, a Respondent's supplementary bundle and numerous legal authorities.

The background

4. The property which is the subject of this application is a block of four flats in which each of the four participating flats/tenants have a 999 year term at a peppercorn rent. The issue between the parties is what price premium is to be paid and whether the Respondent Freeholder is able to take advantage of a “ransom” position, which has come about through the grant of Deeds of Variation over the years.
5. Specifically, this issue concerns the lease of the ground floor flat purchased by the current owners in 2001 at a time when it was apparently being used for residential purposes only. However, it is asserted by the Respondent that the user covenant requires this ground floor flat to be used both as commercial premises (art gallery) and as residential property jointly. Permissions for solely residential use has not been granted, and therefore there is marriage value to be realised in respect of this property in the sum of £174,504 in accordance with the valuation of Mr William Lee FRICS, on behalf of the Respondent.
6. The Applicant contends that the premium payable for this flat, like the others if £1 plus £1500 as the agreed sum for the basement totalling

£1504 in accordance with the valuation of Mr David Radford, BSC Est Man.

7. The parties have agreed all other terms (*page 50 of the second agreed bundle*) in relation to the collective enfranchisement except for the purchase price in respect of this flat.
8. Neither party requested an inspection and the tribunal did not consider that one was necessary although it was assisted by various plans and photographs produced by the parties

The issues

9. At the start of the hearing the parties identified the relevant issues for determination as follows and were helped considerably by the skeleton arguments produced by counsel;
 - (i) What is the purchase price payable for the collective enfranchisement of the subject property in accordance with the provisions of Schedule 6 of the 1993 Act?

The Applicant's submissions

- (i) Is the Respondent entitled to the "ransom" sought i.e. a proportion of the amount by which it is said the value of the lease would be increased by a variation of the user covenant, or is it excluded by the operation of Schedule 6 of the 1993 Act?
- (ii) Are there any reasonable grounds on which the Respondent could rely to refuse consent to residential use?
- (iii) The "ransom" position does in any event amount to a "right to litigate" for which no investor would be willing to pay.

The Respondent's submissions

- (iv) The Tribunal should address and resolve the conflict in the Deed, by construing it. The Tribunal should find that the Deed gives to the Respondent a legal right to restrain the fully residential use of the premises, and to enforce their use as a gallery with a 1-bed flat to the rear.

- (v) Alternatively, as at the valuation date, the legal effect of the Deed was unclear, and therefore the Respondent is afforded an opportunity to make money by agreeing to sort the matter out. This should be reflected in the valuation.

The Tribunal's findings and reasons

10. Having heard extensive oral evidence and submissions from the parties and considered all of the documents provided and been taken through various legal authorities, the tribunal has made the following determinations:
 - (i) The Tribunal finds that planning permission was granted for a one bedroom flat and art gallery in 1994 and no further applications for planning permission were made. However, the Tribunal finds that by the time of the execution of the two Deeds of Variation, the Respondent believed that fully residential use was no longer a planning issue
 - (ii) Nothing was said or done by the parties or any other person to make the parties believe otherwise.
 - (iii) By the execution of the first Deed of Variation dated 23 February 2001, the Respondent intended to consent to alterations converting the premises into solely residential use, but apparently also intending to retain power to seek an "uplift" if permission for a change of use was sought.
 - (iv) Although the intention of the second Deed of Variation was to delete various provisions in the lease relating to shop use, vary the lease for residential use only and allow the alterations to the property, which made the flat a residential property, the actual wording of the second Deed of Variation dated 27 March 2001 did not put into effect those apparent intentions and did not unequivocally allow the use of the flat for residential purposes only. The Tribunal notes that at this time the Respondent could have achieved a premium for the change of use but did not do so.
 - (v) The Tribunal determines that from the time of the second Deed of Variation, the parties proceeded on the basis that the flat was to be used for residential purposes only.

- (vi) The lease date 10th April 1995 made between Inspek Limited and Joseph Coles was varied by two Deeds of Variation dated 23rd February 2001 and 27th March 2001 made between Coles Holdings Plc and Mr Iregui, the flat was sold with effect from 24th April 2001 by the then lessee Mr R A Iregui to Mr W and Mrs J Marshall for £1,065,000.00.
- (vii) The Tribunal finds that at the date of the execution of the second Deed of Variation, the flat was used for residential purposes only and had been for some years previously. The Respondent did not object to this manner of use and no proceedings were instigated because of this. The Tribunal finds that the Respondent intended through the lease and the Deeds of Variation for the flat to be used solely as a residential property, having approved the alterations making it into a 2-bed flat and finds that the correspondence entered into at this time reflects that position.
- (viii) At the time of the current owners' purchase of the flat in 2001 it was represented and used by Mr Iregui as a residential flat only as described in the Building Survey Report dated 13/02/2001 as commissioned by Mr and Mrs Marshall.
- (ix) The Tribunal prefers the arguments submitted on behalf of the Applicant to those of the Respondent. The Tribunal accepts the Applicant's contention that the parties cannot have intended on the one hand to both grant permission for alterations converting the flat for residential use solely and at the same time forbid it. The Tribunal finds that the subsequent actions of the Respondent, as borne out in the correspondence entered into around this time, do not bear this out
- (x) However, the Tribunal determines that until such time as there is a declaration sought and obtained to the effect of the terms of the lease or a further Deed of Variation made, there remains a risk of litigation the outcome of which cannot be predicted. Consequently, the Tribunal accepts that there remains an apparent tension and conflict between the intention of the parties and the wording of the Deeds of Variation. The Tribunal, therefore determines this application as one of valuation.

- (xi) The tribunal is bound to follow the decision* of the Upper Tribunal, in that the demand for a “ransom” is not excluded by the marriage value provisions in para 4.2. of Sch.6 to the 1993Act; *Money v Cadogan Holdings Ltd* [2013] UKUT 211 (LC).

**Currently being considered by the Court of Appeal*

- (xii) The Tribunal accepts the Applicant’s submissions on this point and determines that at the highest, a purchaser would be buying the right to litigate against a user of the flat who uses it for residential purposes only. The Tribunal accepts the Applicant’s submissions that this would present as an unattractive risk and put off potential purchasers. Accordingly it is the opinion of the Tribunal that no bid would be made by a potential purchaser and no value was attributed to this aspect other than the sum proposed by the Applicant.
- (xiii) Further, the Tribunal does not accept Mr Lee’s valuation as he has mistakenly proceeded on the basis that the current tenants are participating purchasers saying in his evidence to the Tribunal, “*I have envisaged the sale of the freehold to the participating tenants*”. This scenario is expressly excluded by the legislation; Schedule 6 of the 1993 Act applies.
- (xiv) Therefore the Tribunal accepts the Applicant’s submissions on this point and that of Mr Radford. The Tribunal finds that at the highest a purchaser is buying a “right to litigate” with all the uncertainties that brings and determines therefore, that the premium payable is £1 for which of the four flats and £1,500 as the agreed value of a storage area in the basement providing a total premium of £1504.

Cases cited:

Kutchukian v Keppers and Governors of John Lyon School [2013] 1 WLR 2842

Money v Cadogan holdings Ltd [2013] UKUT 0211 (LC)

Stocport Metropolitan Borough Council v Alwiyah Developments (1983) 52 P&CR 278 (CA)

ICS v West Bromwich BS [1998] 1 WLR 896

Kirin-Amdgen Inc v Hoechst Marion Roussel Ltd [2004] UKHL 46

Name: Judge Tagliavini

Date: _____2014