LRA/79/2006

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – preliminary issues – procedure – deferment rate and hope value – whether respondent on appeal entitled to seek addition for hope value – whether respondent entitled to seek higher price than LVT determined – held respondent entitled to seek addition for hope value but not entitled to seek higher price than that determined by LVT

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

BETWEEN **STEPHEN L PITTS AND YUE WANG** **Appellants**

and

EARL CADOGAN **Respondent**

Re: 35 Hans Place
London SW1X 0VZ

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
On 23 March 2007

Andrew Walker instructed by Bircham Dyson Bell for the appellants
Philip Rainey instructed by Pemberton Greenish for the respondent

The following cases are referred to in this decision:

Cadogan v Sportelli [2006] RVR 382
Bircham & Co (Nominees) (No 2) v Clarke LRA/63/2005, unreported
Arbib v Earl Cadogan [2005] 3 EGLR 139
Arrowdell Ltd v Coniston Court (Hove) Ltd [2007] RVR 39
West Midlands Baptist (Trust) Associated (Inc) v Birmingham Corporation [1968] 2 QB 188
R (Sinclair Gardens Investments Ltd) v Lands Tribunal [2006] 3 All ER 650
Wellcome Trust Ltd v Cecil Properties Ltd (30 November 2006, LVT ref LON/LVT/2068/06)
Cadogan v Atlantic Telecasters Ltd (23 November 2006, LVT ref LON/LVT/1957/05)

The following further cases were cited in argument:

Sheffield City Council v Meadow Dairy Co Ltd (1958) 51 R & IT 233
Becker Properties Ltd v Garden Court NW8 Property Co Ltd [1998] 1 EGLR 121
Ellerby v March [1954] 2 QB 357
Sole v Henning (VO) [1959] 1 WLR 769
Wellcome Trust v Romines [1999] 3 EGLR 228
Norfolk v Trinity College, Cambridge [1976] 1 EGLR 215

DECISION ON PRELIMINARY ISSUES

1. The appeal in this case is against a decision dated 26 April 2006 of the Leasehold Valuation Tribunal for the London Rent Assessment Panel under section 21 of the Leasehold Reform Act 1967 determining an enfranchisement price of £1,342,895 in respect of a house, 35 Hans Place, SW1X 0VZ. Before the LVT all elements of the valuation were agreed, except for the deferment rate. The freeholder contended for a deferment rate of 4.5%, and the leaseholders contention was that it should be 6.9%. The LVT concluded that the deferment rate should be 4.5%, and it therefore determined the price for which the landlord had contended.

2. The leaseholders sought permission from the LVT to appeal against the decision. On 8 June 2006 the LVT granted permission "on the issue of the deferment rate as this is a subject which is currently before the Lands Tribunal". This was a reference to the case now usually referred to as *Cadogan v Sportelli* (or simply *Sportelli*) [2006] RVR 382, preliminary issues in which were heard by the Tribunal between 5 June and 4 July 2006 and were the subject of its decision given on 15 September 2006. It concerned five enfranchisement applications. Three were for the collective enfranchisement of flats, one was for the lease extension of a flat, and one was for the enfranchisement of a house (13 South Terrace). In its decision the Tribunal (George Bartlett QC, President, His Honour Michael Rich QC and P R Francis FRICS) determined, firstly, that the deferment rate to be applied was 5% in respect of the flats and 4.75% in the case of the house (paragraph 124); secondly, that in all the appeals with the exception of that relating to the house hope value was to be excluded from the valuation (paragraph 108); and that, if hope value was to be included, this should be by the application of a lump sum to the value of the reversion prior to the statutory marriage value apportionment (paragraph 112). The Tribunal said that hope value, as the term had been used in the appeals, consisted in the option that the freeholder had to sell the freehold or lease extension to the tenant and thus realise the whole or part of the freeholder's share of such marriage value as existed at the date of the sale. In a subsequent final decision on the 13 South Terrace (*Bircham & Co (Nominees) (No 2) v Clarke* LRA/63/2005, 9 November 2005, unreported), where the appeal was uncontested, the Tribunal (P R Francis FRICS) determined the enfranchisement price by applying the deferment rate of 4.75% and making an addition of 20% to the value of the reversion to reflect hope value.

3. The decision in *Sportelli* followed an earlier decision of the Tribunal (Judge Rich QC and P H Clarke FRICS) in *Arbib v Earl Cadogan* [2005] 3 EGLR 139. In that decision the Tribunal adopted a basic deferment rate of 4.5% for the Cadogan Estate, and increased this to 4.75% in the case of flats and also to 4.75% in respect of an exceptionally valuable house. It is, I think, clearly implicit in the Tribunal's decision (although this was contested by Mr Andrew Walker in his submissions to me on behalf of the leaseholders) that it treated the deferment rate as reflecting any hope value that might exist and could be taken into account. At paragraph 169 it said:

> ".... we think that there might be reason to increase the deferment rate also where there is more than 80 years unexpired, because of the reduced expectation of realising an early profit."

In *Sportelli* at para 7, the Tribunal said:

> "In *Arbib* the Tribunal allowed for hope value by taking account of it in the deferment rate."

I see no reason to think that this statement was inaccurate. In *Sportelli* the Tribunal concluded that hope value, where it existed and could be taken into account, should not be reflected in the deferment rate but should, as I have already noted, be made the subject of a specific addition to the value of the reversion.

4. In the evidence to the LVT of the landlord's witness, Mr K D Gibbs FRICS, reference was made (at paragraph 8.4) to the potential for early release of capital as one of the features of ground rent investments in prime central London houses; and at paragraph 14.6, Mr Gibbs, in comparing the attractions as investments of gilts as compared with residential property, said:

> "... these attractions must be offset by the effect of inflation without any compensating potential for growth that a freehold reversion has and which also has the potential of a share in the marriage value."

It is, I think, clearly inferable from this that Mr Gibbs took account of hope value in his valuation. He made no specific allowance for it, but, basing himself as he did on the decision in *Arbib*, it is to be inferred that he treated it as a factor that was relevant to the determination of the deferment rate.

5. The LVT did not make any reference to hope value in its decision. It said (at paragraph 7.1) that it "took into account the views expressed in the Lands Tribunal appeals known as *Arbib* which were that each case should be considered individually and determined on its own merits and not on a standard LVT rate." In its conclusion (at paragraph 8.1) it said:

> "Having taken all the evidence into account, and in particular the prime location of the property, a single house, the Tribunal determines the deferment rate @ 4.5%."

It is not possible from this, it seems to me, to say whether the LVT did or did not take hope value into account in reaching its decision on the deferment rate. At the very least, however, it may have done so, bearing in mind Mr Gibbs's reference to it in his evidence and the absence of any contention on behalf of the tenants that hope value was to be excluded. Certainly in the light of *Arbib* it would be expected that, so far as there was hope value, it would properly be reflected in the deferment rate. Thus the deferment rate that it adopted may have been lower than it would have been if hope value had been excluded as an element. Similarly when granting permission to appeal "on the issue of the deferment rate" the LVT at the very least may have had in mind a deferment rate that included a reflection of hope value.

6. Mr Walker's contention, which gives rise to the principal preliminary issue, is that, since permission to appeal has only been given on the issue of the deferment rate, the landlord should not be allowed to argue on the appeal that an addition to the value of the freehold reversion should be made to reflect hope value. The landlord wishes to do so because, he says, *Sportelli* says that this is the appropriate way to allow for hope value where it exists and is not excluded by the wording of the statutory provisions. Mr Walker's submission, it seems to me, is founded on the fallacious assumption that, in granting permission to appeal on the deferment rate, the LVT must have meant a deferment rate that excluded any allowance for hope value. There is no justification for such an assumption, against the background of *Arbib* and Mr Gibbs's evidence, in both of which the deferment rate was treated as encompassing hope value. In these circumstances, it would in my view be manifestly unfair to prevent the landlord from arguing for an addition for hope value.

7. The second issue that arises is whether the landlord can contend on the appeal for a higher price than that determined by the LVT. Mr Philip Rainey for the respondent relied on the Tribunal's recent decision in *Arrowdell Ltd v Coniston Court (Hove) Ltd* [2007] RVR 39 to contend that he was entitled, or alternatively should be permitted, to seek a higher price. Before the LVT, although there was evidence by a financial expert, Mr Peter Clokey, supporting a deferment rate of 3.6%, the landlord's case was that the deferment rate, including an allowance for hope value, should be 4.5%. That is stated in paragraph 5 of the respondent's amended reply of 31 January 2007. Following the appellant's notice of appeal the landlord gave notice to respond on 20 July 2006. The grounds upon which he intended to rely in resisting the appeal were that at the date when the decision was given (ie before the Lands Tribunal decision in *Sportelli*, which was then awaited) the LVT were correct to determine a deferment rate of 4.5%. The reply to the appellants' statement of case said:

> "4. The Respondent contends that the Tribunal's decision of 26 April 2006 was correct and will contend for the same deferment rate of 4.5% and the same enfranchisement price, £1,342,895....
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> 8. The Respondent recognises that the forthcoming Lands Tribunal decision in *Sportelli* LRA/50/2005 will provide further guidance as to the deferment rate. The Respondent notes the Appellants' intention to withdraw the appeal if *Sportelli* suggests that the rate should be below 4.5%. The Respondent considers that [it] would be inappropriate to speculate further pending publication of the *Sportelli* decision: at present, the Respondent's case remains that which was accepted before the LVT; and at the hearing of the appeal the Respondent's present intention is to rely on the evidence of Mr Gibbs and Mr Clokey.
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> 9. The Respondent may seek permission to amend this Statement of Case in Reply after publication of the *Sportelli* decision."

8. The respondent's amended reply was served pursuant to an order that I made following a directions hearing on 1 February 2007. Paragraph 12(c) of the reply asserted:

> "despite the absence of a cross-appeal, it is open to the Respondent to argue for a result, and it is open to the Tribunal to make a determination, which is more favourable to the Respondent than the determination of the LVT:"

and it referred to section 175(4) of the 2002 Act and to *Arrowdell.*

9. I cannot accept the contention that the respondent is entitled, or alternatively should be allowed, to contend for a price that is higher than that determined by the LVT. The Lands Tribunal has power under section 175(4) to exercise any power that was available to the LVT. However, in determining the price under section 21 of the 1967 Act an LVT does not, in my judgment, have power to determine a price that is higher than that contended for by the landlord. It is deciding an inter partes dispute, and it must necessarily be limited in its determination by the extent to which either party has placed a limit on the price that it is seeking. For this reason it is not open to the landlord to contend before the Lands Tribunal for a price that is higher than the one he was seeking before the LVT. *Arrowdell* does not assist him.

10. In any event the price that the landlord was seeking before the LVT was one which reflected its valuer's assessment of hope value. Mr Gibbs included hope value within his deferment rate, and the price for which he contended thus reflected his judgment as to the amount that ought to be allowed in order to reflect this. There is no reason why the landlord should now be able to contend for a higher hope value than the one his valuer saw fit to reflect in his 4.5% deferment rate.

11. Mr Walker included in his submissions a contention that *Arrowdell* was wrongly decided to the extent that it determined that a party that had not been given permission to appeal to the Lands Tribunal could, in certain circumstances, contend for a result that was more favourable to him than that determined by the LVT. In view of my conclusion that *Arrowdell* does not in any event assist the respondent, there is no need for me to deal with this contention.

12. A third preliminary issue that was the subject of submissions was whether *Sportelli* decided that hope value could be allowed for in valuations under section 9(1A) and 9(1C) of the 1967 Act or whether the decision was confined to a determination that hope value was excluded in valuations under the 1993 Act by reason of the words that excluded that tenant and others from the hypothetical market. Since the pre-trial review at which I accepted that this issue should be determined as a preliminary issue appeals to this Tribunal have been made in relation to two decisions of LVTs in which prices had to be determined under section 9(1A) and (1C), *Wellcome Trust Ltd v Cecil Properties Ltd* (30 November 2006, LVT ref LON/LVT/2068/06) and *Cadogan v Atlantic Telecasters Ltd* (23 November 2006, LVT ref LON/LVT/1957/05). In each case the LVT determined that an addition for hope value could not as a matter of law be made and that it was not bound to hold otherwise by reason of the Lands Tribunal's decision in *Sportelli*.

13. Both counsel in the present case expressed the view that the issue of whether an addition for hope value can as a matter of law be made should be determined as a preliminary issue at a

further hearing. That is obviously appropriate. It seems to me also, subject to any views that the parties may express, that the same preliminary issue should be determined in the other two cases and that a single hearing should be held for this purpose. In the circumstances it does not seem to me appropriate that I should express a view at this stage on the question of what *Sportelli* should be treated as deciding in relation to valuations under section 9(1A) and (1C), since this will be a matter which the appellants in these two decisions will no doubt wish to address.

14. On the preliminary issues:

(a) I determine that it is open to the respondent to contend in this appeal that allowance should be made in the price for hope value.

(b) I determine that it is not open to the respondent to contend for a higher price than that determined by the LVT.

(c) I make no determination on the question whether the Tribunal's decision in *Sportelli* and 13 South Terrace determined that hope value may be included in valuations under section 9(1A) and 9(1C) of the 1967 Act.

15. I order that the issue whether the price payable for the subject property can as a matter of law include an allowance for hope value be determined as a preliminary issue. Further directions will be given in relation to this. Counsel asked that this present decision should not become final until this further preliminary issue has been determined, and I so direct.

Dated 28 March 2007

George Bartlett QC, President