LRA/148/2006

LANDS TRIBUNAL ACT 1949

Leasehold enfranchisement - price - agreement

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **BROOMFIELD FREEHOLD MANAGEMENT LIMITED** **Claimant**

and

MEADOW HOLDINGS LIMITED **Respondent**

Re: Broomfield House
179 Stanmore Hill
Middlesex HA7 3ER

Before: His Honour Judge Reid QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 8 November 2007

Mr Adam Rosenthal of counsel instructed by Sherman Phillips, solicitors, for the Appellant
Ms LA Sinclair of counsel instructed by Wedlake Saint, solicitors, for the Respondent

DECISION

Introduction

1. The Appellant ("Broomfield") appeals from the decision of the Leasehold Valuation Panel for the London Rent Assessment Panel dated 4 September 2006 (following a hearing on 22 August 2006) which concerns the collective enfranchisement of Broomfield House, 179 Stanmore Hill, Stanmore, Middlesex. The Respondent ("Meadow") is the freehold reversioner. Broomfield is the nominee purchaser.

2. There were two issues before the LVT: (i) Whether a provision should be included in the transfer of the freehold to Broomfield that the transferee should not acquire any rights of light or air or other easement which would restrict or interfere with the transferor's use of certain retained land (ie that the rights which would otherwise be included by virtue of section 62 of the Law of Property Act 1925 should be excluded); and (ii) if no such provision was to be included, whether the LVT had jurisdiction to consider the price for the freehold or whether the parties, through their respective surveyors, had agreed the price in an exchange of correspondence in December 2005.

3. The LVT found in Broomfield's favour on the first issue, and determined that the disputed provision should not be included in the transfer. It held that Broomfield's surveyor had not by silence implicitly agreed to the exclusion of the section 62 rights, and that the rights should not be excluded by the transfer. The LVT then went on to find in Meadow's favour on the second issue, concluding that no final agreement had been reached as to price, so that the LVT retained jurisdiction to determine the price payable for the freehold. It is against the second aspect of the decision that Broomfield appeals.

Background

4. On 28 September 2004, the participating tenants gave a notice to Meadow under section 13 of the 1993 Act of their intention to acquire the freehold. Meadow gave a counter-notice dated 25 November 2004. There was some initial correspondence between the parties about the validity of Broomfield's initial notice and of the counter-notice, but the parties agreed to waive any defects which might exist in the notices and Broomfield made an application to the LVT to determine the terms of acquisition on 23 May 2005.

5. Broomfield House comprises five blocks of flats fronting on to Stanmore Hill. Behind the flats are "amenity areas" which contain gardens and pathways, which lead to an area containing 14 numbered garages and a forecourt area, "the retained land" which Broomfield agreed should be retained by Meadow.

6. The lessees have, habitually, used the retained land to park cars, to keep their refuse bins and for a storage shed. They have also used it to obtain access to Fallowfield, a road running down from Stanmore Hill. No rights were granted by the leases of the flats over the retained land, although the lessees have, by licence, over the years, exercised such rights.

7. After the application was made to the LVT, the parties' surveyors began to negotiate about the price. This culminated in an exchange of letters dated respectively 20 and 23 December 2005 between the surveyors. It was Broomfield's case that by this exchange of letters the surveyors, acting on behalf of the parties, recorded an oral agreement that the price payable for the freehold should be £117,000.

8. After this exchange of correspondence, the solicitors began to correspond about the terms of the transfer and a draft transfer was produced in which Meadow's solicitors required clause 14.2 to be included, in the following terms:

> "'The Transferee shall not acquire any rights of light or air or other easement that would restrict or interfere with the full use of the Transferor's land edged green on the plan attached hereto ('the retained land') for building or other purposes."

9. Broomfield resisted this on the ground that this would have the effect of excluding the operation of section 62 of the Law of Property Act 1925, contrary to para. 2(1) of schedule 7 to the 1993 Act.

10. In its statement of case prepared for the LVT hearing Meadow asserted that the agreement as to the price was conditional upon the transfer being in the form contended by it. In the event that clause 14.2 of the draft transfer was not included, Meadow sought a determination of the price by the LVT. The inclusion of the rights would, it was asserted, make a very substantial difference to the price to be paid.

11. The LVT decided the first issue (whether clause 14.2 of the draft transfer should be included) in favour of Broomfield, but decided the second issue in favour of Meadow, holding that it had jurisdiction because there had been no concluded agreement as to price. The determination of the price payable was adjourned.

The Letters

12. The terms of the two letters said to record the agreement were as follows.

13. Meadow's surveyor wrote on 20 December 2005:

> "I thank you for your letter dated 8 December 2005 and now confirm by way of open letter the following terms which, have been agreed:-

(1) A sale price of £117,000 (One Hundred and Seventeen Thousand Pounds) in respect of the sale by your client of the freehold interest of Broomfield House, 179 Stanmore Hill, Stanmore, Middlesex HA7 3ER, including the gardens and grounds and pathways which form part of the Estate (but for the avoidance of doubt, excluding the garages adjacent thereto).

(2) There will be no leaseback to your client

(3) The transfer of the freehold to take place on a date to be agreed between the parties but no later than six months from today's date.

(4) A draft Agreement for Sale/Transfer Document to be forwarded by your client's solicitors to my client's solicitors by no later than 9 January 2006.

I should be grateful if you would kindly confirm, also by way of an "open letter", your client's agreement to the foregoing by return of fax as I understand from my client's solicitors that they must advise the LVT that agreement has been reached between the parties."

I look forward to hearing from you."

14. Broomfield's surveyor responded on 23 December:

"I refer to your open letter dated 20th December 2005 concerning the collective enfranchisement on the above block.

I can confirm the following terms have been agreed with yourselves acting as adviser of the prospective purchaser.

1. A sale price of £117,000 (one hundred and seventeen thousand pounds) in respect of the sale of the freehold interest of Broomfield House, 179 Stanmore Hill, Stanmore, Middlesex, including the gardens, grounds and pathways, but excluding the garages (detailed in our Counter Notice to yourselves), but subject to the grant of a lease extension of Flat 12 Broomfield House prior to this sale by the present freeholder, as discussed.

2. There will be no leasebacks to our client.

3. The freehold transfer to take place at a date to be agreed but no later than two months from 20th December 2005.

4. A draft agreement for sale/transfer document to be forwarded to your clients solicitors by 9th January 2006.

I can confirm that my clients solicitors have been advised of our terms and that the LVT may be advised of our agreement and to request that their involvement in this matter be suspended pending the sale."

15. Neither letter makes any reference as to whether the transfer should include any provision such as clause 14(2) thereby excluding the rights which would otherwise have passed by virtue of section 62 of the Law of Property Act 1925. Broomfield's surveyor gave evidence that he had not discussed or known of any rights other than those expressed in the leases and that he did not know that the lessees made any use of the retained land. His valuation had

excluded the retained land, and he accepted that the section 62 rights could have an effect on the value. The LVT accepted his evidence that he had no knowledge of any proposal for the inclusion in the transfer of any term such as the draft clause 14(2). The oral evidence of Meadows' surveyor was that his belief had been that the lessees made no use of the retained land and that if he had been aware that they did (so that section 62 came into play) his valuation would have been higher.

16. In considering this issue the LVT focused on an argument which had not been raised or dealt with in submissions before it. It said:

> "35. The Tribunal has referred for definition to Part II of Schedule 6, paragraph 2, of the Act. This provides that the *price payable by the nominee purchaser for the freehold of those premises shall be the aggregate of-*
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> *(a) the value of the freeholder's interest as determined in accordance with paragraph* 3,
> *(b) the freeholder's share of the marriage value as determined in accordance with paragraph 4, and*
> *(c) any amount of compensation payable to the freeholder under paragraph 5.*
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> 36. Paragraph 5 applies to *any diminution in value of any interest of the freeholder in other property resulting from the acquisition of his interest in the specified premises.* It appears to be this loss under paragraph 2(c) that the freeholder is contending should be paid if paragraph 14.2 of the transfer is deleted and rights over the retained land are established.
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> 37. The wording of the letters specifies that the valuers' agreement of £117,000 is for the "sale....of the freehold interest. They do not describe their agreement as "the price for the freehold" in the terms of the Act. The words used are more like those in paragraph 2(a) -referring to the value of the freeholder's interest - and it is clear from the evidence of the valuers that neither of them, in arriving at that figure, considered the existence of any rights that could give rise to the possibility of any compensation under paragraph 2(c) or included it in that sum. Neither of them meant to include any amount under 2(c).
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> 38. Neither of the parties' representatives at the hearing made the distinction between the "the price payable for the freehold" under paragraph 2(1) and the "value of the freeholder's interest" under sub paragraph (c) but the Tribunal considers that the distinction is important in the context of the dispute. The Tribunal considers that: because the price payable comprises up to three elements, the wording of the Act distinguishes the value of the freeholder's interest from the price payable for the freehold, and the words of the letters are closer to those used in paragraph 2(a) the letters can not constitute an agreement on "the price payable by the nominee purchaser for the freehold" under paragraph 2(1)."

17. The difficulty with this conclusion, which is based entirely on a construction of the letter rather than an examination of what the totality of the evidence was as to what was agreed, is that the word used by each of the surveyors is "price", not "value". It is difficult to see how it can properly be said that the words used in the letters are "closer to those used in paragraph 2(a)". The parties were purporting to record an agreement as to "a sale price … in respect of the sale of the freehold interest." In doing so they were purporting to record an agreement as to

"the price payable by the nominee purchaser for the freehold of [the] premises", as they understood them to be. They may not have used the full cumbersome words of paragraph 2, but they were not purporting to agree only "the value of the freeholder's interest as determined in accordance with paragraph 3" but all of the three constituent elements of the price so far as relevant. In my judgment this appears from the words of paragraph 1 of each letter taken alone, and it is reinforced by the final paragraph of each letter which clearly envisage that the LVT is to be told that agreement has been reached (ie so that a decision would not be needed from the LVT). The words at the end of the letter from the surveyor for Broomfield "and to request that their involvement in this matter is suspended pending the sale" add further weight to this view because the sale could not go ahead unless there were agreement on the total price to be paid.

18. That conclusion as to the construction of the letters does not, however, conclude the question whether the parties were "in dispute" as to the price so as to give the LVT jurisdiction to determine the price to be paid.

19. The LVT is a creature of statute and only has jurisdiction where it has been given jurisdiction by statute. By section 24(1) of the 1993 Act: "Where … 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 application of either the nominee purchaser of the reversioner, determine the matters in dispute."

20. The parties were agreed that the law as to whether a matter is in dispute is correctly set out in Hague on Leasehold Enfranchisement (4th Ed) at para 26-11: "The 1993 Act does not define what is meant by such an agreement. Plainly, it must mean an agreement falling short of a binding contract *(i.e.* one complying with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989) with which it is contrasted in the same subsection. The Act refers to an agreement as to terms of acquisition being subject to contract. There is no provision requiring the agreement to be written, though it will normally be contained in correspondence; if there is sufficient evidence, it is considered that there could be an oral agreement. If an offer made "without prejudice" is accepted by the other side, it is considered that this will constitute an agreement within the Act. It is probably open to either side to accept the terms specified in the initial notice or counter-notice and for such acceptance to amount to an agreement within the Act. If a party wishes to resile from, for example, the price specified in its notice or counter-notice, it should make that clear so that it is not faced with an acceptance."

21. In this case the letters did not themselves comprise an agreement or record of the absence of dispute. They were merely intended to record the terms which the surveyors had already agreed. Quite what the agreement was is unclear from the terms of the letters. First, Meadow's version of what was agreed is expressed to be "subject to the grant of a lease extension on Flat 12 Broomfield House prior to this sale by the present freeholder, as discussed". There is no such condition in Broomfield's version of the agreement. Second, the time limit for completion is expressed to be two months from 20 December 2005 on Meadow's

version and six months from that date in Broomfield's version. Third, it does not spell out that they had considered and agreed the three constituent elements of the price.

22. It does not seem to me that it assists in determining whether there was agreement for the purposes of section 24 before the exchange of letters for Broomfield to assert that the lease of extension of Flat 12 had been granted before the date of the hearing in the LVT. On the face of the letters there was no consensus on the point. Similarly, on the face of the letters there was no agreement as to the date for completion: clearly in fixing the terms of a sale it is material for the vendor to know when he will get his money. In my judgment this is sufficient to show that there was no overall agreement between the surveyors, but it does not answer the question whether it could properly be said that the price payable by the nominee purchaser for the freehold of the premise "remain[ed] in dispute".

23. Broomfield submitted that it could not be said that the parties were not "ad idem" in respect of the price to be paid because Meadow's surveyor had not taken into account any rights to be enjoyed by it over the retained land. This, it was said, would not preclude an agreement binding for the purposes of section 24 so as to deprive the LVT of jurisdiction. No rights would be expressly included in the transfer. Broomfield might or might not be able to establish that it had the benefit of rights by virtue of section 62 following completion of the transfer, and Meadow might resist any such claim. It was open to Meadow to reserve its position in relation to section 62 rights in agreeing the price, but it chose not to do so. In the circumstances it was stuck with the price apparently agreed.

24. This appears to me to be a flawed argument. This was not a case where Meadow assumed there were no section 62 rights whilst Broomfield assumed that there were such rights. The evidence was that neither surveyor was aware of the possibility of such rights being asserted. The common basis on which they were both working was that there were no section 62 rights, and the possibility and possible extent of those rights emerged only when the respective solicitors became involved and a draft contract was prepared. The surveyors never turned their minds to the question whether any amount of compensation should be payable to the freeholder under paragraph 5 because neither of them realised the paragraph could be relevant.

25. The answer to this problem in my judgment depends on whether the parties were ad idem as to what the price of £117,000 was for. This does not depend on the construction of the letters but on what was agreed between the two surveyors. Each of the surveyors assumed that there were no rights which would pass under section 62 of the Law of Property Act 1925. They were agreed on a price for the freehold without any section 62 rights. Each surveyor was accepted that the section 62 rights could affect his valuation. In other words the price for the freehold they orally agreed was a price on the basis that there would be no rights over the retained land created in favour of the land being transferred, and there was no agreement as to the price of the property to be transferred with the retained land being subjected to those rights.

26. In these circumstances it seems to me that two issues before the LVT fell effectively to be decided together. Once it was held that the section 62 rights would not be excluded, the

LVT was presented with a situation in which it was clear that the surveyors had erroneously failed even to attempt to agree anything in respect of the "amount of compensation payable to the freeholder under paragraph 5" in respect of the diminution in value of Meadow's interest in the retained land resulting from the acquisition of the specified premises. The parties were not agreed as to the price payable, whatever impression the letters may have created taken in isolation, and that the parties were in fact in dispute as to the effect on the price of Broomfield obtaining section 62 rights. The LVT thus had and has jurisdiction to determine the price.

27. It follows that in my view the LVT came to a correct conclusion, though I express the route to that conclusion in rather different terms. The appeal will therefore be dismissed.

Dated 13 November 2007

His Honour Judge Reid QC