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REASONS FOR DECISION OF LEASEHOLD VALUATION TRIBUNAL

Leasehold Reform Act 1967 section 21

Premises:	20A-B-C Wellesley Road, Clacton-on-Sea CO15 3PP
Our ref:	CAM/22UN/OCE/2010/0002
Hearing:	17 September 2010
Applicants:	Christos and Sarah-Jane Christophorou
Application dated:	11 January 2010 (received 15 January 2010)
Respondent:	Regisport Ltd
Landlord's representative:	Tolhurst Fisher, Solicitors (Mr Robert Plant)
Members of Tribunal:	Mr G M Jones - Chairman Mr Bryan Collins BSc FRICS Mr J R Humphrys FRICS

ORDER

1. The Respondent's application for costs is hereby refused.

2. The Application herein is hereby dismissed on having been withdrawn.

Geraint M Jones MA LLM (Cantab)
Chairman
28 September 2010

BACKGROUND

The Property

0.1 The property is a house which has been converted into three flats. In the circumstances, there is no need to describe the property further. The Tribunal did not inspect the property. A full description of the property is given in the Decision dated 11 January 2010 in a dispute between the same parties over service and administration charges under reference CAM/22UN/LSC/2009/0049. Each of the flats is let on a long lease at a ground rent and the Applicants are, in each case, joint tenants. They do not and have not at any time resided in any of the flats, which they purchased as investments and sublet on assured shorthold terms.

The Lease

0.2 In the circumstances, the terms of the leases are irrelevant, save to say that each one is for a term of 99 years from 25 December 1988 at a ground rent. Two members of the Tribunal sat on the previous case and retained the case papers, which included the registered leasehold titles for the three flats. The registered titles show that the Applicants purchased Flat 20A (title number EX688092) on 3 May 2002 and became registered owners on 6 August 2002; they purchased Flat 20C (title number EX496766) on 28 August 2003 and became registered owners on 20 February 2004. The Tribunal held that Mr Christophorou purchased flat 20B (title number EX683826)in February or March 2003, the title being subsequently transferred into joint names and registered on 21 January 2005.

1. THE DISPUTE

1.1 The parties provided the Tribunal with a selection of the relevant correspondence in relation to the attempts on the part of the Applicants to purchase the freehold of 20 Wellesley Road. This appears to have begun in February 2003. By a letter dated 10 February 2003 the landlord's managing agents (then Equity Asset Management – "EAM") informed the Applicants that the freeholders "do not make a practice of disposing of there [sic] assets".

1.2 It appears that, at some time between 10 February 2003 and 15 May 2003 Pier Management Ltd ("PML") took over management of the property. On 15 May 2003 Collins Tovell, Solicitors for the Applicants, wrote to PML offering £4,500 for the freehold and pointing out that, as a result of an amendment to the law which was to take effect on 1 November 2003, the Applicants would then have a statutory right to acquire the freehold. The offer was rejected and the Applicants decided to exercise that right when it became available to them. Meanwhile, as appears from the hearing bundle in the previous case, negotiations continued.

1.3 On 1 November 2003 amending provisions contained in the Commonhold & Leasehold Reform Act 2002 took effect. The effect of these provisions was to remove the requirement under the Leasehold Reform Act 1967 that an Applicant for enfranchisement must have resided at the property for a qualifying period or periods. The Applicants were advised that they were now qualifying tenants and accordingly on 1 November 2003 the Applicants, through Colins Tovell, purported to serve notice under section 8 of the 1967 Act to purchase the freehold of "the house", namely, 20 Wellesley Road as a whole.

1.4 The notice was addressed to the Respondent at Gibraltar House, 539-543 London Road, Southend-on-Sea, SS0 9LJ. This was the address shown on the freehold title registered at HM Land Registry under title number EX531028 (included in the hearing bundle for the previous case). Unfortunately, that address had ceased to be the registered office of the Respondent on 14 January 1999, the company having vacated those premises and moved to 16-18 Warrior Square, Southend-on-Sea.

1.5 It is, however, clear that negotiations for the sale of the freehold ensued. On 7 May 2004 PML informed the Applicants that they charged a minimum fee of £500 + VAT for dealing with the initial valuation on behalf of the landlord and the administration of the sale process. This was in addition to the landlord's legal and surveyor's fees. They called for a non-returnable payment of £250 + VAT. The letter also asked for the following information about the property: -

- Size and type of property i.e. one/two bedroom flat/house
- Current market value of the property
- Ground rent payable
- Term remaining on the existing lease
- External photograph of property, to include the garden areas if applicable.

1.6 The Applicants responded by sending PML a photocopy of their letter on which Mrs Christophorou had hand written the relevant information, together with some photographs and a cheque for £250. The cheque was returned by letter dated 24 August 2004 because it did not include the VAT. It is not clear what (if anything) happened after that. Certainly, terms for the sale were never agreed.

1.7 The procedure under the 1967 Act, in a case where the terms of enfranchisement cannot be agreed, is for the tenant to make an application to the Tribunal under section 21. However, the Applicants did not take that step until 15 January 2010. The reason for this was never fully explained; however, the hearing bundle for the previous case shows that from early in 2003 there was a dispute between the parties over rent and service charge payments. On 5 February 2003 EAM served a section 146 notice on the Applicants in relation to Flat 20A. This was, of course, only a few days before the letter referred to at paragraph 1.1 above. By April 2004 PML were claiming that there were service charge arrears of £8,931.06 in relation to Flat 20A; £1,105.25 in relation to 20B; and £9,506.99 in relation to 20C.

1.8 At the heart of the dispute in the previous case was the fact that, in March 2001 the landlord had levied against each flat a charge of £7,742.61 in respect of proposed major refurbishment works that were never carried out. The charge was paid in respect of 20B by the mortgagee then in possession but not in respect of the other flats. The Applicants refused to pay on the ground that the landlord did not intend to carry out the works. Much of the balance of the total claimed related to administration charges for sending arrears letters, referrals to mortgagees and legal charges and disbursements in connection with section 146 notices. Eventually, the levy was abandoned. The Applicants claimed that they were at all material times in credit because of the mortgagee's above-mentioned payment, so that none of those charges were justifiable. The Tribunal agreed.

1.9 It would, of course, be impossible to complete a statutory purchase of the freehold until the dispute over the service and administration charges was resolved. The purchasing tenant would be required to pay the landlord's reasonable charges up to the date of completion as part of the purchase price. That dispute rumbled on until it was finally decided by the Tribunal by a Decision dated 11 January 2010. Only then were the Applicants in a position to pursue their claim under the 1967 Act.

2. THE ISSUES

2.1 The progress of the Application took an unusual course. As is usual, directions were given on 10 February 2010 following a review of the papers. These directions were slightly unusual because it does not appear that the landlord had served a counter-notice (as required under the Leasehold Reform (Enfranchisement and Extension) Regulations 1967). For this reason, it was necessary to give alternative directions, depending upon whether the landlord admitted the Applicants' right to enfranchise. The landlord was required (inter alia) to file a statement of case by Friday 26 March 2010, indicating whether the Applicants' right to enfranchise was admitted and, if not, why not. No such statement of case was filed.

2.2 However, on 13 February 2010 PML wrote to the Tribunal Office asserting that the Tribunal had no jurisdiction as no initial notice had been served under section 13 of the Leasehold Reform, Housing & Urban Development Act 1993. While factually correct, that was irrelevant to the Application, which was clearly brought under the 1967 Act. However, it was apparent to the Chairman that there might be difficulties in the Applicants' claim under either Act. Accordingly, further directions were given on 26 February 2010 requiring the Applicants to file within 14 days a statement of case setting out the grounds on which they contended they had the right to proceed under one or other of the two statutes. No such statement of case was ever filed.

2.3 As it happened, the Tribunal was due to meet on 7 June 2010 to determine the service charge balance in the previous case. The Chairman directed that the Tribunal should, at the same time, consider the question of jurisdiction in the present case. No further representations were received from either party. The Tribunal duly met and (as the Order of 10 June 2010 shows) decided: -

(a) that the Respondent's objections to the Tribunal's jurisdiction by letter dated 13 February 2010 from the Respondent's agent Pier Management Ltd (namely that the Applicants had served no notice under section 13 of the Leasehold Reform Housing & Urban Development Act 1993) were factually correct; and accordingly

(b) That the Applicants are not at present entitled to acquire the freehold of 20 Wellesley Road, Clacton-on-Sea under the provisions of Part 1 of the 1993 Act; and

(c) That the Tribunal has at present no jurisdiction under Part 1 of the 1993 Act

(d) That the Respondents' submissions raised no objection as regards the jurisdiction of the Tribunal under the provisions of the Leasehold Reform Act 1967and accordingly

(e) that the Applicants were entitled to a determination under section 21 of the Leasehold Reform Act 1967 of the price for and terms of acquisition of the freehold of 20 Wellesley Road, Clacton-on-Sea pursuant to the Applicants' notice dated 1 November 2003.

The Tribunal made no determination as to whether the Applicants were entitled to serve notice to enfranchise the freehold under Part 1 of the 1993 Act. However, it seems probable that they would not be entitled so to do because a person owning more than two of the relevant flats is not a qualifying tenant. The Applicants own all three flats jointly. Thus it appears that there are no qualifying tenants in this case. However, it appears that, if Mr Christophorou owned one flat and Mrs Christophorou the other two, both would be qualifying tenants.

2.4 The Order also gave directions for the Application to proceed to a determination of the purchase price and (if necessary) the other terms of sale.

2.5 On 6 July 2010 Mrs Christophorou sent the Tribunal Office an e-mail saying that she had not received any further paperwork and asking what to do next. In fact, it was for the landlord to take the next step. On 22 July 2010 Tolhurst Fisher, Solicitors. Wrote to the Tribunal Office to say that they had been instructed and enclosed a Statement of Case "in compliance with the Tribunal's Directions". By this they must have meant the direction of 10 February 2010, as regards which they were, of course, well out of time. The Statement of Case is in the form of a witness statement by Robert Plant setting out relevant facts and also legal argument. The factual aspect of the statement will be considered below.

2.6 The landlord's Statement of Case argues that the Tribunal has no jurisdiction because: -

(a) The notice dated 1 November 2003 was never served on the Respondent.

(b) The Applicants do not in any event satisfy the qualifying occupation condition under the 1967 Act for reasons that will be considered further below.

The landlord further argues that the Application was, in those circumstances, frivolous vexatious or an abuse of process and the landlord should be awarded its costs under Schedule 12 paragraph 7 of the Commonhold & Leasehold Reform Act 2002.

2.7 On 11 August the Clerk to the Tribunal wrote to the parties to inform them that a hearing had been fixed for 17 September 2010. On 16 August the Applicants asked for an adjournment of the hearing on the ground that Mr Christophorou had arranged a surprise holiday for his wife, of which she was unaware when she gave the Tribunal Office her dates to avoid. This request was refused because it was very late and unreasonable prejudice would be caused to the Respondent by further

delay.

2.8 The Applicants then hesitated until on Monday 13 September 2010, when Mrs Christophorou sent an e-mail to the Tribunal Office saying she had been advised to withdraw. Her explanation as to why she had not taken this step earlier was that she had needed time to take legal advice on the issues raised in the landlord's Statement of Case. On 15 September 2010 she sent a further e-mail to confirm that, so far as she was concerned, the Application was withdrawn. At the same time she made it clear that she did not accede to the Respondent's costs application. However, by letter dated 15 September 2010 Tolhurst Fisher indicated that they would not agree to a withdrawal, as they wanted to pursue their application for wasted costs, adding that: -

> "Our clients do not require any other matter to be heard by the Tribunal other than that of the question of costs under Schedule 12(7) of the Commonhold & Leasehold Reform Act 2002".

2.9 The Tribunal was thus left to consider: -

(a) Whether the Applicants could withdraw without the permission of the Tribunal or the consent of the Respondent;

(b) If they could not, whether the Tribunal should dismiss the Application; and

(c) Whether to grant the Respondent's application for costs.

2.10 As will be seen, these issues were not as simple to decide as at first appeared.

3. THE EVIDENCE

3.1 The Tribunal considered that its decision on the costs issue might be different, depending upon whether the Application was doomed from the start and, if so, for what reason. If the Applicants were not qualifying tenants, then that would be an important point in the Respondent's favour. If, on the other hand, the only barrier to the Application was an inadvertent failure properly to serve the notice of 1 November 2003, the fact that the Respondent did not take that point until very late in the day would be a relevant consideration in favour of the Applicants. It was therefore necessary, in order to decide the costs issue to consider both issues raised by the landlord's Statement of Case.

3.2 The evidence on the issue of due service comprised the contemporaneous correspondence between the Applicants and their Solicitors and the landlord's managing agents EAM and (subsequently) PML and the witness statement of Mr Plant. There was no evidence from any officer or employee of the Respondent. In the first paragraph of his statement Mr Plant says that "save where appears to the contrary matters dealt with in this Statement are within my own knowledge or as are apparent from the papers in my possession". Mr Plant was clearly not speaking from personal knowledge except as regards the contents of the papers in his possession (some of which were exhibited or attached to his statement); but he does not say he

received information from any officer or employee of the Respondent.

3.3 The facts as regards the issue whether the Applicants are qualifying tenants are not in dispute; the issue is entirely a matter of law.

3.4 The other facts relevant to the exercise of the Tribunal's discretion as to costs, apart from the issue of due service (as regards which Mr Plant's evidence is relevant), are to be derived entirely from the correspondence and the papers before the Tribunal.

4. THE LAW

Enfranchisement of Freeholds

4.1 The Leasehold Reform Act 1967 enables tenants of long leases at low rents to enfranchise their properties – in other words to acquire the freehold on terms set out in the Act. If the price is not agreed between the parties, there is provision under section 21 for an application to the Leasehold Valuation Tribunal to determine the price. The valuation methods are set out in section 9 of the Act. The method of determination depends upon which category the property and the lease fall into. The Tribunal will also, if necessary, settle the terms of the relevant transfers.

4.2 The tenant must show that the property is a "house" within the parameters laid down by the Act and that he is a qualifying tenant of the house. A house may under section 2(1) be divided into flats and under section 3(6), where there are separate tenancies, with the same landlord and the same tenant, of two or more parts of a house, those tenancies are treated for the purposes of the Act as though they were a single tenancy whose commencement date is treated as being the earliest of the commencement dates. Generally, the qualification required of the tenant since 1 November 2003 has been that he must have been tenant of the house for a period of two years. But where there is more than one tenancy, as for example where the same tenant has leases, acquired at different dates, of two or more flats together comprising the house, the Act applies as though it were a single tenancy. It follows that, where there is more than one tenancy, it is sufficient that the tenant has been tenant under one of the tenancies for the qualifying period.

4.3 There is, however, under section 1(1ZB) an additional restriction on the right to enfranchise in cases where a flat forming part of the house is let to a person who is a qualifying tenant of the flat under the 1993 Act. In such cases, a tenant of the house does not have any right to enfranchise unless, at the relevant time, he has been occupying the house or any part of it as his only or main residence for the last two years or for periods amounting to two years in the last ten years.

Costs to be borne by Applicant

4.4 The Applicant must pay the reasonable conveyancing costs of the landlord or landlords whose interests he is acquiring as set out in section 9(4). In case of dispute, the Tribunal determines the costs. The Applicant is not liable to pay the landlord's costs in connection with the Application to the Tribunal save that the Tribunal has a limited power under Schedule 12 paragraph 10 to the Commonhold & Leasehold Reform Act 2002 to make costs orders up to £500 in the event of misconduct by a party in relation to the application, which may include cases

whereby reason of that party's conduct, costs have been wasted.

Collective leasehold enfranchisement

4.5 Under section 1 of the Leasehold Reform Housing & Urban Development Act 1993, qualifying tenants of a block of flats, acting together, may (subject to certain exceptions) claim the right to purchase the freehold at a price to be determined in accordance with Schedule 6. The tenants must name a nominee purchaser as Applicant. The Applicant must pay the Respondents' reasonable costs in accordance with section 33. The Applicant must serve notice in accordance with section 13 and the Respondent must serve a counter-notice under section 21. It is important to note that any tenant who, either alone or jointly, owns more that two flats is not a qualifying tenant.

4.6 In addition to the price, there may be issues relating to rights and easements and to the effect of enfranchisement upon nearby land retained by the Respondent. If the Applicant's right to purchase the freehold is admitted or has been determined by the court, but the price or other terms cannot be agreed, the LVT has power under section 24 to determine any disputes.

Costs under LRHUDA 1993

4.7 The tenant is not liable under section 32 or section 60 to pay costs incurred by the landlord in connection with the application, save to the extent that costs relating to valuation evidence may have been reasonably incurred for the purpose of fixing the premium, as provided by the relevant subsection. The Tribunal has only limited power under Schedule 12 paragraph 10 to the Commonhold & Leasehold Reform Act 2002 to award inter-party costs of the application (limited to £500) in the event of misconduct by a party, which may include cases whereby reason of that party's conduct in relation to the application, costs have been wasted.

5. DISCUSSION AND CONCLUSIONS

5.1 As has been said, it is clear that the Applicants are not qualifying tenants under the 1993 Act because they own all three flats. There are no qualifying tenants and thus no right under the 1993 Act to enfranchise the freehold. Thus the landlord's original objection to the Application was factually correct. However, it was irrelevant because the Application was made under the 1967 Act. Thus the landlord's original objection was fatally flawed.

5.2 In his witness statement, Mr Plant takes the point that, where there are tenants of one or more of the flats who are qualifying tenants under the 1993 Act, there is an additional residential requirement for applicants under the 1967 Act. However, he is wrong in saying that this requirement applies in the present case because there are no qualifying tenants under the 1993 Act.

5.3 The Tribunal looked carefully at the correspondence between the parties. It is not surprising that the landlord did not want to sell the freehold. The Respondent is well known in the Southend area as an owner of numerous freeholds and (generally through associated companies) as a manager of residential leasehold property. No company in that line of business would be likely to have much enthusiasm for selling

freeholds.

5.4 The Tribunal considers that the Respondent would be unlikely to enter into negotiations for such a sale unless it believed that there was a statutory obligation to sell. Mr Plant is not correct in saying that the method of service is prescribed by the 1927 Act; the Act merely provides that one particular form of service will be sufficient. If service is attempted in some other way, the test of due service is whether the notice actually came to the attention of the landlord.

5.5 The terms of PML's letter of 7 May 2004 suggest strongly that the Notice of 1 November 2003 had by then come to the attention of PML. PML were clearly holding themselves out as authorised to speak for the Respondent (referred to as "our Client"). Reference is also made to the costs the tenant must pay under the 1967 Act. The information sought appears to relate to elements of the statutory method of ascertaining the purchase price, rather than the open market price. It would be surprising if the Applicants' solicitor, in addition to giving notice to the Respondent at its registered office, did not copy the Notice to PML. The Tribunal concludes that PML had received a copy of the Notice.

5.6 In 2003, EAM was an associated company of the Respondent, sharing its offices at 16-18 Warrior Square. PML is and was in 2003-4 an associated company of the Respondent (see finding of the Tribunal in the previous case at paragraph 5.11 of the Decision of 11 January 2010). The Respondent and PML currently share the same offices at 16-18 Warrior Square (see letter of 13 February 2010 from PML to the Tribunal Office). In the judgment of the Tribunal, either the Respondent received the Notice and passed it to PML for action or PML received a copy of the Notice and informed the Respondent of it.

5.7 Thus, on the findings of the Tribunal, there is no substance in any of the Respondent's objections to the grounds of the Application. However, there appears to be another ground of objection no mentioned by the Respondent or its advisors. At the date of service of the Notice of 1 November 2003 the Applicants were not qualifying tenants under section 1 of the 1967 Act because they had not complied with the requirements of section 1(1)(b), namely, namely, to have been a tenant of the house (or, on the facts of this case, of at least one of the flats in the house) for at least the last two years. On the evidence, the first flat acquired by the Applicants was Flat 20A, which they purchased on 3 May 2002.

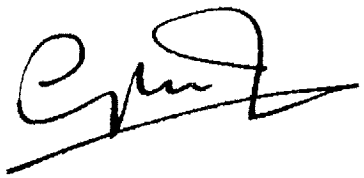
5.8 Had the Respondent taken the right point at the outset much time and expense on the part of the parties and the Tribunal would have been saved. In the event, the Respondent's expenditure was largely wasted because the right point was never taken. One consequence of this was that the Applicants were much delayed in the process of serving a fresh notice, which they are now clearly entitled to do.

5.9 Taking all the above circumstances into account, the Tribunal as a matter of discretion refuses the Respondent's application for costs.

5.10 Having dealt with the Respondent's application for costs, the Tribunal in all the circumstances of the case is content to treat the Application as having been

withdrawn.

5.11 As has been said, the Applicants are now free to serve a fresh notice. Should they decide so to do, no doubt they will exercise great care to ensure that the notice is duly served on the Respondent landlord and not just on the managing agents, irrespective of how closely associated the landlord and the managing agents may or may not be.



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