FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	:	**LON/00BK/OCE/2021/0158** **LON/OOAY/OC9/2021/0178**
HMCTS code	:	**V: VIDEO**
Property	:	**Corben Mews, 46-48 Clyston St, London SW8 4TA**
Applicant	:	**Corben Mews Freehold Limited**
Representative	:	**Gregsons solicitors**
Respondent	:	**Assethold Limited**
Representative	:	**Scott Cohen solicitors**
Type of application	:	**Application to determine a premium under Section 24 and costs under Section 33 of Leasehold Reform Housing and Urban Development Act 1993**
Tribunal members	:	**Judge Pittaway** **Mrs S Redmond MRICS**
Date of hearing	:	**29 March 2022**
Date of decision	:	**7 April 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the tribunal at the hearing were;

1. The bundle of documents (195 pages)
2. The applicants' skeleton argument (4 pages)
3. The respondent's opening submissions (9 pages)
4. A procedural chronology prepared by the respondent.

Ms Adam of Gregsons represented the applicants at the hearing and Mr Loveday of counsel represented the respondent.

Ms Scott of Scott Cohen, Mr Barden of Flat 12, Mr and Mrs Mehta of Flat 2 also attended the hearing. Mr Mubarak of Click Above Corben Mews Limited ('**Click**') joined part of the hearing by telephone.

There was no evidence from the respondent before the tribunal. The bundle before the tribunal did not contain expert valuation reports from either party.

Summary of the tribunal's decision

1. In the absence of expert valuation reports from the parties the Tribunal is not in a position to determine the amount of the premium. It notes that the parties have agreed that the premium for Flats 1 to 14 and car spaces 1 & 2 is £198,262 but that no value has yet been agreed for the premises demised by the lease dated 9 February 2018 made between[Reydene Limited (1) Click (2) (the **Airspace Lease'**).

2. The Tribunal finds that a hypothetical purchaser would interpret the Airspace Lease as contemplating the grant of two residential leases of Flats 17 and 18 (the '**Outstanding Leases')** for terms similar to those upon which the existing residential leases of Flats 1 to 14 have been granted, namely for a term of 99 or 125 years at an initial ground rent of £350 subject to review.

3. The tribunal expect that the parties should now be in a position to agree the premium payable to the freeholder but should they not be in a position they may re-apply to the tribunal to determine the same. If they do so any such application must be accompanied by expert valuation reports from each party.

4. For the avoidance of doubt the Tribunal confirms that it has no power to determine the actual form of the Outstanding Leases. This is a matter for the respondent and Click Above Corben Mews Limited.

5. The Tribunal determines that the respondent's valuers fees are £3,300 plus VAT and that no fees are payable to the managing agents.

6. The reasons for the Tribunal's decisions are given below.

The Applications

7. Corben Mews Freehold Limited, as nominee purchaser of 13 of the 16 lessees, applied pursuant to section 24(1) Leasehold Reform Housing and Urban Development Act 1993 ("**the 1993 Act**") for a determination of the premium to be paid by it for the collective enfranchisement of the freehold of Corben Mews, 46-48 Clyston St, London SW8 4TA (the **"Property"**) and for determination of other terms of acquisition.

8. By a notice of claim dated 12 May 2021, served pursuant to Section 24 of the Act, Corben Mews Freehold Limited exercised its right to acquire the freehold of the Property and proposed to pay a premium of £185,500 for the freehold of that part of Corben Mews shaded blue on the plan attached to the notice (the '**specified premises**') and £500 for the area shaded red on the accompanying plan (being the access, courtyard and car parking spaces) (the '**additional freehold'**).

9. On 12 July 2021 the respondent freeholder served a counter-notice admitting the validity of the claim and counter-proposing a premium of £250,000 for the specified premises and £2,500 for the additional freehold.

10. On 14 September 2021 the applicant applied to the tribunal for a determination of the premium and other terms of acquisition.

11. On 14 September 2021 he applicant also applied for a determination of the respondent's reasonable costs payable under section 33(1) of the Act.

The issues

Matters agreed

12. The Statement of Agreed facts in the bundle before the tribunal set out that the following was agreed.

(i)	Valuation date:	12 May 2020
(ii)	Premium for flats 1 to 14 and car spaces 1 & 2:	£198,262
(iii)	Deferment rate:	5%
(iv)	Capitalisation rate:	6%

13. At the hearing the tribunal were advised that the form of the TR1 transfer was agreed.

14. Insofar as costs under s33(1) of the Act were concerned the legal costs of £2,315 plus VAT are agreed

Matters not agreed

15. The premium payable for Flats 17 and 18 and associated car spaces 3 and 4. The Statement of Agreed Facts states that it is agreed that the freehold vacant possession value (unimproved) of these is £1,300,000.

16. The costs payable to the respondent's valuer and to the respondent's managing agents.

The hearing

17. The hearing took place on 29 March 2022. The Tribunal heard evidence from Mr Mubarak of Click and submissions from Mr Loveday and Ms Adam.

18. Ms Adam referred the tribunal to the failure by the respondent to comply with the directions issued by the tribunal. Mr Loveday submitted that while the directions might contemplate debarring the respondent from taking part in the proceedings the tribunal had not done so.

19. The tribunal did not consider that the respondent had been disbarred from participating in the proceedings.

20. Neither party asked the tribunal to inspect the property and the tribunal did not consider it necessary to carry out a physical inspection to make its determination.

21. Ms Adam referred the tribunal to the decisions in *Kutchukian v John Lyon Free Grammar School* [2013] 1WLR 2842 (**'*Kutchukian*'**)and *The Earl of Cadogan v 2 Herbert Crescent Freehold Limited* [2009] WL 1403609

22. Mr Loveday referred the tribunal to the decision in *Columbia House Properties (no.3) Ltd v Imperial Hall Freehold Ltd [2015] UKUT 0045 (LC) (**'Columbia'**)* in relation to the management fees claimed by the respondent.

Background

23. The property is laid out as two blocks, originally containing 14 flats on a ground and three upper floors. In 2019 Click added a further floor with two penthouses. The bundle contained a schedule which set out the terms of the various leases at the property. Twelve of the original flats are held on leases granted for terms of 99 years from either 24 June 2012 or 24 June 2015. Two of the other tour original leases are car park

spaces held on leases granted for 125 years from 24 May 2019 at a peppercorn. Flat 2 is held for a term of 125 years from 24 June 2015. Flat 3 is held for a term of 125 years from 26 February 2016. The Airspace Lease was granted for a term of 999 years from 9 February 2018. The ground rent reserved by all of the leases of the original flats, with the exception of Flat 3, is £350 p.a. rising to £700 p.a. on 25 June 2037, £1,400 on 25 June 2062 and £2,800 from 25 June 2087 for the remainder of the respective terms. Flat 3 pays a fixed ground rent of £250 p.a.

24. Clause 8.4 of the Airspace Lease provides for the grant of a 'New Flat Lease' in respect of each of the New Flats which the Airspace Lease contemplates being built by Click. Schedule 9 of the Airspace Lease provides for the surrender back to the freeholder of the structural parts of the Property demised by the Airspace Lease, followed by two further surrenders (at a peppercorn if demanded) of the relevant parts of its demise contemporaneously with the grant of each of the New Flat Leases.

25. 'New Flat Lease' is defined at clause 1.1 of the Airspace Lease as follows;

    'a lease of a New Flat which is substantially in the same form as the leases of the Other Flats which have been granted at the date of this Lease and which…….

    f) provides for the payment of a ground rent which shall be a sum specified by the Landlord (acting reasonably) but shall not be more than a sum that's greater than the ground rent sums in the Other Leases (acting reasonably);……

    and which are otherwise in a form which has been approved by the Landlord (such approval not to be unreasonably withheld or delayed).

26. "Other Flats' are defined in clause 1.1 as 'the flats in the Building which do not form part of the Property.' "Property' is the premises demised by the Airspace Lease.

Evidence and submissions

<u>Basis of valuation</u>

27. The bundle before the tribunal contained a witness statement by Mr Mubarak. He is a director of Click Above Limited, the parent company of Click and was duly authorised to make the statement on Click's behalf. In his witness statement Mr Mubarak stated that Click had built the two penthouse flats, completing them in late 2019 but that the New Flat leases contemplated by the Airspace Lease had not yet been granted because Click was unable to agree the terms of the same with the respondent. Click is seeking leases with terms of 999 years granted a peppercorn rent. Mr Mubarak stated that the respondent was only prepared to grant leases for much shorter terms at ground rents 'which return significant value to the freehold.' He also stated that the respondent was seeking the payment of very high service charge amounts before the grant of the leases.

28. Mr Loveday submitted that evidence in respect of matters arising after the valuation date of 12 May 2020 were irrelevant to the Act valuation. He therefore did not cross examine Mr Mubarak. He also submitted that this made irrelevant Ms Adam's reference to a hypothetical purchaser being influenced by the Leasehold Reform (Ground Rent) Act 2022.

29. For the applicant Ms Adam submitted that Mr Mubarak's evidence was relevant as the dispute between Click and the respondent had been ongoing since before the valuation date, and was alive at the valuation date. In her submission the due diligence of any hypothetical purchaser would reveal this dispute and it might affect its valuation.

30. Ms Adam also submitted that a hypothetical purchaser at the valuation date might have in mind the Leasehold Reform (Ground Rent) Act 2022 limiting the amount of ground rent that a leaseholder may be charged.

31. Mr Loveday submitted that the premises are to be valued as they stand on the valuation date. At the valuation date only the Airspace Lease existed. It is not correct that the valuation cannot be concluded until the form of the New Flat Leases is settled. The relevant position is that which existed at the valuation date. Referring to *Kutchukian* Mr Loveday submitted that the valuer has to know what it is that he is asked to value. Paragraph 37 of that decision states that the valuation must proceed by taking a view as to what the legal position is, not by treating it as uncertain and allowing a discount to reflect that uncertainty.

32. In Mr Loveday's submission on the valuation date the hypothetical purchaser would anticipate the grant of the New Flat Leases pursuant to the terms of the Airspace Lease. In his submission such leases would be granted for terms of 99 years at initial ground rents of £350 p.a. raising in the same way as the rents in all the other flats at the Property, with the exception of Flat 3. Mr Loveday submitted that the requirement that the landlord act reasonably in approving the form of the 'New Flat Leases' related to terms other than those set out in sub-paragraphs a) to h) of the definition, which he submitted set out mandatory terms for inclusion in the New Flat Leases. Sub-paragraph f) entitles the landlord to fix a ground rent (acting reasonably) which is not to be more than the ground rent sums in the Other Leases and Mr Loveday submitted that this is what the respondent is doing in seeking to reserve a ground of £350 reviewed in the same way as the other leases. Mr Loveday submitted that the landlord's approval which might not be unreasonably withheld, contemplated at the end of the definition, did not relate to the mandatory clauses, only any other lease terms.

33. Mr Loveday submitted that the fact that the surveyors had agreed a deferment rate suggested that there was some further valuation required, that this was a value to be attributed to the likely form of the New Flat Leases.

34. Ms Adam submitted that paragraphs a) to h) were directed to the orderly management of the Property and in ensuring that the New Flats pay a proportionate share of the service charge. In her submission the requirement that the freeholder should not unreasonably withhold or delay its approval of the lease terms applies equally to these paragraphs. Ms Adam referred the tribunal to Click's statement that it was not prepared to give the freeholder any reversionary value.

Costs

35. Ms Adam referred the tribunal to the absence of a response from the respondent to its statement of case, notwithstanding the directions. Ms Adams invited the tribunal to deal with the issue of costs subsequently on paper. Mr Loveday submitted that it was possible to deal with them at the hearing.

36. The tribunal determined that it was in a position to determine the s33 costs at the hearing on the basis of the information before it and the submissions that it invited the parties to make at the hearing.

37. Mr Loveday submitted that the respondent's valuer's fees were reasonable. The respondent was entitled to instruct an experienced valuer given the complexity of the case. He drew the tribunal's attention to the difference in fees being only £300.

38. Ms Adam submitted that the respondent's valuation fee was unreasonable because it was more than that charged by her valuer, which was £3000 plus VAT.

39. The bundle before the tribunal included a statement of case from the respondents including two 'pro forma' invoices dated 6 January 2022 from the respondent's managing agents Eagerstates Limited one for £300 plus VAT and one for £1000 plus VAT. The statement of case states that the first invoice is administration costs for an aborted section 13 notice, the second administration costs for assistance with the section 13 Notice and 'handover'.

40. Mr Loveday referred the tribunal to the decision in *Columbia* as authority for the proposition that the respondent was entitled to charge fees incurred by Eagerstates Limited

41. Ms Adam submitted that the requirements of *Columbia* were not met in the invoices submitted by the respondent. In her submission the invoices were prepared for the purposes of the solicitor's breakdown of costs incurred, and they do not provide the information directed by the Directions of 9 December, namely, 'a schedule of costs claimed sufficient for a summary assessment'. The invoices do not clarify what work was undertaken by the managing agents. They refer to

'administration'. The point taken on the first notice was a legal one which did not require input from managing agents. The second invoice refers to 'admin' without clarifying what subsection of section 33(1) the managing agent seeks to recover these costs under. The narrative on this invoice also refers to costs incurred in connection with 'handover' and these are not recoverable.

Reasons for the tribunal's determination

Basis of valuation

42. The tribunal is mindful of the decision in *Kutchukian* which requires the valuation to proceed taking a view as to what the legal position is.

43. The tribunal agree with Mr Loveday's submission that it is the form of the Airspace Lease that a hypothetical purchaser would consider at the valuation date. Such a purchaser would be reviewing the likely terms on which the New Flats Leases will be granted. The tribunal prefers Mr Loveday's interpretation of the form any New Flat Lease should take to that of Ms Adam. A New Flat Lease is to be substantially in the same form as the leases of the Other Flats, it must contain the provisions contemplated by sub-paragraphs a) to h) and that otherwise its form is to be approved by the Landlord acting reasonably. By reason of the inclusion of the word 'otherwise' in the definition the tribunal agrees with Mr Loveday that the landlord's approval (not to be unreasonably withheld) relates to any terms other than those set out in sub-paragraphs a) to h). The tribunal agrees with Mr Loveday that such interpretation allows the landlord to contemplate a ground rent starting at £350 p.a. and rising to £2,800 from 25 June 2087. The tribunal does not agree with Ms Adam that clause a) to h) are only there for the orderly management of the Property.

44. While Mr Loveday submitted that a term of 99 years would be the appropriate term length for the New Flat Leases the tribunal notes that the more recently granted leases of the Other Flats are for terms of 125 years.

45. The tribunal accept Ms Adam's submission that the hypothetical purchaser might have regard to the fact that at the valuation date there was a dispute between the respondent and Click as to the length of the lease and the ground rent payable and any hypothetical purchaser might factor that into its valuation. It also accepts that while the Leasehold Reform (Ground Rent) Act 2022 post-dates the valuation date the possibility of some constraint on the level of ground rent in

future leases that was being discussed by then might affect the hypothetical purchaser's valuation.

46. The tribunal note that neither party complied with the direction that required the exchange of expert reports at least three weeks before the hearing date. In the absence of such reports it is unable to determine the premium payable for the collective enfranchisement.

47. The Tribunal concur with the statement in Mr Loveday's submissions that the tribunal has no power to determine what New Flat Leases should be granted to Click and that this is a matter between Click and the respondent.

Costs

48. The tribunal finds the difference in the fees charged by the respective surveyors is not significant given the fees charged by each (£3000 plus VAT and £3300 plus VAT respectively). The tribunal accepts that the respondent may choose which valuer it appoints and finds the difference between the two fees is not so significant as to make the fees of the respondent's valuer unreasonable.

49. In light of the decision in *Columbia t*he tribunal accepts that a respondent can recover the fees of its managing agent, provided that they relate to the matters set out in subsections 33(1)(a) to (e) of the Act.

50. There is insufficient evidence before the tribunal for it to determine that the respondent's managing agent's fees have been incurred under any of the subsections of section 33(1) or that they are reasonable in this case. The respondent was invited by the directions of 9 December 2021 to provide a schedule of costs identifying the basis of charging, and time spent if the costs are assessed by reference to hourly rates. The respondent did not do this in relation to these costs. The tribunal is also concerned that the invoices have been produced as pro formas which does not suggest that they were prepared with reference to the work, if any, actually undertaken by Eagerstates in this case.

51. The tribunal therefore determines that the costs have not been incurred under section 33(1) of the Act. Even if costs were incurred by the managing agents it has not been demonstrated to the tribunal that these were reasonable.

52. The fees of Eagerstates are therefore not recoverable.

Name: Judge Pittaway **Date:** 7 April 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for 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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).