RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/22UC/OAF/2006/0016

Property	:	**57 Church Lane, Bocking, Braintree, Essex CM7 5SE**
Application	:	Determination of the price to be paid in respect of the freehold and the amount or estimated amount of any pecuniary rent payable for the house and premises up to the date of the transfer which remains unpaid; the aggregate being the appropriate sum to be paid into court [Leasehold Reform Act 1967, ss.9, 21(1) & 27(5)]
Applicants	:	Margaret Pearl Andrews, Robert William Hudson & David John Hudson, c/o their solicitors
Respondent	:	person unknown

DECISION ON VALUATION

Tribunal	:	**G K Sinclair, J R Humphrys FRICS, & G R C Petty FRICS**
Hearing date	:	Friday 13th October 2006 at the Old House, Bradford Street, Bocking
For the Applicants	:	Keiron Lowe, of Smith Law Partnership, Gordon House, 22 Rayne Road, Braintree, Essex CM7 2QW

Introduction

1. The applicants are leaseholders of residential premises at 51, 53, 55 and 57 Church Lane, Bocking, near Braintree in Essex. The premises comprise a small terrace of modest sized cottages built in the mid-nineteenth century. The land occupied by these four and, the tribunal suspects, other adjoining property including that on Eagle Lane, were originally granted by a long lease date 18th February 1589 for a term of 440 years commencing on that date. Details of the lease are as recorded on the Land Register, but no copy of it can be found. The premises have been in the Applicants' family as leaseholder since 1906, the identity of the landlord is unknown, and no rent has been paid for as long as the Applicants can recall.

2. On 17th May 2006, in the Colchester County Court, the Applicants issued a claim under Part 8 of the Civil Procedure Rules 1998 seeking a transfer of the freehold of one only of the above premises, viz 57 Church Lane. Filed with the claim form was a witness

statement by Robert William Hudson dated 28th April 2006. Exhibited to that statement is a valuation report by Stephen Malcolm Watson B Sc MRICS dated 21st March 2006, setting out his assessment of the price for acquiring the freehold, as calculated in accordance with section 9(1) of the Leasehold Reform Act 1967. By order of District Judge Molle dated 21st July 2006 it was directed that the Leasehold Valuation Tribunal determine :

a. The price payable, and
b. The amount or estimated amount of any pecuniary rent payable for the house and premises up to the date of the transfer which remains unpaid;

and that the court review the application on the Claimant's filing the Leasehold Valuation Tribunal's determination.

3. For the reasons which follow the tribunal determines that the price payable for the freehold is £36,701.00, to which nothing should be added in respect of unpaid rent under section 27(5) of the Act. The amount which must be paid into court under section 27(5) is therefore £36,701.00.

Inspection

4. The tribunal inspected the premises in the company of Mr Lowe, the representative of the Applicants' solicitors. The premises comprise a small end-terrace house of mid-nineteenth century solid brick and rough cast construction under a tiled roof. There is one ground floor room (no hall entry) and a kitchen to the rear, opening to a rear lean-to porch extension with clear corrugated plastic roof leading to what had previously been an external toilet (the only one serving the building). Upstairs there is a double bedroom to the front and, to the rear, another which has been subdivided into a shower room with handbasin, leading to a small back bedroom. There is a gas fire in the living room.

5. With a house such as this one would usually expect that any yard or garden might occupy a similar sized footprint as the house itself, or perhaps two or three times the size at most. In this particular case, however, the most significant aspect which affects valuation is the fact that – scaling from the title plan – the house occupies less than 2% of the site, and the land to the rear provides a huge potential development area.

6. For that reason the approach to valuation adopted by the tribunal is the "cleared site method" rather than the "standing house", which is more usual in the prime central London (or PCL) area where the premises concerned are almost always well-maintained substantial listed properties owned by large freehold estates, and where the prospect of demolition and sub-division of the site is remote. The tribunal's approach is adopted on the basis of substantial local evidence of the acquisition of old properties and their sub-division into building plots all over Essex and the Haverhill area. The subject house provides sub-standard accommodation, is of no architectural merit, and no developer acquiring the freehold would hesitate an instant to demolish it.

7. Admittedly, there are access difficulties in the instant case. Even after demolishing the house and providing adequate support and weather protection for the adjoining terrace any vehicular access on to Church Lane would be quite narrow. An alternative route to and from the rear of the site would appear to be available via Eagle Lane (although this

is not so clear from the title plan), but this is a private road and no right of way over it is apparent from the property register. Acquiring such a right, and the prevention of actual use, may be problematic. As the tribunal is aware of other local properties enfranchised despite the lack of any known landlord, including a cottage at 5 Eagle Lane, it is distinctly possible that ownership of the road itself is also uncertain. The point where Eagle Lane accesses the highway is also quite narrow, but it does have the advantage of established use.

The Applicants' valuation evidence

8. The tribunal read Mr Watson's report with interest. However, there were two matters on which the tribunal considered that it was unreliable, and Mr Lowe was encouraged to make contact with Mr Watson in the hope that he could either attend the hearing or give instructions by telephone on the following issues :
   a. The lack of discussion of any potential development value for the back land, and
   b. The fact that his calculation of the deferment rate had been overtaken by the recent Lands Tribunal decision in *Sportelli*[1]

9. Unfortunately Mr Watson could not be contacted, and Mr Lowe informed the tribunal that he was in no position to advance any argument beyond that set out in the report written in March 2006. In view of *Sportelli* his valuers fully expected that the price determined would be radically different from that assumed by Mr Watson at the time.

Discussion

Unpaid rent

10. Where the landlord cannot be found section 27(5) of the 1967 Act requires the tenant as a condition of acquiring the freehold to pay into court the amount or estimated amount of any pecuniary rent payable for the house up to the date of the conveyance which remains unpaid. Section 166 of the Commonhold and Leasehold Reform Act 2002[2] may impose an interesting restriction upon that by providing :

> "A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice."

The limitation period for recovery of unpaid rent is 6 years, so that is the maximum rent recoverable. (Were any rent to have been paid within 6 years the court would require some persuading that the landlord has somehow vanished in the meantime). At paragraph 9(ii) of his report Mr Watson suggests that, as the exact terms of the lease are unknown, a reasonable assumption as to its rental value in 1589 would be one guinea per annum. However, the chairman of the tribunal has experience of advising in a similar case where the rent for a farmhouse on the Essex/Suffolk border near Manningtree in the mid-Elizabethan period was only the annual sum of "twelve pence in good English money". As a result of these uncertainties and the tribunal's experience of other cases the amount determined as payable for unpaid rent over 6 years is assessed as nil.

1 *Earl Cadogan and Cadogan Estates Ltd v Sportelli* (LRA/50/2005) and four related appeals (15.ix.06)

2 In force from 28.ii.05

Site value

11. In considering the site value the tribunal took into account the following :
    a. The evidence of a much smaller property on Eagle Lane, which was the subject of a similar application recently and was then sold in a derelict state for £95,000
    b. The assumption that development is initially restricted to one house on the plot; albeit one considerably superior to what is there now, but not unlike a number of others in the immediate neighbourhood
    c. While one is restricted to one house for the 50 year extension, that would not be so thereafter
    d. In view of the cleared site approach adopted by the tribunal consideration of any *Haresign* addition[3] is considered inappropriate.

12. The tribunal has therefore conservatively left the value at that stage at £100,000 and not taken any extra development potential into account. This is due to the access difficulties discussed above and the complete lack of any planning evidence before it.

Deferment rate

13. Section 9(1) of the Act requires the ascertainment, upon certain assumptions, of :
    "...the amount which at the relevant time the house and premises, if sold on the open market by a willing seller, (with the tenant and members of his family not buying or seeking to buy) might be expected to realise.."

14. The ascertainment of this sum is only part of the valuation process required under the Act. By valuers' convention, the value of the right to receive a ground rent during the term has been assessed separately from the value of vacant possession at the end of the term. The former is ascertained by capitalisation of the ground rent to arrive at the present value of the flow of income as at the valuation date. The latter has been arrived at by ascertaining the open market value of the freehold interest with vacant possession as at the valuation date and then adjusting that value to reflect the fact that vacant possession will not be available until the end of the term. The adjusting factor is called the "deferment rate". The valuers in *Sportelli* explained it as being :
    "the annual discount applied, on a compound basis, to an anticipated future receipt (assessed at current prices) to arrive at its market value at an earlier date" [that is to say the valuation date]."

15. For more than thirty years after the passing of the 1967 Act valuers dealing with leasehold enfranchisements agreed a deferment rate of 6% within the prime central London area (PCL). Somewhat higher rates were adopted in less high quality areas. In the instant case Mr Watson adopted a deferment rate of 7%. Subject to what follows the tribunal would have considered that to be unexceptional in this area.

16. In about 2003, however, freeholders in the PCL area began to question why, when yields on all other investments had been falling, the deferment rate should be assumed to be static. In *Cadogan Holdings Ltd v Pockney*[4] the Lands Tribunal held that a deferment rate of 5.25% in respect of a house in the PCL area was not too low and applied this rate in

[3] See *Haresign v St John the Baptist's College, Oxford* (1980) 255 EG 711

[4] LRA/27/2003, 19.v.04

the valuation. Later, in *Arbib v Earl Cadogan*[5] the Lands Tribunal :

a. rejected the established rate of 6% [para 180(3)]
b. arrived at a norm in the PCL area of 4.5% for houses and 4.75 % for flats [para 180 (11) and (15)]
c. in the absence, as they found, of reliable market evidence [para 180(2)] arrived at those figures on the basis of financial market evidence [para 180(10)]
d. took as a starting point a risk-free rate represented by index-linked gilts [para 145] and arrived at a deferment rate of 4.5% by allowance for risk [para 152]
e. arrived at such figures, however, without the benefit of specialist evidence as to the analysis of such evidence [para 126, and see para 142 as to their reasons].

17. *Arbib* left room for further evidence and argument as to what other figure was right. In those circumstances the Lands Tribunal sought to select such further cases for hearing together, and in the five cases now known under the title *Sportelli* the following two preliminary issues were identified :

a. the proper deferment rate to be applied to vacant possession value, and
b. the proper valuation of any "hope value" arising from the option that the freeholder has in the real market to sell the freehold or a lease extension to the tenant and thus realise the whole or part of the freeholder's share of such marriage as exists at the date of the sale.

Sportelli

18. After hearing extensive valuation and expert financial evidence and argument over the course of eleven days the Lands Tribunal delivered judgment on 15th September 2006, concluding that :

a. Splitting the deferment rate into the various components discussed in the case, they should take a risk premium of 4.5%, in combination with a risk-free rate of 2.25% and a real growth rate of 2%, producing a generic deferment rate of 4.75% in the case of houses [79]
b. The greater management problems associated with flats justify an additional 0.25% by way of adjustment to the above rate [95]
c. The deferment rate is constant beyond 20 years. "Below 20 years we accept the view of Mr Dumas, Professor Lizieri and Mr Orr-Ewing that the rate would need to have regard to the property cycle at the time of valuation. Beyond 75 years we see no reason on the evidence before us to conclude that the rate would be either higher or lower." [85]
d. "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." [88]
e. Only in exceptional cases would such factors as obsolescence and condition not be fully reflected in the vacant possession value and the risk premium [91]
f. As a matter of law, all hope value as well as marriage value is excluded – except

5 [2005] 3 EGLR 139

in valuations under section 9(1A). [102 & 103]

19. The Lands Tribunal then turned to the status of its decision. It considered it :

> [114] ...appropriate that we should be rather more explicit about the status of our present decision on the deferment rate. The starting point is to observe that it is the function of the Lands Tribunal, as a specialist tribunal with an England and Wales jurisdiction, to promote consistent practice in the application of the law in decisions that are made within its particular jurisdictions. The purpose of the Tribunal was to provide "a single consistent jurisdiction" in relation to those matters assigned to it...

20. Although it had recently been said that its decisions are not to be regarded as setting any precedent in relation to what must be essentially a question of fact and degree[6], the function of the Tribunal, according to *Sportelli*, is :

> [117] ...to make decisions on points of law and on what may be called principles of practice to which regard should be had by the first-tier tribunals and by practitioners dealing with claims in any of the Tribunal's original or appellate jurisdictions. Such principles of practice are not, in our view, confined to valuation methodology (for example, in rating, whether local authority leisure centres should be valued on the contractor's basis or by some other method : see *Eastbourne Borough Council v Allen (VO)* [2001] RA 273) but may extend to matters of quantification if the considerations underlying the quantification are of general application.
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> .....
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> [120] The function of this Tribunal in determining a deferment rate to be treated as a guideline in other enfranchisement cases is similar to the courts' determination of a discount rate for the purpose of reaching the present value of the loss of future earnings in personal injury cases. What the discount rate should be was the subject of consideration by the House of Lords in *Wright v British Railways Board* [1983] 2 AC 773 and later in *Wells v Wells* [1999] AC 345 before the rate was statutorily prescribed by the Damages (Personal Injury) Order 2001. In *Wright* Lord Diplock said (at 785C) :
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> > "A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach. But though guidelines change, too frequent alteration deprives them of their usefulness in providing a degree of predictability in the litigious process and to facilitating settlement of claims without going to trial."
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> ....
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> [123] The application of the deferment rate of 5% for flats and 4.75% for houses that we have found to be generally applicable will need to be considered in relation to the facts of each individual case. Before applying a rate that is different from this, however, a valuer or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant

[6] *Shephard v Turner* [2006] EWCA Civ 8, at [57], per Carnwath LJ

possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate.

21. In the instant case no evidence was adduced which enables the tribunal to adopt any other deferment rate than that determined in *Sportelli*. As appears from the schedule annexed, the net result is markedly different from that which would be achieved by adopting Mr Watson's rate of 7%; one which (but for *Sportelli*) the valuer members of the tribunal consider would generally be regarded as acceptable within the profession.

22. To demonstrate the effects of differing deferment rates the schedule shows the figures achieved at rates of 4.75% (which the tribunal applies) and 7%. Had the pre-*Sportelli* approach been adopted, at the accepted rate of 7%, then the price would have been only £21,093.

Dated 18th October 2006

Graham Sinclair – chairman
for the Leasehold Valuation Tribunal

SCHEDULE – VALUATION UNDER LRA 1967, s.9(1)

i. Present value of freeholder's interest

Term = 23 years @ ??	(nominal)	£1.00			*£1.00*

ii. Reversion to modern ground rent

Adopting cleared site approach	£100,000.00				
Modern ground rent @ 7% (pa)	£7,000.00				
YP for 50 years @ 7% =	13.8				
Deferment for 23 yrs @ 4.75%	0.3439		@ 7%	*0.2109*	
		£33,320.00			*£20,372.00*

iii. Reversion to freehold

Site value	£100,000.00				
Deferment for 73 yrs @ 4.75%	0.0338		@ 7%	*0.0072*	
		£3,380.00			*£720.00*
Total payable :		**£36,701.00**			*£21,093.00*