Residential Property
TRIBUNAL SERVICE

The London Leasehold Valuation Tribunal

Decision

Reference:	LON/00BK/OCE/2008/0185
Applicant:	Stephen Furneaux (Nominee Purchaser)
Respondent:	Westbourne Property Management Limited (Landlord)
Property:	25 Westbourne Terrace, London W2 3UN
Appearances:	*For the Nominee Purchaser:* Mr Bruce Maunder Taylor, FRICS, MAE (acting as both an expert and as an advocate) *For the Landlord*: Mr David Fleming, solicitor, William Heath & Co. (as advocate)
Members of the Tribunal:	Mr T J Powell LLB Mr C Norman BSc MRICS (CPE)
Date of tenants' notice & agreed valuation date:	4 October 2007
Date of counter-notice:	18 December 2007
Application:	17 June 2008
Directions:	1 August 2008
Hearing:	4 November 2008
Decision:	11 February 2009

Introduction

1. By an Application dated 17 June 2008, the Applicant applied to the Tribunal for a determination of the price payable and the other terms of acquisition in respect of the collective enfranchisement of 25 Westbourne Terrace, London W2 3UN ("the Property") under Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act").

2. The qualifying tenants' Initial Notice was given on 4 October 2007 at a proposed purchase price of £18,900 for the freehold of the Property, plus £4,000 for the freehold interest in the service road on the Property, and £2,500 for the leasehold interest in a head lease.

3. By its Counter Notice dated 18 December 2007, the Respondent proposed a purchase price for the freehold interest in the Property at £34,559, plus £20,532 for the head lease, and offered to grant a right of way over the service road.

4. An application was made on 17 June 2008 to the Tribunal to determine the terms of acquisition that were in dispute between the parties. Directions were given for the conduct of the application on 1 August 2008 and the matter was heard before the Tribunal on 4 November 2008, sitting at 10 Alfred Place London.

Inspection

5. Mr Maunder Taylor did not consider that an external inspection of the property was necessary, because the Tribunal would be aware of the area in which the property was situated already. Mr Fleming invited the Tribunal to carry out an external inspection. The Tribunal determined that an inspection was not necessary in this case.

Agreed Facts

6. By the hearing on 4 November 2008, the following factual matters had been agreed:

   (i) The valuation date is 4 October 2007, the date of the Initial Notice;

(ii) The lessees of Flats C, D, E and F are participating tenants and the lessees of the Basement Flat and Flats A and B are non-participating tenants;

(iii) There is a head lease for 142 years (less 10 days) from 25 March 1965 paying £50 p.a. fixed, without review;

(iv) There are seven flats, each underlet for 127 years (less 14 days) from 25 March 1980 each with rising ground rents.

(v) The capitalised values of the ground rents are as follows: for the freeholder, £900; for the head leaseholder, £18,500;

(vi) The aggregate capital value of the seven flats on a virtual freehold basis is £3,600,000;

(vii) No marriage value is payable as all leases had more than 80 years unexpired as at 4 October 2007, the date notices were served (see above);

(viii) No compensation is payable under Paragraph 2(1) (c) of Schedule 6 of the 1993 Act.

7. Legal and valuers' fees were not in issue in the current application.

8. By the date of the hearing, the sole matter currently in dispute for the Tribunal to determine was the correct deferment rate.

Representation

9. Mr Maunder Taylor FRICS MAE of Maunder Taylor appeared for the Applicant as expert and advocate. The Respondent was represented by Mr David Fleming, solicitor, of William Heath & Co, as advocate. The Respondent did not call any witnesses.

Mr Maunder Taylor's submissions in his capacity as an advocate

10. Mr Maunder Taylor submitted that the Lands Tribunal Decision in *Earl Cadogan & Cadogan Estates Ltd v Sportelli & Sportelli* LRA/50/2005 (as upheld in the Court of Appeal, [2007] EWCA Civ 1042) was not applicable

to cases where the deferment period was in excess of 75 years; that *Sportelli* was unjust to tenants; that the Court of Appeal permitted further challenges to the *Sportelli* Decision; and that the effect of *Sportelli* would be to enable landlords to make unjust profits by "turning" residential investments.

11. The Applicant sought to advance an argument that the Lands Tribunal in *Sportelli* had no or insufficient evidence before it to form any opinion about the appropriate deferment rate for leases where the unexpired term was more than 75 years.

12. Applying the principles which the Lands Tribunal set down in *Arrowdell Limited v Coniston Court (North) Hove Limited* LRA/72/2005, as the minimum requirements for any LVT Decision, Mr Maunder Taylor continued to criticise *Sportelli*. He suggested that the Lands Tribunal was in breach of its own tests when it referred in *Sportelli* to leases with unexpired terms of more than 75 years.

13. Mr Maunder Taylor submitted that the Lands Tribunal did not foresee the consequences of its Decision in *Sportelli* in terms of the mathematical consequences for leases with long unexpired terms. This he asserted, was supported by reference to specific paragraphs in *Sportelli*, set out in Mr Maunder Taylor's written submission. In particular, he argued that *Sportelli* concerned itself with leases none of which had more than 72 years (whole years) unexpired. The Lands Tribunal had also made a comment about marriage value, which Mr Maunder Taylor correctly pointed out could only be relevant for lease terms of less than 80 years.

14. Mr Maunder Taylor also submitted that *Sportelli* was irrational by reference to market transactions concerning the purchase of freeholds, which were then sold on to leaseholders on enfranchisement, i.e. where they were "turned" for significantly more than investors had paid by private treaty.

15. He further submitted that not all LVTs support the *Sportelli* rate, that the judgment of the Privy Council in *Mon Tresor & Mon Desert Ltd v Ministry of Housing and Lands and another* [2008] UKPC 31 was relevant to this

matter, and that the Lands Tribunal in *Sportelli* had been wrong to reject the market comparison approach. For those reasons Mr Maunder Taylor contended for a deferment rate of 7%.

Mr Fleming's submissions

16. Mr Fleming, in a helpful and succinct written submission to the Tribunal and oral argument contended that, based on *Sportelli* the deferment rate should be 5%. He referred to paragraph 85 of the Lands Tribunal Decision where the President stated:

> **"Our conclusion is that the deferment rate is constant beyond 20 years. Below 20 years we accept the view of Mr Dumas, Professor Lizieri and Mr Orr-Ewing that the rate would need to have regard to the property cycle at the time of valuation. Beyond 75 years we see no reason on the evidence before us to conclude that the rate would be either higher or lower."**

17. Mr Fleming emphasised that *Sportelli* had been upheld in the Court of Appeal. With reference to the qualifications set out by Carnwath LJ to the effect that in connection with properties outside the Prime Central London area it is possible to envisage other evidence being called, Mr Fleming asserted, firstly, that Westbourne Terrace is within the Prime Central London area or, alternatively, that no evidence had been adduced upon which the Tribunal could find for a different deferment rate relevant to that area.

Mr Maunder Taylor's evidence in his capacity as an expert

18. At section 10 of Mr Maunder Taylor's submission and expert's report he provided details of auction sales in respect of residential blocks in various parts of London, but none of them in W2. By this means, he sought to demonstrate that the various properties were acquired at auction at a much lower price than their subsequent collective enfranchisement levels.

19. Mr Maunder Taylor also referred to an article by Professor Julian Farrand QC (a member of the Leasehold Valuation Tribunal) and Alison Clarke published by Sweet & Maxwell in Bulletin 44, distributed free in 2008 to

subscribers to "*Emmet and Farrand on Title*," in which *Sportelli* was criticised.

The Tribunal's Decision

20. Mr Maunder Taylor's submissions amount to a direct challenge to the Decision of the Lands Tribunal in respect of the deferment rate in *Sportelli*, as upheld in the Court of Appeal. Dealing with these submissions, the Tribunal makes the following findings where it considers that it has jurisdiction to do so.

(i) Whether the Lands Tribunal was entitled to make a finding in relation to lease lengths above 75 years unexpired

21. This Tribunal does not consider that it has any jurisdiction to make a finding in relation to the conduct of proceedings in the Lands Tribunal and therefore declines to make a finding on this question.

22. However, for what it is worth, this Tribunal considers that there was ample evidence before the Lands Tribunal for it to reach its Decision on this issue. The Lands Tribunal, most powerfully-constituted, arrived at this Decision following an 11-day hearing when evidence was given by four valuation and four financial experts, who were cross-examined at length and also questioned by the Tribunal.

(ii) Whether the Lands Tribunal was wrong to reject evidence of market transactions as being of assistance in deciding the deferment rate issue in Sportelli

23. Firstly, this Tribunal does not consider that it has jurisdiction to make a finding as to whether or not the Lands Tribunal was wrong to reject market evidence.

24. However, and again for what it is worth, we would simply observe that the Lands Tribunal rejected the use of market evidence for the reasons set out in paragraphs 64 to 67 of its Decision. We do not therefore consider it necessary to comment upon the individual transactions put forward by Mr Maunder Taylor.

25. As to the published article by Professor Farrand QC, this Tribunal records that it was not published in his capacity as member of this Tribunal and the private opinions of a member are not evidence.

26. As far as the mathematical consequences of the Lands Tribunal Decision is concerned, again that is not a matter for this Tribunal, but we would simply observe that it would be inconceivable that the Lands Tribunal in hearing such an important and fully argued case would have been unaware of the consequences to which Mr Maunder Taylor refers. Further, the Court of Appeal expressly referred to this matter, when it upheld the Decision of the Lands Tribunal (see paragraph 91 of its judgment), when it reported the criticism of Mr Jourdan, counsel for one of the Respondents to the appeal, to the effect that the guidance of the Lands Tribunal "... will effect a massive transfer of value from tenants to landlords."

27. Mr Maunder Taylor also referred to the case of *Mon Tresor* supporting his contention that market evidence should be used as the basis for assessing the deferment rate. That case was not concerned with valuation versus financial methodology, but rather with competing valuation techniques (direct capital comparison versus the residual method) both of which are market-related. This Tribunal therefore did not find the case to be of relevance or of assistance.

(iii) Whether the property is within Prime Central London ("PCL")

28. Mr Maunder Taylor asserted that Westbourne Terrace is not within the PCL area. We would observe as follows:

29. We note that the virtual freehold values per flat are in excess of £500,000 each, and we were told, are in general two bedroom flats. Further Westbourne Terrace is close to the West End. We consider that it is a borderline case whether the property in Westbourne Terrace is within PCL.

30. However, in *Hildron Finance Ltd v Greenhill Hampstead Ltd (2008)* LRA/120/2006, which concerned a property in Hampstead, the Lands

Tribunal held that the *Sportelli* deferment rate was applicable, although Hampstead is outside PCL.

31. In the light of *Hildron*, the Tribunal finds that that the *Sportelli* rate would have been applicable in any event to a property of this type and in Westbourne Terrace, London W2. It is therefore unnecessary for us to make a finding on whether or not Westbourne Terrace is within PCL.

(iv) Whether LVTs are bound by decisions of the Lands Tribunal

32. Mr Maunder Taylor also referred to the question whether or not the Leasehold Valuation Tribunal is bound by the Lands Tribunal. He relied upon the well-known compulsory purchase case of *West Midland Baptist (Trust) Association (INC) v Birmingham Corporation* [1968] 2 QB 188 (CA) to support his contention that the LVTs are not bound by Lands Tribunal Decisions, because the judgments in the *West Midland* case made clear that the Lands Tribunal should not be bound by its own previous decisions.

33. Mr Fleming for the Respondent accepted that the Lands Tribunal was not a superior court of record and that accordingly its Decisions are not therefore binding in the narrow sense of setting formal binding precedents on LVTs.

34. However, this Tribunal considers itself bound by the Lands Tribunal's Decision in *Sportelli*, as upheld by the Court of Appeal.

35. Further, notwithstanding the dicta in the Lands Tribunal and the Court of Appeal as to the possibility of mounting a challenge to *Sportelli* based on additional evidence, no such financial evidence was in fact adduced; nor did the Applicant adduce any evidence to show any special factor affecting the subject property that would have made the adoption of a 5% deferment rate inappropriate.

36. The Tribunal therefore determines that the deferment rate is 5%.

Costs

37. Mr Fleming submitted at the hearing that if the Tribunal found in his favour it should award costs of £500 against the Applicant on the basis that paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 was engaged, on the ground of unreasonableness. Mr Fleming contended that it was unreasonable for the Applicant to challenge the deferment rate. He said that the Applicant had acted "... unreasonably in connection with the proceedings."

38. Mr Fleming asserted that in order to succeed on the deferment rate point this (or another) case would need to go to the Lands Tribunal at least, if not the Court of Appeal. Given the need for certainty in cases such as this, and the need to prevent the huge costs that would be involved coming back to the issue and re-arguing it time and time again, Mr Fleming suggested that a signal should be sent by the Tribunal to discourage such applications.

39. Not surprisingly, Mr Maunder Taylor disputed strongly that there had been any unreasonableness in the way the Applicant had dealt with the application; a lot of money rested on the Decision; much preparation had been involved; it was not frivolous; and it was all backed up by research.

40. The Tribunal considers that although it has found against the Applicant's case, the Applicant did not act unreasonably in applying to the Tribunal nor in the subsequent conduct of these proceedings. Accordingly the application for costs pursuant to paragraph 10 of Schedule 12 to the 2002 Act is refused.

Chairman: .....
Timothy Powell

Date: 11 February 2009