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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0013/04/13

In the matter of 115 Pantbach Road, Cardiff CF20 4DZ
In the matter of an Application under Sections 21(1)(a) of the Leasehold Reform Act 1967

TRIBUNAL David Evans LLB LLM
Andrew Morris LLB
D Rhys Davies FRICS

APPLICANT Clarise Properties Ltd

RESPONDENTS Rachel Emily Rees and John James Rees

APPLICATION FOR PERMISSION TO APPEAL THE DECISION
OF THE LEASEHOLD VALUATION TRIBUNAL

DECISION

1 BACKGROUND

1.1 On the 3rd and 4th September 2013, we heard a preliminary issue arising out of an application brought by Clarise Properties Ltd (the Applicant) under section 21(1)(a) of the Leasehold Reform Act 1967 (the Act) for us to determine the amount payable by Rachel Emily Rees and John James Rees (the Respondents) for the freehold reversion of 115 Pantbach Road, Cardiff (the Property). The preliminary issue concerned the interpretation of the ground rent review clause in the Respondents' lease (the Lease) which was granted on the 7th June 1991 for a term of 99 years from the 24th June 1990.

1.2 The particular issue for determination was that part of clause 1 of the Lease which required the ground rent to increase in 2015 to "a sum representing the open market letting value of the land hereby leased…" The decision was published on the 19th September 2013. In that decision, we concluded that the reviewed ground rent "is a marketable ground rent; the highest ground rent at which a purchaser (builder or otherwise) in the hypothetical open market would be willing to acquire a lease of the plot of land" (paragraph 63(f) of the decision)

1.3 At the conclusion of the hearing, we enquired of the parties whether they would wish to have some guidance as to the approach which they should adopt when making their valuations rather than a bare interpretation of the expression used in the clause. The surveyors for both parties clearly indicated that they would indeed welcome such guidance (paragraph 62).

1.4 The Applicant has requested permission to appeal to the Upper Tribunal. The application is dated the 8th October 2013 and was received by the Tribunal on the 9th October 2013. The Respondents were notified of the application both by the Applicant and by this Tribunal.

2 PRINCIPLES

2.1 Permission to appeal will only be granted where:

(a) The Tribunal has wrongly interpreted or applied the law;

(b) The Tribunal has wrongly applied or misinterpreted or disregarded a principle of valuation or professional practice;

(c) The Tribunal has taken account of irrelevant considerations or failed to take account of relevant considerations or evidence or there was a substantial procedural defect;

(d) The point or points at issue is/are of potentially wide implication.

2.2 A finding of fact is generally not able to be appealed unless it falls within paragraph 2.1 (c) above or it is one which no tribunal could reasonably have reached based upon the evidence. It is not the purpose of this procedure to re-argue the issues dealt with at the hearing, nor is it for us to re-consider our Decision.

3 GROUNDS OF APPEAL

The Respondent raises five grounds of appeal. We shall deal with each of them in turn:

3.1 *The so called presumption of reality (paragraph 63 (b))*

"The LVT determined that in this case, the hypothetical letting would be at a premium of £600 and that there would be rent reviews after 25, 50 and 75 years.

(1) Such an interpretation was not one advanced by either party at the hearing and it was not an argument addressed by the experts. In the premises, there was a procedural defect.

(2) The Tribunal erred in law in applying the so-called "presumption of reality in this case and/or finding that the same directed the hypothetical letting to reflect payment of a premium of £600 and rent reviews after 25, 50 and 75 years.

(3) The Tribunal stated that in reaching its conclusions, it relied upon the evidence given by experts at the hearing. However, neither expert purported to address the question of whether one should take the payment of the premium of £600 into account for the purposes of determining the rent payable on review or the rent should be valued assuming rent reviews after 25, 50 and 75 years. The evidence of both experts was given in respect of the other separate issue as to whether the initial premium was at or below market value. In the premises the LVT took account of irrelevant considerations, or failed to take account of relevant considerations or evidence."

3.2 Point (1) is not, with respect, correct. The presumption of reality was considered by both parties at the hearing. At paragraph 19 of the Respondents' skeleton argument, Mr Denyer-Green submitted: "the presumption of reality points to the terms of the hypothetical letting being upon the same terms as the actual Lease (save as to the amount of the rent and premium)….The hypothetical willing tenant must therefore be assumed to be taking a 99 year lease of a site upon which it may residentially develop, and then market and sell such lease at a premium." At paragraph 20, he continued that the parties' intentions, as expressed in the words used in the Lease, "leads to the conclusion of a hypothetical letting of a long lease, such as for 99 years, and at a nominal ground rent, and at a premium". Further at paragraph 23, Mr Denyer-Green comments that "to assume that no premium will be paid does require an assumption of a transaction that is different from the original letting".

3.3 Mr Loveday also addressed the issue of the presumption of reality emphasising its "so-called" nature. In paragraph 11 of his closing submissions, he drew our attention to Co-operative Wholesale Society Ltd -v- National Westminster Bank plc [1995] 1 EGLR 97 and to Basingstoke and Deane Borough Council -v- Host Group Ltd [1988]1 WLR 448 (Basingstoke) submitting that the

presumption could be displaced by contrary intention, a suggestion, in his opinion, supported by the Lands Tribunal in Jarrett -v- Burford Estates and Property Co Ltd [1995] 1 EGLR 181.

3.4 In paragraph 63 (b) of the decision, we were merely drawing the attention of the parties' surveyors to actual terms of the Lease. There is a premium and there are rent reviews in the Lease. That is the reality of the situation. The premium is extant throughout the term. It was part of the deal along with the rent reviews. There is nothing in the Lease to suggest that the premium has to be disregarded. Mr Loveday did not indicate whether or not it should be. The main thrust of his argument when dealing with the wording of the rent review clause was that by including assumptions in the clause it was clear that the parties did not intend the revised ground rent to be "nominal" (paragraph 49(c)).

3.5 It is correct that the surveyors did not advance arguments in respect of the terms of the hypothetical lease. However, this was a legal issue and not a valuation issue. If either Counsel had considered it appropriate to question the valuers concerning this, it was open to them to do so. They did not.

3.6 In accepting Mr Denyer-Green's argument on this point and applying the presumption of reality, we were following the Court of Appeal's decision in Basingstoke. Although Mr Loveday referred to Basingstoke in his closing submissions (paragraph 11), he did not address the point at length, nor did he seek to distinguish the decision on the facts. He did not counter Mr Denyer-Green's argument nor did he put forward alternative suggestions as to what the terms of the hypothetical lease should be.

3.7 With reference to the final point, Mr Evans was not merely addressing the issue of whether the initial premium was at or below market value. Both surveyors agreed that the initial premium was nominal (paragraph 19). Both surveyors also agreed that where a premium was charged, it would affect the amount of ground rent payable (also paragraph 19). Mr Evans, who gave his evidence first, referred to a case in Sheffield, mentioned in his supplemental report of the 30th August 2013, where a lessee had accepted a new lease at an initial ground rent of £340 pa subject to an increase in accordance with the RPI every 10 years. In the context of a modern ground rent, he referred to a trade-off between the amount of any premium and the ground rent, pointing out that there was no premium with a section 15 ground rent. Asked about the premium of £600 he stated that whilst Mr Cooper had de-capitalised the premium of £600 (see paragraph 5.10 of Mr Cooper's report at page 68 in the application bundle), in modern terms he considered the amount of the premium to be insignificant. That may well be the case. It will be for the valuers to bring evidence on the point when the application is finally dealt with.

3.8 We do not consider that this ground raises any issue which merits the grant of permission to appeal.

3.9 *The approach to valuation (63(c))*

"At paragraph 63(c) of its decision, the Tribunal considered that the valuation exercise needed to be made by reference to the sale value of plots of land, rather than by reference to such formulae as the standing house method. It relied upon the use of the word current open market "values" (in the plural), in clause 1(b) of the lease.

(1) Such an interpretation was not one advanced by either party at the hearing and it was not addressed by the experts. In the premises there was a substantial procedural defect.
(2) The Tribunal erred in law in relying upon the plural word "values" in clause 1(b) of the lease. The interpretation is contrary to s.61 of the Law of Property Act 1925. In any event the use of the word "values" in clause 1(b) of the lease simply signifies that the valuation exercise needs to be conducted on more than one rent review date.
(3) In any event, there was no evidence that there are any comparable sales of plots of land on the assumptions made by the LVT. In the premises, the LVT took account of irrelevant considerations, or failed to take account of relevant considerations or evidence."

3.10 During the hearing, the Respondents' approach was to argue that the revised ground rent was a nominal ground rent. One of the Applicant's arguments was that the ground rent could not be a nominal ground rent and therefore it must be a modern ground rent which was not necessarily the same as a section 15 ground rent. If we decided that the revised rent was a modern ground rent, it would then be a matter of evidence as to the actual rent payable. We were aware at the hearing of the substantial difference of view between the Respondents who considered that the revised ground should be in the order of a couple of hundred pounds and the Applicant who would be arguing for a figure in the order of £4,000 to £5,000. We were mindful that the parties had taken up positions each at, or close to, the far ends of the interpretative spectrum and it might not be helpful simply to determine that the reviewed ground rent was or was not a nominal or a modern ground rent. We raised with the parties the possibility of other interpretations (paragraph 61). Both parties, represented by experienced Counsel, were given the opportunity to address that possibility. Mr Loveday argued that we had to make a determination that the reviewed rent was either a nominal ground rent or a modern ground rent. If it were a modern ground rent, we could add qualifications to it. Mr Denyer-Green commented that a narrative would be very helpful. Both surveyors agreed.

3.11 As mentioned in paragraph 1.3 above, we therefore had the agreement of both parties to provide guidance. Accordingly, we took the opportunity to address some of the issues which we considered might arise when the valuers submitted their reports at the final hearing. We felt that the guidance would assist them in agreeing as many points as possible and would draw their attention to a number of issues which we or Counsel might wish to ask them about at the final hearing. In paragraphs 63(c) and (d), we were not interpreting other phrases used in the clause. We were trying to ensure that we had as full a picture as possible at the valuation hearing - comparables, plot size, development issues, planning issues and so on. Such matters do not affect the interpretation of the expression "open market letting value of the land".

3.12 One of the points of guidance was to draw the valuers' attention to the expression used by the draftsman that the reviewed rent had to be "a sum representing the open market letting value of the site without buildings "to be assessed in accordance with current open market <u>values</u> of the Site" (our underlining). We were not suggesting what values could be attributed to the site. That is a matter of evidence. Frequently at hearings we are not provided with evidence of plot sales and then we resort to one of the formulae such as the standing house method. The wording in the Lease is merely recognising that valuation is not an exact science. We were simply asking the valuers to provide the evidence of plot sales. If none exists, we will have to use one of the formulae. Paragraph 63(c) is not doing anything more than indicating that the valuation process should use comparable evidence if it is available. That is what should happen in any event. As Hague comments (5th edition @ 8 - 11), "the approach to be taken is as much a matter of valuation evidence as any other aspect of the valuation formula…If the [comparable] evidence can be found then there is no reason why both the "cleared site" and "standing house" approaches should not be used, one as a check against the other." It is notable that both valuers applied the standing house method when dealing with their assessments of the value of the Property in 1990/1991. We were drawing their attention to what the Lease says. We were not interpreting the expression as such. We were not diverting from the established practice. We were pointing out to the valuers that they should follow that process.

3.13 With regard to point (2), section 61 of the Law of Property Act 1925 states that: "in all deeds…unless the context otherwise requires…(c) the singular includes the plural and vice versa". There is no issue here. The word used is plural. The draftsman anticipated more than one value. However, if the exercise produces a single value the result is still valid. The plural "includes" the singular. It does not "mean" the singular. It means the plural, but it can also mean the singular if the context requires it to do so.

3.14 The expression used is "current open market values of the Site at <u>each</u> Relevant Review Date" (our underlining). "Values" relate to each review. The draftsman does not say "current open

market values of the Site on the Rent Review Dates" which is the wording he/she would have used if the Applicant's interpretation in point (2) were correct.

3.15 As we were dealing with a preliminary issue, we were not given evidence of comparable sales of plots of land (point 3). It was not necessary as we were dealing with the interpretation of a clause in the Lease. We do not consider that this ground raises any issue which merits the grant of permission to appeal.

3.16 *Site specific factors*

"At paragraph 63(d) of its decision, the Tribunal have (sic) general guidance as to a number of specific factors relevant to the valuation exercise. Such guidance was not one advanced by either party at the hearing and it was not addressed by the experts. In the premises, there was a substantial procedural defect"

3.17 This point has been dealt with in paragraph 3.10 above. The parties were asked if they wanted guidance. They indicated that they did. We drew the attention of the valuers to a number of points which might be relevant when it came to determine the actual value(s). As we explain (paragraph 63(d)), the points were intended to be indicative. Certain aspects were mentioned at the hearing - the narrowness of the plot, driveway access, the positioning of the adjoining properties. We were not suggesting what weight, if any, should be attached to them. That is a matter of evidence. However, it is better that the valuers come prepared, having considered the many factors which a builder or self-build purchaser would need to answer before proceeding to acquire the plot. Some of the points may have no significance. That is a matter for evidence at the final hearing. It is surely better that we have all the relevant information available at the hearing. We are not restricting what can be raised. That is ultimately a matter for the parties. However, we do not consider that this ground raises any issue which merits the grant of permission to appeal.

3.18 *A 'marketable rent'*

"At paragraph 63(e) of its decision, the Tribunal stated that the "open market letting value" to be ascertained on review meant a "marketable rent". The LVT relied on Mr Cooper's evidence to that effect. It was satisfied "on the evidence that there would be no market for a letting at a s 15 ground rent or a ground rent akin to that.

The LVT erred in law in finding that clause 1(c) of the lease did not require to be reviewed to a section 15 ground rent or a "modern ground rent" akin to that:

(1) The evidence of both experts was that there was no market for any letting adopting the assumptions made in clause 1(c) of the lease, irrespective of how that clause was interpreted. The lack of any actual market at a s 15 ground rent (or at a modern ground rent akin to that) is therefore no reason to interpret the clause in this way.
(2) There is in any event a "market" for leases with review provisions to a section 15 ground rent. All houses where a lease has been extended under LRA 1967 s 14 will include a s 15(2)(b) rent review provision after 25 years. There is no suggestion that such leases are not marketable. Most leases of houses potentially involve a s 15 ground rent exercise being carried out in the event of a claim to acquire the freehold.
(3) The lease has in fact been sold twice since 1991 and has been re-mortgaged."

3.19 At paragraph 63(e) we state that the "open market letting value" means precisely that. The expression "a marketable rent" or as we put it in paragraph 63(f) "a marketable ground rent" is just a convenient shorthand phrase for the letting value of the site achievable in the open market. We expand further - "the highest ground rent at which a purchaser…in the hypothetical open market would be willing to acquire a lease of the plot".

3.20 We acknowledge that both valuers agreed that there was no evidence of a market in plots of land at modern ground rents (paragraph 18). We have not suggested that the lack of a market precludes our finding that that the reviewed ground rent was a s 15 ground rent or one akin to that. We considered at paragraphs 19 and 20 the evidence of both Mr Evans and Mr Cooper and for the reasons set out in those paragraphs we preferred the evidence of Mr Cooper on this issue. Having seen and heard the witnesses, we were entitled to do so.

3.21 We accepted that there was a limited market in properties with modern ground rents (paragraph 21). That was not the market we were considering. Properties with ground rents are houses constructed on plots of land. Such properties have a combined value which may well exceed the value of the land plus the construction costs, depending on the market. The effect of imposing a modern ground rent is to reduce the market value of the property. It is the combined value which is reduced. There is something in the combined value which can absorb the shock of that reduction. The effect of the modern ground rent is to emphasise the diminishing nature of the asset. As Mr Evans pointed out, everything has a price (paragraph 19), but such properties may in fact be sold for less than they were purchased as the value of the property declines. However, when the transaction involves only the land, there is nothing to absorb the loss as the asset declines in value.

3.22 We appreciate that the enfranchisement exercise involves the calculation of a s 15 ground rent. However, as Counsel for the Applicant rightly pointed out, section 15 does not contain reference to the market.

3.23 There is no issue that the Property was sold and mortgaged twice (paragraphs 7(d) and (e)). However, as Mr Evans conceded (paragraph 19) this could be because no-one at the time realised that the ground rent might be reviewed to a modern ground rent. Again, these were transactions concerning a site with a building on it. That is not the same as a market in a building plot. On this issue we preferred the evidence of Mr Cooper (paragraphs 19 and 20).

3.24 We do not consider that this ground raises any issue which merits the grant of permission to appeal.

3.25 *Limitations on "open market letting"*

"At paragraph 63(f) of its decision, the Tribunal concluded that the "open market letting value of the land" meant "a marketable ground rent". That rent was stated to be more than a "nominal sum". However, "there would come a point when the cash buyer or one with other sources of borrowing will cease to take on a commitment

Such an interpretation was not one advanced by either party at the hearing and it was not addressed by the experts. In the premises, there was a substantial procedural defect

The LVT erred in law. It failed to give effect to the words in clause 1(c) of the lease that directed the rent on review to be valued:

(a) As if it were a vacant site without any buildings thereon;
(b) Available for residential development for purposes authorised by the Town and Country Planning Acts."

3.26 In paragraph 54, we noted it was important "when seeking the intentions of the parties from an expression, phrase or clause, that each of its elements is considered as the inclusion of each such element is in all probability for a particular purpose." In paragraph 46 we analysed the component parts of the rent review clause. Points (a) and (b) of this ground of appeal are referred to as points (c) and (e) in paragraph 46. At paragraph 55, we state that "it seems to us that there can be no issue in respect of sub-paragraphs (a), (c) and (e)….The valuation(s) have to be on the assumption that what is being valued is a building plot with planning permission for residential development". In paragraph 63, we refer to "plots of land", "builder who would wish to build", "self-build purchaser", "build to let". It is apparent from the context that we were referring to vacant sites. It is also apparent that we were referring to a plot which was available for residential development with

planning permission. For example, we refer in paragraph 63(d) to some of the planning issues which may be faced by a builder when constructing a dwelling on the plot and which might need to be addressed when dealing with the valuation. We are not saying that they will need to be addressed, only that the valuers should be prepared to deal with the points should they arise.

3.27 The hypothetical market is not an academic exercise. It must be rooted in reality. It concerns a real piece of land in a real place. Of course, the land actually has a house built on it and has to be valued on the assumption that it has not. That is not a problem for an experienced valuer. Nor is the question of the hypothetical seller and buyer. The process is little different from that in the real world. The valuer is considering the property (or land) in the context of others and then gauging the price which a potential buyer would be willing to pay or, if acting for a buyer, the price at which the actual owner would be willing to sell. We appreciate that the difficulty is that here the hypothetical owner is proposing to lease the plot and in order to fulfil the requirements of the Lease, there has to be a deal. At what point would the hypothetical owner and the hypothetical lessee strike the deal? That is the open market letting value of the site. That is what we have stated in paragraph 63(f). Once the level of the rent exceeds what the prospective hypothetical lessee is willing to pay, there is no deal and the conditions of the Lease are not fulfilled.

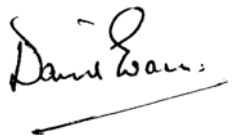
3.28 We do not consider that this ground raises any issue which merits the grant of permission to appeal.

4 CONCLUSION

4.1 We have considered only the grounds set out in the Applicant's request for permission to appeal. While some grounds raise valuation issues which will be dealt with at the final (valuation) hearing, they do not persuade us that that they raise any issue which merits the grant of permission to appeal. The application for permission to appeal is therefore REFUSED.

4.2 The Applicant has the right to appeal to the Upper Tribunal for permission to appeal as set out in the accompanying letter.

DATED this 14th day of November 2013



CHAIRMAN