SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case Number: CHI/00HP/OCE/2004/0095

In the matter of Chapter I of Part I of the Leasehold Reform Housing and Urban Development Act 1993

and in the matter of Wykeham Lodge, 16 Chaddesley Glen, Canford Cliffs, Poole, Dorset ("the property")

Between

Wykeham Lodge Freehold Limited "the Applicant"

and

Hoyle & Co (Bournemouth) Limited "the Respondent"

Hearing: 20th July 2005

Appearances :

Mr A Howard of Messrs DTW Solicitors for the Applicant

Miss L Wood of Counsel (instructed by Messrs Preston & Redman) for the Respondents

Decision of the Tribunal

Issued 23 August 2005

Tribunal

Mr Robert Long LLB (Chairman)
Mr Paul Harrison FRICS
Mr Peter Turner Powell FRICS

Decision

1. The numbers in square brackets in this paragraph relate to the number of the paragraph(s) in the reasons that appear below that relate to the decision in question. In the event of any conflict between the descriptions of the decision here set out and those reasons, the terms of the reasons are to prevail.

    a. The tribunal gives the parties leave to advance further written argument upon any matters of recoverability of costs that otherwise appear to be payable in this matter arising from the judgement of the Court of Appeal in the case of Edwards v Garbett if they consider it necessary to do so once the decision is in that case is known. It will if appropriate give brief directions for the provision of those arguments when the judgement has been given. Its findings described in this note are subject to any further questions of recoverability of costs that may then arise. [4]

    b. The landlord's costs of the challenge to the counter notice are not properly to be regarded as recoverable from the nominee purchaser [11], so that the costs referred to in items 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 27 on page 53 of the bundle are not to be paid by the nominee purchaser [14]

    c. As to the issues arising from other legal costs that remained in dispute:

        (i) The nominee purchaser is responsible for the landlord's costs of the two letters about boundary encroachment at items 3 and 5 on page 53 of the bundle [15a]

        (ii) The tribunal accepts that the breakdowns of costs at pages 30-32 of the bundle do not include anything for costs in respect of letters received. [15b]

        (iii) A reduction of 0.75 hours should be made in the amount time claimed for (apparently) the costs of preparing the counter notice at item 9 on page 53 of the bundle [15c]

        (iv) A charge amounting to one unit of time is reasonable and recoverable from the nominee purchaser for the e-mail at item 6 on page 53 of the bundle [15d]

        (v) The costs of change of solicitor are recoverable to the extent that they would be payable if the work in question was done by the original solicitors [15e]

    d. The nominee purchaser is to pay a sum of £1025-78 (£873 plus VAT of £152-58) for Messrs James and Sons valuation fees [20]

    e. The tribunal makes no order for costs as requested by the Respondents pursuant to Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 [23]

    f. In the light of the doubt over the actual amount to be disallowed in the light of the tribunal's decision at paragraph 15(e) the tribunal has been unable to calculate the amount to be paid by the nominee purchaser to the respondent in the light of the conclusions it has

reached. It gives leave to apply within three months from the date of issue of these directions in the event that they are unable to do so.[24]

Reasons

Background

2. On 13th April 2004, Wykeham Lodge Freehold Limited ("Wykeham") gave initial notice through its solicitors to Hoyle & Co (Bournemouth) Limited ("Hoyle") under section 13 of the Law Reform Housing and Urban Development Act 1993 ("the Act") that it proposed to acquire the freehold of Wykeham Lodge, 16 Chaddesley Glen, Canford Cliffs ("the property") pursuant to the provisions of that section. Hoyle responded by counter notice given through its then solicitors on 16th June 2004. It admitted the right to acquire the freehold, but did not accept certain of the proposals (including that as to price) contained in the notice, and made counter proposals.

3. Following the decision in Central London County Court in 7 Strathray Gardens Limited v Pointstar Shipping Limited ("Pointstar"), the solicitors for Wykeham challenged the validity of the counter notice on the ground that it did not contain a statement as to whether or not the premises were in an area of a scheme approved as an estate management scheme under section 70 of the Act. County Court proceedings were commenced to establish the validity or otherwise of the counter notice. Subsequently the Court of Appeal reversed the decision in Pointstar, the County Court proceedings were withdrawn and the matter has since progressed to completion. The issues in dispute (other than those arising from the decision in Evans v Garbett) relate to the costs payable by the applicant to the respondent under section 33 of the Act.

Edwards v Garbett

4. There was an issue arising from the case of Edwards v Garbett presently before the Court of Appeal whether or not costs could in any case be recovered in the absence of an advance estimate of costs. A decision in that case was awaited, and it may be that further argument as to liability for costs may arise in this case when its outcome was known. He would provide a copy of the judgement to the tribunal when it was available, and indicate whether further argument about it may be appropriate. Miss Wood agreed with him that it would be sensible in those circumstances for the parties to have leave to advance further argument in writing to the tribunal. The tribunal gives the parties leave to advance further written argument upon that point if they consider it necessary to do so once the decision is known, and will, if it appears necessary to do so, give brief directions for the provision of those arguments when the judgement has been given. Its findings described in this note are subject to any further questions of recoverability of costs that may then arise.

Costs in the challenge to the counter notice

5. Section 33(1) of the Act specifies the landlord's costs of enfranchisement that are to be paid by the nominee purchaser. They are the costs:

   a. any investigation reasonably undertaken –
      i. of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or
      ii. of any other question arising out of that notice;
   b. deducing, evidencing and verifying the title to any such interest;
   c. making out and furnishing such abstracts and copies as the nominee purchaser may require
   d. any valuation of any interest in the specified premises or other property
   e. any conveyance of any such interest

   but the section further provides that it 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.

6. Subject to the Edwards v Garbett point, Mr Howard indicated that the hourly rates of both Messrs Dickinson Manser and of Messrs Preston & Redman in this matter were agreed. Similarly there was no challenge raised to the cost of the preparation of the counter notice in this case, because section 33 (a) (ii) of the Act makes it plain that the nominee purchaser is responsible for 'any other question arising out of that notice', and the counter notice plainly fell within that definition.

7. He contended however that some other of the landlord's legal fees claimed against the nominee purchaser in this case fell outside of section 33 of the Act. These related to the circumstances that arose from the challenge made to the validity of the counter notice. In particular, the counter notice was invalid in accordance with the decision in Pointstar at the time of service. That invalidity was a proper point to take at that date. If Pointstar had been decided otherwise in the Court of Appeal, the issue of validity in this case would then have been heard in the County Court, and costs in respect of the proceedings would have lain in the discretion of the County Court. It was inconsistent with the legislation if the landlord was held in this case to be entitled to its costs in respect of the issue of invalidity of the counter notice when the question of entitlement to them would have been for the County Court had the issue been heard there. Section 33 did not refer to costs arising out of challenges to the counter notice.

8. Miss Wood argued that the tenants had taken the risk of pursuing a challenge to the counter notice based on the County Court decision in Pointstar knowing that the Court if Appeal may reverse that decision. By doing so they directly increased the landlord's costs. Had the claim gone to a hearing in the County Court, the proceedings would have been stayed pending the Court of Appeal decision, and when the tenants were ultimately unsuccessful as a result of that

decision the landlord would have recovered its costs of the proceedings. Costs of determining the validity of a counter notice must fall within the structure of section 33. The costs of dealing with the initial notice, and preparing the counter notice were properly recoverable under section 33, as the applicant accepted, and if such principles applied to the costs of preparing and serving a counter notice they applied pari passu to dealing with challenges to it.

9. Notwithstanding Miss Wood's persuasive argument, the tribunal considers itself bound by the express wording of section 33(1). It accepts that the cost of preparation of a counter notice may properly be regarded as payable by the applicant as a matter "arising out of the (initial) notice", but in its judgement the wording of section 33(1)(a)(ii) cannot be extended so far as to require the applicant to pay the respondent's costs of a proper challenge to the validity of the counter notice. It is appropriate for the applicant to pay the costs of a counter notice properly prepared for the service of the counter notice is a step that the framework of the Act specifically requires, but if the counter notice may be subject to challenge then in the tribunal's view that ceases for the purposes of section 33(1)(a)(ii) to be a matter that can still be regarded as "arising out of the (initial) notice". It is rather a matter that arises out of the nature of the counter notice, and as such moves aside from the ordinary flow of the procedure that the Act lays down.

10. That is illustrated by the situation that arises in this case. Pointstar was decided in the County Court on 12 February 2004. According to Messrs Dickinson Manser's time records on page 6 of the bundle, the counter notice was prepared (and apparently served) on 16 June 2004. Pointstar was reversed by the Court of Appeal in early 2005. As the law stood at the time of preparation of the counter notice, it appeared that the statement that the County Court had held should be included in such a notice as to whether or not the premises were in an area of a scheme approved as an estate management scheme under section 70 of the Act should have been included in this notice. It would at the least have been prudent for the draftsman of such a notice in those circumstances to have included that statement, even if he felt certain that the decision would be reversed upon appeal.

11. Because the Pointstar decision suggested at the time of service that the counter notice was defective it was entirely reasonable that the applicant's advisers should have pointed out that the counter notice should be challenged. On the basis of the dates mentioned above they had to lodge such an application, if they elected to make it, with the County Court by 16 December 2004 (ie before the date of the Court of Appeal decision). It seems unlikely that Parliament intended the wording of section 33(1)(a)(ii) to be construed so widely that the nominee purchaser would have to pay the landlord's costs of resisting a challenge to a notice that had been incorrectly prepared (or, as here, where it might reasonably have been thought at the time to have been incorrectly prepared). In the event of a groundless challenge to a counter notice, of course, the County Court's costs jurisdiction is available to the landlord to recover his costs, and it may be that a landlord should rely on that jurisdiction too, or upon separate agreement, in a case like this one where an

application to challenge the counter notice in the County Court is subsequently withdrawn.

12. In re Chivelston, 78 Wimbledon Parkside, London SW 19 (LON/ENF/1005/03) the LVT expressed its view about section 33(1) of the Act in the following terms after having remarked that the nature of the legislation was to create a form of compulsory purchase:

"Accordingly, it would be surprising if freeholders were expected to be further put of pocket in respect of their inevitable incidental expenditure incurred in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them. Parliament has indeed provided that this expenditure is recoverable, in effect, from tenant-purchasers subject only to the requirement of reasonableness (see section 33(1) of the 1993 Act"

13. This tribunal does not dissent from that general view, which has been widely adopted in other decisions. It is however of the view that it is not of unlimited application, as the respondents in this case argue. It is in this tribunal's view similarly not surprising that Parliament did not intend that the tenant purchaser should reimburse the landlord for what may not be regarded as inevitable expenditure. For example, the costs in this case relate to work in connection with the consequences of what may at the time have been seen as a possible error on the part of the landlord's advisors in preparing the counter notice, and where in any event the procedure is one in respect of which a quite separate costs regime may apply. In its view therefore, it is wrong to regard the general comment in Chivelston as being one of unlimited application to all costs incurred after an initial notice is served. It doubts that the tribunal in question intended it in that sense, and is of the view that there may be other (possibly unusual, as the present ones are) circumstances where a similar limitation might apply.

14. For the avoidance of doubt it follows that the costs referred to in items 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 27 in Appendix 1 to this decision are not to be paid by the nominee purchaser.

Other legal costs

15. There were a number of other detailed challenges in the applicant's written points in dispute at pages 63 to 70 in the bundle that are dealt with in writing in the respondent's reply to those points at pages 110-115. Some of the replies amount to admissions, and are not further mentioned here. The tribunal's findings in respect of those points that are in dispute, and its reasons for them, are set out below.

    a. In the respondent's points in reply (page 112) the challenge to the letters mentioned in paragraph 17 in the applicant's statement as being matters for which the applicant should not pay costs is apparently accepted, but at the hearing Miss Wood did not accept it. The letters relate to a possible boundary encroachment and appear in the schedule of Messrs Dickinson Manser's costs at

items 3 and 5 on page 53 of the bundle.. The tribunal accepts Miss Wood's argument that such letters may properly be regarded as going to matters of title, and that as such the costs in respect of them is properly to be paid by the applicant under the provisions of section 33(1)(b) of the Act.

b. For the avoidance of doubt the tribunal accepts the respondent's assurances that the breakdowns of costs at pages 30-32 do not appear to include anything for costs in respect of letters received (paragraph 18 of the points in reply). The elements appearing in that respect in the summaries at pages 53-61 appear to have been removed.

c. The tribunal accepts that a reduction of 0.75 hours should be made (paragraph 19 of the points in reply) which allows (as far as it can establish from information before it) for the cost of preparing the Schedule at pages 96 and 97 of the bundle. Thus a charge of 0.5 hours is to be allowed for the work at item 9 in the schedule of Messrs Dickinson Manser's costs on page 53 of the bundle.. That period of time is in the tribunal's judgement more than adequate for the additional work of preparation of the schedule and the total that it produces (with the other work mentioned at items 4, 8 and 31 on page 66 of the bundle) is quite sufficient for the work of consideration and preparation of the whole of the counter notice.

d. The tribunal accepts that a charge amounting to one unit of time for the e-mail mentioned at item 6 in the schedule of Messrs Dickinson Manser's costs on page 53 of the bundle is allowable, the challenge having been to the existence, now demonstrated by its inclusion at page 123, of that e-mail rather than to the amount of the costs.

e. As to the costs of change of solicitors, challenged at paragraph 23 in the applicants points of dispute on page 68 of the bundle, the tribunal accepts Miss Wood's argument that these are recoverable to the extent that the cost would be recoverable if the work in question was done by the original solicitors. The parties did not address the tribunal on the question of what did and did not fall within that definition. They have leave to make written representations (to be exchanged) to the tribunal within twenty eight days after the issue of this decision if they are unable to agree on the matter, and if that happens the date for lodging a request for leave to appeal in respect of that aspect only of this decision will be extended until twenty days after the decision upon the point is issued to the parties.

The Valuers' Costs

16. It is common ground between the parties that the nominee purchaser is responsible, in accordance with section 33(1)(d) of the Act for the landlord's cost of any valuation of any in the specified premises or other property, but that that description is not wide enough to make him responsible for the landlord's costs associated with any negotiations.

17. The issue is simply one of how long those negotiations took. It arises because the account from Messrs James & Son at page 78 in the bundle does not differentiate between the costs incurred in valuation and those in negotiation, but simply shows an omnibus fee for all of that work. The parties require to establish a breakdown between the two to establish how much the nominee purchaser should pay, and there is a factual conflict in the evidence available for that purpose.

18. The landlord states in paragraph 5.2 of the points in reply (page 111 of the bundle) that the time charged by Messrs James & Son for negotiation relates to one meeting of approximately half an hour. It makes no reference to any correspondence or any other work ancillary to that meeting. On the other hand the nominee purchaser engaged the services of Messrs Goadsby and Harding in relation to the negotiation, and their account at page 80 of the bundle indicates a total time involvement of 4.5 hours. One hour of that total is wrongly attributed to the negotiation, says Mr Howard, and related to an inspection that they conducted with James & Son at an earlier stage, so thattheperiod actually attributable to the negotiation is 3.5 hours. The matter was dealt with at James & Son by Mr Davey, who is a chartered surveyor, but who does not appear on their letterhead in the bundle (page 79) as a partner That is the sum total of the evidence upon the point before the tribunal.

19. The tribunal prefers the nominee purchaser's evidence upon the point. That is primarily because Messrs Goadsby and Harding appear from such evidence as it has to have time records for the matter, whereas Messrs James & Son similarly appear to proceed (there is no direct evidence from them upon the point) purely from recollection relayed to the landlord's solicitors for the purposes of the points in reply. The letter from Messrs James & Son on page 80 of the bundle indicates a charge of £1100-00 for the valuation work which is calculated on a percentage rather than a time basis. That, by comparison with the bill on page 79 totalling £1223-67 exclusive of VAT, suggests a net charge of £123-67 for the half an hour's negotiating work to which they refer, a charge at the rate of £247-33 for a non partner.

20. The tribunal finds such a charge rate unlikely. In its experience the likely charge rate for a non partner chartered surveyor at the time in question (early this year) in the Bournemouth area would be unlikely much to exceed £100 per hour. Applying that figure to the period of three and a half hours given by Messrs Goadsby and Harding (and assuming in the absence of other evidence that the work involved on both sides would have been similar) would suggest an element of £350 net in Messsrs James & Sons total charge for the negotiating work whose cost is not payable by the nominee purchaser under section 33(1)(d). That leaves a sum of £873 plus VAT of £152-78 payable by him, a total of £1025-78.

The claim for costs

21. Miss Wood put forward a claim for costs of £500 on behalf of the landlord against the nominee purchaser. The tribunal has jurisdiction to make such an award of up to that amount under the provisions of paragraph 10 of Schedule

12 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). It may make an award either where the application before it has been dismissed in accordance with the relevant regulations (the Leasehold Valuation Tribunal (England) (Procedure) Regulations 2003 as amended ("the regulations")) or where a party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. It is to be borne in mind in this connection that the tribunal's powers to dismiss under the regulations (regulation 11) are limited to occasions where the application before it appears to it to be frivolous, vexatious or an abuse of its process.

22. Miss Wood said that the application for costs was an application for the tribunal to award the whole £500 available to it. There had been a blanket refusal to deal with costs, and that was unreasonable. The tribunal should mark its displeasure with applicants who refuse to negotiate. Mr Howard said that the correspondence (see for example that on pages 11, 26 and 33 of the bundle) showed a willingness to negotiate but a difficulty evinced by the lack of sufficient information.

23. The test to be applied by the tribunal is whether the nominee purchaser has acted where a party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings (there being no application to dismiss an application under regulation 11 in this case). It concluded as a matter of fact that it has not done so. Undoubtedly there have been discussions that both parties may have subjectively regarded as vexatious about the amount of information to be supplied by the landlord's solicitors to the nominee purchaser's solicitors in order for the costs element to be negotiated. Viewed objectively, however, those matters have arisen from genuine differences of opinion that the parties have rightly brought before the tribunal in order to have them resolved. The tribunal would not, in its judgement, be justified in making the order for costs sought in those circumstances, or indeed any order for costs under Schedule 12 paragraph 10 of the 2002 Act.

Calculation of the Costs

24. In the light of the doubt over the actual amount to be disallowed in the light of the tribunal's decision at paragraph 15(e) the tribunal has been unable to calculate the amount to be paid by the nominee purchaser to the respondent in the light of the conclusions it has reached. It anticipates however that that the parties will readily be able to do this by reference to the contents of this decision as applied to the schedules of costs at pages 53-61 of the bundle when that figure has been either agreed between them or determined as set out in paragraph 15(e), but gives leave to apply within three months from the date of issue of these directions in the event that they are unable to do so.

Robert Long
Chairman
23 August 2005