



2743

**First-tier Tribunal
Property Chamber
(Residential Property)**

Case Reference : **CAM/00KF/OLR/2013/0068**

Properties : **Ground Floor Flat,
46 Napier Road,
Southend-on-Sea,
Essex SS1 1LZ**

Applicant : **Lynsey Anne Brierly (nee Nott)**

Respondent : **Ground Rents (Regis) Ltd.**

Date of Applications : **13th May 2013**

Type of Application : **To determine of the terms of acquisition
and costs of the lease extension of the
property**

Tribunal : **Bruce Edgington
Stephen Moll FRICS
Evelyn Flint DMS FRICS IRRV**

**Date and venue of
Hearing** : **6th August 2013
Park Inn by Radisson Palace, Church
Road, Southend-on-Sea SS1 2AL**

DECISION

1. The premium payable by the applicant in respect of the property is £6,296.00. The calculations are set out in the schedule at the end of this decision.
2. The valuation fee payable by the Applicant is £795.00 plus VAT upon the understanding that the Respondent is not registered for VAT purposes and is thus unable to reclaim VAT. If it is so registered, VAT will not be payable because the service provided by the surveyor is to the Respondent, not the Applicant, and will therefore be recoverable as an offset in the usual way.
3. The Application by the Applicant for the costs allegedly wasted as a result of the Respondent's unreasonable behaviour in conducting these proceedings is successful to the extent of £50.00 plus VAT i.e. a total of £60, which is now payable by the Respondent to the Applicant. Assuming that this matter now proceeds to completion, it can simply be deducted from the monies payable by the Applicant.

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Reasons

4. This is an application for the Tribunal to determine the terms of a lease extension for the property and the amount payable by the Applicant for the Respondent's legal and valuation costs. Bundles were delivered as ordered by the Tribunal, albeit late. One of the reasons for this was the failure of the Respondent to serve its case or surveyor's report on time.
5. It was clear from both the bundle and the subsequent statement from the Respondent that there was a large measure of agreement. The terms of the deed of surrender and new lease had been agreed save for the premium, the legal costs had been agreed and the valuation fee had been agreed 'in principle' subject to the Applicant being satisfied that the surveyor had prepared a report.
6. As to the premium, the 'no Act world' value of the flat had been agreed at £108,000.00 and the only matters in dispute were the deferment rate, the capitalisation rate and relativity. These terms will not be explained in detail as both parties are represented by surveyors and they will be able to explain any unknown terms to their lay clients.

The Law

7. On 1st July 2013, the Leasehold Valuation Tribunal was subsumed into the new First-tier Tribunal, Property Chamber. The new regulatory rules then became **The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**. Under rule 13, a person may make an application at a hearing for an unlimited costs order where another party has acted unreasonably in conducting proceedings before the Tribunal. Even if no application is made, a Tribunal can still make such an order which is sometimes known as a wasted costs order.
8. It is trite law to say that the valuation of a premium payable in respect of a new lease in these circumstances is governed by Schedule 13 of the 1993 Act. Paragraph 2 says that:-

“The premium payable by the tenant in respect of the grant of the new lease shall be the aggregate of-

- (a) the diminution in value of the landlord's interest in the tenant's flat as determined in accordance with paragraph 3,*
- (b) the landlord's share of the marriage value as determined in accordance with paragraph 4, and*
- (c) any amount of compensation payable to the landlord under paragraph 5*

The Inspection

9. In view of the issues remaining and the full description of the property in the reports from both sides, the members of the Tribunal did not think it necessary to inspect the property and neither party requested an inspection.

The Hearing

10. The hearing was attended by a number of people including the Applicant's surveyor, Ian Burden DIP BS FRICS and by Todd Harrison-Moore AIRPM on behalf of the Respondent. Those two spoke exclusively on behalf of the parties.
11. In respect of the **deferment rate**, the main issue was whether a departure should be made from *Sportelli*. As Mr. Burden was the only one asking for such a departure, he was asked to say what 'compelling evidence' he wanted to introduce to persuade the Tribunal that there should be such a departure. These were the words used by the then Lands Tribunal as approved by the Court of Appeal. The Tribunal wanted to know whether he could add anything to the one sentence in his report which dealt with the point which said that, in his view, the reason for departing from *Sportelli* was "to reflect the lower growth potential for flats in the Southend area".
12. He said that there was an over-supply of flats in the Southend area. Houses had more or less regained the value they had before the property crash in 2008 but flats were still lagging behind. This was in contrast to prime central London where prices had more than recovered for flats. This had been reflected in previous such 'dips' in the property market i.e. the effect in places like Southend was worse than central London. He said that, in his view, this could be said to be a problem which reached over a 50 year period.
13. When asked whether he had investigated Land Registry figures, he said that he had but he had not brought any figures with him and could not give any specific figures.
14. Dealing with **capitalisation of the loss of ground rents**, Mr. Burden acknowledged that he had prepared his report suggesting a 7% capitalisation rate on the basis of a flat ground rent over the remainder of the lease period. There was no copy of the lease in the bundle and it was therefore surprising that a surveyor should seek to put forward a valuation without knowing what the ground rent provisions were. In the event, he had now appreciated what they were i.e. a doubling of ground rent every 33 years, and had re-calculated his figure. However, he still used the 7% figure which he described as a 'standard' figure.
15. Mr. Harrison-Moore asserted a 6% figure and made the point that an increasing ground rent would be more attractive for an investor which would mean a reduced capitalisation rate, particularly, as in this case, the next 'review' was in 4 years' time. He quoted a number of cases but unfortunately had not produced copies of any decisions for the Tribunal to consider. He should realise that this is important because the Tribunal needs to know whether the particular point being discussed was actually determined by the previous Tribunal.
16. As an example, in this case, the 'no Act world' value has been agreed at £108,000. However the Tribunal has not considered whether that is an appropriate figure because it is agreed. It would be quite wrong, therefore, for someone to rely on this case in some future Tribunal case as being a determination that £108,000 is the appropriate figure for this property. Similarly, in this case, it is wrong for brief quotes to be used from previous

cases without knowing the context of those quotes. Having said that, the quoted case of **Nicolson v Goff** [2007] 1 EGLR 83 is relevant as authority for the view that an increasing ground rent will be more attractive to an investor than a level ground rent. In fact, the difference would be marginal with ground rents as low as those in this case.

17. As to **relativity**, it seemed clear on hearing the evidence that Mr. Burden was relying on 92.55% and Mr. Harrison-Moore on 91.50%. The former had rounded up to 93% and the latter had rounded up to 92%. The actual effect of the difference was marginal, to say the least.
18. On the question of the **valuation fee**, Mr. Burden sought to resile from his agreement that the figure proposed by the Respondent was agreed in principle. He had meant to say that this figure was not agreed as the surveyor, Mr. Paul Holford MRICS of Morgan Sloane, had never produced a valuation report. In fact, Mr. Harrison-Moore did produce a 27 page report from Mr. Holford dated 1st November 2012 i.e. 18 days before the counter-notice.
19. Finally, Mr. Burden said that he wanted to make a claim for a **wasted costs order** because of the unreasonable behaviour of the Respondent in connection with this application. Until he received the statement from Mr. Harrison-Moore dated 23rd July 2013, he had no idea that the Respondent was prepared to accept anything like £6,617.00. Until then they had been asking for figures in line with the counter-notice which proposed £14,490.00. He said that he received that information on the 31st July. The Tribunal had received it on the 26th July. Thus, he argued, the bundles and the hearing were really a waste of time because the difference between the parties was only about £1,400.00. If he had known about this before, he was sure that a settlement could have been reached.
20. As to figures, Mr. Burden was unable to provide any detail but thought that the total cost of the hearing and the preparation would be in the region of £1,000.00.
21. For his part, Mr. Harrison-Moore said that an offer of just under £9,000.00 had been made 3 weeks ago. He had been away for the period just up to the date when he prepared his statement and he had not been involved with this case before. He opposed any order for costs.

Conclusions

22. As far as the **deferment rate** is concerned, the Tribunal came to the view that without clear and compelling evidence, it did not have the ability to determine any rate which was different to that set down by *Sportelli* i.e. 5%. Following the property crash in 2008, the sale of flats was affected by the sudden change in the attitude of lenders who were lending on unexpired terms of 30 years or thereabouts before the crash whereas they then increased that to at least 60 years in some cases. Compelling evidence would need to include an analysis of how this issue affects the long term growth market for flats and figures from the Land Registry. Otherwise Mr. Burden's evidence did not really amount to much more than anecdotal 'evidence'.

23. As far as **capitalisation** is concerned, the Tribunal did consider that an increasing ground rent would make a slight difference to a potential investor and determined a rate of 6.5%.
24. As has been said, each side has relied upon **relativity** figures and then 'rounded' them up. The difference in the rates as applied to this case is very marginal and the Tribunal determined that 92.5% was the correct figure based on its knowledge and experience.
25. Turning now to the **valuation fee**, the Respondent did produce a lengthy report from the valuer. As this was the only reservation mentioned by Mr. Burden to his agreement in principle to the valuation fee requested, the Tribunal considered that its jurisdiction to interfere with that figure was removed by production of such report. Mr. Burden certainly did not suggest that the report produced was not a genuine report.
26. Finally, the application for a wasted costs order needs to be considered. It should be made absolutely clear that this is not the first time that Pier Management Ltd., who effectively dealt with all the work on behalf of the Respondent in this case, has failed to produce a valuation report. Indeed, there have been many cases involving that company where settlements are made at the very last minute, resulting in greater costs for both Applicants and, indeed, the taxpayer who has to pick up the bill for the cost of running this Tribunal.
27. One can, of course, see the commercial drive to keep the premium as high as possible but to delay telling the Applicant that the Respondent would agree a figure substantially less than that contained in the counter-notice until 3 weeks before the hearing, could be described as being unreasonable behaviour or, at its worst, brinkmanship. However, that is not the criterion which has to be considered by the Tribunal. It has to consider whether the way the Respondent has conducted the proceedings themselves has been unreasonable.
28. The way in which this Tribunal considers that the Respondent has behaved unreasonably is in failing to comply with a very clear direction that it must serve its valuation report by 4.00 pm on the 21st June 2013. It only produced its valuation report on the day of the hearing. Having said that, the statement from Mr. Harrison-Moore dated 23rd July 2013 did set out the Respondent's case in full.
29. Whether the service of the report on time would have prevented a hearing is simply not known. However, by not serving it on time, the Applicant's advisor was not realistically going to be able to discuss settlement with the Applicant because he did not know the Respondent's case before it was necessary to prepare the bundles of documents for the Tribunal hearing. He did subsequently know such case in detail on the 31st July when he received Mr. Harrison-Moore's statement. At that time, he knew that he was only £1,400.00 or thereabouts apart from the Respondent and he could have preserved his position by making a firm written offer at that stage with appropriate wording to ensure that his client's position was not prejudiced by such offer i.e. 'without prejudice save as to costs' or something of that nature.

30. Thus, the Tribunal is not convinced that the costs of the hearing itself were incurred by the behaviour of Pier Management. However, the cost of preparing the bundles clearly was. The Respondent's 'open' case, despite what was in the counter-notice, was that it would have accepted £6,617.00 and the Applicant's advisor did not know that before having to prepare the bundles. Doing the best it can with a lack of evidence, the Tribunal considers that the cost of copying the bundles would have been in the region of £50 plus VAT and the Respondent is therefore ordered to pay that amount to the Applicant.

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Bruce Edgington
Regional Judge
13th August 2013

The Schedule

**Ground Floor Flat 46 Napier Avenue Southend on Sea
SS1 1LZ**

Valuation Date	19th September 2012	
Lease Start Date	25th December 1983	
Lease Length (Years)		99
Lease Remaining (Years)		70.25
Market Value following new lease		£108,000
Capitalisation Rate		6.50%
Deferment Rate		5.00%
Relativity		92.50%

Freeholder's Present Interest

Ground Rent	£35.00	
YP 4.25 years @ 6.5%	3.6083	£126
Ground Rent	£70.00	
YP 33 years @ 6.5% def 4.25 years	10.302437	£721
Ground Rent	£140	
YP 33 years @ 6.5% def 37.25 years	1.2894463	£181
		£1,028

<u>Reversion to Freehold with vacant possn.</u>	£108,000	
PV of £1 @ 5% def 70.25 years	0.032475	£3,507
Less value of new reversion	£108,000	
PV of £1 @ 5% def 160.25 years	0.0004022	£43
Diminution in value		£3,464

£4,492

Marriage Value

Add

Freeholders proposed interest	£43	
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Lessee's proposed interest		£108,000	£108,043	
<u>Less</u>				
Freeholder's current interest		£4,535		
Lessee's current interest		£99,900	£104,435	
Marriage value			£3,608	
	50%			£1,804
PREMIUM				£6,296