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First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	:	**CAM/00KF/OLR/2016/0159**
Property	:	**138a North Road, Southend-on-Sea, Essex SS0 7AG**
Applicant Represented by	:	**IBC Properties Ltd. Mike Stapleton FRICS**
Respondent	:	**Icilda Abdul (not represented)**
Date of Application	:	**17th October 2016**
Type of Application	:	**To determine the terms of acquisition of the lease extension of the property where the landlord cannot be found (section 51 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) Stephen Moll FRICS Derek Barnden MRICS**
Date and place of hearing	:	**6th April 2017 at the Court House, 80 Victoria Avenue, Southend-on-Sea SS2 6EU**

DECISION

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1. The 'appropriate sum' to be paid into court for the freehold of the property pursuant to section 51(5) of the 1993 Act is £9,100.00.

2. The remaining terms of the Deed of Surrender and New Lease are as set out in the document in the bundle provided to the Tribunal by the Applicants' solicitors as approved by the Tribunal subject, of course, to (a) any reasonable requisitions which may be raised by the Land Registry, (b) the insertion of the appropriate sum and dates and (c) the alteration of the signature block to show that it is signed by a District Judge of the county court, not the Regional Judge.

Reasons

Introduction

3. This application is for the Tribunal to determine the terms (including the price) of the surrender of the existing lease of the property and the

granting of a new lease following a vesting order made by Regional Judge Edgington sitting as a District Judge of the county court on the 1st November 2016. The existing freehold owner cannot be found. Section 51(8)(a) of the **Leasehold Reform, Housing & Urban Development Act 1993** ("the Act") means that the valuation date is 8th September 2016.

4. The existing lease is dated 8th December 1987 and is for a term of 99 years from 24th March 1986.

The Inspection

5. The members of the Tribunal inspected the property on the morning of the hearing, having previously received and read the report of the Applicants' expert valuer, Mr. Mike Stapleton FRICS, dated 15th November 2016. The property was as described save that the slate roof had been replaced by an interlocking concrete tiled roof. The property was valued as if it had the old roof which had clearly been there on the valuation date.

The Law

6. The price to be paid on a lease extension is calculated in accordance with the provisions of Schedule 13 of the 1993 Act. The price includes (a) the premium payable under Schedule 13 for the grant of a new lease (b) any other sums payable under Schedule 13 (if any) and (c) any monies which the Tribunal considers are owed by the Applicant to the landlord either under the terms of the lease or any collateral agreement.

The Hearing

7. The hearing was attended by Mr. Stapleton. The members of the Tribunal had been able to discuss the evidence after the inspection but before the hearing. At the hearing they clarified with Mr. Stapleton the different areas of Southend from some of the quoted comparables to ascertain the reason for the percentage differences in general value figures used. The members of the Tribunal were satisfied with his explanations and determined that Mr. Stapleton's figures would be accepted.

Conclusions

8. As has been said, the figures supplied by Mr. Stapleton were agreed by the Tribunal.

9. As far as the draft Deed of Surrender and New Lease is concerned, the Tribunal determined that it was agreed save for the matters set out in the decision above.

....

Bruce Edgington
Regional Judge
6th April 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

In the County Court
Sitting at Southend **claim number C00SS568**

Between:

IBC Properties Ltd.

Claimant

and

Icilda Abdul

Defendant

JUDGMENT

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BEFORE Regional Judge Edgington sitting as a county court District Judge

Mr. Mike Stapleton FRICS representing the Claimant
The Defendant has already been determined as being 'missing' and was unrepresented.

Introduction

1. This is an application made for a lease extension pursuant to section 50 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") in respect of the property known as 138a North Road, Southend-on-Sea SS0 7AG where the landlord is missing.

2. As part of a Government initiative to rationalise and promote the best use of judicial experience and save the public money in costs, there has been a fairly recent change to the **County Courts Act 1984**. Sub-sections 5(2)(t) and (u) were amended by the **Crime and Courts Act 2013** so that First-tier Tribunal judges became County Court judges. The previous procedure in these cases where the landlord is missing was for the application to be made in the county court which would consider whether a vesting order should be made.

3. The First-tier Tribunal in the Property Chamber would then be asked to undertake a valuation of the property and determine the amount to be paid into court and the terms of the new lease. The matter would then be transferred back to the court for the new lease to be executed.

4. As this was just the sort of situation envisaged by the new initiative, District Judge Ashworth, by Order dated 17th October 2016, simply transferred the whole case to me sitting as a county court judge to deal with the vesting order

and completion of the lease and for the Tribunal chaired by me to deal with the valuation and lease terms. The county court hearing scheduled for the 18th October 2016 was vacated.

The Vesting Order

5. On the 1st November 2016, I noted that the application was supported by a statement with a statement of truth setting out the salient facts. I considered the application and decided to make the vesting order requested without requiring the attendance of – and consequent cost to – the Claimant. However, I noticed that the Claimant had asked for an order that the Defendant pay the costs of the application and that such costs be deducted from the monies to be paid into court.

6. I subsequently learned that the Claimant's solicitors had helpfully prepared a draft order for the county court judge for the hearing on the 18th October. Such draft included the costs order in favour of the Claimant and authorised such costs to be deducted from the sum to be paid into court. The amount requested in form N260 dated 14th October was £1,735.49.

7. When I made my Order, I was unaware of the amount requested but as far as those costs were concerned, I said, as part of the vesting order but ancillary to it, "*The court makes no order as requested for any amount in respect of costs to be deducted from the appropriate sum to be paid into court as the 1993 Act makes no provision permitting such a deduction*".

8. The Claimant appealed that part of my Order to the Circuit Judge sitting at Southend. Obviously I have no idea what was said to that Judge and the appeal could not be contested as the Defendant is missing. The Order made by His Honour Judge Moloney QC on the 16th February 2017 was:-

> "5. *As to paragraph 5 of the Order of Regional Judge Edgington (costs), it is set aside and the question of costs is remitted to Regional Judge Edgington for him to reconsider at an oral or telephone hearing (to be held at the conclusion of the proceedings in the County Court and the Property Tribunal in relation to this matter):*
> *(a) what order for costs he should make in respect of the County Court proceedings, in exercise of his direction under CPR; and*
> *(b) whether any such costs should be deducted from the sum paid into court under section 51(3) of the 1993 Act*"

9. The word 'direction' in paragraph 5(a) would appear to be a typographical error and I have assumed that the word should have been 'discretion'.

The Hearing

10. The hearing was attended by Mr. Stapleton, who is the Claimant's valuer. He dealt with the first part of the hearing which assessed the 'appropriate sum' to be paid into court and the terms of the Deed of Surrender and New Lease. When I saw that he was the only representative of the Claimant, I asked if he was instructed to deal with the costs question. I showed him the part of the order of HHJ Moloney QC which said that the determination as to costs would be dealt with at the conclusion of the proceedings before the Tribunal. He said that he was not. He contacted the solicitors on the record as acting for the Claimant, namely Tolhurst Fisher LLP., prior to the Tribunal hearing. He was simply told that they would not be attending.

11. I had explained to Mr. Stapleton that I proposed to deal with the costs question immediately after the Tribunal hearing and could he explain that to the solicitors. I was therefore satisfied (a) that the solicitors were aware of the hearing date because they had instructed Mr. Stapleton to attend, (b) that they had been told before the Tribunal hearing had started that I was proposing to deal with the costs aspect of the matter after that hearing (the solicitors office is 10 minutes walking distance from the hearing venue) and (c) that the solicitors had made the positive decision not to attend, not to ask for an adjournment and not to give Mr. Stapleton any instructions on the costs issue.

Discussion – should a costs order have been made?

12. There are 2 questions to determine. The first is whether a costs order should be made. I appreciate that I have full discretion to make any Order I feel appropriate in respect of costs to be paid by a party in litigation before the court. CPR 44.2 makes this clear. However, the relevant CPR also states that I should consider the conduct of the parties, whether any party has succeeded and any offer made. In other words, I have to take all the circumstances into account.

13. In this case, the Defendant is simply missing. The evidence produced by the Claimant is that the Defendant has not lived at the property since the Claimant acquired the lease in 2002. An enquiry agent has been unable to locate the Defendant and there has been no answer to an advertisement in the London Gazette. Enquiries at the Probate Registry produced no evidence that any grant of probate has been issued.

14. The Claimant presumably says, in effect, that it has won the case and should have a costs order. The reality is that there could be any number of reasons why the Defendant is missing. She may be abroad or have died abroad. She may have a mental illness. It is a difficult task to exercise discretion in favour of a party when neither I nor the Claimant has idea what brought about this situation. There is a value to the Defendant in the property apart from the

capital value at the end of the term, either in money to be obtained for a lease extension as in this case or in a collective enfranchisement. It is therefore of no benefit to the Defendant to just abandon the property.

15. The main reason why I am not exercising my discretion in favour of the Claimant is that on the balance of probabilities, the fact that the landlord is missing has actually saved money. No ground rent or service charges have had to be paid to the landlord. However the main reason is that if the landlord was not missing, the Claimant would have had to serve a claim notice which would almost always mean that the landlord would instruct a lawyer and a valuer. Section 60 of the 1993 Act says that the Claimant would have had to pay the landlord's lawyers for assessing the claim and completing the lease and also her valuer's fees.

16. Thus, in all probability, the Claimant would have to pay not only its own lawyer and valuer but also part of the landlord's costs. Admittedly, it would not have had to apply for a vesting Order but the overall expense is likely to have been less. There is the added benefit of having no opposition to the valuation process which could possibly have reduced the overall cost to the Claimant.

If a Costs Order had been made, could the costs be deducted from the money paid into Court?

17. Section 51(5) of the 1993 Act sets out what has to be paid into court as 'the appropriate sum'. It is:

(a) *such amount as may be determined by a First-tier Tribunal to be the premium which is payable under Schedule 13 in respect of the grant of a new lease;*
(b) *such other amount or amounts (if any) as may be determined by such a tribunal to be payable by virtue of that Schedule in connection with the grant of that lease; and*
(c) *any amounts or estimated amounts determined by such a tribunal as being, at the time of execution of that lease, due to the landlord from the tenant (whether due under or in respect of the tenant's lease of his flat or under or in respect of an agreement collateral thereto)*

18. Schedule 13 sets out the formula to be used for the valuation which is the total of (a) the diminution of the landlord's interest in the flat as a result of the new lease, (b) the landlord's share of the marriage value (if payable) and (c) any compensation due to the landlord. There is no provision for any deduction to be made, such as costs.

19. The wording of the 1993 Act is clear. Section 51(3) says that where a vesting order is made in favour of the tenant "*then on his paying into court the*

appropriate sum there shall be executed by such person as the court may designate a lease" in such form as the Tribunal shall approve.

20. Thus it is clear, in primary legislation, that the appropriate sum is to be paid into court, nothing more and nothing less. Neither the CPR, a form of secondary legislation, nor a District Judge of the county court can override primary legislation. In other words, a District Judge can order one party to pay the costs of another, but he or she cannot order such costs to be deducted from the appropriate sum. That is an entirely different thing.

21. The only option would seem to be a matter of enforcement. If a costs order were deemed to be appropriate, then a charging order could be applied for and that could be registered against the freehold title. However, even as a matter of enforcement, section 51(3) of the 1993 Act does not permit the appropriate sum to be 'attached' simply because of the ordinary meaning of the words used.

Conclusion

22. In the circumstances, I reject the Claimant's application. No costs order is made and no deduction for costs can, in any event, be made from the appropriate sum.

Dated this 6th day of April 2017