

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – Leasehold Reform Housing and Urban Development Act 1993 Section 24 – whether agreement reached as to part of purchase price deprived LVT of jurisdiction to determine that element of the price – Schedule 9 paragraphs 2 and 4 – application of mandatory leaseback provisions – should the leaseback include provision indemnifying the local authority lessee against unexpected increases in service charge which cannot be recovered from tenants exercising right to buy.

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

THE LORD MAYOR AND CITIZENS OF THE
CITY OF WESTMINSTER

Appellant

and

CH2006 LIMITED

Respondent

Re: Cooper House
Lyons place
London NW8 8NJ

Before: Her Honour Judge Alice Robinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 8th September 2009

Ms Nicola Muir instructed by Judge & Priestley LLP for the Appellant
Mr Christopher Heather instructed by Sheppersons on behalf of the Respondent

The following cases are referred to in this decision:

Broomfield Freehold Management Ltd v Meadow Holdings Ltd (LRA/148/2006)

Goldeagle Properties Ltd v Thornbury Court Ltd [2009] L&TR 1, CA

Ellis & Dines v Logothetis (LRA/3/2000)

DECISION

Introduction

1. The Appellant appeals to the Lands Tribunal, with permission, from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (hereafter “the LVT”) dated 5 February 2008 whereby the LVT decided (1) that it did not have jurisdiction to determine the price to be paid for the specified premises and the common and appurtenant land by virtue of s.24 of the Leasehold Reform Housing and Urban Development Act 1993, the price having been agreed and (2) that the leaseback to be granted of the flats the subject of secure tenancies should not include the proposed clause 4(3) which sought to indemnify the Appellant lessee against increases in service charge which had not been notified to any tenants exercising the right to buy pursuant to s.125 of the Housing Act 1985.

2. The Respondent is the nominee purchaser under the 1993 Act for 16 out of the 21 qualifying lessees of Cooper House, Lyons Place, London NW8 8NJ (hereafter “the Premises”) who are participating in the proposed purchase of the freehold. The Appellant is the freeholder of the premises and immediate landlord of 6 flats within the premises let on secure tenancies.

3. The chronology is as follows:

- 9 August 2006 initial notice given by the Respondent under section 13
- 11 October 2006 counter notice given by the Appellant under section 21
- 16 January 2007 letter from Respondent’s solicitors to Appellant’s solicitors stating “Our client is prepared to accept your client’s premium proposal of £7,560 for the relevant premises and the common and appurtenant land.”
- 20 February 2007 letter from Appellant’s solicitors to Respondent’s solicitors stating “We note that you are prepared to accept your client’s premium proposal of £7,560 for the relevant premises and the common and appurtenant land” and agreeing to inclusion of the common and appurtenant land set out in the plan accompanying the initial notice.
- 10 April 2007 application to the LVT asking it to determine, amongst other matters, “the premium payable”
- 23 October 2007 letter from Appellant’s solicitors to Respondent’s solicitors stating the price payable for the relevant premises and the common and appurtenant land is now £34,054.16
- 5 February 2008 LVT decision
- 7 March 2008 LVT grants permission to appeal to the Lands Tribunal in respect of the leaseback issue
- 21 July 2008 Lands Tribunal grants permission to appeal in respect of the jurisdiction issue

4. The Respondent's initial notice proposed a purchase price for the freehold of £4,500 for the specified premises and £250 for the common and appurtenant parts shown edged brown and shaded green on an accompanying plan. The Appellant's counter notice proposed the purchase price of the Premises should be £37,560 which included 4 car parking spaces at £7,500 each. By implication the price proposed for the rest of the Premises i.e. the building and remaining common and appurtenant parts was £7,560. The Respondent's solicitors wrote on 16th January 2007 stating that "Our client is prepared to accept your client's premium proposal of £7,560 for the relevant premises and the common and appurtenant land." The letter disputed the value of the car parking spaces and sought the Appellant's agreement to the boundary of the premises shown on the plan accompanying the initial notice which differed from the plan accompanying the counter notice. The Appellant's solicitors' response dated 20 February was to agree the boundary shown on the plan accompanying the initial notice and they stated "We note that you are prepared to accept your client's premium proposal of £7,560 for the relevant premises and the common and appurtenant land."

5. The Respondent's application to the LVT dated 10 April 2007 stated the parties

"have not been able to agree:

1. The extent of the property capable of being enfranchised
2. All the terms of the leasebacks to the freeholder pursuant to Schedule 9.
3. The premium payable
4. All the terms of the Transfer

The Applicant seeks a determination of the above matters."

6. The parties unsuccessfully negotiated the price to be paid for the car parking spaces and later successfully negotiated the price to be paid for 6 sheds which it was agreed should be included in the transfer. However, the price to be paid for the specified premises and the common and appurtenant land was not revisited and remained uncontentious until October 2007. At this time the Appellant reviewed its valuation of the relevant premises and the common and appurtenant land and put forward an alternative valuation of £34,054.16 using a reversionary rate of 5% as opposed to the 7% used previously.

7. There were also negotiations as to other terms of the transfer and by the time of the LVT hearing there were a number of outstanding issues which the LVT was asked to determine. These were

- (1) whether the parties had agreed the price payable for the specified premises and the common and appurtenant land and, if so, whether this deprived the LVT of jurisdiction to determine the price,
- (2) the value of the car parking spaces,
- (3) whether compensation was payable pursuant to Schedule 6 paragraph 5(2) of the 1993 Act for estate charges,
- (4) the price to be paid for the storage sheds,
- (5) the terms of the transfer and
- (6) the terms of the leaseback of flats the subject of secure tenancies.

8. As to issue (6) in particular, it was agreed between the parties that the terms of the leaseback of the 6 flats subject to secure tenancies should make provision for the Lessor to provide information to the Lessee as to likely future service charges in the event that any of the tenants exercised the right to buy so as to enable the Appellant to comply with s.125 of the Housing Act 1985, see clause 4(2). The Appellant also sought the inclusion of clause 4(3) which was opposed by the Respondent. This provides:

“For the period of six years commencing three months after the Lessee shall have served a notice upon the Tenant pursuant to Section 125 of the 1985 Act (a copy of which shall be supplied to the Lessor) not to require the Lessee to pay by way of Service Charge a proportion of the cost of any works (whether repairs or improvements) carried out to the Property by the Lessor not included in the schedule of works referred to in the previous sub-clause (3)¹ nor any amounts in excess of the cost of such works as shown on the said schedule of works save for a permitted inflation allowance calculated in accordance with the Housing (Right to Buy)(Service Charges) Order 1986.”

9. Issue (1) was resolved by the LVT in favour of the Respondent. The LVT held that

“8. The Tribunal is satisfied that there was an agreement between the parties as to the price payable for the specified premises and the common and appurtenant land claimed in the Section 13 notice. They accept that they have jurisdiction under Section 24(1) and (8) to determine only the terms of the acquisition in dispute and this could include constituent elements of the purchase price when some, but not all, were agreed between the parties.”

The LVT determined the value of the car parking spaces to be £20,000. Issues (3) and (4) were resolved by agreement during the hearing and the LVT determined the total premium payable for the freehold to be £28,060. The LVT determined issues (5) and (6), the terms of the transfer and the leaseback. In particular, the LVT deleted clause 4(3) of the draft leaseback proposed by the Appellant stating

“27.b. ...The Tribunal is of the opinion that the responsibility of the local authority under Section 125 of the Housing Act 1985 cannot be devolved to the applicants...”

10. The Appellant appeals against the LVT’s decision on issue (1) and its decision to delete clause 4(3) on issue (6). In responding to this latter issue the Respondent has taken an additional point not put forward in the LVT namely that the LVT had no jurisdiction to include clause 4(3) in any event by virtue of Schedule 9 paragraph 4 because this is a case where leaseback is mandatory and the inclusion of clause 4(3) was not agreed by the parties.

The first issue: was the price agreed so as to deprive the LVT of jurisdiction?

11. Section 13 of the 1993 Act requires the initial notice to specify a number of detailed matters including in section 13(3)(d)

¹ This appears to be a typing error and should read ‘sub-clause (2)’

- “(d) ... the proposed purchase price for each of the following, namely –
- (i) the freehold interest in the specified premises, or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises,
 - (ii) the freehold interest in any property specified under paragraph (a)(ii), and
 - (iii) any leasehold interest specified under paragraph (c)(i);”

The counter notice must state which of the proposals contained in the initial notice are accepted and where they are not, the reversioner’s counter proposal, section 21(3)(a).

12. Section 24 provides so far as relevant as follows:

“(1) Where the reversioner in respect of the specified premises has given the nominee purchaser –

- (a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or
- (b) a further counter-notice required by or by virtue of section 22(3) or section 23(5) or (6),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute.

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the nominee purchaser.

(3) Where –

- (a) the reversioner has given the nominee purchaser such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and
- (b) all of the terms of acquisition have been either agreed between the parties or determined by a leasehold valuation tribunal under subsection (1),

but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6), the court may, on the application of either the nominee purchaser or the reversioner, make such order under subsection (4) as it thinks fit.

(4) The court may under this subsection make an order –

- (a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);
- (b) providing for those interests to be vested in him on those terms, but subject to such modifications as –
 - (i) may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser or the reversioner, to be

- required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and
- (ii) are specified in the order; or
 - (c) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6);

and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above.

(8) In this Chapter “the terms of acquisition”, in relation to a claim made under this Chapter, means the terms of the proposed acquisition by the nominee purchaser, whether relating to –

- (a) the interests to be acquired,
- (b) the extent of the property to which those interests relate or the rights to be granted over any property,
- (c) the amounts payable as the purchase price for such interests,
- (d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or
- (e) the provisions to be contained in any conveyance,

or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of section 1(4) or 21(4).”

13. The Appellant submitted that as a matter of fact the terms of acquisition for the purposes of s.24(8) had not been agreed. The counter notice proposed a different area of land and price from the initial notice and also proposed detailed terms of transfer. The letter dated 16th January did not unequivocally accept those terms; it suggested negotiating ‘the premium’ in the singular and rejected the area of land, part of the premium and other terms. The response on 20th February simply noted that the Respondent was ‘prepared to accept’ the figure of £7,560 but disputed the price of the car parking spaces and their inclusion in the transfer, the price of sheds and inclusion of other terms. It amounted neither to acceptance nor to acceptance on the same terms. Subsequent letters from both parties indicated the premium would change depending on whether a clause permitted the Appellant to charge for estate costs was included in the transfer. The parties’ position was that until all the terms were agreed nothing was fixed.

14. It was also submitted that 2 months after the counter notice was given terms remained in dispute and an application was made to the LVT in time so that the LVT had jurisdiction to determine all the matters which were in dispute which included the premium as to which there was no final agreement. The application to the LVT asked it to determine ‘the premium payable’ not just part of it. The fact that the agreement need not be a binding contract (section 38(4)) does not detract from the fact that there must be an agreement. Further, although s.24(8) envisages that separate amounts could be agreed or determined such amounts must relate to one of the category of interests to be acquired: the specified land, common and appurtenant land and intermediate leases (not relevant here), see section 13(3)(d). Here the figure of £7,560 related neither to the specified premises alone nor to the common and appurtenant parts because it excluded the car parking spaces and sheds.

15. The Appellant also prayed in aid the decision of the Lands Tribunal in *Broomfield Freehold Management Ltd v Meadow Holdings Ltd* (LRA/148/2006) where it was held that because the parties were not agreed as to what the purchase price was for, the price was not agreed for the purposes of s.24. Thus the terms had not all been agreed so as to deprive the LVT of jurisdiction.

16. The Respondent submitted that the policy of the 1993 Act was to encourage negotiation and agreement. There should be no distinction between the finality of terms which had been agreed and terms which had been determined by the LVT for the purposes of s.24. The scheme of the legislation is that when a term of acquisition has been agreed the LVT do not need to deal with it and it can be enforced by application for a vesting order without the worry that at the last minute the LVT or court will be asked to re-open an issue previously agreed. Section 91 of the 1993 Act only gives the LVT jurisdiction over matters ‘in default of agreement.’ In this context ‘agreed’ does not mean a legally binding contract which would have to comply with the formalities of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see *Broomfield* paragraph 20) nor does it import contractual analogies. The test for deciding whether this lesser species of agreement has been reached is the ‘elephant in the room’ test, you know when it has happened. Section 24(8) made it clear terms could be separately agreed including elements of the price payable for different interests and parts of property.

17. It was submitted that the exchange of correspondence in January and February 2007 effectively agreed £7,560 as the price payable for everything except the car parking spaces. When the inclusion of the sheds was introduced they were separately valued as was the loss which the Appellant said it would suffer if the estate cost provision was not included. This would not affect the price already agreed as it is valued separately pursuant to Schedule 6 paragraphs 2(1)(c) and 5. By 3 September at the latest the price was finally agreed apart from the car parking spaces, the Appellant’s solicitors said so in their letter and the accompanying list of issues document prepared for the purposes of the LVT. *Broomfield* was a different case, on the facts agreement had not been reached.

18. In my judgment the legislation provides that the elements which go to make up the total purchase price for the freehold may be agreed or determined by the LVT separately. Section 13(3)(d) requires the initial notice to provide a breakdown of the proposed price setting out separate figures for the specified premises and any common and appurtenant land. The counter notice must respond to these proposals and where not agreed put forward counter proposals. Section 24(1) refers to the terms of acquisition which remain in dispute and gives the LVT jurisdiction to determine the matters in dispute. By virtue of s.24(8) the phrase ‘terms of acquisition’ includes the interests to be acquired, the extent of the property to which those interests relate and “the amounts payable as the purchase price for such interests.” The use of the plural in all these sub-sections to describe ‘the interests’ and ‘the amounts’ shows that the purchase price for different interests and different parts of the property may be agreed or determined separately from the price for others. This is consistent with section 24(1) which envisages that some terms may be agreed and those not agreed must be determined by the LVT. It is also consistent with a number of decisions which make it clear that the LVT can determine issues in stages, see mostly recently *Goldeagle Properties Ltd v Thornbury Court Ltd* [2009] L&TR 1, CA.

19. What is the status of an agreement as to some of the terms of acquisition? The 1993 Act distinguishes between agreement as to a term of acquisition and a 'binding contract', see sections 24(3) and 38(4). In other words the normal conveyancing process by which formal contracts are exchanged for the sale of land is to be followed, subject to the procedural requirements of the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 (SI 1993/2407). After the terms have been agreed or determined, there must be a binding contract which can then be enforced as a matter of contract law. Failing the parties entering into a binding contract after all the terms have been agreed and/or determined by the LVT, the court steps in to make a vesting order, see sections 13(11), 24(4) and 25(6). Therefore an agreement as to a term must be an agreement which falls short of such a binding contract, described by Mr Heather in argument as 'a lesser species of agreement.'

20. This could either be an agreement which is final in the sense that neither party can change their mind and ask the LVT to determine that issue, or it could simply mean an agreement for the time being such that agreement may later be withdrawn. In *Broomfield* the parties appear to have agreed that it means the former, see paragraph 20 relying on Hague on Leasehold Enfranchisement at para 26-11, but in the event the point did not arise directly for decision because the Tribunal held that agreement had not been reached. There may be valid reasons why a term agreed at an early stage in the negotiations does not appear to be such a good idea later in the negotiations when other issues have been raised and perhaps resolved. Preventing a party from revisiting an issue previously agreed may give rise to unfairness. On the other hand, allowing a party to resile from agreement reached much earlier may also give rise to unfairness, it could simply be a delaying tactic or result in the need for a further LVT hearing after one has already been held. Such unfairness may arise in circumstances falling short of an estoppel which could prevent one party from resiling from an earlier agreement.

21. In my judgment the scheme of section 24 is such that an agreement as to terms of acquisition must be binding in the sense that it can be enforced by application for a vesting order. To hold that a party could resile from an earlier agreement would result in uncertainty and potentially render the enforcement mechanism ineffective which cannot have been intended. Further, there is no basis in section 24 for distinguishing between the status of an agreement reached at different times in the process of negotiation, application to the LVT, determination by the LVT of matters in issue and application for vesting order. Therefore an agreement reached at any time after the statutory formalities of initial notice and counter notice have been completed for the purposes of section 24 is binding.

22. In arriving at this decision I have been assisted by a decision of the Tribunal in *Ellis & Dines v Logothetis* (LRA/3/2000) which considered section 48 of the 1993 Act, the equivalent provision to section 24 relating to the acquisition of new leases. The enforcement mechanism provided for in section 48 is slightly different in that there is no reference to a subsequent binding contract but otherwise the sections are very similar and in particular section 48(3) provides that after the counter notice has been given and all the terms of acquisition have been agreed or determined either party may apply to the court for an ordering for the performance or discharge of obligations arising out of the notice. At paragraph 10 the President said this:

“The terms are determined either by agreement between the parties or by the LVT. So long as any of the terms of acquisition are not agreed those terms remain in dispute and it is for the LVT to determine them. Terms which are agreed cease to be in dispute. The LVT only has jurisdiction where there are terms that are not agreed, and the county court only has jurisdiction where all the terms have been agreed or determined by the LVT. Any agreement reached is necessarily reached in the context of the provisions of section 48. Any terms agreed are “terms of acquisition” of the new lease to which the tenant is entitled under the Section. Any agreement reached which is not intended to create rights independent of the statutory provisions is thus an agreement made for the purpose of those provisions. It has to be a complete agreement in the sense that each party commits itself unconditionally to such terms as are agreed.”

In my judgment this aptly describes the scheme of section 24, adjusted to reflect the fact that section 24 relates to collective enfranchisement rather than the grant of a new lease.

23. How is one to determine if such an agreement has been reached for the purposes of section 24? It would not be appropriate to require the formalities necessary to give rise to a binding contract at common law, even one made orally. There is unlikely to be any consideration flowing from one party to the other because the agreement relates to only some terms of a larger whole. On the other hand the ‘elephant in the room’ test is inadequate as being insufficiently certain. In my judgment it must be clear that negotiations have been completed and final agreement has been reached, either orally or in writing, on a specific term or terms that is not in any way contingent on agreement or determination of some other term or terms. It would thus be open to the parties to express any agreement as to e.g. the price as conditional on the acceptance of other terms overcoming the potential unfairness identified in paragraph 20 above.

24. Turning to the facts, in my view the parties agreed that the price to be paid for the specified premises and the common and appurtenant land excluding the car parking spaces and sheds was £7,560. The fact that the exchange of correspondence in January and February 2007 uses the phrase “prepared to accept” does not detract from this although I agree that this language is less certain than might otherwise be the case. It could be said that the counter notice price was predicated on agreement as to the rest of the terms set out in it no such contingency is expressed in the letters dated 16th January and 20th February. For example, there is no suggestion that the price may vary depending on where the boundary between Cooper House and Dicksee House is to be drawn or whether the transfer terms sought by the Appellant are agreed. The uncontested evidence before the LVT of the Respondent’s solicitor Ian Mitchell is that between May and October 2007 there were negotiations with the Appellant’s solicitors about matters in dispute but at no time did this include the price payable for the specified premises and the common and appurtenant land.

25. It is right to say that in the letters dated 19th March and 17th July both parties indicate that the premium payable may vary depending on whether the estate charge clause is included and that given the less certain phrase “prepared to accept” used in the earlier correspondence the parties had not intended to reach final agreement on the price at that stage. If both parties agreement to £7,560 was on the basis of their preferred terms of transfer then the price could

vary. Even if a separate valuation of loss were made pursuant to Schedule 6 paragraph 5 should the estate charge clause be excluded, inclusion of the estate charge clause certainly had the potential to affect the valuation of the specified premises.

26. However, on 3 September the Appellant's solicitors wrote to the Respondent's solicitor and under the heading 'Agreement' stated

"The only obvious point of dispute would be the purchase price, which can be ascertained once the car parking spaces issue is resolved."

The implication from this is clear, the parties had agreed the rest of the price payable. This is confirmed by the list of issues document accompanying the letter which states:

"10. The Purchase Price is disputed and will be known when the issue of the car parking spaces is determined." (my emphasis)

Of particular importance is the fact that there is no suggestion or implication anywhere that the purchase price may change or have to be revisited depending on the LVT's decision as to the other issues still in dispute. Although there is no evidence as to what was in the Respondent's list of issues, the letter dated 25th September which accompanied them stated in terms that the price had been agreed at £7,560, that agreement deprived the LVT of jurisdiction to determine it and that would remain the position even if the LVT excluded the estate charge clause.

27. At this stage there can be no doubt that the figure was agreed and that agreement was not conditional upon agreement or determination of other terms. It was open to the parties to say that agreement as to the price was conditional but they did not do so. Although there may well be circumstances when the terms of the transfer necessarily affect the price that is not invariably the case and here the parties clearly concluded that they did not. Nor do I accept the submission that any agreement as to price has to relate to the interests or property as required to be described in the initial notice by virtue of section 13(3)(d). In this case there was a discrete issue as to parking spaces on the forecourt which was readily capable of being decided separately both in terms of the plan of the land to be acquired and the valuation of it. Even assuming the parking spaces and storage sheds were part of the common and appurtenant land (which they may well not have been), for the reasons set out in paragraph 18 above the parties could agree the price of part of the specified premises and part of the property forming the common and appurtenant land provided the agreement was clear and unconditional.

28. I therefore consider the LVT was correct to conclude that there was agreement as to a term of acquisition, namely the price of the specified premise and common and appurtenant land excluding the car parking spaces and sheds, if not by 20 February then certainly by 25 September 2007 at the latest, and that agreement deprived the LVT of jurisdiction to determine that term.

The second issue: should the leaseback include clause 4(3)?

29. The parties are now agreed that the grant of leasebacks of the 6 flats let on secure tenancies would be mandatory by virtue of Schedule 9 paragraph 2 of the 1993 Act. Accordingly the terms of any such leaseback are governed by Schedule 9 paragraph 4 which I must set out in full:

- “(1) Any lease granted to the freeholder in pursuance of paragraph 2 or 3, and any agreement collateral to it, shall conform with the provisions of Part IV of this Schedule except to the extent that any departure from those provisions is agreed to by the nominee purchaser and the freeholder with the approval of a leasehold valuation tribunal.
- (2) A leasehold valuation tribunal shall not approve any such departure from those provisions unless it appears to the tribunal that it is reasonable in the circumstances.
- (3) In determining whether any such departure is reasonable in the circumstances, the tribunal shall have particular regard to the interests of the tenant under the secure tenancy or introductory tenancy referred to in paragraph 2(1) or (as the case may be) under the housing association tenancy referred to in paragraph 3(1).
- (4) Subject to the preceding provisions of this paragraph, any such lease or agreement as is mentioned in sub-paragraph (1) may include such terms as are reasonable in the circumstances.”

30. Part IV of Schedule 9 contains a number of provisions which must or may be included in a leaseback and covers the main standard provisions one would expect in a lease. In particular paragraph 14 states ‘the lease shall include covenants by the lessor’ to repair and insure. Paragraph 16 states:

- “(1) The lease may require the lessee to bear a reasonable part of the costs incurred by the lessor in discharging or insuring against the obligations imposed by the covenants required by paragraph 14(1) or in discharging the obligation imposed by the covenant required by paragraph 14(2)(a).
- (2) Where a covenant required by paragraph 14(1) or (2)(a) has been modified to any extent in accordance with paragraph 4 or 7, the reference in sub-paragraph (1) above to the obligations or (as the case may be) the obligation imposed by that covenant shall be read as a reference to the obligations or obligation imposed by that covenant as so modified.”

31. The Appellant submitted and the Respondent accepted that paragraph 4 permitted the inclusion of a clause in the leaseback even though the Respondent did not agree provided it conformed with the terms set out in Part IV and did not amount to a departure from them. As a matter of language that must be right. It also explains the separate requirement of reasonableness in paragraph 4(4) which applies to clauses which are not a departure from Part IV whereas paragraph 4(2) applies to clauses that are a departure from Part IV. The difference between the parties was as to whether clause 4(3) amounted to such a departure, in which case the LVT had no jurisdiction to include it because the Respondent did not consent to it, and if not a departure, whether it was reasonable to include it.

32. The Appellant submitted that the purpose of the legislation was to prevent the freeholder and nominee purchaser agreeing provisions of a leaseback which would be to the detriment of the secure tenant. That did not apply in this case because clause 4(3) was designed to prevent the Appellant from being out of pocket as a result of inaccurate forecasting of future service charges by the Respondent. Paragraph 4(1) does not preclude additional provisions of which this would be one and it would not be a departure from Part IV. Clause 4(3) simply imposed liability on the nominee purchaser for the provision of inaccurate information.

33. It was submitted it would be reasonable to include clause 4(3). Section 125 of the 1985 Act requires the local authority to provide a tenant exercising the right to buy with information about likely future service charges. Section 139 and Schedule 6 paragraphs 16A-16E then require the lease granted to the secure tenant to prevent the local authority from recovering more than the predicted amounts, subject to an inflation allowance, for a period of roughly 5 years. When the local authority is the freeholder it can control the works and their cost whereas after collective enfranchisement it cannot and has no knowledge. The Appellant would be exposed to a potentially substantial financial loss beyond its control and that would be contrary to the scheme of the legislation which is to fairly compensate it for being forcibly deprived of the freehold. It was also suggested that the nominee purchaser of the freehold and secure tenants might collude so as to increase service charges with the result that the Appellant would have to pay for them and could not recover them from the former secure tenant.

34. The Respondent submitted that a provision which entitled the lessor to recover more or less than a reasonable service charge would be a departure from paragraph 14 for the purposes of paragraph 4(1) and this would include clause 4(3). Although paragraph 14 states that the lease may require the lessee to bear a reasonable part of the service charge, not must require, this means that the lease need not include any provision at all for the recovery of a service charge from the lessee. If a service charge provision is included, it must conform with paragraph 14.

35. It was submitted it would not be reasonable to include clause 4(3). The Housing Act 1985 imposes an onerous obligation on local authorities to make accurate service charge predictions and allocates the risk of failing to do so to the authority. When the 1993 Act was introduced the right to buy legislation as already in existence and if there had been any intention to shift that burden to nominee purchasers the 1993 Act would have made that clear. The Respondent does not have the resources or experience of management of a substantial block of flats that the Appellant does to and it would be unfair to impose liability for genuine errors on, in effect, the long leaseholders who formed the nominee purchaser. The Appellant would be better off anyway if a secure tenant exercised the right to buy because it could recover more service charges under the new lease than it could do under the secure tenancy. The Respondent also submitted that the Appellant could challenge the reasonableness of any service charges which exceeded the predicted sums under sections 19 and 27A of the Landlord and Tenant Act 1985.

36. In my judgment clause 4(3) is not a departure from the provisions of Part IV. The leaseback includes clause 3 which makes standard provision for the recovery of a service charge and requires the lessee to pay the appropriate proportion of moneys 'properly and reasonably expended' by the lessor. This conforms with paragraph 14 of Part IV. Clause 4 is dealing with an entirely different question, namely the provision of information to the lessee for the purposes of s.125 of the 1985 Act and the allocation of risk where that information proves to be inaccurate. In my view that is different from and not covered by the provisions of Part IV, in particular paragraph 16. Even if that is wrong, paragraph 16 is expressed in permissive not mandatory terms, the lease may require the lessee to bear a reasonable part of service charge, it does not have to do so. In my view a provision which prevents the lessor from recovering all of the service charge in certain circumstances is not a departure from paragraph 14 the object of which is to prevent the lessor from recovering too much not too little. Accordingly the inclusion of all the provisions in clause 4, not just clause 4(3), are not a departure from the provisions of Part IV and the LVT had jurisdiction to consider whether they should be included.

37. However, I do not consider it would be reasonable to include clause 4(3) in this case. The drafters of the 1993 Act would have been well aware of the right to buy legislation. Indeed, paragraph 4 requires the terms of the leaseback to conform to certain provisions (subject to the possibility of departure in certain circumstances), as does s.139 of the 1985 Act relating to the new lease to the secure tenant. In both cases those provisions state 'the lease may require the lessee/tenant to bear a reasonable part of the costs incurred by the lessor/landlord in discharging or insuring against the obligations imposed by' the provisions which require the lease to contain a covenant by the lessor to repair etc. (see Schedule 9 paragraph 16 of the 1993 Act and Schedule 6 paragraph 16A of the 1985 Act). The fact that Schedule 6 of the 1985 Act goes on to cap the service charge recoverable in certain circumstances and Schedule 9 of the 1993 Act does not suggest that this is not normally a provision which one would expect to see in a leaseback, or put another way, there would need to be a good reason to include it.

38. The Appellant has managed the Premises in the past and will continue to manage other similar blocks of flats on the same estate. It therefore has considerable experience of likely works and their cost, not just in general terms but as they relate to the Premises and similar properties. Further it will know what works have or have not been carried out to the Premises by the Respondent through service charge bills from the time the freehold is transferred to the Respondent. Therefore it is in a position to take a realistic view of works which might be required in the future and their likely cost. Indeed, during the hearing before me counsel for the Appellant accepted that the respondent would not necessarily accept any estimates the Respondent provides pursuant to clause 4(2) when serving its section 125 notice. Thus, even though it will lose control of the carrying out of works to the Premises it retains the knowledge which will enable it to make reasonable judgements about information provided to it by the Respondent. In these circumstances it would not be fair to make the Respondent wholly liable for the consequences of any inaccuracy in the information provided by the Respondent under clause 4(2); the Appellant will be able to make its own independent judgement as to whether that information is accurate. The possibility of collusion, in the absence of any evidence to support it, is not a good enough reason to impose such liability.

39. Nor do I consider that the risk of the Respondent providing inaccurate estimates pursuant to clause 4(2) is necessarily any greater than the Appellant doing so. The Respondent may lack the resources and experience of the Appellant but it can be expected to employ competent agents to advise it on the need for works and their cost. It may also require payment of service charges in advance based on an estimate of the likely cost, see clause 3(1) of the leaseback and the existing leases are likely to contain similar provision. Failure to adopt a professional and reasonable approach is likely to result in problems and challenges to service charges pursuant to the Landlord and Tenant Act 1985. While I agree that the LVT will not simply find a service charge to be unreasonable because it exceeds an estimate given pursuant to clause 4(2), that would be a factor in e.g. determining whether a charge is reasonably incurred (see section 19(1)(a)) and this legislation tightly circumscribes the recovery of service charges. The respondent can therefore reasonably be expected to act responsibly not only in the provision of information pursuant to clause 4(2) but also in the subsequent carrying out of work which results in a service charge.

40. I do not consider the omission of clause 4(3) unfairly exposes the Appellant to a potential loss contrary to the intention of the legislation that it should be fairly compensated for being deprived of the freehold. It is already exposed to such a potential loss, that is the deliberate policy of the right to buy legislation, and for the reasons already given I do not consider that the exposure would significantly increase as a result of the collective enfranchisement. Therefore I agree with the LVT that the Appellant's responsibility under s.125 of the 1985 Act should not be devolved to the Respondent in this case and clause 4(3) should be omitted.

41. The Appellant argued that if clause 4(3) was omitted the additional wording in clause 4(2) referring to the lessor's knowledge at the time should be deleted. The Respondent took the view it did not matter either way. Clause 4(2) requires the lessor to notify the lessee of the works it intends to carry out and the amount the lessor proposes to charge for them. This can only be based on the lessor's knowledge at the time and I consider the references to within the lessor's knowledge or possession adds nothing and should be deleted. Otherwise the LVT decision stands. For the avoidance of doubt, clause 4(2) therefore reads as follows:

“Within six weeks of the Lessee serving notice (“the Lessee’s Notice”) upon the Lessor that the Tenant has claimed to exercise his right to buy pursuant to the provisions of Part V of the 1985 Act (that claim having been admitted by the Lessee) to provide the Lessee with a schedule of works (including improvements) which the Lessor intends to carry out to the Property within 6 years of the date of the Lessee’s Notice in respect of which the Lessor is entitled to charge the Lessee the service Charge together with the estimated costs of such works payable by the Lessee and the average annual amount which the Lessor proposes to charge the Lessee during such six years for the management of the Property to enable the Lessee to comply with the requirements of sections 125A and 125B of the 1985 Act together also with details of any structural defects known to the Lessor affecting the Property or Demised Premises and together also with any other information for the time being required to be given to a Tenant exercising his right to buy. All expenses incurred by the Lessor in the pursuit of the above shall be charge to and paid by the Lessee.”

42. In the light of my decision on the first issue it is not necessary for the tribunal to reconvene to consider valuation evidence as to the price payable for the specified premises of common and appurtenant land. The appeal is dismissed.

43. Neither party made any application for costs.

Dated 17 September 2009

Her Honour Judge Alice Robinson