FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**MM/LON/00AW/OCE/2023/0010**
HMCTS Code	**:**	**V: CVPREMOTE**
Property	**:**	**6 Embankment Gardens, London SW3 4LJ**
Applicant	**:**	**6 Embankment Gardens Freehold Limited**
Representative	**:**	**Mr Piers Harrison (counsel) instructed by Bishop & Sewell LLP**
Respondent	**:**	**Dr Borut Samastur (1) Ms Irena Ferme (2)**
Representative	**:**	**Ms Ferme**
Type of application	**:**	**Paragraph 3(1) of Schedule 5 to the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal member	**:**	**Judge Jeremy Donegan**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**31 July 2023**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing. The applicant produced a hearing bundle of 473 pages, the contents of which I have noted.

Decision of the Tribunal

The Tribunal determines that the appropriate sum to be paid into court pursuant to Paragraph 3(1) of Schedule 5 to the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act') is £210 (Two Hundred and Ten Pounds).

The background and procedural history

1. This application arises from a long running enfranchisement claim for 6 Embankment Gardens, London SW3 4LJ ('the Property'). The applicant company is the nominee purchaser of the headlease and freehold. The members of this company are underlessees of flats at the Property. The respondents are the headlessees of the Property. At the time the enfranchisement claim commenced, the freeholders of the Property were the Commissioners of the Royal Hospital Chelsea. The applicant has completed the freehold purchase but not the headlease purchase.

2. On 18 November 2022, Deputy District Judge Smyth made a vesting order ('the Vesting Order') under section 24(4)(a) of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'). The effect of the order is the headlease will vest in the applicant upon their solicitor executing the form of transfer deed approved by the court and upon the applicant paying into court "*the appropriate sum*" under Paragraph 3 of Schedule 5 to the 1993 Act. Paragraph 3(1) is recited below:

   In the case of any vesting order, the appropriate sum which in accordance with paragraph 2(1) is to be paid into court in respect of any interest is the aggregate of—

(a) such amount as is fixed by the relevant terms of acquisition as the price which is payable in accordance with Schedule 6 in respect of that interest; and

(b) any amounts or estimated amounts determined by the appropriate 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).

3. The First-tier Tribunal ('F-tT') determined the terms of acquisition on the enfranchisement claim in a decision dated 05 April 2021. The total premium was determined as £16,187, with the respondents' share (for the headlease) being £10. They have tried to appeal that decision, without success. They have also submitted an appellant's notice in respect of the Vesting Order but, as at 17 July 2023, had not obtained permission to appeal that order.

4. On 16 January 2023 the applicant applied to the Tribunal for a determination of the appropriate sum. Panel four of the application form gave an address in Wembley for both respondents. It also included an email address for the second respondent, Ms Ferme. Initially the Tribunal used this email address for all correspondence with the respondents.

5. I gave directions at a video case management hearing ('VCMH') on 14 February 2023, attended solely by the applicant's solicitor (Mr Stephen Charnock). I directed the parties to file and serve statements of case addressing the appropriate sum and listed the application for a paper determination in the week commencing 20 March 2023.

6. Ms Ferme raised various issues in a statement of response dated 27 February 2023, including:

   (a) the Tribunal application had not been served on the first respondent, Dr Samastur, who lives in Slovenia,

   (b) the personal data of the first and second respondents is incorrect,

   (c) she was not notified of the VCMH on 14 February 2023, and

   (d) she has filed an appellant's notice in respect of the Vesting Order.

7. In a statement in reply dated 10 March 2023, the applicant pointed out:

   (a) The F-tT decision dated 15 April 2021 (determining the premium for the headlease) is final,

   (b) as far as it is aware, the court has not granted permission to appeal the Vesting Order, and

   (c) the Vesting Order is not subject to any stay.

8. I gave further directions in a letter dated 29 March 2023, including listing the application for another VCMH on 09 May 2023. These were sent to Ms Ferme by email and Dr Samastur by post (in Slovenia). Paragraph 1 required Dr Samastur to supply an email address by 26 April 2023. He did not comply with this direction and did not disclose his email address until 12 July 2023 (see paragraph 12, below).

9. I gave supplemental directions at the further VCMH, including corrections to the respondents' names. The case was listed for a final video hearing on Monday 17 July 2023. Again, these were sent to Ms Ferme by email and Dr Samastur by post.

10. Paragraph 2 of the supplemental directions required Ms Ferme to supply the Tribunal and the applicant's solicitor with Dr Samastur's email address by 16 May 2023. Ms Ferme did not comply with this direction but forwarded a letter from Dr Samastur dated 15 May 2023, saying he refused consent to disclosure of his email address "*because I have not got any claim or any tribunal documents relating to this matter*".

11. I issued a minded to bar notice, pursuant to rule 9(4) of the Tribunal (Procedure) (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules'), on 19 May 2013. This was sent to Ms Ferme by email and Dr Samastur by post and special delivery. Ms Ferme responded, by email, on 19 May. I issued a further notice on 06 June 2023, explaining I had decided not to bar the respondents from further participation in these proceedings. I also directed that all further documents to be sent or delivered to the respondents by the Tribunal shall be sent to them jointly, using Ms Ferme's email address.

12. In a letter dated 12 July 2023, Dr Samastur complained he had only just received the minded to notice and claimed "*I do not know the content of noted proceedings before the Tribunal. I have not got served yet the claim relating to it, so I am not able to defend it.*" This letter was sent to the Tribunal case officer by email. This was the first occasion Dr Samastur disclosed his email address to the Tribunal.

The final video hearing on 17 July 2023

13. Mr Piers Harrison (counsel) appeared for the applicant and was accompanied, remotely, by Mr Charnock. Ms Ferme attended in person, but Dr Samastur did not.

14. The applicant's solicitors produced a digital hearing bundle in accordance with the supplemental directions. This was emailed to the case officer and Ms Ferme on 29 June 2023 and a link to the digital file was also supplied on 10 July 2023. The bundle included copies of the Tribunal application and supporting documents, the various directions,

and statements of case from the applicant and Ms Ferme. There was no statement of case from Dr Samastur.

15. Mr Harrison also produced a helpful skeleton argument that was emailed to the case officer and Ms Ferme on 14 July 2023.

16. At 9:41am on 17 July (the morning of the hearing) Ms Ferme sent an email to the case officer and Mr Charnock stating she had not received the hearing bundle, and this was "*an additional reason to cancel today's hearing*". The applicant's solicitors immediately supplied a further copy of the bundle, by email.

17. At the start of the hearing, Ms Ferme made an application to adjourn on the basis she did not have access to the bundle and Dr Samatur had not been served with the proceedings. She explained that she had found an email in her junk email box on Saturday 14 July, referring to the bundle, but this was not attached. She had received the bundle that morning but was unable to open this without downloading additional software. She suggested an adjournment of a "*month or two*" so she could access the bundle and the Tribunal could email the papers to Dr Samastur.

18. Mr Harrison opposed the application to adjourn, pointing out the bundle had been produced in accordance with the directions and Ms Ferme was familiar with the documents in the bundle. I informed the parties that I would proceed with the hearing that day, as the bundle had been produced in good time and I was satisfied the proceedings had been delivered to Dr Samastur and he is fully aware of the case. I suggested a 30-minute adjournment so Ms Ferme could access the bundle. She rejected this suggestion, saying she was unwilling to open the bundle as she was unwell and in bed. I queried if there was documentary evidence of her illness, such as a letter or report from her doctor. She said there was no such evidence and could participate in the hearing from her bed. In the light of this information, I decided to press on with the hearing but told Ms Ferme that we could take breaks as required. I also explained the parties could make oral submissions, summarising their respective cases, without referring to the bundle.

Submissions

19. It is convenient to summarise Ms Ferme's case first, to give some context to the applicant's submissions. In her statement of case, dated 30 May 2023, she suggested the Tribunal application should be dismissed as the Vesting Order is subject to appeal and is not final. She also addressed the appropriate sum, contending the respondents are entitled to £728,750 for the headlease, being the sum claimed in the original F-tT proceedings, plus:

    (a) damages for breaches of the underleases of Flats 5 and 7, estimated at £80,000.

(b) legal costs on a right to manage ('RTM') claim for the Property, estimated at "*at least £2,500*", and

(c) an additional share of the premium paid for a statutory lease extension of Flat 1 that completed on 17 January 2020. The freeholders agreed a total premium of £351,858 and the respondents' share at £3,553, without their consent.

20. The damages claim arises from applications under s.168(4) of the Commonhold and Leasehold Reform Act ('the 2002 Act'), pursued by the respondents. They sought determinations the underleases of Flats 3, 4, 5, 6 and 7 had all been breached. The F-tT consolidated those applications and issued a combined decision on 22 January 2020. It determined there had been no breaches for Flats 3, 4 and 6. In relation to Flats 5 and 7 it determined:

"(3) The Third Respondent has not breached the covenant contained in (i) paragraph (7) of Schedule 5, Part 1 or (ii) paragraph 12 of Schedule 9 to the lease dated 19 September 2005. The Third Respondent has breached (i) the covenant contained at paragraph (18)(a) of Schedule 5, Part 1 to the said lease by sub-letting Flat 5 on one occasion to a Heather Harris between 11 November 2018 and 11 February 2019 and (ii) the covenant contained at paragraph (20) of Schedule 5, Part 1 to the said lease by bailing to provider the Applicants or their predecessors in title with particulars of the underletting or a copy of the underlease.

...

(5) The Fifth Respondent has not breached the covenant contained in (i) paragraph 6 of Schedule 5 or (ii) paragraph 19(a) or (b) of Schedule 5 or (iii) paragraph 8 of Schedule 7 to the lease dated 26 October 2007. The Fifth Respondent has breached the covenant contained at paragraph 20 of Schedule 5 to the said lease by failing to provide the Applicants or their predecessors in title with particulars of any of the underlettings which she admitted or copies of the underlease in respect of each admitted underletting."

21. At paragraph 49, the F-tT went on to say:

"*What happens hereafter is a matter for the Applicants and potentially the County Court. However, we are not going to leave this case without expressing the hope that recourse to the County Court is not necessary and that the parties are able to resolve their differences without further litigation. The breachers we have found proved are one-off and historical in the case of Ms Mignon and Flat 5 and entirely technical in relation to Ms De Monte and Flat 7. We therefore earnestly hope that the parties can resolve this matter without the need for court proceedings.*"

22. Various copy documents accompany Ms Ferme's statement of case, including the F-tT decision and letters she and Dr Samastur sent to the underlessees of Flats 5 and 7 on 09 May 2023. The letters are in similar

terms, refer to the breaches found by the F-tT, allege breaches of planning law, claim there have been other breaches "*which are going to be the subject of second appeal*" and allege the underlesseees "*intentionally misled the FTT*". They also include offers to settle the respondents' damages claims upon payment of £80,000 (per flat). The letters refer to Ms Ferme's address in Wembley as a "*Contact common address*" and her email address as a "*Contact common e-mail address*" for both respondents.

23. In relation to the RTM costs, Ms Ferme relied on a F-tT decision dated 03 March 2020 arising from a costs application under rule 13 of the 2013 Rules. That application was pursued by the RTM company, 6 Embankment Gardens RTM Company Limited, against both respondents and was refused. At paragraphs 35 and 36 of the decision, Regional Judge Powell said:

> "*35. However, for the avoidance of doubt, the respondents may be entitled to claim their reasonable statutory costs for dealing with the substantive RTM application to pursuant to section 88(1) of the Act. These would appear to include Healys' costs of advising about the claim notice and drafting the counternotice, but there may be other justifiable costs. However, as mentioned in paragraphs 39 and 40 of the substantive decision, the respondents are not entitled to recover their costs of the proceedings before the tribunal, due to section 88(3) of the Act.*
>
> *36. Therefore, quite separately to this application, the parties should try and agree the respondents' reasonable statutory costs under section 88(1) but, if agreement cannot be reached, either party may make further application under section 88(4) of the Act."*

24. In his oral submissions, Mr Harrison refined points made in the applicant's statements of case dated 10 March and 15 June 2023. These are summarised below:

(a) The appropriate sum is £210, representing the headlease premium determined by the F-tT (£10) and ground rent for Flats 2 and 6 for the period 25 March to 28 September 2023 (£200).

(b) The respondents are only entitled to nominal damages, at most, for the breaches of the underleases. They took no action in respect of these breaches until their letters dated 09 May 2023. Further, the underleases are "*new tenancies*" for the purposes of the Landlord and Tenant (Covenants) Act 1995 ('the 1995 Act') so tthey will retain the right to pursue these breaches following the transfer of the headlease. The transfer deed approved by the F-tT does not provide otherwise and the applicant will not acquire this right.

(c) The Tribunal need not formally determine the damages due from the underlessees of Flats 5 and 7. Rather it can estimate the sums due, in the knowledge the respondents can sue for damages and recover any balance over and above the estimated amounts. The

estimated sums should be nominal, given the technical nature of the breaches and could be expressed as a cap (such as "*not exceeding £100*").

(d) The F-tT made a rule 13 costs order arising from the breach of covenant proceedings. It ordered the respondents to pay total costs of £12,000 to the leaseholders of Flats 3, 4, 5, 6 and 7 in a further decision dated 30 March 2020. The respondents have not paid these costs and the leaseholders are entitled set these off against any damages for breach of covenant. Given the inaction since 2020, the Tribunal can infer the the respondents formed the view that any damages would not exceed these costs.

(e) The respondents' costs of the RTM claim are principally due from the RTM company and are statutory costs, rather than amounts due under or in respect of the flat underleases.

25. Mr Harrison did not specifically object to the claim arising from Flat 1's lease extension and this was not addressed in the applicant's statements of case. However, I deduce this claim is also contested given the £210 quantification of the appropriate sum.

26. In her oral submissions, Ms Ferme suggested the lease breaches were extremely serious. Flat 5 and 7 had been sublet on a short-term basis, which could have had "*catastrophic consequences*" for the respondents including the risk of prosecution. Ms Ferme repeated her allegation the underlessees misled the F-tT, and said she intended to pursue a "*second appeal*" by the end of the month.

27. Ms Ferme submitted that damages are a matter for the County Court, rather than the Tribunal. She values non-pecuniary damages at £160,000 (£80,000 per flat). In addition, the respondents may seek a possession order for Flat 7, arising from further breaches of that lease.

28. Ms Ferme said she needed additional time to submit details of the RTM costs, but the Tribunal could estimate the sum due. The respondents are not bound by the £10 determination of the headlease price as this was an abuse of process. The F-tT "*ignored the rule of law*" and the respondents will claim compensation from the Ministry of Justice.

29. In conclusion, Ms Ferme said the application "*must be dismissed*" as the Vesting Order is not final, and Dr Samastur had been unable to participate in the proceedings. The application for permission to appeal the Vesting Order is "*still pending*". Further, the respondents plan another appeal against the F-tT determination of the headlease price.

<u>The Tribunal's decision</u>

30. The appropriate sum to be paid into court is £210 (Two Hundred and Ten Pounds).

Reasons for the Tribunal's decision

31. There is no basis to dismiss the application, as requested by Ms Ferme. The F-tT determination of the headlease premium is final, as all appeal avenues have been exhausted. The Vesting Order is also final, as the respondents have not obtained permission to appeal that order. A court judgment or order takes effect from the day when it is given or made, or such later date as the court may specify (Part 40.7 of the Civil Procedure Rules).

32. As stated at paragraph 18, I am satisfied these proceedings have been delivered to Dr Samastur and he is fully aware of the case. He and Ms Ferme are joint headlessees of the Property, are clearly in regular contact and act in concert when it suits them. Initially, the Tribunal supplied documents to Ms Ferme's email address. This is clearly used by both respondents, as it was described as their "*Contact common e-mail address*" in their letters dated 09 May 2023 (see paragraph 22, above). Between 29 March and 05 June 2023, documents were also sent Dr Samastur's postal address in Slovenia, as a precaution. From 06 June, all documents have been sent to the respondents using Ms Ferme's email address, pursuant to my direction of that date.

33. Dr Samastur's failure to engage with these proceedings was his choice and this is no basis to dismiss the application.

34. Turning now to the headlease premium, this was determined by the F-tT back on 05 April 2021. That decision is final and the determined premium of £10 is the sum payable under paragraph 3(1)(a) of Schedule 5 to the 1993 Act. The respondents' attempts to appeal this decision have failed and they cannot reopen it now. They are not entitled to £728,750, as advanced by Ms Ferme, or any alternative sum.

35. The respondents are entitled to ground rent for Flats 2 and 6 for the period 25 March to 28 September 2023. I agree the applicant's figure of £200, which was not challenged by Ms Ferme. This rent is payable under paragraph 3(1)(b).

36. As to the breaches of covenant, there was no explanation of Ms Ferme's figure of £80,000 per flat and no evidence of any damage/loss arising from the breaches. In the case of Flat 5 the only determined breaches were subletting without prior written consent between November 2018 and November 2019 and a failure to notify the respondents of this subletting. In the case of Flat 7, the determined breaches were a failure to notify the respondents of various sublettings during a five to six-year period ending September 2019. All breaches had been remedied by the time of the F-tT decision (20 January 2020) and it appears the respondents took no further action until their letters dated 09 May 2023. If they wish to recover damages arising from these breaches, they will have to issue separate court proceedings. They can still pursue these

claims after the transfer of the headlease, as the leases are both "*new tenancies*" within s.1(3) of the 1995 Act.

37. I agree with Mr Harrison that any damages will be nominal. The breaches were technical and relatively minor. They were remedied over three years ago and it is difficult to see what loss/damage flows from them, if any. In the absence of any evidence from the respondents and taking a broad-brush approach, I estimate the damages will be between £1 and £500, per flat.

38. The respondents are liable to pay costs of £12,000 to the underlessees Flats 3, 4, 5, 6 and 7, pursuant to the F-tT decision dated 30 March 2020. This equates to £2,400 per flat. The underlessees of Flats 5 and 7 can set-off the £2,400 due to each of them against the potential damages. The net result is the respondents will probably owe them money, rather than the other way around. Taking account of the set offs I determine that no estimated amounts are due for breaches. As invited by Mr Harrison, I infer the respondents have not pursued the breaches as any damages will not exceed the costs due for Flats 5 and 7.

39. The respondents' letters of 09 May 2023 each stated an intention to pursue "*a second appeal*" for further breaches of the underleases. However, there are no details or supporting evidence. No additional sum is payable for these alleged breaches, which have not been determined by the F-tT (or a court).

40. As to the RTM costs, the RTM company is liable for the respondents' reasonable costs incurred in consequence of the claim notice given to them, pursuant to s.88(1) of the 2002 Act. Each person who is or has been a member of that company is also liable for those costs, jointly and severally (s.89(3)). This means the respondents can claim their s.88(1) costs from the company members, who are (or were) underlessees at the Property. However, these costs have not been agreed or determined and Ms Ferme only gave an approximate figure of "*at least £2,500*", unsupported by any schedule or invoice/s. I am unable to determine the amount of these costs, or the estimated amount, under paragraph 3(1)(b), as they are payable under statute rather than the underleases (or any collateral agreement to the leases). It remains open to the respondents to seek a determination under s.88(4) but these costs do not come within paragraph 3(1)(b).

41. Finally, there is Ms Ferme's claim for an additional share of the Flat 1 lease extension premium. The basis of this claim is unclear. The new underlease completed back in January 2020 and clearly states the respondents' share of the premium (£3,553). If they were unhappy with this figure, they should have taken this up with the freeholders, who agreed it as the "*competent landlord*" (s.40(4)(b) of the 1993 Act), at the time. There is no basis for claiming an additional sum from the underlessee now, more than three years after completion.

42. In summary, the only sums payable under paragraph 3(1) are the headlease premium of £10 and the ground rent of £200. These two items total £210 and this is the appropriate sum to be paid into court.

Name: Judge Donegan **Date:** 31 July 2023

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).