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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**OT/LON/00BJ/OCE/2015/0072,0073,0074,0075, 0076,0077,0078 and 0079, and 0080**
Property	:	Blocks 1 to 5 Chapman Square SW19 5QW and Blocks 6 to 10 Southlands Drive, Wimbledon, London SW19 5QL
Applicant	:	SOUTHLANDS COLLEGE ESTATE WIMBLEDON LIMITED
Representative	:	Ms Elodie Gibbons of Counsel, Instructed by Fairweather Stephenson & Co, solicitors
Respondent	:	(1) Fit Nominee Limited (2) Fit Nominee 2 Limited
Representative	:	Mr Tim Clarke of Counsel, instructed by Shakespeare Martineau, solicitors
Type of Application	:	An application for determination of the terms of Collective Enfranchisement, pursuant to the Leasehold Reform, Housing and Urban Development Act, 1993
Tribunal Members		Judge Shaw Mr I Holdsworth FRICS
Date and venue of Hearing	:	4th August 2015 10 Alfred Place, London WC1E 7LR
Date of Decision	:	12th August 2015

DECISION

Introduction

1. This case involves an application for collective enfranchisement of over 100 flats, set out over some 10 blocks on the Southlands College Estate in Wimbledon ("the Property"). The application is made by Southlands College Estate Wimbledon Limited ("the Applicant") and is made against the landlord or freeholder, FIT Nominee Limited and FIT Nominee 2 Limited ("the Respondent"), the freehold presumably being shared between those two companies. The Applicant was represented by Ms Gibbons of Counsel, and she made very helpful submissions supported by the evidence from the Applicant's expert, Mr Geraint Evans. The Respondent was represented by Mr Tim Clarke of Counsel, and the Tribunal also heard helpful submissions, from him and Mr Alastair Mason, who is the Respondent's expert. Both those experts are of course valuers and chartered surveyors.

2. The Tribunal was presented with, at first, a slightly alarming amount of paperwork in respect of these applications incorporating each of these flats, but was relieved to hear when the parties arrived, that in fact the issues between the parties had been distilled to only one remaining contentious issue – and that is the deferment rate to be used in calculating the overall price for the enfranchisement. On that issue there was no agreement as between Mr Evans on the part of the Applicant and Mr Mason on the part of the Respondent. The extent of the disparity between them is that Mr Evans for the Applicant argues that this is a case in which there should be a departure from the usual starting point, indicated by the Court in the well-known decision in *Sportelli of 5%* (the Tribunal was referred to then Lands Tribunal decision LRA/5/2005). He argued there are factors in this case that justify a departure from that starting point to the extent of a further 0.5%. So he argues for a deferment rate of 5.5%. The Respondent, through Mr Mason contended that that is not the case, and that there is no sufficient reason in this case to depart from the usual starting point, and the deferment rate to be used in the calculation should be the standard 5%.

3. Although 0.5% may in many cases not make a particularly significant impact on the valuation, in a case of this kind, where the purchase price is likely to be in excess of £1 million the disparity does make a significant difference, and it is for that reason, no doubt, that the matter was contested.

4. As indicated, both sides were represented by Counsel, and the Tribunal heard extremely helpful submissions from both Counsel, and also has read their distillation of the issues as set out in written skeleton arguments. In addition the Tribunal was assisted by the expert evidence which from the respective valuers, to whom reference has been made.

5. It seems to be common ground between the parties that the issues which emerge from their helpful reports and their evidence can be analysed in the way that both Counsel have analysed them in their skeleton arguments. In fact, although they have analysed them in a slightly different order and describe them in a slightly different way, they appear to be the same issues. For convenience only, the Tribunal is proposing to take the skeleton argument of the Applicant as prepared by Ms Gibbons in this case, and go through in an analytical way the reasons that have been put forward on behalf of the Applicant for moving from the *Sportelli* rate of 5%.

6. It should be said by way of introduction, that this development is by all accounts a relatively "high-end" estate in a very desirable area in Wimbledon. The site used for the development was originally a college of some kind (as the title of the Applicant company would suggest). It has been converted in a very attractive way and the apartments which have resulted from this project, are selling, the Tribunal was told, at prices approximately between £600,000 and £800,000 each.

7. The issues which have arisen, are set out below. There is nothing between the parties to this extent – that it is accepted on all fronts that

Sportelli is the starting point, and the burden of persuading the Tribunal that there should be a departure from *Sportelli* lies on the Applicant in this case, and the Applicant is the party seeking that departure. Of course, there have been some cases in which the evidence has been sufficiently compelling to justify such a departure, and Ms Gibbons in particular has been very helpful in taking the Tribunal through some of the cases which have been decided by the Courts and Tribunals, in considering the appropriate approach to the valuation of the purchase price, and how these prices should be calculated, and the appropriate percentages to be applied in respect of either capitalisation or deferment, and other approaches to be taken. The in the conclusions Tribunal has borne those decisions in mind in the conclusions reached, athough this case turns essentially on the strength or otherwise of the evidence supplied to the Tribunal.

8. The way that Ms Gibbons puts the matter on behalf of the Applicant, and which the Tribunal is content really to adopt in this case, is that the *Sportelli* decision analysed matters so as to break down the question of the deferment rate into constituent parts. The particular part affected in this case, is really the question of the *'risk premium'*. The way that she put it, as understood by the Tribunal, is that she accepts the burden is upon the Applican to persuade the Tribunal that there is sufficient evidence in this case to justify the conclusion that the risk premium is sufficiently affected, so as to justify an upwards variation of the usual deferment rate to the extent of a further 0.5%.

9. The argument was developed so as to say that in respect of some of the factors to which the Tribunal is about to come, they may be marginal in their impact or of slight impact, but the cumulative effect of each of these points must be such as to justify a significant change in the rate, - and the expert opinion of Mr Evans, which is based on substantial experience within the field, is that the cumulative effect is 0.5%. The Tribunal ought, so it was said, to accede to an adjustment to that extent, and that the evidence justifies it.

10. It is proposed to deal with the individual matters in an individual way and the Tribunal proposes to give its finding in respect of each of these factors, and then to conclude on the basis of those findings.

RISK OF DESIGN FAULT

11. The first matter that was raised was that there is a risk of a design fault in the blocks, which make up the development, which may create a fire risk. The result of that possible risk is that the hypothetical purchaser would want some kind of adjustment to the deferment rate. The impact on the purchase price would be such as to require an adjustment of the deferment rate in some way. The Tribunal heard evidence from the respective experts on this. The evidence from Mr Evans on behalf of the Applicant was that the hypothetical purchaser in this case would be likely, presumably on a balance of probabilities, to know about, (or if he did not, would be advised about), a finding of the Tribunal in a case involving the property at *Sigrist Square. Sigrist Square,* or the finding in *Sigrist Square,* has been helpfully produced for the assistance of the Tribunal and is appended to Mr Evans' report at page 944 in the bundle. That is a decision of the Tribunal which is dated 17 May 2011 and it involves some property which comprised six blocks of flats totalling some 69 properties at Sigrist Square in Kingston upon Thames. The thrust of the argument was that Sigrist Square is a not dissimilar development to the subject development. It is not that far way. It was constructed at approximately the same time by the sane developers. It is also a good quality development. On the facts of that case, it was found there was a design fault, which affected the fire risk at the properties. The hypothetical purchaser would want, said the Applicant in this case, either to be assured that there was not such a fault in the subject property, or that if there were, that it impacted on the deferment rate to be applied in some way.

12. Of course, first of all, that argument is predicated on the fact that the hypothetical purchaser would know about this unreported decision in *Sigrist Square Freehold Limited -v- Reverter Plus Limited,* or would be advised about it. The Tribunal's view is that that could not necessarily be assumed, but if it were the case, then, so the argument ran, such a purchaser would be concerned, not necessarily as to the **actuality** of such a design fault, but as to the **risk** of such a design fault, which would impact or should impact in some way upon the price to be paid for the freehold in this case.

13. The effect of Mr Evans' evidence, was that the purchaser would be sufficiently worried about that, or he would be advised to be sufficiently worried about it, so as to require either himself or through his advisors that the deferment rate be adjusted upwards in order to reflect the possibility of that risk.

14. Mr Mason on behalf of the Respondent, said that firstly, he found it exceedingly unlikely there would be that kind of response. There would be nothing really to put such a hypothetical purchaser on notice of such a worry but that if he did, it would be not be difficult and certainly not particularly costly in a proportionate way, to have the matter investigated. These matters are generally not difficult to investigate, and the suggestion that there is some roof space or some vacuum in the roof space that would create a heightened risk was not something that could not be looked at, and taken into account in the overall price that is paid, (rather than impacting specifically on the deferment rate), when making the offer to purchase.

15. Really the issue that the Tribunal has to make a finding upon is: is there sufficient evidence before the Tribunal to justify the conclusion that the hypothetical purchaser would make that calculation, and if so, would that impact in some way upon the deferment rate to be applied? The conclusion of the Tribunal is that there is not sufficient evidence in this case to enable it to come to that conclusion. This property is on the face

of it a well-built property. It is a property that, as has been indicated, and appears accepted on all sides, is attractive and relatively *"high-end"*. Of course, that does not stop it having an inherent design defect of some kind. But there is no real or clear evidence to suggest that it is a significant risk in this case, and, nor that, if it were, that it would not be a risk that would be capable of being dealt with by investigation. t seems to the Tribunal on the evidence before it that there is no compelling or sufficient evidence for the Tribunal to come to the conclusion that the possibility of that risk is such that it would impact upon the deferment rate, in particular in such a way as to require an adjustment upwards. The burden of confirming that there is such a risk seems to the Tribunal is upon the Applicant. Some kind of extrapolation or inference from Sigrist Square, does not in the view of the Tribunal come anywhere near the quality of evidence needed by the Applicant to discharge that burden. So on that first issue, the Tribunal finding is in favour of the Respondent and against the Applicant.

RISK TO RECOVERY OF VACANT POSSESSION

16. The second point made to justify a departure from the usual deferment rate was this: it was said that this is a case in which vacant possession at the end of the term cannot be guaranteed, and that an important consideration of the hypothetical purchaser in a case of this kind would be whether or not such vacant possession could be guaranteed. The way Mr Evans put it on behalf of the Applicant was that all purchasers are concerned about vacant possession. He has not in his considerable experience, dealt with any purchasers who are not so concerned, and that would be a worry in this case, because the leases are long leases, and in the absence of any suggestion to the contrary, would attract the benefit of Schedule 10 to the Local Government and Community Act 1989. If Schedule 10 did apply – Ms Gibbons said there were certain requirements that had to be satisfied - but if it did apply, then it could result in the leaseholder at the end of the term having the benefit of an assured, rather than an assured shorthold, tenancy. That tenancy would

be protected, and be problematic from the point of view of the hypothetical purchaser having control of the property, and vacant possession of the property.

17. The evidence from Mr Mason was that he did not accept that that would be a particularly weighty consideration as far as the hypothetical purchaser was concerned, because here we are dealing with leases that have significantly over 100 years to run. The outstanding term in relation to these leases is 108 years, they having originally been 125 years. He thought it very unlikely, just to summarise the effect of his evidence, that that really would importantly or significantly impact upon the considerations of the hypothetical purchaser. That purchaser in this case would be much more concerned about receiving a reasonably secure and regular income, and at a reasonable rate, from the investment. That would be the paramount concern of the hypothetical purchaser in this case. Being worried about what may or may not happen 108 years down the line, would not really impact on the price the purchaser would be paying for the property at this stage.

18. The Tribunal found the evidence of Mr Mason more compelling on this point, and for the reasons that he gave, was not satisfied that that point was sufficiently supported by the evidence or indeed the reasoning, to depart from the *Sportelli* rate. The Tribunal can imagine that in some cases where one is dealing with the remainder of a much shorter period, these considerations might be of concern. The Tribunal found the evidence about income being of greater concern to the purchaser, than who may or may not be in possession at the expiry of such a long term, term more persuasive than that of Mr Evans on this point. So, in respect of the second point too, the Tribunal's finding is in favour of the Respondent, and against the Applicant.

GROWTH RATES

19. The third point made on behalf of the Applicant, was that the relative growth of a property in Wimbledon is not that of prime central London property, and that the hypothetical purchaser would want an adjustment made to take that into account, that adjustment impacting upon the deferment rate. In this regard, Mr Evans produced for the Tribunal a graph which appears at page 972 in File 3, which is the file the Tribunal was mainly referred to. That graph charts the uplift in growth that has taken place, firstly in the London Borough of Wandsworth which is represented by the blue line on the graph, secondly with Birmingham which is represented with a red line on the graph, and thirdly Kensington and Chelsea (prime central London) which is a grey line on the graph. The parties were not greatly in dispute as to the fact that the difference represented by the growth between the Borough of Wandsworth, which is the area in which the subject properties are situated, and prime central London (Kensington and Chelsea), began to open up in around about 2007 / 2008. The explanation for that disparity was that at about that time, very substantial foreign investment began increasing significantly in the UK. That foreign investment had a bigger impact on prime central London property than it did in respect of property in the London Borough of Wandsworth. It had even less impact on Birmingham which is represented by an almost flat or straight line on the graph. The reason for Birmingham being in the graph is that was the area being considered by the tribunal in the case of *Zuckerman v Trustees of the Calthorpe Estates [2001] L & TR 20*, which is one of the authorities included in the bundle the Tribunal was helpfully provided with. The *Zuckerman* case is at tab 1 of the bundle the Applicant has provided, and there is some helpful guidance in *Zuckerman* on the approach to use. Towards the end under the heading *"Prospect of future growth – conclusions"* at paragraph 49 it is said that

> *"Both experts in the present case have taken trouble to search for all the available statistics illustrating residential property movements in the West Midlands and the PCL over the past 50 years. As a result, it appears that the statistical*

information that the Tribunal indicated in Hildron would be required is simply not available. Contrary to the impression which I obtained in Mansal, the Nationwide statistics do not provide a reliable indication of the relative change in house prices in the West Midlands and Inner London between 1952 and 2007. Nationwide did not provide separate statistics for the West Midlands until 1973. The information referred to in para 30 of Mansal was based on an attempt by a surveyor giving evidence at an earlier LVT hearing to extrapolate back from statistics relating to the West Midlands rather than using actual base data."

20. This decision was by the Upper Tribunal in 2009. The difference in growth started opening up as the Tribunal has indicated in 2007 / 2008 and we are now in 2015. It seems to the Tribunal that the graph alone does not present the kind of evidence that would be sufficient to justify a departure from the deferment rate indicated by the court in *Sportelli*. The main difference as the Tribunal has indicated begins to open up at that sort of period which means the graph plots the different growth rates eight years or so up until 2015. What happens 10, 20, 30, 40, or even 50 years into the future, which is just part of the remainder of these leases, is speculative, and as far as the Tribunal is concerned that suggestion that the growth rate is going to continue with that kind of disparity, or the speculative suggestion that it might, is not one on its own, sufficient again to justify a departure from the deferment rate. In any event – and this is perhaps a supplementary reason for not being persuaded by the Applicant's point, under this head - the hypothetical purchaser it seems to the Tribunal, in accordance with what Mr Mason felt, would take that into account in the price paid, rather than focussing all fire on the deferment rate. In any event, as indicated, and for the reasons mentioned, the Tribunal does not take the view that this is sufficient evidence to depart from the *Sportelli* rate, and so finds.

OBSOLESCENCE AND DETERIORATION

21. An interlinked, but separate point, constituting the fourth point raised in the Applicant's skeleton, was that the difference in prices between the Borough of Kensington & Chelsea in prime central London, and

Wandsworth, would so impact on the hypothetical purchaser as to require an adjustment to the deferment rate for an additional reason. That would be that there would be a greater risk of obsolescence and deterioration in the property, because it is not prime central London property, and this of course was one of the heads identified by the Court in *Sportelli* as perhaps justifying a departure.

22. Once again, it is worth looking at the evidence from the parties in respect of this particular point. So far as the Applicant is concerned, and as far as Mr Evans was concerned, he seemed to feel that the point was really made simply by stating it. He argued that the investor in prime central London, because of the way investments have performed in that area, and because of the higher value of property in that area, would have a greater prospect of having his property looked after, and well maintained, than would be the position in Wimbledon or the London Borough of Wandsworth, and because of that one could expect there to be a compelling argument for a reduction in the deferment rate.

23. So far as Mr Mason was concerned, he did not agree with that at all. He said that the subject properties in this case, situated as they were in a good area in Wimbledon, which were well maintained by all accounts, and which were well-managed and looked after by a managing company, which itself had appointed agents to look after the maintenance of the property, all led one to the conclusion that people who had investments of this kind, (and who had capital of £600,000 to £800,000 invested in these properties), would be very likely to be looking after their properties. There was no evidence of ongoing disrepair. In fact, quite the opposite. From inspections of the supplied property details, they all appeared to be reasonable, well maintained and attractive properties in a desirable area. Really that is the conclusion reached by the Tribunal. If it were to be suggested that there were such a risk of obsolescence or deterioration as to require a move from the standard deferment rate, then the Tribunal would have required some kind of evidence much more compelling than the extrapolation that Mr Evans has made to

justify such a conclusion. There is no such evidence in this case and, the Tribunal is disinclined to make such any such adjustment.

DEFECTIVE RENT REVIEW CLAUSES

24. The final point made on behalf of the Applicant was that this is a case in which there is some defect in the rent review clauses. The Tribunal should explain what that was suggested to be. The Tribunal proposes to do so without going through the provisions in detail, as there is no issue between the parties as to the mechanism. Suffice it to say that the leases, (and in this respect it is understood by the Tribunal the leases are identical), make provision for the periodic reviews, in such a way as to refer to a particular certificate which is to be provided by the secretary to the manager. The particular formula is calculated by reference to something that is referred to in the lease as *"The First Value of the Block"*. That is defined at clause 1.21 in the leases, and a sample lease to that effect can be found at page 454 of bundle 2 as supplied to the Tribunal. The "*first value of the block*" is defined as being:

> *"the total of the open market value selling prices achieved by the Lessor of the Dwellings in the Block and the Certificate of the Secretary of the Manager as to the amount of such selling prices shall be accepted as conclusive as to fact unless manifestly incorrect".*

25. It is common ground in this case, that at the time certainly that the properties were valued, which in this case was 8 August 2014, being the date of the Claim Notice, that certificate was not available. The respective valuers therefore went around that by making the calculation, and agreeing it as between themselves. The data upon which the certificate is provided is available. The selling prices and such other information as is necessary can all be ascertained. Mr Evans on behalf of the Applicant said *"well, yes we did, we cooperated with each other and although it took time, not because we disagreed but because the calculations took time, we agreed what that figure would be"*. But, said Mr Evans, the hypothetical purchaser would be perturbed in some way by the absence of the certificate. He would want the risk created by the absence of the

certificate to be reflected in some kind of uplift in the deferment rate, and corresponding decrease in price to be paid for the freehold. That, says Mr Evans, is one of the contributing factors to be taken into account in uplifting the deferment value.

26. Mr Mason on behalf of the Respondent said that he could not see that happening at all. Indeed Mr Clarke developed the point in submissions. The certificate can be produced at any time. It does not take very much to produce, but the absence of such certificate in any event is not central to agreeing this figure. It is a means of arriving at this figure or a means of having a conclusive answer, which binds the parties unless there is a manifestly incorrect contributor to that certificate. It does not preclude the parties reaching the appropriate figure using the data in exactly the way provided for in the lease. The suggestion that it justifies a departure from *Sportelli* or justifies being included in the balance of reasons for uplifting the deferment rate really is not a good point as far as Mr Mason is concerned, and once again the Tribunal takes a similar view. It is not a bar in any way to arriving at that figure. The absence of the certificate can either be overcome quite quickly by obtaining the certificate, or by the parties themselves reaching the same conclusions independently through their respective advisors or otherwise. So that point too is decided in favour of the Respondent and against the Applicant.

CONCLUSION

27. The upshot of this analysis is that the Tribunal finds in favour of the Respondents and against the Applicant. The conclusion urged upon the Tribunal by Ms Gibbons' very attractively and persuasively presented argument, was that, whilst one of these factors on its own might not be sufficient to justify a departure from the standard rate, the cumulative effect of these factors put together, is sufficient to reach such a conclusion. The finding of the Tribunal is that that is not an equation the Tribunal considers, however attractively presented, can be made in this case. Each of these factors either has not got the significance that was argued for, or there is not sufficient evidence to justify the departure.

Adding them together does not help in the view of the Tribunal, to make the points more forceful or cumulatively more persuasive in this particular case.

28. It follows from what has been said, that the Tribunal prefers the arguments of the Respondents to that of the Applicant, and is not persuaded on the evidence before it that this is a case justifying a departure from the *Sportelli* rate of 5%.

29. The parties have helpfully indicated that they are content to take a finding on that particular issue, without requiring the Tribunal to produce its own valuation, because valuations have already been calculated, subject to the resolution of this one outstanding point. That being so, it will not be necessary for the Tribunal to compile any further or separate valuation.

JUDGE SHAW

12th August 2015