IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 151 (LC)
Case No: ACQ/86/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – maisonette – valuation by reference to costs of refurbishment – whether claimant occupied and qualified for home loss payment or basic loss payment – reinvestment costs – professional fees – interest – compensation determined at £124,266.84

BETWEEN :

SUSAN ANN HO **Claimant**

- and -

WELWYN HATFIELD BOROUGH COUNCIL

Acquiring Authority

2 White Lion House
Town Centre
Hatfield
Hertfordshire
AL10 0JL

24 February 2016

A J Trott FRICS

Royal Courts of Justice, London WC2A 2LL

The Claimant did not appear and was not represented
Hugh Flanagan, instructed by Pinsent Masons LLP, for the Acquiring Authority

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The following cases are referred to in this decision:

Bishopsgate Parking (No.2) Limited v *Welsh Ministers* [2012] RVR 237
Sadiq and Hashmi v Stoke on Trent City Council [2009] RVR 178
Meghnagi v London Borough of Hackney [2008] RVR 122
Mallick v Liverpool City Council (2000) 79 P&CR 1

DECISION

Introduction

1. This is a reference to determine the compensation payable to the claimant, Ms Susan Ann Ho, following the compulsory acquisition of her leasehold interest in the maisonette known as 2 White Lion House, Town Centre, Hatfield, Hertfordshire AL10 0JL by Welwyn Hatfield Borough Council ("the acquiring authority").

2. The property was acquired under the Welwyn Hatfield Borough Council (Hatfield Town Centre East) Compulsory Purchase Order 2006. Possession was taken on 29 May 2012 which is the valuation date.

3. The claimant is the widow of Dr Murray Carse who first occupied the property in July 1972 and who was the lessee under a lease granted on 17 October 2000 by Glencoy Investments Limited for a term of 125 years from 25 December 1986. It is that leasehold interest which is the subject of this reference. Dr Carse died in May 2006 and the claimant was granted probate of his estate in December 2007. The acquiring authority acquired the freehold interest in White Lion House in 2006.

4. The hearing, which was held under the simplified procedure, was originally listed on 14 December 2015 but was postponed because the claimant was taken ill abroad and could not attend. It was rescheduled for 24 February 2016. At 09:10 on that day the claimant sent an email to the Tribunal saying that she would be unable to attend because she could not take a leave of absence from her work which comprised an overseas assignment in Kuwait City. In view of the extreme lateness of the claimant's notification that she would be unable to attend the hearing, despite due notice having been given, and in the light of her statement in her email that "I believe sufficient documents have been supplied to present my position", I proceeded with the hearing in her absence. The claimant was not represented.

5. Mr Hugh Flanagan of counsel appeared for the acquiring authority and called Mr David Conboy MRICS, a director of G L Hearn, as an expert valuation witness.

Facts

6. The reference property is located on the western side of White Lion Square in the centre of Hatfield. It forms part of a 1950s mixed retail, office and residential development arranged in a horse-shoe configuration (open to the south) around a central square. The property is on the second and third floors of a four-storey block and is accessed from Robin Hood Lane, a service road for the retail units below. Access from ground level is via a concrete staircase to a second floor deck.

7. The property comprises a reception room, kitchen and WC on the second floor, with stairs to the third floor which contains three bedrooms (two double, one single) and a bathroom. There was no central heating and no double-glazing and at the valuation date there was no furniture in the property. There is a balcony overlooking the communal deck with access from the front bedroom. There is a flat roof covered with bitumen felt. The gross internal area of the property is 93.63sm (1,008 sf). An external store was included in the demise but this was demolished prior to the valuation date at which time it formed part of an area of vacant land.

8. The property was in poor decorative condition at the valuation date and required significant refurbishment works to bring it into a habitable condition. The property was vandalised in July 2011 and was squatted in at or about December 2011. The property was not let out as an investment.

Issues

9. The following issues remain in dispute between the parties:

(i) The open market value of the reference property;

(ii) The appropriate statutory loss payment;

(iii) The amount of reinvestment costs;

(iv) Professional fees;

(v) Interest;

(vi) A punitive award of compensation.

Issue (i): open market value

10. In response to the notice to treat the claimant claimed £150,000 as the open market value of the reference property. In a subsequent request for an advance payment of compensation Messrs Bruton Knowles, who were then acting for the claimant, valued the property at £160,000. In her statement of case the claimant estimated the open market value of the property at £130,000 but offered £125,000 "for settlement". There was no evidence to support any of these figures.

11. For the acquiring authority Mr Conboy said that the open market value of the reference property was £95,000. He said that if it had been in good condition the property would have been worth £125,000 at the valuation date. But the property required substantial works of repair which Mr Conboy estimated at £25,000 to which he added a further £5,000 as a contingency and for profit. He therefore deducted £30,000 from £125,000 to give £95,000 as the open market value.

12. Mr Conboy relied upon comparable sales of three maisonettes in White Lion House (Nos. 5, 6 and 7) and three other maisonettes located elsewhere in Hatfield; two in Deerswood Avenue and one at Wordsworth Court. The three sales of maisonettes in White Lion House post dated the valuation date by 20 months or more. The other comparables were sold one to seven months before the valuation date. Mr Conboy adjusted all the sale prices for time using the Land Registry Index for Hertfordshire.

13. The average adjusted price of the White Lion House comparables was approximately £113,000, that of the Deerswood Avenue comparables £153,000 and the adjusted price of 106 Wordsworth Court was £143,000. All of the White Lion House comparables were sold as investment properties.

14. Mr Conboy said that Deerswood Avenue was in a superior location to White Lion House and that the comparables benefited from on-street parking, double-glazing, gas central heating and private gardens. The comparables were both larger than the reference property and had two reception rooms. Mr Conboy described the condition of these comparables as good (No.35) and reasonable (No.39). 106 Wordsworth Court was also in a superior location to the reference property and was said to be in the best decorative condition of all the comparables. But it was smaller than the reference property at only 704sf.

15. By comparison with the Deerswood Avenue and Wordsworth Court comparables Mr Conboy said that the reference property would be worth £125,000 in good condition. This was supported by the adjusted sale prices of Nos. 5 and 7 White Lion House: £115,000 and £132,000 respectively. (6 White Lion House was a smaller two bedroom property which sold for an adjusted price of £91,500.)

16. Mr Conboy also gave a general commentary upon the housing market as at the valuation date saying that it was "reasonably subdued" with the UK economy in recession and with tight mortgage lending criteria in force. Maisonettes such as the reference property would be viewed as a very high risk by lenders, particularly in view of its age, location and condition. It would have attracted more interest from investors than from owner-occupiers.

17. The estimated cost of £30,000 for works of repair and refurbishment included a sum for the installation of central heating but not double-glazing.

Discussion

18. The sales of the three comparable maisonettes at White Lion House have the obvious attraction of being properties in the same building as the reference property and therefore they share locational and physical factors with the subject maisonette. But they were sold between 20 and 26 months after the valuation date.

19. Section 5A(2) of the Land Compensation Act 1961 ("the 1961 Act") states:

> "No adjustment is to be made to the valuation in respect of anything which happens after the relevant valuation date."

The Tribunal considered the meaning of this section in *Bishopsgate Parking (No.2) Limited* v *Welsh Ministers* [2012] RVR 237. The Tribunal, George Bartlett QC, President, and N J Rose FRICS, said at 247 [63]:

> "… evidence of a post valuation event may be relied on to establish an objective fact as at the valuation date. Thus a comparable may provide evidence of what the hypothetical vendor and purchaser would in fact have agreed. That an actual vendor and an actual purchaser have agreed a price on a property that is comparable with the reference property is undoubtedly capable of constituting evidence of what would have been agreed in the hypothetical transaction for the reference property itself … Of course the degree to which a comparable transaction will assist in determining the price of the reference property will depend on how similar the factors that are material to the valuation were at, respectively, the date of the transaction and the date of valuation and on whether adjustments can satisfactorily be made for such differences as there were. But this applies both to pre-valuation date comparables and to post-valuation date comparables."

20. In this case there is no evidence about any changes in factors material to the valuation other than in terms of price changes from the valuation date to the date of sale of the comparables. It would appear from the Map for the Compulsory Purchase Order that 5, 6 and 7 White Lion House were also referenced for compulsory acquisition and the circumstances of the open market sales from January 2014 onwards were not explained, although there is evidence that the acquiring authority no longer required the reference property by February 2014 and had offered it for re-purchase to the claimant. In view of these uncertainties I place more weight upon the pre-valuation date sales of the three comparable maisonettes at Deerswood Avenue and Wordsworth Court.

21. I accept Mr Conboy's view that these comparables were in a superior location with better amenities and built to a higher specification. Doing the best I can with the evidence of these transactions and bearing in mind that Mr Conboy had not inspected any of the them internally but was relying upon agent's particulars, I consider that the reference property would, in good condition, be worth some 15% less than the time adjusted average value (£150,000) of the three non-White Lion House comparables. This gives an open market value for the reference property in good condition of £127,500. In my opinion this is also consistent with the time adjusted values of the post-valuation date comparables in White Lion House bearing in mind that it is assumed the reference property is to be completely refurbished. I do not accept Mr Conboy's view that the economic climate at the valuation date combined with the characteristics of the reference property would have materially constrained the market for its purchase or that a low level of competition for its acquisition would necessarily have been expected. In my opinion the reference property would have been a buy to let opportunity for cash investors and I am satisfied that there would have been a competitive market for its acquisition at the valuation date.

22. The cost of the refurbishment works is taken by Mr Conboy at £25,000. In my opinion this is a reasonable estimate for the works which needed to be done following the vandalism to and squatting of the reference property which had taken place prior to the valuation date. I accept that a purchaser would allow for a small contingency and profit element and Mr Conboy's figure of £5,000 is reasonable.

23. In her written representations dated 12 February 2016 the claimant states at paragraph 8.3:

> "In that the Acquiring Authority no longer intends to demolish the Property the Claimant avers that the estimate for repairs is an attempt by the acquiring authority to obtain development value at the expense of the claimant. The estimate for repairs, of £30,000 is the Development Value of the revised scheme."

In her statement of case she said on the same point at paragraph 5.2.4:

> "… the claimant considers that in establishing a valuation of £30,000 for refurbishment (including items of betterment) the acquiring authority is acting in misfeasance of public office.
>
> The claimant maintains that the acquiring authority is undertaking additional development after acquisition and is looking for the claimant to fund that development."

(The "betterment" referred to is the installation of double-glazing and central hearing. Mr Conboy explained at the hearing that his estimates included the cost of installing central heating but not double-glazing; he had only allowed for the cost of repairing the existing secondary glazing).

24. Mr Conboy's approach to the valuation of the reference property is a standard one. The property is first valued in its refurbished condition and then the costs of the refurbishment are deducted. That is what happens in the market and the acquiring authority are not gaining any advantage at the expense of the claimant. The reference property falls to be valued in its physical condition as at the valuation date and that is what Mr Conboy has done. It is true that the proposed refurbishment includes the installation of central heating which was not previously a feature of the reference property but the added value of this exceeds the cost and that benefit goes to the claimant.

25. The claimant also says that the acquiring authority, as freeholder, did not fulfil its obligation under the lease to repair a water leak in the flat roof to which she drew their attention in September 2010. She says that the acquiring authority's failure to repair the roof meant that the reference property suffered damage for which the claimant should not have to pay, the cost of such repair being effectively included within Mr Conboy's refurbishment allowance of £30,000.

26. At the hearing Mr Conboy said that the alleged water leak in the roof had been raised consistently by the claimant's then surveyor. Mr Conboy felt that the extent of the damage had

been exaggerated. When he inspected the reference property in 2014 the only evidence of damage to the upper floor ceiling was in the front bedroom where the soffit had been removed. But there was no indication of any water ingress damage; no staining or minor cracks. Mr Conboy would have expected there to have been a significant ceiling failure had a roof leak been as bad as the claimants suggested e.g. blown plaster or a collapsed ceiling board. No such damage was apparent. Just a piece of the ceiling had been cut out and replaced with ceiling board. Mr Conboy considered that any water damage from a roof leak must have been far less than the claimant's complaint contained in her email to the acquiring authority's then project manager in September 2010.

27. In my opinion the evidence does not support the claimant's assertion that the acquiring authority had avoided their repairing liability by including the cost of repairing the flat roof in the estimated cost of refurbishment.

28. It seems on the evidence that the small shed that formed part of the demise was probably demolished by the Homes and Communities Agency before the acquiring authority purchased the freehold interest in the reference property. I agree with Mr Conboy that no additional value should be attributed to it.

29. In my opinion the open market value of the reference property at the valuation date was £97,500, being the value when refurbished of £127,500 less costs of refurbishment of £30,000.

Issue (ii): statutory loss payment

30. The claimant said in her statement of case that to "qualify for a home loss payment the claimant must have lived in the dwelling as the only or main residence for a period of not less than one year ending with the day you have to move out." Since Dr Carse had lived in the property as his sole or main residence for more than one year and since only Dr Carse, the claimant and their children had resided in the property, it never having been rented out, it was the claimant's home. To say that the claimant was not in occupation was "a technical argument and is considered a breach of the European Convention on Human Rights." The claimant considered that she was entitled to a home loss payment of 10%.

31. For the acquiring authority Mr Flanagan submitted that section 29 of the Land Compensation Act 1973 ("the 1973 Act") did not apply to the claimant because she had not been in occupation of the dwelling as her only or main residence "throughout the period of one year ending with the date of displacement" i.e. the year ending 29 May 2012. The claimant was therefore not entitled to a home loss payment. The acquiring authority accepted that the claimant was entitled to a basic loss payment of 7.5% of the value of her interest in accordance with section 33A of the 1973 Act.

Decision

32. The claimant is not entitled to a home loss payment since she does not satisfy the requirements of section 29 of the 1973 Act. Those requirements are that she occupies the reference property, or a substantial part of it, as her only or main residence throughout the period of one year ending on 29 May 2012. It is not sufficient that she and/or her late husband occupied the reference property for more than a year at some time in the past. Section 29 requires the occupation to be throughout a particular period of one year and the claimant does not satisfy that test. I agree with the acquiring authority that the claimant qualifies for a basic loss payment of 7.5% of the value of her interest, i.e. for a payment of £9,562.50. The claimant's claim for a home loss payment is also inconsistent with her claim for reinvestment costs under section 10A of the 1961 Act since that section only applies where an acquiring authority acquires an interest of a person who is not then in occupation of the land (see below).

33. The claimant is not entitled to an occupiers loss payment since she does not satisfy the occupancy condition contained in section 33C(1)(d) of the 1973 Act.

Issue (iii): reinvestment costs

34. The claimant sought her costs of reinvesting in another property in accordance with section 10A of the 1961 Act. The claim under this head totals £4,944.74 including the sum of £1,000 for "soft furnishings".

35. The acquiring authority accepted that conveyancing costs, stamp duty and Land Registry fees together totalling £3,944.74 were payable under section 10A, but not the claim for soft furnishings.

36. Mr Flanagan submitted that section 10A applied to "incidental charges or expenses in acquiring" other land. In *Sadiq and Hashmi v Stoke on Trent City Council* [2009] RVR 178 the Tribunal, George Bartlett QC, President, said at 180[8] that:

> "Section 10A was clearly designed to mitigate the effect of the limitation on the scope of compensation for disturbance. It does so in terms that are specific. To be taken into account in assessing compensation payable to the person whose land is acquired are the 'incidental charges or expenses in acquiring' an interest in other land. The charges and expenses so recoverable must be incidental to the acquisition of the interest. Charges and expenses incurred in doing things to the land in which the interest is acquired are not covered, nor are removal expenses or the alteration of carpets or curtains."

37. Mr Flanagan submitted that the soft furnishings forming part of the section 10A claim were not incidental to the acquisition of the replacement property and were not compensatable.

Decision

38. The claim for "soft furnishings" is an expense of either removal from the reference property or fitting out the replacement property and is not an incidental expense or charge of acquiring other land. I disallow this item of claim. The compensation under section 10A of the 1961 Act is therefore limited to £3,944.74.

Issue (iv): professional fees

39. The claimant sought professional fees of £14,342.96 comprising £5,216.96 in respect of her surveyors, Messrs Bruton Knowles, and £9,126.00 in respect of her solicitors, Mills and Reeve LLP.

40. The acquiring authority accepted that the surveyor's fees of £5,322.60 (including VAT correctly assessed at 20%) were payable. They also accepted that the invoice in the sum of £6,999 from Mills and Reeve for work done between 1 December 2010 and 20 May 2015 was payable. A second invoice from Mills and Reeve, in the sum of £2,127, was not accepted in full because work amounting to £1,189 has been incurred after the reference had been made to the Tribunal on 6 August 2015 and was therefore a cost of the reference. Deducting these costs from the total the acquiring authority offered compensation for professional fees of £5,322.60 for the claimant's surveyors and £7,937 for her solicitors.

Decision

41. The only difference between the parties on this item of claim is in respect of that part of the claimant's solicitor's fees that were incurred after the reference was made to the Tribunal. I agree with the acquiring authority that the sum of £1,189 are costs of the reference and fall to be dealt with separately. I therefore award the total sum of £13,259.60 for professional fees.

Issue (v): interest

42. The claimant said that the acquiring authority deliberately prolonged the compulsory purchase process and the negotiation of the open market value of the reference property since it had no financial incentive to complete the acquisition quickly. Consequently to use the statutory rate of interest (0%) would be a breach of her human rights. She argued for the payment of interest on three alternative bases:

(a) The rate payable under the Late Payment of Commercial Debt (Interest) Act 1998 ("the 1998 Act") as amended; or

(b) The court judgment rate (8%); or

(c) 4.5%

43. Adopting the court judgment rate of 8% the claimants sought a total of £17,132.64 as interest up to 14 December 2015 and £11.92 per day thereafter.

44. The claimant also referred to a recent consultation exercise by the Department for Communities and Local Government in which it was proposed that the statutory rate of interest should be 2% above the base rate, i.e. 2.5% at present.

45. Mr Flanagan said that section 11 of the Compulsory Purchase Act 1965 ("the 1965 Act") provided that after service of a notice of entry any compensation "shall carry interest at the rate prescribed under section 32 of the Land Compensation Act 1961 from the time of entry until compensation is paid." Section 32 of the 1961 Act provided that the rate of interest should be such rate as may from time to time be prescribed by regulations made by the Treasury. Such regulations prescribed that the rate of interest should be 0.5% below the base rate quoted by the reference banks. Since 31 March 2009 this meant that the statutory rate of interest was zero. The claimant was therefore not entitled to any interest.

46. The claimant's reference to the 1998 Act was misplaced since that Act only applied to contracts for the supply of goods and services.

Decision

47. The Tribunal has no discretion to award interest on any other basis than that provided for in the relevant statutes, in this case section 11 of the 1965 Act and section 32 of the 1961 Act. As the Lands Tribunal, N J Rose FRICS, said in *Meghnagi v London Borough of Hackney* [2008] RVR 122 at paragraph 27:

> "The task of the Tribunal is to assess the value of the acquired property at the valuation date. It has no discretion to award a different level of compensation because the view might be taken that interest payments are inadequate. Moreover, interest is a matter to be determined in accordance with the relevant statutory provisions. It is not a matter for the Tribunal."

48. The statutory interest payable on the outstanding compensation owed to the claimant is zero. The recent Department for Communities and Local Government consultation exercise has no effect on this conclusion, nor has the 1998 Act any application to compensation for compulsory purchase.

Issue (vi): punitive award of compensation

49. As a further alternative to her arguments about the statutory rate of interest the claimant said that the Tribunal should make a punitive award in her favour of £17,132.64 or such other

sum as the Tribunal considered appropriate in recognition of the acquiring authority's delay in settling the claim.

50. Mr Flanagan referred to the decision in *Mallick v Liverpool City Council* (2000) 79 P&CR 1 in which Henry LJ said at 12:

> "It seems to me that the provisions for advance payment of compensation and interest on that compensation provide a statutory scheme intended to deal with delay in all cases, to apply in all cases. I accept that the success of the scheme in any individual case depends on the section 52(2) estimate being realistic, and both parties proceeding with proper despatch with the valuation process. But I do not accept that Parliament intended that in all cases there would remain the possibility of claiming compensation (and consequently interest) for allegedly underestimating the value of the property of for delay in reaching a proper value."

51. Mr Flanagan said that the only avenue for compensation was that provided for under statute and therefore the claimant could not be paid a punitive award.

Decision

52. The Tribunal has no discretion to make a punitive award of compensation. It is bound to determine the compensation in accordance with the relevant statutory provisions. With regard to the accusation that the acquiring authority had delayed proceedings in this case I note (a) that an advance payment of compensation was made (albeit late), (b) that the reference to the Tribunal was made by the acquiring authority and not by the claimant, and (c) the claimant appears to accept in her latest representations that there is not a legal basis for such a claim.

Determination

53. I determine that the compensation payable is:

(i)	Open market value of leasehold interest:	£ 97,500
(ii)	Basic loss payment:	£ 9,562.50
(iii)	Section 10A reinvestment costs:	£ 3,944.74
(iv)	Professional fees:	£ 13,259.60
(v)	Interest:	nil
		Total: £124,266.84

54. This decision is final on all matters other than the costs of the reference. The hearing was conducted under the simplified procedure which is not a procedure under which costs are normally awarded. At the hearing the acquiring authority said that they should receive their costs of the reference and I agreed that both parties should have the opportunity of making

submissions on costs. A letter giving directions for the exchange of such submissions accompanies this decision.

Dated: 22 March 2016

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)