



Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

APPLICATION UNDER SECTION 51 LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 ('the Act')

<u>Premises Applicant</u>	Case reference: CHI/29UG/OLR/2010/0022 36A Old Road East, Gravesend, Kent, DA12 1NR Mrs IP Derbyshire (leaseholder)
<u>Representation</u>	Mr A Lane of counsel instructed by Judge & Priestly LLP (solicitors) with expert evidence from Peter Coling FRICS (Haywards, surveyors and valuers)
<u>Respondents</u>	Mr R Chapple (missing landlord) and Mrs G Chapple (landlord)
<u>Representation</u>	Mrs Chapple attended the hearing but she was not represented.
<u>Date of Hearing</u>	23 July 2010
<u>Date of Inspection</u>	23 July 2010
<u>Date of Decision</u>	18 August 2010
<u>The Tribunal</u>	Professor J Driscoll, LLM, LLB, solicitor (lawyer chair), Mr B Simms FRICS, MCI Arb and Mr R Wilkey FRICS FICPD
<u>The Decisions</u>	<p>The price payable for the grant of a new lease under section 56 of the Act is the sum of £11,362.</p> <p>The new lease is for a term 90 years longer than the term of the current lease at a peppercorn rent. It is otherwise on the same terms as the current lease except for limited changes which are summarised in paragraph 33 of the decision below.</p> <p>The applicant's claim for an order for costs is dismissed.</p>

Introduction

1. This is an application for a determination of the price payable for the grant of a new lease under the provisions in Part I of the Act. The applicant, Mrs Derbyshire, is the leaseholder of the property known as 36A Old Road East, Gravesend, Kent ('the premises') under a lease dated 8 May 1973 for a term of 99 years from 25 December 1972 at a ground rent of £25 per annum. The respondents are the joint owners of the freehold of the building containing the applicant's flat and the joint landlords under her lease. It has not been possible to trace Mr Chapple so effectively there is one active respondent who is Mrs Chapple.
2. The building consists of two flats. Mrs Chapple lives in the ground floor flat. Mrs Derbyshire lives in another property next door and she has rented out her flat. We will refer to the applicant as the 'leaseholder' and the respondent as the 'landlord'. At the hearing we were told that the leaseholder had engaged with the landlord to try to agree the terms of a new lease but these negotiations were unsuccessful. The landlord received advice from a firm of solicitors and valuation advice. She told us that she withdrew instructions when her solicitors did not seem to understand the legal position where in a case such as this, where one of the landlords cannot be found.
3. As will be seen she has not been served with a notice of claim under section 42 of the Act and has not therefore had to serve a counter-notice under section 45 of the Act. She told us that she agreed that a new lease should be granted; her sole concern was the size of the premium and the terms of the new lease.
4. The leaseholder seeks the grant of a new lease under section 56 of the Act. It has not been possible to trace Mr Chapple. Application was made in the Dartford County Court for either an order to dispense with serving a copy of the section 42 notice on Mr Chapple, or a vesting order and an order was made under section 51 of the Act. On 16 March 2010 District Judge Glover made a vesting order under which on payment of a sum into court (to be determined by this tribunal) a new lease will be executed on behalf of the respondents. The landlord was present at that hearing.
5. This led to the transfer of the case to this tribunal. Directions were given on 19 April 2010. A copy of these directions was sent to the landlord. She responded by writing to the tribunal on 7 July 2010 enclosing a report from Caxtons, surveyors who advised her former solicitors in a letter to them dated 19 June 2008 that the premium for a new lease of the premises should be £12,800.
6. Following these directions those advising the leaseholder prepared a bundle of documents which included a copy of the current lease, a valuation prepared on behalf of the leaseholder and proposals for the terms of the new lease.

Our inspection

7. We inspected the premises on the 23 July 2010 when we were accompanied by the leaseholder and by Mr Coling who has advised her on valuation. The premises appears to have been originally constructed in circa 1850 as a large house. It has been since converted into two maisonettes. The leaseholder has the upper maisonette and she also has a garage and a garden to the rear of the property. The ground floor flat is owned and occupied by the landlord.

8. The property is a first floor flat formed by the conversion of a detached Victorian house which has been extended and converted into two units. The accommodation comprises ground floor entrance hall with stairs up to first floor landing/dining area, living room, kitchen, utility space, three bedrooms, bathroom and separate WC. The building is constructed with part-brick, part-rendered and part half-timbered elevations under a pitched roof re-covered at the front with modern concrete tiles and with clay tiles at the rear. There is access to an on-site parking area on which the lessee has constructed a garage. A narrow path leads to a rectangular garden area some distance from the property.

The hearing

9. At the hearing Mr Lane of counsel told us that there did not appear to have been a signed notice of claim under section 42 of the Act. He agreed that a copy of such a notice could have been served on the landlord and that the court application could have sought an order dispensing with service on Mr Chapple whose whereabouts are unknown. Such an order can be made under section 50 (2) of the Act where the Court can make an order dispensing with the need to give a copy of the section 42 notice where that person cannot be found. Instead the Court made a vesting order under section 50(1). However, he argued that as the court had made a vesting order directing that this tribunal should make a determination of price and the terms of the new lease that we had jurisdiction to do so. This is the position notwithstanding that no section 42 notice appears to have been prepared or served on the landlord. As there was no service of the notice of claim, no counter-notice was served under section 45 of the Act.
10. The landlord told us that she was present at the Court hearing. She had previously informed the leaseholder's solicitors of the circumstances of her husband's disappearance. She stated that she agreed to grant a new lease and that her understanding of the position is that she would execute the new lease on payment of the premium determined by this tribunal to her.
11. In the leaseholder's solicitor's statement in the Court application it was suggested that the court could either make a vesting order, or an order dispensing with the need to give a copy of the notice to the landlord who could not be traced, and that Mrs Chapple could execute the new lease.
12. In the event the Court made a vesting order. The terms of this order are that the new lease will be executed by a District Judge on the premium being paid into Court. It is not clear why a vesting order was made rather than an order dispensing with the requirement to serve a copy of the notice on the joint landlord who cannot be traced.
13. Counsel also agreed with us that the valuation date is the date of the application to the Court (section 51(8)(a) of the Act).
14. Turning to the premium, Mr Coling prepared a report dated 27 May 2010 in which he advised that the premium should be the sum of £11,100. He appended a valuation in which a capitalisation rate of 7% be applied to the ground rent and a deferment rate of 6% should be applied to a capital value which he proposed is £140,000. Mr Coling told us that he had not been asked to prepare a witness statement as an expert. In the circumstances we agreed to hear his oral evidence and we directed he must serve and file his signed witness statement by Friday 30 July 2010.

15. Mr Coling gave his oral evidence and started by telling us that he qualified as a surveyor in 1972 and that he is now the Technical Director of Haywards, a firm of surveyors and valuers. He has some 40 years experience of residential work with extensive experience with leasehold claims.
16. In his evidence he told us that he has revised two of the assumptions to his valuation and he handed us a revised valuation, this one with a deferment rate of 5%, and a relativity of 90% (as opposed to 87% in the first valuation). This produces a revised valuation of the premium at £10,470.
17. Mr Coling decided that the appropriate deferment rate should be 5% (applying the decision of the Lands Tribunal in *Sportelli v Cadogan* [2004]) that this rate should be applied in all but exceptional cases. He told us that he changed his mind about relativity and that his original figure of 87% was mistaken as he had not fully prepared this part of his valuation. On the basis of examining a number of settlements he has been involved with he now advises that the appropriate relativity should be 90 not 87%. This is based on 6 settlements he has been involved with in the past two years and on discussions with other valuers in his company. He has not relied on any of the published graphs of relativity. The only one he considered was the graph produced by Messrs Beckett and Kay but he did not find this useful to this valuation.
18. Turning to capital values he arrived at his £140,000 on the basis of three sales of comparable flats in the past year. These are all sales of converted flats with two bedrooms. The first was the sale of 4B Constitution Crescent in Gravesend with a lease of 100 years unexpired which sold for £131,000 on 14 October 2009. This is two bedroom flat with an outside garden, but no garage. The second was the sale of 7 Parrock Hall, Joy Road, Gravesend, a two bedroom flat with a communal garden which sold for £142,500 on 21 December 2009. The third is the sale of 17A Clarence Place in Gravesend. Mr Coling spoke to the agent selling this flat and was told that a recent sale at a price of £152,000 had fallen through and that the property is now back on the market at an asking price of £169,995.
19. We pressed him on how he had arrived at capital value of only £140,000 on the basis of this comparable market evidence. He told us that he does not think that three bedroom flats are much more expensive than two bed-roomed flats; in his opinion a buyer seeking three bed-roomed accommodation would prefer a house to a flat. He is also of the opinion that the market evidence was based on flats in more desirable locations than the subject property. The landlord put to him that her property is in one of the most sought after roads in Gravesend. She based this on having lived in the area since 1982.
20. After the hearing, Mr Coling produced a signed expert report. It largely confirmed his oral evidence and it included references to the garage and the garden area. He did not refer in his conclusions to the effects of the statutory rights bestowed on leaseholders on the settlement evidence he relies on (often referred to as the 'no Act world'). Nor did he comply in full with the requirements of the RICS declarations.
21. The landlord produced a copy of a valuation her previous solicitors obtained from Caxtons, chartered surveyors who in June 2008 advised that a premium of £12,804.53 should be payable. This appeared to be based on a capital value of £162,895.05. She told us that her flat had been valued at £300,000 before the current recession.

Reasons for our decision on the premium payable

22. Having considered this evidence we have reached the conclusion that the capital value of the flat was £150,000 at the valuation date. We have reached this conclusion on the basis of the market evidence. Mr Coling's conclusions on this point are too pessimistic in our view and support the higher figure. We have noted that the unexpired length of the lease in this determination is 62.5 years. Our conclusion is also supported indirectly by the Caxton report which arrived at a capital value one year before the valuation date.
23. We agree with Mr Coling's opinion that the 5% deferment rate should be applied in this case following the *Sportelli* decision. However, we were more troubled by Mr Coling's changed position on relativity bearing in mind that he advised on a lower figure only a few weeks before this hearing. That said, his revised opinion is supported by our reading of the graphs of relativity (see: RICS research report on relativity published in October 2009). It is also supported indirectly by the landlord's valuer.
24. Lease extension valuations must be carried out in accordance with Schedule 13 of the Act. In Part 2 paragraph 2 of that Schedule it is provided that 'the premium payable for the grant of a new lease shall be the aggregate of :
- (a) the diminution in value of the landlord's interest in the tenant's flat as determined in accordance with paragraph 3,
 - (b) the landlord's share of the marriage value as determined in accordance with paragraph 4, and
 - (c) any amount of compensation payable to the landlord under paragraph 5'
25. There is no claim for compensation in this case. In determining the diminution in the landlord's interest in the flat Schedule 13 states Paragraph 3 of Schedule 13 requires a valuation of the landlord's interest before and after the grant of the new lease. This has to be determined under paragraph 3(2) which reads as follows:
- (1) The diminution in value of the landlord's interest is the difference between--
 - (a) the value of the landlord's interest in the tenant's flat prior to the grant of the new lease; and
 - (b) the value of his interest in the flat once the new lease is granted.
 - (2) Subject to the provisions of this paragraph, the value of any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) is the amount which at [the relevant date] that interest might be expected to realise if sold on the open market by a willing seller (with [neither the tenant nor any owner of an intermediate leasehold interest] buying or seeking to buy) on the following assumptions--
 - (a) on the assumption that the vendor is selling for an estate in fee simple or (as the case may be) such other interest as is held by the landlord, subject to the relevant lease and any intermediate leasehold interests;
 - (b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;
 - (c) on the assumption that any increase in the value of the flat which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and
 - (d) on the assumption that (subject to paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the relevant lease has effect or (as the case may be) is to be granted.

26. In any claims where the current lease has less than 80 years unexpired, any marriage value must be shared 50:50 (Schedule 13 paragraph 1). In the case of a claim for the grant of new lease, marriage value is defined as:

(2) [Subject to sub-paragraph (2A),] the marriage value is the difference between the following amounts, namely--

(a) the aggregate of--

- (i) the value of the interest of the tenant under his existing lease,
- (ii) the value of the landlord's interest in the tenant's flat prior to the grant of the new lease, and
- (iii) the values prior to the grant of that lease of all intermediate leasehold interests (if any); and

(b) the aggregate of--

- (i) the value of the interest to be held by the tenant under the new lease,
- (ii) the value of the landlord's interest in the tenant's flat once the new lease is granted, and
- (iii) the values of all intermediate leasehold interests (if any) once that lease is granted.

27. We have therefore taken £150,000 as the capital value of the flat as at the valuation date. To this figure we have applied the generic deferment rate of 5% following the *Sportelli* decision. The ground rent has been capitalised at 7%, the rate proposed by those advising the leaseholder which is also the rate we would have adopted on the basis of our knowledge and experience. The marriage value is to be shared equally between the leaseholder and the landlord. With this approach we determine that the premium payable by the leaseholder to the landlord is the sum of £11,362. A copy of our valuation is appended to this decision.

Reasons for our decision on the terms of the new lease

28. Under section 56(1) of the Act the landlord is bound to grant a new lease of the flat, in substitution of the existing lease, on payment of the premium, for a term expiring 90 years after the term date of the existing lease, at a peppercorn rent. Section 57 makes provision for the terms of the new lease. The basic rule is that the new lease shall be on the same terms as the existing lease as they were at the valuation date. However, some modifications are permissible under that section.

29. Those advising the leaseholder included in their bundle of documents a document they describe as the new lease, but in fact, this document contains some of the lease terms of the existing lease and includes some proposed variations. Two linked variations are proposed to clause 4(7) of the existing lease. First, an additional landlord covenant is proposed. This would impose an obligation on the landlord to enforce leaseholder covenants at the written request of the leaseholder or any mortgagee, provided the landlord has been given security for the costs involved. However, we have concluded that this is not a term that needs to be included under section 57(6): it is not necessary to either remedy a defect in the existing lease, nor unreasonable to include it without modification because of changes which have occurred since the start of the existing lease. Besides, as the landlord could under this proposed term, insist on receiving an indemnity

before acting, so the leaseholder for the time being would surely prefer to act himself rather than incur the landlord's costs.

30. We also reject, for the same reasons, the proposed alteration to clause 4 of the existing lease by adding the words 'and protection' after the words 'support and shelter'.
31. The third proposed amendment adding as a new clause 8 to the second schedule to the existing lease by adding a right of access was agreed by the landlord at the hearing.
32. It has also been suggested in the draft lease a mutual covenant by the parties to the lease to observe and perform the covenants and conditions as modified; a statement that the new lease is granted under section 56 of the Act and statements made under section 61 (that is the landlord's redevelopment rights) and under section 59(3) (no statutory rights for any sublease); a statement about the Contract (Rights of Third Parties) Act 1999 and an obligation on the part of the leaseholder to apply to register the new lease under the Land Registration Act 2002. These proposed additional terms are acceptable.
33. To summarise the terms of the new lease shall be the same as those in the existing lease, save for the addition as a new clause 8 to the second schedule to the lease the following words: 'The right of access over the front garden, pathways or accessways for the purposes of ingress and egress to and from the Premises'. The new lease may also include all of the statements referred to in paragraph 27 of this decision.

Costs

34. We were surprised that counsel for the leaseholder applied at the close of the hearing that the landlord should pay costs to the landlord under Schedule 12, of the Commonhold and Leasehold Reform Act 2002. To be fair to counsel, he made it clear that he was doing so on the express instructions of his client and he did not make this application with any enthusiasm. Bearing in mind that this hearing took place following an order of the Court, that if the landlord had chosen to instruct solicitors and a valuer in connection with this application the leaseholder would have been responsible for payment of those costs under section 60 of the Act, we conclude that the application is both misconceived and preposterous. The application is refused.

Summary

35. To summarise, this matter is to return to the Dartford County Court (under claim number 9 DA03739). Those advising the leaseholder are to settle a new draft lease consistent with this determination to be lodged with the Court which on payment of the premium of £11,362 will execute the new lease. Counsel for the leaseholder told us that he will ask those instructing him to inform the landlord when they apply to the court for the new lease to be executed and as to the payment into court of the premium.
36. The landlord will, no doubt, seek independent advice on her entitlement to the premium.

Signed:
(James Driscoll, lawyer chair)

Dated: 18 August 2010