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Residential Property
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DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 24 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 AND PARAGRAPH 10 OF SCHEDULE 12 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Reference number:	LON/00AU/OCE/2007/0084
Property:	4 Birnam Road, London N4 3LQ
Applicant:	4 Birnam Road (Freehold) Co Ltd
Respondent:	Pledream Properties Ltd
Appearances:	For the Applicant: Miss S Dolasa, participating tenant of flat 2 For the Respondent: Ms E Godfrey, a barrister instructed by Sheridan & Stretton, Solicitors
Tribunal members:	Mr A J Andrew Mr J C Avery BSc, FRICS
Application dated:	21 February 2007
Directions:	25 April 2007 and 7 June 2007
Hearing:	3 July 2007
Decision:	5 July 2007

DECISIONS

1. All the terms of acquisition, as defined in sub section 24(8) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") were agreed by 24 May 2007 and consequentially from that date we had no continuing jurisdiction to make a determination on the application.

2. We declined to order the Respondent to pay any of the costs incurred by the Applicant in these proceedings pursuant to paragraph 10 of schedule 12 of the Commonhold and Leasehold Reform Act 2002 ("CLRA").

FACTS

3. On the basis of the documents included in the hearing bundles and the oral submissions made by Miss Dolasa and Ms Godfrey we found the following relevant facts:-

    a. On 28 June 2006 the qualifying tenants gave notice of their intention to acquire the freehold interest in the premises. The initial notice proposed a total price of £4,400. By a counter notice given on 30 August 2006 the Respondent admitted the claim but made a counter proposal of £7,700. Although the counter notice records that the Respondent challenged the validity of the claim notice that challenge appears to fallen away and certainly it was not put in issue before us.

    b. On 10 January 2007 the Applicant's solicitors, Pro-Legal, wrote to the Respondent's solicitors, Sheridan & Stretton, saying that they had their *"Client's instructions to accept your section 21 Counter-Notice"*. The letter also requested Sheridan & Stretton to provide a draft transfer and a breakdown of their client's costs recoverable under the Act. Perhaps somewhat surprisingly Ms Dolasa agreed that this letter amounted to an acceptance by the Applicant of the price proposed in the counter notice: that is £7,700.

c. Subsequent reminders from Pro-Legal requesting both a draft transfer and a completion statement were ignored by Sheridan & Stretton until on 14 February 2007 they submitted a draft contract without commenting upon those requests. Accordingly and with time running against them Pro-Legal made an application to the tribunal on 23 February 2007. In their application under the heading *"the purpose of the application"* they requested the tribunal *"to determine the terms of the acquisition. In particular, the Applicant has received no response in relation to request provide Completion Statement or Approved Transfer Form. Section 33 costs have also not been provided for approval by the Respondent's Representatives"*.

d. Having made their application Pro-Legal repeated their request for a draft transfer and a completion statement. Finally they drafted the transfer themselves and submitted it to the Sheridan & Stretton on 22 March 2007: their letter of that date said that a copy had been sent by e-mail on 16 February 2007 but if so a copy of that e-mail was not included in the hearing bundle.

e. The draft transfer was in form TR1. It provided that the Respondent would transfer with full title guarantee but included no additional provisions.

f. On 11 May 2007 Sheridan & Stretton wrote to Pro-Legal effectively disputing the tribunal's jurisdiction on the grounds that the terms of acquisition had been agreed. Notwithstanding this assertion they submitted their own draft transfer on 18 May 2007. Although a copy was not included in the hearing bundle it would seem that it provided that the Respondent would transfer with limited title guarantee because on 24 May 2007 Pro-Legal returned the transfer with an appropriate amendment and wrote that their clients wanted to obtain the freehold *"under full title guarantee"*. The letter

reiterated the request for a completion statement and requested the removal of a notice of deposit on the charges register of the reversioner's title in favour of Barclays Bank Plc

g. By letter of the same date Sheridan & Stretton replied drawing Pro-Legal's attention to paragraph 2(2)(b) of schedule 7 to the Act which provides that the reversioner need only transfer with limited title guarantee. Again Ms Dolasa accepted that on 24 May 2007 the terms of the transfer had been agreed.

h. By the date of the hearing Sheridan & Stretton had still not provided a completion statement or dealt with the requisition relating to the notice of deposit in favour of Barclays Bank Plc.

4. In response to letters dated 4 and 5 June 2007 received from both solicitors the application was listed for a preliminary hearing to determine the extent of the tribunal's jurisdiction and directions were issued on 7 June 2007 which required the Respondent to provide a hearing bundle by 28 June 2007. The Respondent failed to comply with that direction and thus on 29 June 2007 Pro-Legal prepared and submitted their clients statement of case together with their own hearing bundle.

Statutory framework

5. The tribunal's jurisdiction stems from subsection 24(1) of the Act which provides that where "*any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute*".

6. The phrase "*the terms of acquisition*" is defined in subsection 24(8) in these terms: "*In this Chapter "the terms of acquisition", in relation to a*

claim made under this Chapter, means the terms of the proposed acquisition by the nominee purchaser, whether relating to –

(a) the interests to be acquired,

(b) the extent of the property to which those interests relate or the rights to be granted over the property,

(c) the amounts payable as the purchase price for such interests,

(d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e) the provisions to be contained in any conveyance,

or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of Section 1(4) or 21(4)".

7. Subsection 24(3) provides that either the nominee purchaser or the reversioner may apply to the court for an order where *"all the terms of acquisition have been either agreed between the parties or determined by a leasehold valuation tribunal under subsection (1)..... but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6.)".*

8. Subsection 24(4) provides that schedule 5 shall have effect in relation to any order made by the court and it is helpful to summarise the relevant provisions of that schedule. Paragraph 2 provides for the execution of the conveyance by a person nominated by the court. The conveyance *"(a) is in a form approved by the leasehold valuation tribunal, and (b) contains such provisions as may be so approved for the purpose of giving effect to the relevant terms of acquisition".*

9. Paragraph 3 provides for the payment into Court of *"the appropriate sum"* which is the aggregate of two amounts : the first in effect being the price agreed or determined by the leasehold valuation tribunal and the second

being *"any amounts or estimated amounts determine by a leasehold valuation tribunal as being, at the time of the execution of the conveyance, due to the transferor from any tenants of his or premises comprised in the premises in which that interest subsists (whether due under or in respect of their leases or under or in respect of agreements collateral thereto)"*.

10. Although the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 are clearly subservient to the Act (under which they were made), it is helpful to have regard to them. In particular, subparagraph 6(1) schedule 1 to those regulations provides that *"the reversioner shall prepare the draft contract and give it to the nominee purchaser within the period of 21 days beginning with the date the terms of acquisition are agreed or determined by a leasehold valuation tribunal"*.

The issues

11. The primary issue was whether any of the terms of acquisition remained in dispute on 30 October 2006 (two months after the counter notice) and if so whether and upon which dates those terms were subsequently agreed by the parties.

12. The secondary issue was the Applicant's application for costs. Ms Dolasa sought to recover costs of £600 plus VAT charged by Pro-Legal: £300 plus VAT relating to the preparation of the application to the tribunal and further £300 in respect of subsequent correspondence and the preparation of a statement of case in respect of the preliminary issue. Ms Godfrey resisted the application but did not dispute the quantum of the costs.

Reasons for our decision

13. Ms Godfrey's position was that our jurisdiction under section 24(1) was limited to any terms of acquisition that could be identified as being in dispute on a reading of the claim and counter notices. As she put it those notices *"flagged up"* the disputed issues to be determined by the tribunal in

the absence of agreement. Some support for that argument can be gleaned from Penman v Upavon Enterprises Ltd [2001] EWCA Civ 956. Although Penman is usually cited in support of the proposition that the tribunal has continuing jurisdiction under section 24(1) until the terms of the transfer have been agreed or determined the disputed term related to the inclusion of an indemnity clause that had been specified in the counter notice. Ms Godfrey also drew our attention to another tribunal decision that concluded that a landlord's counter notice accepting the tenants proposed price deprived the tribunal of jurisdiction. We were however reluctant to have regard to another tribunal decision decided on very different facts.

14. Miss Dolasa, although a solicitor, accepted that she did not practise in this area of Law and in reality appeared as a litigant in person. Her argument was a practical one. In effect she asserted that the tribunal retained jurisdiction until the moment of completion and that the outstanding issues (namely the preparation of a completion statement, the outstanding notice of deposit in favour of Barclays Bank plc and the section 33 costs) were all matters for the tribunal. It was however apparent that Miss Dolasa was unaware of the provisions of the section 24 of the Act and in particular those relating to the court's jurisdiction and the time limit within which any application to the court must be made.

15. Although Ms Godfrey presented her case with attractive simplicity it is based entirely upon an interpretation of subsection 24(1) and overlooks the interrelation of the subsections 24(1), (3) and (8). It is clear from the definition of *"the terms of acquisition"* in subsection 24(8) that the tribunal has jurisdiction, under subsection 24(8)(e), to determine the terms of the transfer. It is apparent from subsection 24(3) that jurisdiction only moves to the court when *"all the terms of acquisition have been either agreed between the parties or determined by the leasehold valuation tribunal under subsection (1)"*. Consequently the reference in subsection 24(1) to the terms of acquisition remaining in dispute must refer to those terms, as defined in subsection 24(8), which have not been agreed. If that were not

the case a nominee purchaser, in the position in which the Applicant finds itself, would be left without any means of advancing its claim because neither the tribunal nor the court would have jurisdiction. A reversioner would, in the counter notice, simply have to remain silent on the terms of the transfer to defeat the Nominee Purchaser's claim. We doubted that this had been Parliament's intention.

16. Such an interpretation is consistent with modern conveyancing practice in enfranchisement cases where the transfer is invariably drafted by the reversioner's solicitor and submitted to the nominee purchaser's solicitor. In the majority of cases the disputed provisions of the transfer are only identified after the draft has been received and considered by the nominee purchaser's solicitor. Accordingly and for each of these reasons we rejected Ms Godfrey's approach.

17. As far as Ms Dolasa's approach was concerned we agreed that it was pragmatic. However it ignored the scheme of the Act and the regulations which clearly envisage the tribunal's jurisdiction ceasing prior to the parties entering into a legally binding contract (although it has to be said that in the majority of enfranchisement cases the parties proceed straight to completion and without entering into a contract).

18. As far as the section 33 costs were concerned we endorsed the view of the editors of Hague at paragraphs 26-10 and 26-11 where they write that those costs *"are plainly not part of terms of acquisition"*. As far as the notice of deposit in favour of Barclays Bank plc was concerned it did not fall within the tribunal's jurisdiction under subsection 24(1) but rather it is dealt with by section 35 of the Act. That left the tribunals jurisdiction, under section 24(1), hanging on the unprepared completion statement.

19. Although the words *"or otherwise"* in subsection 24(8) could be interpreted as giving the tribunal an almost limitless jurisdiction in terms of differences between the nominee purchaser and the reversioner, we did not consider that such an interpretation was intended. Those additional matters that

might fall within the ambit of that phrase must bear some relationship to the specific matters itemised in subparagraphs (a) to (e). The preparation of a completion statement does not bear such a relationship.

20. If one stands back and looks at the scheme of the legislation it is apparent that the tribunal's jurisdiction under section 24(1) is essentially limited to valuation of the price and the terms of the transfer, which will generally identify both the interest and the extent of the property to be transferred. When those matters have either been agreed between the parties or determined by the tribunal jurisdiction moves to the court under sub section 24(3). As contemplated by paragraph 2 of schedule 5 the court will have before it the transfer approved by the tribunal (in the absence of agreement between the parties) and will appoint a person to execute the transfer which will be completed upon the payment into Court *"of the appropriate sum"* as referred to in paragraph 3 of schedule 5.

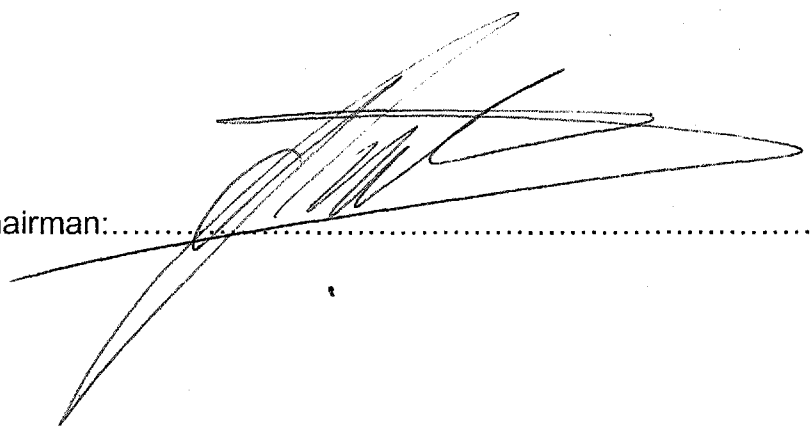
21. If, as in this case, a recalcitrant reversioner fails to provide a completion statement then subparagraph 3(1)(b) of schedule 5 enables the court to refer back to the tribunal the calculation of the completion statement as at the date upon which the court nominee executed the transfer. In such circumstances the reversioner would be at risk as to costs in the court proceedings.

22. The tribunal can have no jurisdiction under sub section 24(1) to prepare a completion statement because one can only be prepared when the completion date has crystallised and in the circumstances contemplated it will only crystallise upon the execution of the transfer by the court's nominee. Consequently and for each of the above reasons we rejected Ms Dolasa's approach.

23. As observed in paragraph 20 above we considered that the tribunal's jurisdiction under sub section 24(1) ceases when the price and the terms of the transfer have been agreed. Ms Dolasa accepted that the price had been agreed on 10 January 2007 and the terms of the transfer on 24 May

2007. Consequentially from 24 May 2007 the tribunal had no jurisdiction under section 24(1) and the Applicant would therefore have to seek relief from the court under subsection 24(3).

24. Turning to the application for costs we considered that the case had simply not been made out. Although the Respondent had failed to comply with the tribunal's standard-directions its primary position, confirmed in writing, was that the tribunal had no jurisdiction from the outset. Its failure to comply with the subsequent directions relating to the preliminary issue was regrettable but in reality had put the Applicant to very little additional cost. Before making an order for costs under schedule 12 of the CLRA we had to be satisfied that the Respondent *"acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings"*. That was a high hurdle and we did not consider that it had been cleared. Consequently we declined to make an order for costs.



Chairman:.....(A J Andrew)