LRA/56/2007
LRA/68/2007

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – procedure – whether amendment to statements of case and replies should be permitted – whether evidence challenging guidance in* Sportelli *should be excluded

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

THE EARL CADOGAN

Appellant in appeal LRA/56/2007
Respondent in appeal LRA/68/2007

and

BETUL ERKMAN

Respondent in appeal LRA/56/2007
Appellant in appeal LRA/68/2007

Re: 42 Cadogan Square
London
SW1X 0JW

Before: The President and A J Trott FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 4 December 2008

K S Munro instructed by Pemberton Greenish for the freeholder
Stephen Jourdan instructed by Forsters LLP for the nominee purchaser

The following cases are referred to in this decision:

Cadogan v Sportelli [2007] 1 EGLR 153; [2008] 2 All ER 220
Arrowdell Ltd v. Coniston Court (Hove) Ltd [2007] RVR 39
Chelsea Properties Ltd v. Cadogan LRA/69/2006 (unreported)
Pitts and Wang v. Cadogan LRA/79/2006 (unreported)
S v Secretary of State for the Home Department [2002] EWCA Civ 539
Hunter v Chief Constable of the West Midlands Police [1982] AC 529

The following further cases were referred to in argument:

Becker Properties Ltd v Garden Court NW8 Property Co Ltd [1998] 1 EGLR 121
Hollis v Burton [1892] 2 Ch 226
Gale v Superdrug Stores plc [1996] 1 WLR 1089
Jones v MBNA International Bank Ltd 30 June 2000 unreported
Ashmore v British Coal Corporation [1990] 2 QB 338
Arbib v Cadogan [2005] EGLR 139
Secretary of State for Trade and Industry v Bairstow [2004] 4 All ER 325

DECISION ON PROCEDURAL ISSUES

Introduction

1. Both the freeholder and the nominee purchaser have appealed against the decision of a leasehold valuation tribunal on an application under section 24(1) of the Leasehold Reform, Housing and Urban Development Act 1993. The proceedings relate to a collective enfranchisement of premises at 42 Cadogan Square, London SW1. The procedural application which we now have to decide is made by the nominee purchaser, who seeks an order that the freeholder should not be permitted to rely at the hearing on the evidence contained in an expert report of Mr Mark Bezant dated 18 April 2008.

2. Leave to appeal was granted by the LVT. It was unlimited and unconditional. The parties' statements of case and replies identify the issues that arise in the appeals. One of these issues is the deferment rate. Before the LVT the nominee purchaser contended for a deferment rate of 5.5%. The basis of the contention was the Lands Tribunal's decision *Cadogan v Sportelli* [2007] 1 EGLR 153. The rate of 5.5% was said properly to reflect the fact that the lease of the flat in the premises had only 17 years to run. The freeholder's valuation witness, Mr Julian Clark FRICS, said that there was no justification for departing from the *Sportelli* 5% for flats. The LVT's decision failed to recognise that the parties disagreed on the deferment rate. It mistakenly thought that they were in agreement that 5% should be adopted, and it therefore applied this rate in its decision.

3. In its statement of case filed in September 2007, the nominee purchaser said:

> "8. The LVT should have held, following the *Sportelli* guidelines, that a deferment rate of 5.5% was appropriate."

4. The freeholder's reply, filed in October 2007, said this in response:

> "7. Paragraph 8 is denied – no convincing evidence, as opposed to theoretical speculation, was adduced to the LVT sufficient to persuade it to depart from the *Sportelli* rate for an unexpired term of 17.31 years, so close to the 20 year period referred to in *Sportelli*."

5. In February 2008, with the expert reports of the valuers ready for exchange, the nominee purchaser's solicitors confirmed to the freeholder's solicitors that they would be relying on financial evidence from Professor Lizieri, who had given evidence in *Sportelli*, in relation to the deferment rate issues. The freeholder applied for permission to call a financial expert, and on 26 March 2008 the President ordered that the freeholder should have permission to call a third expert witness to deal with financial matters.

6. In April 2008 Mr Bezant's report was filed. For the purpose of assessing the approach to a short-term deferment rate (ie one that applies to leases with less than 20 years unexpired) it

reviewed the evidence given by the eight expert witnesses in *Sportelli* and concluded that the Tribunal in its decision in that case had overstated the risk premium and understated the growth rate, with the result that it had reached a deferment rate that was too high. Mr Bezant's view is that there is no basis for using a higher generic deferment rate for a short-term reversion than for a long-term reversion, and, thus, on the basis of his review of the *Sportelli* evidence and his conclusion that the Tribunal was wrong in determining the generic deferment at 4.75% rather than (as he thinks) 3.75%, he says that the rate to be applied to the subject premises is 3.75% "and, if Sportelli is followed, a 0.25% increment should be added" since the premises are flats.

7. In addition to its re-evaluation of the *Sportelli* evidence, Mr Bezant's report also does two things. It produces and analyses certain transaction data given to him by the Cadogan and Howard de Walden estates and concludes that this supports the conclusions that he has earlier reached; and it considers an alternative approach, the net rental yield approach, which, it concludes, "can be used to…affirm, or adjust, the rate using the Sportelli formula."

8. Mr Stephen Jourdan for the nominee purchaser submitted that the Tribunal should order that the freeholder should not be permitted to rely on Mr Bezant's report for three reasons. Firstly, he said, it was an abuse of the process of the Lands Tribunal for Cadogan to challenge the decision in *Sportelli*. Secondly, Cadogan was not entitled to contend for a deferment rate of less than 5% because in the LVT it was agreed that the starting point was the *Sportelli* rate of 5%, and the only issue was whether the length of the unexpired term of the headlease justified an increase in that rate. Thirdly, Mr Jourdan said, Cadogan was not entitled to contend for a deferment rate of less than 5% without obtaining permission to appeal in respect of that contention and permission to amend its statement of call. Such permission, if sought, should not be granted.

9. For the freeholder Mr K S Munro submitted that the application raised important questions as to the way such issues should be dealt with in the Lands Tribunal and LVTs. The fundamental question was whether *Sportelli* was the starting point here at all. It was not clear that *Sportelli* was providing guidance for leases, like the one in the present case, with less than 20 years to run. There was no evidence before the Tribunal in relation to such leases. Under section 24 of the 1993 Act the LVT in the present case had to determine such terms of the acquisition as were in dispute, and under subsection (8) the term of acquisition that was in dispute was "the amount payable as the purchase price." This was the issue in the appeal before the Lands Tribunal, and in the appeal matters relating to this issue were at large. It would not be an abuse of process for Mr Bezant to give evidence in accordance with his report. There was no authority to suggest that the doctrine of abuse of process had any application in expert tribunals. Mr Bezant could not give evidence that he did not believe to be true.

10. Mr Munro said that the deferment rate was an issue in the appeal and that the freeholder should have leave to amend his statement of case and reply to rely on the deferment rate spoken to by Mr Bezant in his report. He relied on *Arrowdell Ltd v. Coniston Court (Hove) Ltd* [2007] RVR 39 and *Chelsea Properties Ltd v. Cadogan* LRA/69/2006 (unreported). For his part Mr Jourdan sought leave to amend so as to enable the nominee purchaser to contend for a deferment rate of 5.8%, the figure supported in Professor Lizieri's report, although he accepted

that on the basis of the authorities, including *Pitts and Wang v. Cadogan* LRA/79/2006 (unreported) he ought not to get leave.

11. The first issue to which we consider that we should address ourselves is whether either party should be given leave to amend. Under rule 36(1) of the Lands Tribunal Rules 1996 an appellant is limited to his grounds of appeal. As things are, the freeholder's case is that the 5% deferment rate adopted by the LVT should stand, and the nominee purchaser's case is that the rate should be 5.5%. Before the LVT the freeholder's case was that the deferment rate should be 5% in accordance with *Sportelli*. Unsurprisingly he did not seek leave to appeal in relation to the determination of 5%, and in his reply to the nominee purchaser's statement of case (see paragraph 4 above) asserted that no convincing evidence was adduced to the LVT sufficient to persuade it to depart from the *Sportelli* 5% rate. There was clearly no evidence before the LVT that would have justified a finding that the deferment rate should be less than 5% and, had it so found, its decision in this respect would have been wrong in law. The power of the Lands Tribunal on appeal is that conferred by section 175(4) of the Commonhold and Leasehold Reform Act 2002: it may exercise any power that was available to the LVT.

12. The relevant power of the LVT in relation to the application made to it by the nominee purchaser is that contained in section 24 of the 1993 Act. Subsection (1) provides:

> "(1) Where the reversioner in respect of the specified premises has given the nominee purchaser –
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> (a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or
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> (b) a further counter-notice required by or by virtue of section 22(3) or section 23(5) or (6),
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> but 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."

The expression "terms of acquisition" is defined in subsection (8):

> "(8) 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 –
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> (a) the interests to be acquired,
>
> (b) the extent of the property to which those interests relate or the rights to be granted over any property,
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> (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
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> (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)."

13. The terms of acquisition that were in dispute before the LVT included (c) above, the amount payable as the purchase price for the freeholder's interest. The power of the LVT in this respect was thus to determine the price for the freeholder's interest, and on appeal the Lands Tribunal has the same power.

14. The Lands Tribunal may determine a price that is higher or lower than that determined by the LVT (see *Arrowdell* at para 14), but it cannot determine a price that is higher than that contended for by the freeholder (or lower than that contended for by the nominee purchaser) before the LVT: see *Pitt* (decision of 28 March 2007), where the President said:

> "9. I cannot accept the contention that the respondent is entitled, or alternatively should be allowed, to contend for a price that is higher than that determined by the LVT. The Lands Tribunal has power under section 175(4) to exercise any power that was available to the LVT. However, in determining the price under section 21 of the 1967 Act an LVT does not, in my judgment, have power to determine a price that is higher than that contended for by the landlord. It is deciding an inter partes dispute, and it must necessarily be limited in its determination by the extent to which either party has placed a limit on the price that it is seeking. For this reason it is not open to the landlord to contend before the Lands Tribunal for a price that is higher than the one he was seeking before the LVT. *Arrowdell* does not assist him."

15. In terms of section 24, a price outside the range encompassed by the parties' contentions would not be a matter in dispute. The limitation that is by statute imposed on the tribunal's power, however, is as to the price as a whole, rather than to components of it (such as the deferment rate). It will nevertheless have no power to reach a determination in relation to a component of the price unless there is evidence to support it (see above). This latter limitation arises, however, not from the wording of the Act but because, as a principle of administrative law, a tribunal may only exercise a determinative power on the basis of the evidence before it. Where there is an appeal to the Lands Tribunal it may be conducted by review or on the basis of a full or partial re-hearing. If the appeal is by re-hearing (as it is in the present case), the Tribunal will not be limited by the evidence given before the LVT.

16. It follows from this that the Tribunal has power to entertain evidence that would justify a deferment rate outside the range of the rates for which the parties contended before the LVT and to determine a rate outside this range. It could not, however, as a consequence of this determine a price that was outside the range of those contended for. The question, therefore, is whether either party should be permitted to amend its pleadings so as to enable it to contend for a deferment rate lower than 5% (in the case of the freeholder) or higher than 5.5% (in the case of the nominee purchaser). We can see no justification for permitting such amendments. In neither case is there any suggestion that the evidence on which it is sought to rely could not have been put before the LVT. The parties established their respective stances on the deferment rate before the LVT and maintained those stances in their applications for leave to appeal and in their pleadings. There is no reason why they should be allowed to alter them at

this stage. An added reason for not allowing the freeholder to amend is that amendment is sought to enable him to rely on the report of Mr Bezant, and we now turn to consider this.

17. In *Sportelli* ([2008] 2 All ER 220) the Court of Appeal approved the conclusion of this Tribunal that the derferment rates that it had determined (4.75% for houses and 5% for flats) should be treated as guidelines to be followed in future cases. At paragraphs 98-99 Carnwath LJ, having quoted from the judgment of Laws LJ in *S v Secretary of State for the Home Department* [2002] EWCA Civ 539 at paragraph 28 on the need in refugee claims to avoid multiple examinations of the political backdrop of the country concerned, said this:

> "98. Although the present context is very different, there is an equal public interest in avoiding wasted expenditure, and the risk of inconsistent results, in successive LVT appeals on an issue such as that of deferment rates. The tribunal could hardly have done more to ensure that the issues were fully ventilated and exhaustively examined. They had already been discussed in *Arbib*'s case [2005] 3 EGLR 139. I have already referred to the steps taken by the tribunal to bring together the present group of cases. Furthermore it is difficult to envisage a better qualified panel of experts than those called in this case, or of specialist counsel on both sides of the argument.
>
> 99. I agree with the tribunal that an important part of its role is to promote consistent practice in land valuation matters. It was entirely appropriate for the tribunal to offer guidance as they have done in this case, and, unless and until the legislature intervenes, to expect LVTs to follow generally that lead."

18. Mr Bezant's report expressly challenges the correctness of the Tribunal's guidance on the generic deferment rate. Mr Jourdan contends that this amounts to an abuse of the process of the Tribunal and urges the exclusion of the report on this ground. He refers to *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and specifically to the start of Lord Diplock's speech at 536:

> "My Lords, this case is about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

19. It does not seem to us that evidence directed towards challenging guidance of the sort given in *Sportelli* could ever be properly characterised as an abuse of the process, unless the issue was raised in proceedings between the same parties, in which case an estoppel might arise. In any event, however, we see no need to determine the issue before us on this basis. It would clearly undermine the concept of guidance, as derived from the Court of Appeal's decision, if a party could in any case insist upon giving evidence designed to show that the

guidance was wrong. A statutory tribunal has inherent power to control its own procedure, and, as far as this Tribunal is concerned, rule 48 of the Lands Tribunal Rules 1996 expressly provides that the procedure at the hearing of any proceedings shall (subject to any provisions in the rules or any direction of the President) be such as the Tribunal may direct. Control over procedure includes, clearly, control over the giving of evidence, so that the Tribunal has power to determine what evidence may be given and how it may be given. The Tribunal must, of course, exercise this power in accordance with the principles of natural justice, and it acts unlawfully if it unfairly excludes evidence. An LVT has similar powers to control the procedure, reg 14(7)(a) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 making specific provision in this respect. The power is stated to be subject to the Regulations, and reg 14(7)(c) provides that a person appearing before the tribunal may give evidence on his own behalf, call witnesses and cross-examine any witnesses called by any other person appearing. This does not, however, mean in our judgment that such person has unlimited power to call evidence and to cross-examine. That would be unthinkable. An LVT has power, like any other court or tribunal, to control the procedure, and this includes, for instance, the power to exclude irrelevant evidence and to limit cross-examination. Every LVT will be used to doing both these things.

20. The "public interest in avoiding wasted expenditure, and the risk of inconsistent results, in successive LVT appeals on an issue such as that of deferment rates" (see per Carnwath LJ supra) means that an LVT or the Lands Tribunal ought in general, in the exercise of its power to control the procedure, to exclude evidence designed to show that the guidance is wrong. Another reason for doing so is that of fairness. A party is entitled to expect that the guidance will be followed, and it would be unfair if it were compelled or felt the need to adduce evidence on the deferment rate, or to cross-examine such evidence, in order to counter a challenge to the guidance by the other party. Two things, however, must be noted. Before excluding evidence the tribunal must satisfy itself that it is indeed designed to show that the guidance is wrong. And, secondly, any such exclusion is a matter of discretion, so that the tribunal needs to consider whether there are any exceptional circumstances that would justify the evidence not being excluded.

21. In the present case, as we have said, the substance of the evidence that Mr Bezant would give is that there is no justification for taking a higher deferment rate for a short term reversion than for the longer term reversions considered in *Sportelli* and that, because, he says, the Tribunal was wrong to determine a generic rate of 4.75% rather than 3.75%, the latter figure (plus the 0.25% addition for a flat) should be applied. This is a direct challenge to the guidance, and the evidence constituting such challenge should be excluded for this reason. We can see no exceptional circumstances that might justify not excluding it. Indeed the circumstances for excluding it are particularly strong given that the freeholder was one of the parties in *Sportelli* and the property is in the same square as one of those to which that decision related. There may be parts of the evidence that are not reliant on the challenge to the guidance in *Sportelli*, but it is not for us or the nominee purchaser to attempt to identify and disentangle any such parts. We direct that evidence based on Mr Bezant's report be excluded: but that the freeholder may within 21 days of this decision if so advised file and serve a version of that report from which all matters relating to the challenge to the guidance in *Sportelli* have been excised.

Dated 22 December 2008

George Bartlett QC, President

A J Trott FRICS