

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

**DECISION ON AN APPLICATION UNDER SECTION 48 OF THE LEASEHOLD
REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993**

Applicant: Aesse Inc

Respondent: The Trustees of the Portman Estate

Re: 3rd, 4th & 5th Floor Flat, 24 Montagu Square, London W1

Hearing date: 12-13 September 2006 & 4-5 December 2006

**Appearances: Mr T Dutton, Counsel
Mr R D Kay BSc (Hons) MRICS, Beckett and Kay LLP
Mrs H Midworth, Boyes Turner**

For the Applicant

**Mr K Munro, Counsel
Mr J P Hamilton BSc MRICS, Cluttons LLP
Miss S Thomas, RadcliffesLeBrasseur
Mr C Keough, RadcliffesLeBrasseur**

For the Respondent

Members of the Leasehold Valuation Tribunal:

**Mrs B M Hindley LLB
Mr J C Avery BSc FRICS**

Date of decision: 12 December 2006

1. This is an application to determine the price payable for a new lease of the subject premises, together with the terms thereof.
2. On 25 August 2005 the applicants served a notice under Section 42 in respect of the '3rd, 4th and 5th floor flat' held on two separate leases both commencing on 25 December 1986 for terms of 67 years less ten days. The premium proposed was £180,000.
3. On 1 November 2005 the respondents served a counter notice admitting the tenants' right to a new lease of 'the flat' and proposing a premium of £245,750.
4. On 12 September 2006 a hearing commenced and continued on 13 September when it was adjourned to enable the parties to take into account the anticipated Lands Tribunal decision in the Sportelli case.
5. An inspection of the property took place on 11 October 2006.
6. On inspection the Tribunal found the subject premises to be a flat on three floors containing, on the third floor, four rooms, the two larger of which having en suite bathrooms. On the fourth floor there were two large rooms both with en suite bathrooms and on the fifth floor was an L. shaped living room giving access to a large roof terrace. Also opening from the living room was the kitchen.
7. The third floor had, at some time, been occupied as a separate flat entered via a door on the third floor landing. This landing and the staircase to the fourth floor had been common parts also used for access to the fourth floor. When the third floor had been combined with the fourth and fifth floor to form the present, enlarged, flat, the doorway and partition on the third floor had been removed and the door repositioned to enclose the landing and staircase within the flat. The main entrance was now at fourth floor level via the lift which opened there within the flat. An internal staircase led up to the fifth floor and the original common parts staircase, down to the third floor.
8. On 4 December 2006 the hearing resumed and continued on 5 December. New valuations, taking into account the Sportelli case, were provided by both valuers and are now attached at Annex 1 and Annex 2 respectively.
9. At the resumed hearing the following matters were not in dispute:-

(a) Date of Valuation	25 August 2005
(b) Total freehold value of both flats	£1,510,000
(c) Total extended lease values	£1,494,900
(d) Deferment Rate	5%
(e) Capitalization Rate	5%
(f) Ground Rent at Review	£6,569pa.

10. The items remaining in dispute were:-

- (a) The value of the current leases
- (b) The extent of the demise
- (c) The terms of the new lease/s

The Value of the Current Leases

11. The only valuation issue remaining in dispute was the value of the current leasehold interests with 48.33 years unexpired. Both expert valuers made reference to the options available to them – market and settlement evidence, relativity graphs and Tribunal determinations.
12. The valuers were of one mind that the best evidence was market transactions but they acknowledged that the prices paid for short leases would almost always reflect the owners' rights to enfranchise. Although both valuers referred to the other available options they both preferred the market approach, with adjustments to reflect not only the differences between the subject premises and the comparables but also 'Act rights'.
13. Mr Kay's analysis of the comparables gave him a short leasehold value amounting to 81% of the freehold.
14. Mr Hamilton's analysis resulted in a relativity of 70%. However, in cross examination Mr Hamilton conceded that he had used the wrong transaction price for his main comparable – Flat 4, 12 Montagu Square. He had used £1,320,500 when the true transaction price had been £1,132,500. When recalculated using the correct price the relativity became 81% and on that basis the experts were in agreement.
15. At the resumed hearing Mr Munro drew attention to a decision of the Lands Tribunal in *Arrowdell Ltd v. Coniston Court (North) Hove Ltd* (LRA/72/2005) in which the members had concluded that the graph provided by one of the valuers was to be preferred to transaction and other evidence.
16. Nevertheless, in the subject case, the graphs were given little weight by either valuer, both of whom were confident in giving priority to their analysis of transactions, and it is upon that evidence that the Tribunal determined the issue.
17. Accordingly, the Tribunal determined that the short leasehold values of the two occupational leases are, in total, £1,223,100.

The Extent of the Demise

18. Mr Dutton claimed that the applicants had established adverse possession of the staircase on the basis that, at least 12 years prior to the valuation date, they had assumed exclusive occupation of the staircase between the third and fourth floors.
19. In support of this proposition he produced a witness statement from Mario Cassandro, one of the occupiers of the flat. Attached to Mr Cassandro's witness statement was correspondence purporting to show that the relevant works had been carried out at the premises in 1990. He also produced draft licences which had been sealed by the lessee company (Attendus Treuchandgesellschaft) but, for reasons unexplained, never executed by the landlords.
20. Mr Munro did not accept that the evidence provided proved adverse possession – indeed he claimed that the existence of the licences, which included an obligation to reinstate, militated against the possibility. The landlord had prepared licences so had been content for the work to proceed and it was, in his opinion, 'a massive leap' between non completion of the licences to adverse possession.

21. An extract from Megarry and Wade *The Law of Real Property* was handed in and the Tribunal's attention was drawn to 21-027 at page 1313, where it was stated -:
'If the tenant occupies other land belonging to the landlord but not included in the demise, that land is presumed to be an addition to the land demised to the tenant ('a mere extension of the locus of his tenancy'), so that it becomes subject to the terms of the tenancy, and although the tenant may acquire a title to it against the landlord for the remainder of the term, he must give it up to him when the tenancy ends.'
22. The only arguments against the establishment of adverse possession were:
 - (a) that by proffering the uncompleted licences the landlord had consented and thus granted a mere licence, and
 - (b) that the work carried out in 1990 was different work from that which enclosed the staircase.
23. Mr Munro also identified a number of practical issues which could arise from the loss of the staircase as common parts but he produced no evidence that any actually existed, or that they impacted on the argument relating to adverse possession.
24. The first argument was not supported by any authorities and as a finding of fact the Tribunal determined that the occupation of the landing and staircase by the lessees satisfied the criteria set out in Megarry above. The second argument was put but not pursued in the absence of evidence that the work referred to in the documents was not the relevant work. To satisfy the twelve year test the occupation needed to have commenced before 25 August 1993 and no evidence was provided that it had not.
25. On the basis of the evidence provided and the submissions made the Tribunal was satisfied that adverse possession had been established in respect of the landing and staircase.
26. It was also suggested that the roof terrace, leading from the living area on the fifth floor, was not included in the demise. The original lease was not produced. However, the Tribunal was shown a copy of the lease plan by Mr Hamilton which included the terrace within the red edging. Moreover, Mr Hamilton confirmed that he had included the terrace in his valuation. It was, therefore, so accepted by the Tribunal.

One Lease or Two Leases

27. Two leases presently existed – one in respect of the original third floor flat and one in respect of the fourth and fifth floor maisonette. The applicants served one notice claiming a new lease in respect of the third, fourth and fifth floors as a single unit.
28. By their counter notice the respondents admitted the applicants' right to acquire a new lease of 'the flat'. There was, therefore, no dispute between the parties that one lease should be granted except that Mr Dutton wished for two leases if, otherwise, the applicants would lose the present alienation provisions.
29. Mr Munro asserted that the applicants were not entitled to two leases since only one notice had been served.
30. The Tribunal accepted Mr Munro's argument that if two leases were required, two notices needed to have been served since Section 42(1) refers to 'a claim'

to acquire a new lease of 'the flat'. Accordingly, the Tribunal had no jurisdiction in this case to determine the terms of more than one lease.

Alienation

31. Mr Dutton wanted that one lease to contain, particularly, the alienation clauses presently in the two existing leases, since this would enable 'the flat' to be occupied as two separate dwellings. For this proposition he relied on Section 57(1)(c) which allows for the effect of two separate leases to be combined. He argued that the applicants should not lose the rights they currently enjoyed to alienate separately the third or the fourth and fifth floors
32. Mr Munro argued that the applicants could not 'have it both ways'. They had served a single notice to acquire a single new lease, perhaps to enhance the chance of success of their claim to adverse possession. The grant of a single lease for the whole of the premises meant that it was appropriate to include the original and normal alienation provision.
33. The Tribunal considered that the present configuration, including the accretion of the staircase and the consequent re-arrangement of the accommodation over the three floors, had rendered the third floor no longer capable of occupation as a separate dwelling. Accordingly, they determined the clause, prohibiting alienation of part, to be appropriate.

Permitted User

34. Mr Munro described a changing attitude in landlords' dealings with companies in support of his proposed more stringent permitted use.
35. The Tribunal noted that the premises were presently let to a company without the additional condition requiring occupation by a director or senior officer. The Tribunal did not accept that the changes now sought were reasonable or within the contemplation of Section 57(6)(b) and they were further influenced by the fact, pointed out by Mr Dutton, that the present occupation would not satisfy the proposed new condition.

Service Charge Percentage

36. Mr Munro queried the allocation of 42%. Mr Dutton said that it was the present allocation.
37. The Tribunal determined that the allocation should be in accordance with the existing leases.

Rent Deposit

38. Mr Dutton argued that proposed clause 3.9.2.3.2 was not in the original leases. Mr Munro asserted that risk of default meant that the landlord required additional security.
39. The Tribunal was not persuaded that the modification proposed was appropriate under Section 57(1).

Management Company

40. None of the provisions relating to the management company were contained in the original leases. Mr Dutton accepted paragraphs 3.221 – 3.224 and 3.227 but sought the deletion of 3.225 and 6 on the basis that they could not be justified under Section 57(6).
41. The Tribunal did not accept that the distinction drawn by Mr Dutton justified the omission of the two sub paragraphs.

Landlord's Covenants

42. Mr Munro argued that 5.7 was a standard clause in new leases to ensure that landlords were responsible only for breaches of their own covenants and not for those e.g. of a management company.
43. Mr Dutton said that a statutory procedure was in place, as a result of the Landlord and Tenant (Covenants) Act 1995, which protected landlords if they adopted the specified notice procedure.
44. The Tribunal was of the opinion that since this clause was not in the original lease it could not be justified under Section 57(6) and that, in any event, the landlords were protected by the statutory procedure.

Reserve Fund

45. The original leases provided for a reserve fund and Mr Dutton argued that these provisions should be incorporated in their entirety since they contained no defect as envisaged by Section 57(6).
46. Mr Munro argued that the provisions in the new lease were similar to those of the old.
47. The Tribunal was of the opinion that, if the applicant requested it, there was no basis on which to change the original provision contained in paragraph 6(2) of Part V of the 4th Schedule of the original lease.

Conclusion

48. Accordingly, the Tribunal determines the price to be paid for the new lease of the third, fourth and fifth floor flat to be £256,700 as set out in the valuation attached at Annex 3.
49. However, since time is now required to enable the new lease to be redrafted to take account of the Tribunal's determination of disputed issues, the application is adjourned until 31 January 2007.
50. If, by that date, the final draft of the lease has not been agreed the applicant shall submit the respective clauses to the Tribunal for a determination of the wording of those clauses remaining in dispute.
51. Any further determination by the Tribunal to be without an oral hearing unless either party, on or before 31 January 2007, requests otherwise.
52. If the applicant makes no submissions this determination is effective from 31 January 2007.

Chairman

R. D. Hadley

Date

12/12/06

Beckett and Kay
Leasehold Reform Housing and Urban Development Act 1993 as amended
Third to fifth floor flat, 24 Montagu Square, London W1
Revised following "Sportelli"

1. Components of the valuation and price payable

a. Date of valuation:	25-Aug-05		
b. Lease structure:			
<i>Occupational lease</i>			
Expiry:	15-Dec-53	Years unexpired:	48.31
Ground rent now:	£1,045 per annum		
First review:	25-Dec-08 to £6,569	Years to first review:	3.33
<i>Headlease</i>			
Expiry:	25-Dec-53	Years unexpired:	48.33
Headrent:	£2,500 per annum		
Headrent apportioned to this flat	£1,045 per annum, by floors (equal to underlease rent)		
First review:	25-Dec-08 to £6,569	Years to first review:	3.33
c. Unimproved Property values			
Freehold	£1,510,000	197 m ² GIA	
Extended lease	£1,494,900	138 years	Relativity 99.00%
Hypothetical lease for rent review	£1,313,700	67 years	Relativity 87.00%
Reversion under headlease	£0	0.02 years	
Occupational lease	£1,223,100	48.3 years	Relativity (OGR) 81.00%
d. Other valuation factors			
Deferment rate	5.00%		
Capitalisation rate <i>before</i>	8.00%		
Capitalisation rate <i>after</i>	5.00%		
Rent review factor	0.50% of hypothetical unimproved 67-year lease value		
Landlord's share of marriage value:	50%		

Price payable

(see attached sheet for detail)

£257,510

Beckett and Kay
Leasehold Reform Housing and Urban Development Act 1993 as amended
Third to fifth floor flat, 24 Montagu Square, London W1
Revised following "Sportelli"

2. Valuation

A Diminution in the value of freeholder's interest

i) Freeholder's interest before lease extension

a) Apportioned headrent now		1,045		
YP 3.33 years @ 8.00%		2,8259	2,953	
		<u>6,569</u>		
b) Apportioned headrent at first review				
YP 44.98 years @ 5.00%	17.7719			
Deferred 3.33 years @ 5.00%	0.8500	15.1061	99,232	
		<u>1,510,000</u>		
c) Reversion to freehold value				
Deferred 48.33 years @ 5.00%		0.0946	142,846	
Freeholder's interest before lease extension			<u>245,031</u>	

ii) Freeholder's interest after lease extension

Reversion to freehold value		1,510,000		
Deferred 138.31 years @ 5.00%		<u>0.0012</u>		
Freeholder's interest after lease extension			<u>1,812</u>	

Diminution in the value of the freeholder's interest **243,219**

B Diminution in value of headlessee's interest

Headrent commuted in accordance with Headlease proviso - no loss
Reversion: 0.02 days - no value

Diminution in value of headlessee's interest **0**

C Landlords' share of marriage value

Interests after marriage

Long leasehold value	1,494,900	
Freeholder's interest after lease extension	1,812	
Headlessee's interest after lease extension	<u>0</u>	
Value of combined interests after lease extension		1,496,712

Interests before marriage

Value of lessee's current interest	1,223,100	
Freeholder's interest before lease extension	245,031	
Headlessee's interest before lease extension	<u>0</u>	
Aggregate value of interests before lease extension		1,468,131

Marriage value, therefore		28,581
Landlord's percentage share		<u>50%</u>

Landlords' share of marriage value **14,291**

Price payable under the Act **257,510**

Beckett and Kay
Leasehold Reform Housing and Urban Development Act 1993 as amended
Third to fifth floor flat, 24 Montagu Square, London W1
Revised following "Sportelli"

3. Apportionment of price payable among the landlords

	Diminution in interest	Marriage value	Total receivable
Freeholder	243,219	14,291	257,510
Headlessee	0	0	0
Total	243,219	14,291	£257,510

THE LEASEHOLD REFORM, HOUSING URBAN AND DEVELOPMENT ACT 1993

DATE:- 08/09/06 Amended 30/10/06 1. Following "Sportelli" Lands Tribunal decision
2. Following agreement on relativity for rent review

PROPERTY THIRD FLOOR FLAT AND FOURTH AND FIFTH FLOOR MAISONETTE
24 MONTAGU SQUARE

VALUATION DATE 26/08/05

HEADLEASE DETAILS

DATE 12/11/87
TERM 67 years
EXPIRY DATE 25/12/53
UNEXPIRED TERM 48.33
RENT £2,500 p.a. subject to review

SUBLEASE DETAILS

	Third Floor	Fourth and Fifth Floors
DATE	12/11/87	12/11/87
TERM	67.00 less 10 days	67.00 less 10 days
EXPIRY DATE	15/12/53	15/12/53
UNEXPIRED TERM	48.30	48.30
RENT	£425 to 24/12/08	£620 to 24/12/08
RENT ON REVIEW	£2,219 from 25/12/08	£4,350 from 25/12/08
RENT REVIEW BASIS in 2015 & 2040	0.50% of value of 67 year term	0.50% of value of 67 year term

VALUES

	Third Floor	Fourth and Fifth Floors
FREEHOLD	£510,000	£1,000,000
EXTENDED	£505,000 0.9902	£990,000 0.9900
EXISTING LEASE	£357,000 0.7000	£700,000 0.7000
67 YEAR TERM	£443,700 0.8700	£870,000 0.8700

DIMINUTION IN VALUE OF FREEHOLDER'S INTEREST

Before Grant				
TERM 1	LOSS OF RENT			£1,045
	xYP	3.33 years @	5.00%	<u>2,999</u>
				£3,133
TERM 2	LOSS OF RENT			£6,569
	xYP	44.97 years @	5.00%	17,771
	x.PV	3.33 years @	5.00%	<u>0.85007</u>
				£99,228
REVERSION	FHVP			£1,510,000
	x PV	48.33 years @	5.00%	<u>0.09460</u>
				£142,847
LESS after grant	FHVP			£1,510,000
REVERSION	x PV	138.30 years @	5.00%	<u>0.00117</u>
				£1,772
	DIMINUTION IN VALUE OF FREEHOLDER'S INTEREST			<u>£243,437</u>

DIMINUTION IN VALUE OF HEADLESSEE'S INTEREST

DIMINUTION IN VALUE OF HEAD LESSEE'S INTEREST £0

CALCULATION OF MARRIAGE VALUE

	Tenant's proposed interest	£1,495,000	
	Freeholder's proposed interest	£1,772	
	Head lessee's proposed interest	£0	
Less			£1,496,772
	Tenant's existing interest	£1,057,000	
	Value of freeholder's interest	£245,209	
	Value of head lessee's interest	£0	
			<u>£1,302,209</u>
Marriage Value			<u>£194,563</u>
	Take	50% Marriage Value	<u>£97,282</u>
	Total		£340,718

Date of valuation	25-Aug-2005	
Expiry of head lease	24-Dec-2053	
Term unexpired at date of valuation	48.33	
Ground rent	£1,045	
Review ground rent	24-Dec-08	£6,569
Capitalisation rate	5.0%	
Deferment Rate	5.0%	
PV in 3.33 years	0.850	
PV in 48.33 years	0.0946	
PV in 138.33 years	0.0012	
YP 3.33 years	3.00	
YP 45 years	17.774	
Freeholder's share of marriage value	50%	
Value of freehold	£1,510,000	
Value of extended lease	£1,494,900	99%
Value of existing lease	£1,223,100	81%

Calculation

Diminution in Landlord's interest

Value prior to grant of new lease:

Present ground rent	£1,045	
YP 3.33 years	3.00	
		£3,135
Review ground rent	£6,569	
YP 45 years deferred 3.33 years	15.1079	
		£99,244
Freehold value	£1,510,000	
PV in 48.33	0.0946	
		£142,846
Value of freeholder's present interest		£245,225

Value after grant of new lease

Freeholder's future interest:

Freehold value	£1,510,000	
PV in 138.33 years	0.0012	
		£1,812

Diminution in landlord's interest

£246,437

Marriage value

Tenant's future interest	£1,494,900	
Landlord's future interest	£1,812	
		£1,496,712
Tenant's present interest	£1,223,100	
Landlord's present interest	£245,225	
		£1,468,325
Marriage Value		£26,575
		50%

not picked up in formula

should be £28,387

£14,194

Freeholder's share

£13,288

Price for lease extension

£256,700 £257,607