

Leasehold Reform Act 1967

Commonhold and leasehold Reform Act 2002

DETERMINATIONS OF LEASEHOLD VALUATION TRIBUNAL

On an application under s.21 1967 Act to determine the price payable on enfranchisement by the tenant under s.9(1) 1967 Act

Determination of reasonable costs under s.9(4) 1967 Act

Determination of costs of proceedings under para 10. Schedule 12 2002 Act

Applicant Tenant: Gertrude Davies

Respondent Freeholder: The Trustees of The Alison Hillman Charitable Trust

Property: 5, Aubrey Road, Small Heath, Birmingham B10 9DQ

Date of Tenant's Notice: 23 July 2003

Applications dated: 4 August 2004

Heard at: The Panel Office

On: 30 September 2004

APPEARANCES:

For the Tenant: Mr P Rocky FRICS

For the Freeholder: Mr P Burton BSc FRICS

Members of the Leasehold Valuation Tribunal:

Mr T F Cooper (Chairman)
Mr J H Dove
Mrs C L Smith

Date of Tribunal's decision: 25 OCT 2004

Background:

- 1 Mrs Gertrude Davies is the tenant (the '**Tenant**') by a 99 year lease less 3 days from 1907 of the dwelling house and premises at 5, Aubrey Road, Small Heath, Birmingham B10 9DQ (the '**Property**'). The Freeholders are Clare Wishart, Ian George Humphrey and Jervis Andrew Fisher as The Trustees of The Alison Hillman Charitable Trust (the '**Freeholder**'). By a notice (the '**Notice**') dated 23 July 2003 (the '**Date**') the Tenant claims to acquire the freehold under the Leasehold Reform Act 1967 (as amended) (the '**Act**'). By applications dated 4 August 2004 the Tenant applies to us: (a) to determine the price payable on the acquisition of the freehold of the Property under s.9(1) of the Act; and (b) the Freeholder's reasonable costs under s.9(4). During the proceedings the Tenant applies for an order that the Respondent pay £500 to the Tenant in connection with the proceedings under para 10. Schedule 12 Commonhold and Leasehold Reform Act 2002. We inspected the Property on 30 September 2004 and a hearing was held on the same day.
- 2 The Tenant holds the Property by a lease (the '**Lease**') for a term of 99 years less 3 days from 29 September 1907 at a fixed ground rent of £3.50 pa. The underlease (a term of 99 years less 4 days from 29 September 1907 at £4 pa) has merged with the head lease.
- 3 The unexpired term of the Lease on the Date - which is the relevant date for the determination of the price payable - was about 3 years 2 months.
- 4 The Property comprises an inner terraced house of brick and tile construction in an established residential area of similar properties. The accommodation includes:- on the ground floor - porch, hall, two living rooms, kitchen; on the first floor - 3 bedrooms (one with shower enclosure), bathroom with wc. The site frontage is about 5.1m; the width is maintained throughout the depth of the site and the total site area is about 230m².
- 5 **Mr P Rocky** FRICS appeared for the applicant Tenant; **Mr P Burton** BSc FRICS appeared for the Freeholder.

Adjournment dismissal:

- 6 By letter 15 September 2004, Fishers, property agents for the Respondent, applied for an adjournment of the hearing listed for 30 September 2004 on the grounds that Mr Burton has been appointed instead of **Mr E Rutledge** FRICS; the application was opposed by Mr Rocky. The Tribunal dismissed the application on the grounds that, on the facts introduced, the prejudice to the Tenant by an adjournment is greater than the prejudice to the Freeholder by not allowing an adjournment and a fair hearing could be maintained by not allowing an adjournment.

Alleged agreement on the price payable:

- 7 Mr Rocky says the price has been agreed between himself and Mr Rutledge, evidenced by a contract for the purchase of the freehold signed by Mrs Davies, sent with a deposit to the Respondent's solicitor under cover of a letter 5 March 2004 with an invitation to exchange contracts. On enquiry from ourselves, Mr Rocky says contracts have not been exchanged and he accepts that no binding contract exists. However, he urges

us to accept the evidence of an agreement on the price payable between surveyors (himself and Mr Rutledge) as evidence of the price payable. He accepts that neither he nor Mr Rutledge had express or implied authority to commit their respective clients to the price unconditionally.

- 8 While we are not bound by the strict rules of evidence, we decide we should apply the principles of without prejudice privilege. Negotiations to seek to achieve a settlement on the price are privileged and we take no account of such evidence as both parties have not waived the privilege. In any event we infer that all negotiations were subject to contract as it is accepted by Mr Rocky that he had no authority to make an unconditional agreement. The contract signed by Mrs Davies is, we believe, not a privileged offer and is evidence we take into account but the price offered is less than the price we determine, so it does not assist us. We do not accept Mr Rocky's contention that the price has been agreed. In weighing Mr Rocky's evidence of a provisional agreement by Mr Rutledge we have no evidence from Mr Rutledge directly but accept that Mr Rutledge's opinion of the price payable may well have been the figure alleged to have been agreed by Mr Rocky.

THE PRICE PAYABLE UNDER S.9(1) 1967 ACT

Common Ground:

- 9 The valuation date is 23 July 2003.
- 10 The unexpired term for the purposes of the valuation is 3 years 2 months.
- 11 6½% is the percentage to derive the s.15 annual modern ground rent from the site value and is the capitalisation rate to value the reversion.
- 12 A *Haresign* addition - recognised in *Haresign v St John The Baptists' College, Oxford* [1980] 255 EG 711 when specific account was taken of the reversion to the full value of the dwelling after the expiration of the assumed fifty years' extension of the lease - is not appropriate in this case.
- 13 In the absence of reliable evidence of sales of sites for residential development, the method of valuation of the reversion is the standing house method: accepted in *Farr v Millerson Investments Ltd* [1971] 22 P & CR 1055, as (i) derive the site value from the entirety value as a percentage of it; derive the s.15 modern ground rent from the site value; capitalise the modern ground as if in perpetuity, but deferred for the unexpired term of the Lease - 'as if in perpetuity' because, although the value of the modern ground rent is for a term of 50 years (as the extension to the Lease), the value of the freehold reversion in possession at the end of the fifty years' extension is ignored as being too remote to have a separate value for it. The entirety value is the value of the freehold interest in the Property with vacant possession assuming it to be in good condition and fully developing the potential of its site provided always that the potential identified is realistic and not fanciful.

[continued]

Valuations:

- 14 By Mr Rocky for the Tenant - £24,596.
By Mr Burton for the Freeholder - £35,500.
More specifically:

15	For the Tenant:			
	The term		say	£10
	The reversion:			
	Entirety value	£105,000		
	Site value (28% of entirety value)	£29,400		
	S.15 modern ground rent (6½% of site value)	£1,911 pa		
	YP perpetuity at 6½% deferred 3 years 2 months		<u>12.8657</u>	
				<u>£24,586</u>
				£24,596
16	For the Freeholder:			
	The term (ignore as nominal)			£Nil
	The reversion:			
	Entirety value	£130,000		
	Site value (1/3 of entirety value)	£43,333		
	S.15 modern ground rent (6½% of site value)	£2,816 pa		
	YP perpetuity at 6½% deferred 3 years 2 months		<u>12.606587</u>	
				<u>£35,500</u>
				£35,500

There are three issues in dispute:

(1) The value of the term:

- 17 Mr Rocky says £10; Mr Burton £Nil. We find that, however nominal, the term has a positive value. We adopt £10.

(2) The amount of the entirety value:

- 18 Mr Rocky says £105,000; Mr Burton £130,000.
- 19 Mr Rocky refers us to 12 comparable properties with details of asking prices and sale prices, saying we should be very cautious in relying on asking prices and we should recognise that some sale prices are inconsistent with the general level of values and should carry little weight without information on the surrounding circumstances. Excluding 94 Aubrey Road (asking £170,000), which we refer to later, asking prices range from £97,000 to £148,000 (£148,000 for 167 Aubrey Road); sale prices range from £40,000 (in October 2001) to £102,500 (in August 2003), excluding 94 Aubrey Road (sold at £127,000 in September 2002). Mr Rocky says the sale of 94 Aubrey Road is a single transaction which is not consistent with the general level of values known to him through his many valuations undertaken for prospective bank mortgagees; supported by the sale of no. 94 at £166,500 in March 2004.
- 20 Mr Burton relies on three comparables in Aubrey Road: nos. 1 (£172,000 in January 2004), 94 (in common with Mr Rocky - £127,000 in September 2002) and 113 (£131,000 in June 2003). By reference to helpful photographs he stresses the greater size and width of the houses, and comparables, in Aubrey Road compared with ten of the comparables (excluding the two in Aubrey Road) introduced by Mr Rocky, which he says is supported by the sales evidence.

21 We find the most helpful evidence is sales in Aubrey Road closest to the Date (23 July 2003). We accept Mr Burton's distinction between the characteristics of houses in Aubrey Road and elsewhere. We also accept Mr Rocky's proposition that a single transaction may be one thing and a general level of value another. In respect of the Aubrey Road comparables, Mr Rocky says no. 94 (at £127,000) is unreliable, which we find may be true but no. 113 (at £131,000 about two months before the Date) is not contested and no. 167 (asking £148,000 in the same month as the Date) is consistent with the level of value submitted by Mr Burton. Weighing the evidence of comparables as a whole and placing particular reliance on nos. 113 and 167 Aubrey Road which we find are not inconsistent with no. 94 (despite Mr Rocky's reservations), as matter of judgment, we find the entirety value is £130,000 as submitted by Mr Burton.

(3) The site value:

- 22 Mr Rocky says 28%; Mr Burton 33.33%.
- 23 Mr Rocky refers us to two 2002 LVT determinations in which 28% was adopted for houses with frontages of 4m and 6.43m. He says the difficult characteristics of the subject site (frontage 5.1m) support 28%.
- 24 Mr Burton says 31% to 35% is the generally accepted site apportionment level for terraced houses and, as the Property does not have a narrow frontage (for a terraced house), 33.33% is sustainable.
- 25 Reflecting the standing house valuation principles, we find 28 % is too low and 33.33% is too high. We find 30% properly reflects the characteristics of the site.

Summary of our Decisions on the Issues:

- 26 (1) The value of the term is £10;
- 27 (2) The amount of the entirety value is £130,000;
- 28 (3) The site value is 30% of the entirety value.

29 Valuation of the Tribunal:

The term		£10
The reversion:		
Entirety value	£130,000	
Site value (30% of entirety value)	£39,000	
S.15 modern ground rent (6½% of site value)	£2,535 pa	
YP perpetuity at 6½% deferred 3 years 2 months	<u>12.606587</u> ¹	
		£31,958
		£31,968

Note ¹: we find the YP calculated by Mr Burton is correct.

30 Conclusion on the price payable:

We determine that, taking account of all the evidence adduced, our evaluation of it, using our general knowledge and experience but not any special knowledge and our inspection, the sum to be paid by the Tenant for the acquisition of the freehold interest in the Property in accordance with section 9(1) Leasehold Reform Act 1967, as amended, is £31,968 (Thirty one thousand nine hundred and sixty eight pounds).

COSTS TO BE BORNE BY THE APPLICANT UNDER S.9(4) AND (4A) 1967 ACT:

31 S.9(4) of the Act provides:

'Where a person gives notice of his desire to have the freehold of a house and premises under this Part of this

Act, then unless the notice lapses under any provision of this Act excluding his liability, there shall be borne by him (so far as they are incurred in pursuance of the notice) the reasonable costs of or incidental to any of the [matters in subs.(4)(a) to (d) as to "legal costs" and in subs.(4)(e) as to "valuation costs"]; but [subs.9(4)] shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.'

32 S.9(4A), added by s.176 Commonhold and Leasehold Reform Act 2002, Sch. 13 para 2, provides:

'[A person is not required] to bear the costs of another person in connection with an application to a [LVT].'

33 Mr Rocky submits we should determine the s.9(4) costs at £Nil. He argues that we should, in the exercise of our discretion, determine that the Freeholder shall pay £500 towards the costs incurred by the Tenant in the proceedings pursuant to para 10. Schedule 12 Commonhold and Leasehold Reform Act 2002; and that, in consequence, the s.9(4) costs should £Nil.

34 While, by para 10, we have a discretion on costs in the proceedings, we do not accept Mr Rocky's submission that costs in the proceedings are connected with s.9(4) costs. We hold that we shall determine them separately on the criteria set out in the Act.

VAT:

35 All figures we refer to are exclusive of VAT. We have no jurisdiction to determine conclusively VAT matters as they are a matter for HM Customs and Excise. Therefore, we make our determination exclusive of VAT, save that VAT shall be added at the appropriate rate if applicable.

The subs. 9(4)(a) to (d) 'legal costs':

36 Mr Rocky says £250 is the generally accepted amount. Mr Burton says that while he has no instructions, primarily because he did not receive instructions on the matters before us until 27 September 2004, £500 would not be unreasonable.

37 We find that, in the case before us, £275 is the amount of the reasonable subs.(4)(a) to (d) costs incurred or to be incurred plus office copy disbursements.

The 'valuation costs':

38 Mr Rocky says he knows that a valuation has been carried out in pursuance of the Notice and, inferentially, a cost has been incurred. He says £250 is the generally accepted level. Mr Burton, again without instructions, says £500 would be more appropriate.

39 We accept that the Freeholder has incurred valuation costs in pursuance of the Notice. In the absence of helpful evidence on the extent of relevant details of such costs, we find £250, as conceded by Mr Rocky, is reasonable.

Our determination of the s.9(4) costs:

40 In so far as subs.9(4)(a) to (d) 'legal costs' are incurred and are to be incurred by the Respondent Freeholder, the Applicant Tenant shall bear a sum not exceeding £250 (Two hundred and fifty pounds) plus actual disbursements incurred in obtaining office copy register entries, plus VAT if appropriate, as the reasonable

or incidental costs.

- 41 In so far as subs.9(4)(e) 'valuation costs' have been incurred by the Respondent Freeholder, the Applicant Tenant shall bear a sum not exceeding £250 (Two hundred and fifty pounds), plus VAT if appropriate, as the reasonable or incidental costs.

COSTS IN THE PROCEEDINGS UNDER PARA 10. SCH. 12 COMMONHOLD AND LEASEHOLD REFORM ACT 2002:

- 42 Para 10 provides:

'A LVT may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances [where a party] has made an application to the LVT which is dismissed ..., or [a party] has, in the opinion of the LVT, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. The amount which a party to proceedings may be ordered to pay in the proceedings ... shall not exceed £500'

- 43 Mr Rocky says the Respondent has acted vexatiously, disruptively and unreasonably, by agreeing to withdraw a previous application (dated 9 December 2003) to the LVT for determinations of matters before us as the Applicant's solicitor had received a signed contract but, after withdrawing the 9 December 2003 applications, the Respondent refused to complete the agreement. In support of £500 claimed by the Applicant, Mr Rocky says additional costs incurred, since August 2004 (the date of the current applications to us), amount to over £1,000. Mr Burton, again without instructions, makes no representations. In reply to our question on the meaning of 'in connection with the proceedings' Mr Rocky says the proceedings now before us started 23 July 2003 (the date of the Notice) or could be argued to have started 9 December 2003 (the date of the first applications to us, subsequently withdrawn). He says it would be inequitable for us to adopt 4 August 2004 (the date of the current applications) as the starting date.

- 44 We do not accept Mr Rocky's interpretation of 'in connection with the proceedings' to the effect that he submits we shall take account of the Respondent's conduct before the commencement of the proceedings now before us. We hold that 'proceedings' is limited to those in connection with our proceedings initiated by the Applicant's applications 4 August 2004. The Applicant's 9 December 2003 previous applications were withdrawn which was a matter for the Applicant, not requiring the agreement of the Respondent. We are, therefore, solely concerned with the Respondent's conduct in the proceedings now before us. We have decided no agreement was made on the price payable. The Respondent is entitled to argue the case before us and we find it cannot be said that the Respondent has acted frivolously *etc.* in the case before us. We find and hold that we make no determination on the payment of costs incurred by a party in the proceedings and make no order.

Date:

25 OCT 2004

T F Cooper
CHAIRMAN

