



## DECISION

### Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel given on 27 June 2006 following a hearing on 27 April 2006. The matter related to 62-79 Armadale Court, Westcote Road, Reading and an application pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”).

2. The property is a purpose built block of flats of brick and pitched tile construction in large grounds. There are three entrance hallways and stairwells, each providing access to two flats on the ground floor, two flats on the first floor and two flats on the second floor. In each of the top floor flats there is a small loft space that houses a water tank for the exclusive use of the flat. The communal area at the top of each stairwell provides further access to the roof void and houses the water tanks serving the four flats on the lower floors. The property has frontage onto Bath Road and there is a pedestrian access to the front. At the rear of the development there are two blocks of garages and a communal parking area. There is a bin store and a drying area for use by all the flat occupiers.

3. On 26 February 2005, a notice was served on the landlords, Ulterra, under section 13 of the Act. A counter-notice dated 26th May 2005 was served that, inter alia, recognised the Applicants' right to collectively enfranchise but limited the extent of the property to be purchased to the "specified premises" and offered rights over the “retained land” in order to comply with the provisions of Section 1(4) of the Act. The “specified premises” were defined to relate to the actual buildings in which the flats, together with the garages and refuse area. The remainder of the property was the “retained land”.

4. By the time of the hearing the issues in dispute between the parties related to (1) the extent of the premises to be collectively enfranchised and of the premises to be retained by Ulterra, (2) dependent upon the extent of the premises to be enfranchised, the extent of Ulterra's right over the enfranchised land and (3) the premium to be paid on the enfranchisement. By the hearing date the majority of the valuation issues had been agreed date between the two surveyors and the only issues that needed to be addressed by the LVT were the level of yield to be adopted and the question of any development or hope value.

5. The LVT decided these issues and it is against two of their findings that Ulterra now appeals with the permission of the President. The issues on the appeal are (1) whether the LVT was right in its determination that the transfer should include the “retained land” and (2) whether it was correct in fixing the yield at 7 per cent in assessing the premium to be paid. The appeal was conducted by way of review.

6. Ulterra was represented by counsel on the hearing of the appeal. The respondent nominee purchaser put in a reply to the appeal but was not represented at the hearing.

### The “retained land” point

7. Under section 1 (4)(a) of the 1993 Act, the freeholder is entitled to retain land which the tenant might otherwise be able to acquire under the Act. The section provides, so far as relevant:

“The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter

- (a) there are granted by the person who owns the freehold of that property -
  - (i) over that property, or
  - (ii) over any other property

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease.”

8. If the rights which Ulterra sought to grant satisfied that test, The LVT was obliged to permit it to retain the land in question: *Shortdean Place (Eastbourne) Residents Association v Lynari Properties* [2003] 3 EGLR 147 (LT), where Mr Peter H Clarke said at paragraph 63:

“In my judgment, if the permanent rights offered satisfy the test under section 1(4)(a)(i), the LVT had no power to determine that the freehold of the common use property should be transferred to the nominee purchaser. Section 1(4) is in mandatory terms: the right of acquisition of the freehold “shall, however, be taken to be satisfied” if permanent rights to satisfy the subsection are granted by the freeholder. An LVT is not bound to accept the proposals in a landlord's counternotice with regard to property used in common. If the permanent rights offered do not satisfy the test in section 1 (4)(a)(i), the tribunal has a discretion. If, however, the rights offered do satisfy the test, section 1(4) requires that the right of acquisition of the freehold shall be satisfied by the grant of the permanent rights and the LVT has no power or discretion to order the transfer of the freehold of the land. It has determined the matters in dispute, and the right of acquisition must be taken to be satisfied in accordance with section 1(4) of the 1993 Act.”

9. Ulterra submitted that in this case the LVT accepted that the terms offered by Ulterra satisfied the test. It relied on a passage at paragraph 8.3 of the LVT decision:

“The Tribunal closely examined and compared the relevant provisions in the leases and those rights offered and the rights reserved to the landlord in paragraphs 5 and 6 of the counter notice. Some differences in the wording would in all practical effect render the leaseholders in the same or nearly the same position as they are currently enjoying.”

10. This, in the submission of Ulterra, should have been an end to the matter. Because the LVT had held that section 1 (4)(a) was satisfied so the LVT had no discretion as to whether to permit the land to be retained, and the LVT fell into error by proceeding to consider the effect of rights which Ulterra sought to retain for itself under section 21(3)(d). This, it was submitted, was apparent from the remainder of paragraph 8.3 of the decision which demonstrated that the LVT was conflating two different tests on two different points and so erred in law. The remainder of paragraph 8.3 reads:

“However, the right reserved to the landlord to “rebuild build on or alter buildings or land forming any part of the retained land” affects the rights to be offered to the leaseholders and as such, is in our opinion a significant difference to the current position. Accordingly we are of the opinion that the test in paragraph 1(4) is not satisfied. That being so then the tribunal has some discretion over the extent of the premises to be included in the enfranchisement. We determine that all the land including the “retained land” is to be included in the transfer to the Applicant”

11. In my judgment Ulterra’s submission is not correct.

12. By paragraph 6 of its counternotice Ulterra was setting out “the rights [it] desires to retain for itself and those authorised by it and all others having a like right over the Specified Premises pursuant to Section 21(3)(d) of the Act”. That subsection provides that the counternotice must:

“(d) state which rights (if any) the person who owns the freehold of the specified premises, or any other relevant landlord, desires to retain—

(i) over any property in which he has any interest which is included in the proposed acquisition by the nominee purchaser, or

(ii) over any property in which he has any interest which the nominee purchaser is to be required to acquire in accordance with subsection (4) below,

on the grounds that the rights are necessary for the proper management or maintenance of property in which he is to retain a freehold or leasehold interest.”

13. Thus paragraph 6 of the counternotice was concerned to identify the rights which Ulterra would have in respect of the land which it was transferring to the nominee purchaser. The object of the right sought by clause 6(iv) of the counternotice was to enable Ulterra to do things on the retained land which would affect the specified land and which it might not have been able to do without the retained right: for example, if it built on a part of the retained land in pursuance of the reserved right, the new building might be objectionable as infringing a right to light or making the path from the flats to the garages substantially less convenient, things which the landlord could not do under the existing leases.

14. What Ulterra asked the LVT to do was to look at clause 5 of its counternotice in isolation from the remainder of the notice. This is what the LVT, rightly, would not do. It had to construe “the permanent rights [offered] to satisfy the subsection” in the context of the

Ulterra's proposals taken as a whole. It had to determine whether there were to be granted "such permanent rights as [would] ensure that thereafter the occupier of the flat referred to in that provision ha[d] as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of the lease." In doing that it was not confined to looking only at clause 5 without reference to the remainder of the counternotice.

15. A landlord cannot say that he has satisfied the subsection if he proposes to grant rights with the one hand and take them back or modify them to an unacceptable extent with the other. The LVT's view was that this was what Ulterra was proposing to do by its proposal as to the rights it intended should be reserved rights over the retained land. Those rights affected the rights offered so as to create a significant difference from the current position and therefore section 1(4)(a) of the Act was not satisfied. In so concluding the LVT did not err in law and reached a conclusion to which it was entitled to come.

## **Yield**

16. The LVT was asked to determine the "yield to be adopted in the valuation". The hearing took place and the decision was given before the decision in *Cadogan v Sportelli* (LRA/50/2005) in the Lands Tribunal and long before that decision was upheld by the Court of Appeal at [2007] EWCA 1042. The LVT and the valuers giving evidence did, however, have the benefit of the decision in *Arbib v Cadogan* [2005] 3 EGLR 139.

17. The LVT was presented with evidence from valuers on each side. The expert for the Applicants adopted a yield of 7.5 per cent and the expert for Ulterra adopted a figure of 6 per cent. The LVT carefully examined their respective approaches and concluded that in this particular case the proper figure for yield was 7 per cent. As is clear from the calculations each of the valuers produced to the LVT each of them was using the word "yield" in the sense of "deferment rate". That is clearly how the LVT understood the position and also how the President understood the position in giving permission for this appeal.

18. The Respondent submitted in its written submission that the appeal was limited to yield and not deferment rate and therefore Ulterra did not have the right to argue any question relating to deferment rate on the appeal and therefore the *Sportelli* decisions were immaterial. This was clearly incorrect.

19. Ulterra put its submission on the question of deferment rate very simply. The decision of the Lands Tribunal in *Sportelli* had been confirmed by the Court of Appeal. The decision of the Lands Tribunal had been expressed to applicable both to properties in the prime central London area and to properties elsewhere. In those circumstances, the decision of the LVT could not stand. The rate of 5% held in that case to be the applicable rate of deferment for flats in the Prime Central London area should be applied. There was no evidence, it was said, before the Lands Tribunal which justified departing from that rate. The position was the same as if the Court of Appeal or the House of Lords had handed down a decision which was perceived to effect an alteration

in the law between a hearing at first instance and the hearing of the appeal from it. In such a case the appellate court would apply the “new” law on the basis that it declared what had in fact always been the law, though not previously properly appreciated.

20. The decisions in *Sportelli* all related to properties in the Prime Central London area. The property in this case does not. What Carnwarth LJ (with whom the other two members of the Court agreed) said in the Court of Appeal about the applicability of the *Sportelli* decision to properties outside that area was as follows:

“100. The cases before the Tribunals related entirely to properties within the Prime Central London area, and the evidence was directed principally to the market within that area. It seems that the Tribunal of its own motion invited the experts to say whether the deferment rate would vary with location (para 86). A variety of views was offered. For example Mr Dumas and Professor Lizieri thought there would be no variation “since the compounding effects of different growth rates would eventually lead to differences in value that were unsustainable and would accordingly correct themselves”. On the other hand, Mr Clark accepted that different deferment rates might apply in different locations in London and in other parts of the country “having regard to local prospect for growth and local factors affecting risk”. Both Mr Orr-Ewing and Mr Beckett thought that location would make a difference, but could not provide evidence or “statistical justification” for such differences (para 86-7).

101. The Tribunal concluded:

“While we accept the view of the valuers that the deferment rate could require adjustment for location, *on the evidence before us* we see no justification for making any adjustment to reflect regional or local considerations either generally or in relation to the particular cases before us. The evidence of the financial experts suggests that no adjustment to the real growth rate is appropriate given the long-term basis of the deferment rate, and locational differences of a local nature are, in the absence of clear evidence suggesting otherwise, to be assumed to be properly reflected in the freehold vacant possession value.” (para 88, emphasis added)

102. The Tribunal’s later comments on the significance of their guidance do not distinguish in terms between the PCL area and other parts of London or the country. However, there must in my view be an implicit distinction. The issues within the PCL were fully examined in a fully contested dispute between directly interested parties. The same cannot be said in respect of other areas. The judgment that the same deferment rate should apply outside the PCL area was made, and could only be made, on the evidence then available. That must leave the way open to the possibility of further evidence being called by other parties in other cases directly concerned with different areas. The deferment rate adopted by the Tribunal will no doubt be the starting point; and their conclusions on the methodology, including the limitations of market evidence, are likely to remain valid. However, it is possible to envisage other evidence being called, for example, on issues relevant to the risk premium for residential property in different areas. That will be a matter for those advising future parties, and for the tribunals, to consider as such issues arise.”

21. The starting point in considering Ulterra's argument must be to look at what is before the Lands Tribunal. This is an appeal by way of review rather than re-hearing. Ulterra did not seek to adduce any evidence at the hearing, and did not produce either the reports of the experts which were before the LVT or any transcript of the oral evidence given by the experts. It now seeks to establish a lower deferment rate than that for which its own expert contended before the LVT.

22. What the Lands Tribunal is being asked to do is to disregard whatever evidence there was below (without knowing in any detail what it was). The Lands Tribunal is asked to assume from the decisions in *Sportelli* that the LVT must have been wrong in its conclusion, to hold that the LVT should have disregarded the evidence before it and to conclude that it should have fixed on the 5 per cent figure emanating from the *Sportelli* decisions. The Lands Tribunal is being asked, notwithstanding the "the possibility of further evidence being called by other parties in other cases directly concerned with different areas", to accept that because "the deferment rate adopted by the Tribunal [is] no doubt the starting point" that must have been the correct finishing point in this case.

23. In my judgment the Lands Tribunal cannot properly do that on an appeal by way of review. It is not conducting a re-hearing and it is not receiving fresh evidence. It is not being asked to apply the law as it always has been (though previously misunderstood). It is being asked to overturn the decision of the LVT on the evidence it heard, to reject that evidence, and (without the benefit of any evidence) to adopt as correct in this particular case the expressions of expert opinion accepted in another case. In my judgment that goes beyond what the Lands Tribunal can do on an appeal by way of review.

24. It was for Ulterra to show that the decision of the LVT as to the deferment rate was wrong in this particular case and in my view it has failed to do so.

### **Conclusion**

25. It follows that Ulterra fails on both issues in the appeal and the appeal will be dismissed.

Dated 13 November 2007

His Honour Judge Reid QC