FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/OOKG/OCE/2019/003 & 004**
Property	:	**Flats 1 – 6 and 7 – 12 The Finches, 46 Ashburnham Road, Bedford MK40 1JX**
Applicants	:	**The Finches (Bedford) A Limited and The Finches (Ashburnham) B Limited**
Representative	:	**Sharmans Solicitors and Mr T J Palmer BSc (Hons) MRICS of McNeill Lowe and Palmer Chartered Surveyors**
Respondent	:	**Mrs Simone Ann Myer**
Representative	:	**Mr J Levy BSc (Hons) MRICS of BMCS Chartered Surveyors and in respect of the costs application Mr S Serota of Wallace LLP**
Type of Application	:	**Application under section 24(1) of the Leasehold Reform Housing and Urban Development Act 1993 and sections 33(1) and section 91 of the Leasehold Reform Housing and Urban Development Act 1993**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs M Hardman FRICS IRRV (Hons)** **Miss M Krisko BSc (Est Man) FRICS**
Date and venue of Hearing	:	**Bedford Swan Hotel, Bedford MK40 1RW on 23rd April 2019**
Date of Decision	:	**3rd May 2019**

DECISION

DECISION

1. **The Tribunal determines that the price to be paid for the freehold of Flats 1 – 6 The Finches, Ashburnham Road, Bedford is £40,341. The price to be paid for the freehold of Flats 7 – 12 The Finches, Ashburnham Road, Bedford is £42,224. The price to be paid for the appurtenant land is £600.**
2. **In respect of the costs the Tribunal determines that the sum of £3,064.48, inclusive of VAT is payable by the Applicants in respect of the costs of the Respondent. There appears to be no dispute as to the fees of Mr Levy.**

BACKGROUND

1. On 8th January 2019 an application was made on behalf of the nominee purchasers The Finches (Bedford) A Limited and the Finches (Ashburnham) B Limited in respect of the collective enfranchisement of the Flats at 1 – 6 The Finches, Ashburnham Road, Bedford MK 40 1JX and Flats 7 – 12 The Finches of the same address.

2. On 18th May 2018 notices under the section 13 of the Leasehold Reform Housing and Urban Development Act 1993 (the Act) were sent by the nominee purchasers to the Respondent, Simone Ann Myer at her address in Russell House and Powell Close, Edgware. These suggested that in respect of Flats 1 – 6 Ashburnham Road the price for the freehold should be £28,000 with a sum of £300 in respect of appurtenant land. Details of the participating qualifying tenants are set out in that application and also those who are not participating. In respect of Flats 7 – 12 the proposed price payable was £34,500 again with an additional sum of £300 for the appurtenant property. Again, details of participating and non-participating tenants were included.

3. On 19th July 2018 Wallace LLP, on behalf of Mrs Myer, served counter notices under section 21 of the Act admitting the nominee purchasers' rights to acquire the freehold of both blocks and suggesting in respect of Flats 1 – 6 The Finches that a price payable was £104,220 with appurtenant land valued at £5,000. In respect of Flats 7 – 12 The Finches the price suggested was £116,950 with an additional sum of £5,000 for appurtenant land.

4. This substantial difference in values lead to the application being made to us, which became before us on 23rd April 2019.

5. In the bundle of papers produced for the hearing we had a report from Mr T J Palmer from McNeill Lowe and Palmer dated 8th April 2019 and two reports from Mr Levy, the second however being the effective one which was dated 9th April 2019.

6. The parties' valuers had done an excellent job of agreeing most of the valuation matters. It was agreed that the only issue that we were required to determine was the development value in respect of the creation of flats at the top floor level in the roof of the two blocks. We will return to that in a moment. However, we can confirm that the parties have agreed that the enfranchisement price for the

freehold in respect of Flats 1 – 6 is £40,341 and in respect of Flats 7 – 12 £42,224. It is agreed also that the appurtenant land is valued at £600. It is noted that the figures recorded on the Counter Notices are far removed from the values agreed between Mr Palmer and Mr Levy.

7. The difference in this case rests with the potential to develop the roof space in both blocks.

8. In addition to the reports we were provided with copies of the freehold and leasehold title, a draft lease, the section 13 and the section 21 notices.

9. In this case we have also been asked to consider the costs of the Respondent and those are set out on a statement of costs at pages 17 and 18 of the bundle and the Applicants' points of dispute set out at pages 19 to 21 which have been addressed by the Respondent's solicitors Wallace LLP. We will deal with the question of costs as a separate issue after we have considered the price to be paid for the freehold of these two blocks of flats.

INSPECTION

10. We inspected the exterior of both blocks. They are three storey, one at the end of a terrace (7 – 12) and the other a free standing block (1 – 6) sitting at the front by the entrance to the development. We internally inspected the common parts of Flats 1 – 6 and noted at the top that there was a large landing as well as a large roof light providing light to the stairwell. We were told that the common parts to blocks housing 7 – 12 were the same.

11. The development is a mix of private and housing authority accommodation. It sits in close proximity to the railway line to the rear and is we suspect a development built somewhere around the late 1980s.

12. It appears that each flat has one allocated car parking space and there are a further six visitors' car parking spaces. The communal area is unprepossessing and at the time of our inspection there was some dumped furniture and other detritus close to the bin area.

HEARING

13. At the hearing Mr Palmer represented the Applicants and Mr Levy the Respondent. As we have indicated, the only issue for us to determine is whether or not there is any development value in either of these blocks. Mr Palmer's position, simply put, is that there is no development value as in his view the sale value to be achieved for a two-bedroom flat situated in the roof spaces of each block would only give rise to a value for both in the region of £265,000 compared to his anticipated costs of undertaking the work of £333,900. Accordingly on his view the value of the roof space was a negative.

14. We noted all that he said in his report concerning the issue. He also raised a question as to whether or not there was some claim for adverse possession by the owners of Flats 5, 6, 11 and 12. The best he could say was that he had been advised that the leaseholder of Flat 11 that they have used them for storage

purposes, there being a loft hatch within the demise of each of the flats. However, there is no direct evidence on this basis and the comment was made by Mr Levy that a leaseholder is not in a position to acquire any form of adverse possession.

15. In contrast Mr Levy took a far more positive approach to the relative values. He reminded us of the case of Francia Properties Limited v St James House Freehold Limited reference [2018]UKUT79(LC). A copy of the report was provided to us at the hearing.

16. His view was that the gross development value for the works would be based on each flat valued at £210,000 giving a combined figure of £420,000. He had achieved this figure by taking the average of the adjusted long lease top floor flat sales at 159 Crowe Road and 29 Henley Road. Details of these properties were included within the papers before us. He told us that he had chosen these flats and adjusted the values to take an average because the price per square metre was slightly lower than the comparable sale of a flat on a lower floor and which was in his view reflective of the circumstances. He concluded that the average square meterage price was £2,735.50. We will return to that matter.

17. He then assessed the various costs associated with the development which in his view came to a total of £320,134, not greatly different from the figures suggested by Mr Palmer. Applying a risk of 50% he came to the conclusion that the development value for 1 – 6 The Finches was £24,966 and the same for 7 – 12 The Finches.

18. In answers to questions Mr Palmer was of the view that the compensation payable to the tenants would be quite high as there were serious health and safety issues for those living immediately below the proposed works. He did, however, say that no lessees were owner occupiers. In respect of the planning issues, he accepted that the refusal for planning which was dated 1st October 2018 arose from a planning application made on 3rd July 2018 after the valuation date. Applying the principles of the Francia case it would appear that this refusal for planning should not interfere to any great extent with our decision making on the value to be attributed to any further development.

19. Mr Palmer pointed out that the flats to be created would have no parking and having attempted to measure from the plans that had been produced, the ceiling height, he was concerned that this would not be as suggested on the drawing at 2.3m but something below that. His view was based on the plans attached to Mr Levy's second report. He concluded that the floor area would be in the region of 45.25m² with some 19m² under a head height of 1.5m. The unusual design with the sloping roof, lack of lift and lack of parking meant in his view that the demand for flats of this nature would be very low.

20. He did tell us that he had looked at the wider market in Bedford to see what flats were selling at £210,000 but did not come to the hearing with any comparable details which he had produced to the other side nor to the Tribunal in advance. When asked by Mr Levy whether he accepted that the plans he was looking at were for planning only and not for building works, he agreed. On the question of parking, he confirmed that station parking would be available. He was also of the

view that the values having been agreed for the Flats 1 – 6 and 7 – 12 that was a indicative of the value of the two new flats.

21. Mr Levy spoke to his report and did ask whether or not we would be prepared to accept a statement from Mr Harjinder Juttla MRICS MCIOB MFPWS a Chartered Building Surveyor with BMCS Chartered Surveyors. This report had apparently been produced to the Applicants but they had refused to accept it as it was, in their view, an expert's report for which permission had not been sought.

22. Mr Serota who was sitting in the hearing, suggested that this was merely a statement of fact and was not an expert's report.

23. We considered the report and whether or not it should be admitted. Within the report is a paragraph headed Statement of Fact and in that it says the following:

"My appointment as the named expert surveyor to provide services in accordance with these terms of engagement (the instructions), is subject to the RICS Practice Statement and Guidance Note: Surveyors Acting as Expert Witnesses (effective from January 2009) copies attached at appendix 1."

The report then goes on to set out his work experience and provides opinion, based on his past experience in dealing with planning applications, that he believed that planning inspectorate would consider the appeal positively. At the end of his report he says as follows: *"In preparing this statement of fact I can confirm that the facts are true and that the opinions I have expressed are my own and correct. This submission has been prepared pursuant to the provisions of civil procedures rules 1999. This statement complies with the requirements of the Royal Institute of Chartered Surveyors as set down in Surveyors Acting as Expert Witnesses: A Practice Statement. I understand that my duties to the Court/Tribunal and I believe that I have complied with that duty."*

Having considered the report we are firmly of the view that this is not just a statement of fact. It is a statement of fact and opinion and it is put forward as expert opinion. We therefore reject any submission being made that this is merely a factual statement given by a witness. As no consent was sought from the Tribunal to introduce a further expert's report we must reject it.

24. That having been dealt with Mr Levy also addressed the point that had been raised about him acting as an expert when one of his co-directors was the husband of the Respondent. He confirmed in his report that he had no personal interest in the properties and was of the firm belief that his independence and impartiality in providing expert evidence to the Tribunal was unaffected.

25. We will comment on this matter in due course.

26. He took us to the second set of plans which were now accompanying a fresh planning application. These were different to the original ones and in his view, gave a GIA measurement excluding areas under 1.5m^2 of 77m^2. For those under 1.5m^2 he concluded that this was 10.25m^2 giving a gross area for the new flats of 87.2m^2. Taking the average size of four comparables that he produced, at 4 Philip Larkin House, 169 Crowe Road, 12 The Finches and 27 Crowe Road, he

came to the conclusion that this gave a square metre figure of £2,735.50 from which he adduced the value for these flats at £210,000 each. He was asked questions by Mr Palmer about the drawings but confirmed that these were for planning purposes only and that he was not qualified as a building surveyor and could not therefore address any issues that might arise if the floors had to be lifted higher than was anticipated. He did say that Mr Juttla had measured the areas on site but of course his report was not to be before us.

27. He was asked about the lack of any engineering reports but did not consider it was necessary for that to be undertaken and did point out that he had offered to jointly measure the flats with Mr Palmer but such an offer had been refused.

28. He was asked by the Tribunal to consider the measurements of the flat below which appeared to have an agreed area of approximately 43m² each giving a maximum footprint of 86m² with no area under 1.5m in size. This contrasted with Mr Levy's view that the gross area of the flats was 87.2m². He did, however, accept that the top floor measurements might be slightly high.

29. He was also asked whether he had given any consideration as to the market for flats that may be purchased in Bedford for £210,000. He indicated that he had carried out some research but had not included it in his report. He told us that he did not find any that would support his evidence.

30. Asked about the calculations in respect of the costs works, he was questioned about compensation assessed at £7,000 but was unable to assist in a number of regards as he indicated these were beyond his area of expertise. Asked again by the Tribunal about the square footage usage he indicated that there was no requirement nor evidence to show that a larger flat would achieve a lower square meterage value.

THE LAW

31. In considering this matter we have taken into account the provisions of section 32 and schedule 6 of the Act but of course in this case the only matter that we need to consider is any development value that might be appropriate.

FINDINGS

32. We have considered all that was said in the reports and said to us in evidence. We are very grateful to Mr Palmer and Mr Levy for narrowing the issues to the extent that they have leaving us only with the question of development value to consider.

33. We noted that both valuers were close to each other in respect of the costs of works but neither appear to have included VAT as part those liabilities. Accordingly, assuming VAT to be payable, Mr Levy's costs of £320,134 have to be increased by another £64,027. This makes the total development cost £384,161.

34. We should also say that it seemed to us that his compensation of £7,000 purely for disruption to the car park seemed far too low. It is not clear how many car parking spaces might be utilised but it could be six or more and those persons

would need to park elsewhere. Parking at the station would be an expensive exercise. This also gives no compensation to the owners of the flats on the second floor who will be directly affected by the works particularly if there is to be removal of the roof.

35. However, the main area where we found Mr Levy's evidence uncompelling, was his assessment of the resale value of these two flats. He had taken a somewhat simplistic view of applying average square meterage rates to flats at 159 Crowe Road and 29 Henley Road and those at paragraph 26 above, and then applying the resultant value to what he considered to be the floor area of the two flats. That floor area, however, in our view must be wrong. His assessment was that the usable area, that is to say above 1.5m in height, was 77m^2. If one then added the area under 1.5m^2, which is calculated to be a further 10.2m^2 you reach an area over 87m^2. However, we cannot see that that is correct when one considers the drawings upon which he relied and the fact that the flats below each have an agreed size of circa 43m^2. These plans were attached to the second planning application and show a void area to the front, which is not insubstantial and could well be around 1.5m in depth running the whole width of the building. On a fairly rough and ready basis it seems to us that allowing for the reduced head height there would be, taking measurements from the plans that were produced, a floor area of only around 65m^2 with perhaps a further 9m^2 below 1.5. This would be consistent with the size of the flats on the floor below.

36. Of the comparables, the only flat this size was 27 Crowe Road which gave rise to a square metreage figure of £2,394.

37. We are not, however, convinced the valuing of flats of this nature in Bedford would be on a square meterage basis. In the Property itself the experts have agreed values for two-bedroom flats on a long lease basis of £132,500. We struggle, therefore, to see how Mr Levy can suggest that the flats at the top of the Property, without parking and affected ceiling height to the front, although new, would achieve figures so much higher at £210,000.

38. Although we have indicated that in Bedford we are doubtful that flats of this nature would be assessed on their square meterage basis nonetheless if we look at, for example, the 27 Crowe Road comparable of 66m^2 this was on the second floor and achieved a value of £158,000. Unfortunately, neither valuer was able to give any indication to us in a form that we could accept, showing the type of flat in Bedford that one might acquire for £210,000. We are satisfied, however, having considered the gross internal area of the proposed flats, the drawbacks and the value attributed to the other flats in the building that £210,000 per flat is just not realistic. Doing the best we can, we have concluded that a figure of perhaps something in the region of £160,000 might be appropriate giving a combined development value in the region of £320,000. That barely breaks even on Mr Levy's assessment of the costs of these works, without taking into account the omission of VAT and our view that the compensation payable is too low.

39. Accordingly, our finding is that it is not economic to consider the development of the two flats in the roof space of these buildings. We are not satisfied that it generates anything like the level of profit that Mr Levy suggests and in those

circumstances, therefore, we attribute no value to the potential development of these two blocks.

40. We therefore find that the price payable for Flats 1 – 6 is £40,341 and for Flats 7 – 12 £42,224 each block has an appurtenant land value of £300 giving a total additional sum of £600.

COSTS

41. We now turn to the question of costs which we have also been asked to determine and in this regard, have reviewed the schedule of costs prepared by Wallace LLP and the points of dispute.

42. Mr Serota gave some evidence in respect of the costs incurred. Mr Palmer was not instructed to deal with this element and nobody from the Applicants attended.

43. Mr Serota was asked by us whether he represented Mrs Myer on a regular basis and confirmed this is the only matter where he had acted for her, although he had carried out works for her husband's company in respect of its role as managing agent of other properties.

44. On the question of notices served under the Act, we were told that notices had been issued earlier but had not been pursued and he considered it appropriate to recover the costs for considering these ineffective notices as well as the ones upon which the application was based.

45. In respect of the anticipated costs of 12 hours he was critical of the directions issued by the Tribunal, which he felt were different to those in London where the costs assessment would take place after the matter had been concluded. His view was that a contract would be required as the question of service charges would need to be reviewed. It was pointed out there appeared to be a small typographical error in the transfer set out in the rider where reference to 'Second Transferor' appears.

46. The issues raised by the Applicants are set out in the points of dispute. They are essentially as follows:

    1. That the charge out rates for Wallace LLP is too high and that the Respondent should reasonably have used a local solicitor at a much lower hourly rate of £267 plus VAT. The response to this is contained in the points of dispute and it is not necessary for us to repeat same.
    2. There are then challenges to some of the time that has been spent alleging it to be excessive. We have dealt with those by completing the Tribunal element of the points of dispute and we hope that will clarify the issues for the parties.

47. There are, however, perhaps two matters that we should specifically deal with in this decision, the first being the charging rates and the second the need for a contract and thus the anticipated time.

48. We noted from Mr Serota's evidence that he had not acted for Mrs Myer before. The provisions of section 33 of the Act contained at section 33(2) contain the following wording: *"For the purposes of sub-section(1) any costs incurred by the reversioner or other relevant landlord in respect of professional services rendered by any person should only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs."* Putting aside the 'masculinity' of that clause this is clearly relevant to us given that Mrs Myer has never used Wallace LLP before.

49. We remind ourselves that this is a relatively straightforward collective enfranchisement case. The sums involved, as have been set out in our decision, are not great. The total costs that Wallace LLP seek to recover are profit costs of £9,627 plus VAT and minimal disbursements. The total bill comes to £11,574 and includes 12 hours of anticipated costs in finalising the transaction.

50. Although reference is made in the points of dispute to a somewhat elderly First Tier Tribunal (LVT) decision, we are clearly not bound by that. The charging rates for Mr Serota reflect both the fact that this is a central London firm of solicitors and the acknowledged expertise of Mr Serota in matters relating to enfranchisement claims. His hourly rate is £595 until 1st August 2018 when it rises to £625. It is noted that in respect of the anticipated costs the rate has dropped to £385 presumably being dealt with by a lower grade of fee earner although it is not wholly clear from the statement of costs as it still refers to a partner at grade A.

51. Our finding therefore in respect of the hourly rate is that it is excessive. We know that Mrs Myer does not use Wallace LLP as a matter of course, indeed, never before it would seem. We consider that if Mrs Myer, had she been expecting to incur the costs herself she would have in all likelihood chosen a local solicitor who would have charged substantially less than Mr Serota's firm. The Applicants suggest an hourly rate of £267 per hour.

52. The solicitors guideline hourly rates published by the Government show a grade 1 London solicitor at £409 and decreasing, although it is accepted that these were fixed in 2010. The London grade 3 gives charging between £229 and £267 per hour. It is this figure that has been put forward by the Applicants' solicitors. Bedford would appear to fall within national grade 2 where the hourly rate is £201.

53. We accept the point made by Mr Serota that these rates are somewhat historic. They do not reflect the real world. However, it does seem to us that Mrs Myer, had she been expecting to incur the costs herself, would have considered utilising the services of a local solicitor who was specialist in this type of work where we would anticipate the hourly costs would be substantially less than that put forward by Wallace LLP. We consider it unreasonable in the light of this transaction and the solicitor/ client relationship, or rather lack of it, for her to use Wallace LLP at the rates being sought.

54. London grade 2 which is Central London has an hourly rate of £317 for a grade A fee earner. Although we have no direct evidence, our knowledge and experience would suggest that something around this rate would be reasonable for a Grade A solicitor in Bedford and its surrounds. Doing the best we can we find that an hourly rate of £317 reflects a reasonable level of fee to be incurred by somebody in Mrs Myer's position utilising a solicitor for the first time and taking into account that she may be required to be personally liable for the costs involved. We have throughout applied this hourly rate of £317 plus VAT. We see need no need to uplift this as Wallace LLP did.

55. We have dealt with the other specifics within the points of dispute and the only other matters that we should perhaps comment upon is the need for a contract and the anticipated time. It seems to us, as was suggested by Wallace LLP in the response, that the need for a contract is correct and would be the norm in the question of collective enfranchisement particularly where there are issues that may need to be resolved, such as service charges. We accept, therefore, that time would be spent on that element.

56. In respect of the anticipated costs we cannot help but feel these have been lifted to an extent to reflect Mr Serota's view that it would be more appropriate to submit claims for costs under the Act once the transaction had concluded. that the directions from the Eastern panel are somewhat lacking. We find it difficult to accept that drafting what would be fairly straightforward contracts and a transfer, this is already approved, would take 12 hours. In addition, also, some of that time would surely be used by a lower grade of fee earner. We will propose to reduce the anticipated costs to five hours but will leave that at the rate of £317. This gives a total costs liability for the Applicant of £2,536.00 plus VAT of £507.20 and the disbursements listed on the statement of costs of £18 plus VAT of £3.60.

Andrew Dutton

Judge: _____

A A Dutton

Date: 3rd May 2019

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with

the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.