UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 68 (LC)
LT Case Number: LRA/76/2007
LRA/145/2007
(Consolidated)

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – premium payable – power of Upper Tribunal to correct a clerical mistake or error arising from an accidental slip or omission by the LVT – whether in determining the terms of acquisition under Leasehold Reform, Housing and Urban Development Act 1993 the Tribunal has power to order the inclusion of a term in the transfer which would involve the price payable being recalculated in the event of a particular decision being reached in a potential appeal in another case.

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

BETWEEN **EARL CADOGAN** **Appellant**

and

CADOGAN SQUARE PROPERTIES LIMITED **Respondent**

Re: 23 Cadogan Square
London SW1

Before: His Honour Judge Nicholas Huskinson
and A J Trott FRICS

Sitting at 43 -45 Bedford Square, London WC1B 3AS
on 4 February 2011

K S Munro instructed by Pemberton Greenish on behalf of the Appellant
Steven Jourdan QC instructed by Forsters LLP on behalf of the Respondent

The following cases are referred to in this decision:

McHale v Earl Cadogan [2010] EWCA Civ 1471
Sportelli v Cadogan [2007] RVR 387

DECISION

Introduction

1. There are two appeals before the Tribunal, namely an appeal by the Appellant and an appeal by the Respondent, the two appeals having been consolidated. The appeals are brought from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (the LVT) dated 23 March 2007 and addendum thereto dated 8 May 2007 whereby the LVT decided various issues upon an application made to it by the Appellant under section 24 of the Leasehold Reform Housing and Urban Development Act 1993. In summary the LVT decided the price to be paid upon the collective enfranchisement by the Respondent, who is the nominee purchaser, upon the purchase from the Appellant of the freehold of 23 Cadogan Square. The price decided by the LVT was £2,050,000.

2. So far as concerns the points taken by the parties in their respective appeals, the sole issue raised by the Appellant in his appeal was whether the Lands Tribunal's decision in *Sportelli v Cadogan* [2007] RVR 387 was correct. So far as concerns the Respondent's appeal this raised four points, but two of these were subsequently abandoned (see paragraph 6 of the Respondent's statement of case). That left outstanding on the Respondent's appeal the question of deferment rate and the question of whether rights under the 1993 Act should be taken into account when valuing the existing leases for the purposes of the marriage value.

3. All of these points have now been resolved without the necessity of argument upon them in this appeal. The Lands Tribunal's decision in *Sportelli* has been decided on appeal; the question of deferment rate in this case (and various related cases) has been decided at a separate hearing of this Tribunal (before the Honourable Mr Justice Morgan and A J Trott FRICS); and the question of whether rights under 1993 Act should be taken into account when valuing the existing leases for the purposes of the marriage value has been decided by the Court of Appeal in the recent decision of *McHale v Earl Cadogan* [2010] EWCA Civ 1471. The decision in *McHale* was to the effect that rights under the 1993 Act should not be taken into account when valuing existing leases for the purposes of the marriage value – thus the point was decided adversely to the contentions of the Respondent in the present case. The Respondent is a company which is (putting matters broadly) within the ownership of the Erkman family interests. In the *McHale* case Betul Erkman was permitted to participate as an intervener.

4. The issues raised in the appeal having all been either decided or abandoned it might be thought that all that remained for this Tribunal was to recalculate the price in accordance with the deferment rate as decided in the previous decision of the Tribunal (5.25% instead of 5% for the shorter leases in the present case) and, having made that amendment to the price payable, to allow the Respondent's appeal but only to the extent of this alteration in price and otherwise to dismiss the appeals. However two further problems have arisen.

5. The problems are these:

(1) The Appellant points out that there are certain minor obvious errors in the calculations of the LVT and that these need to be corrected because otherwise the price ordered to be paid will the wrong price rather than the right price. The Appellant says the right price is £2,021,700, whereas the price payable if these errors are not corrected would be £2,012,000. The Respondent argues that the Tribunal has no jurisdiction to make the requested correction or, if the Tribunal has such jurisdiction, the Tribunal should not exercise this jurisdiction. We will call this "the errors point".

(2) We are told that the Court of Appeal refused permission to appeal to the Supreme Court in the *McHale* case (judgment being handed down on 21 December 2010) but that it was the intention of Mr McHale and of Ms Erkman (if she had status so to do as intervener) to apply to the Supreme Court for permission to appeal. The Respondent was concerned to protect its position so as to guard against the possibility that an application for permission to appeal to the Supreme Court was made (the last date for such application being 17 February 2011) and that the application for permission to appeal was granted and that on the ultimate substantive hearing the Supreme Court reversed *McHale* or decided the point more favourably to the contentions of the Respondent. We will call this "the *McHale* point".

The errors point

6. There are two questions, namely, (a) whether the alleged errors have been made and (b) if they have been made, what can or should be done about them.

7. The errors complained of by the Appellant are these, namely that at two points in the schedule where the price payable was calculated the LVT proclaimed that it was using the present value for a deferment of 107.44 years at 5% and it gave the relevant multiplier for this operation as 0.0032, whereas the Appellant says that as a matter of arithmetic it is clear that the correct figure for this multiplier is 0.00529. The Appellant describes this as a simple arithmetical mistake. The Appellant complains there is a further mistake in the calculation of marriage value by the LVT in that the LVT, having correctly identified the fact that marriage value fell only to be calculated in respect of the participating flats namely Flat A and Flat C, mistakenly included within the figure for "value of Freeholders interest" a figure which embraced the value not merely in respect of Flat A and Flat C but also a figure in respect of Flat D. This was an error by the LVT because in including the value of Flat D within the value of the freeholders' interest the LVT was being inconsistent with that which it had itself proclaimed it was doing (namely working out marriage value for the participating flats, namely Flat A and Flat C) and the LVT was also erring in that it would be wrong to include Flat D within the calculation of marriage value because Flat D is a lease held for more than 80 years and hence is statutorily excluded from the marriage value calculations. Mr Munro submitted that it was obvious that these mistakes had been made, that the parties' valuers had expressly agreed that they had been made and had expressly agreed that the correct figure for the

enfranchisement price was the higher figure of £2,021,700, and that this Tribunal could and should correct the mistake. Mr Munro submitted that having regard to section 175(4) of the Commonhold and Leasehold Reform Act 2002 the Upper Tribunal (Lands Chamber) can exercise any power which was available to the LVT. He pointed out that the LVT could itself have corrected these mistakes and that therefore the Tribunal can do so. He referred to Regulation 18(7) of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 which provides as follows:-

> "(7) An appropriate person may, by means of a certificate signed and dated by him, correct any clerical mistakes in a document or any errors arising in it from an accidental slip or omission."

Mr Munro submitted that the mistakes made clearly fell within Regulation 18(7) and that, as the LVT could have corrected them, so can the Tribunal.

8. On the question of whether the errors existed at all Mr Jourdan objected to what he perceived as an attempt by Mr Munro to prove the existence of the errors by reference to without prejudice correspondence. We offered to adjourn so as to enable both parties to bring their valuers before the Tribunal so that evidence could be called on the existence of errors in the LVT's decision so that the alleged errors could be established without any reference to without prejudice correspondence. In due course Mr Jourdan expressly accepted that the two arithmetical errors had been made as described above regarding the use of the wrong multiplier at two places in the calculations. Accordingly it was not necessary to hear evidence on this point. Mr Jourdan objected that he had not had sufficient time to consider the alleged error in the marriage value calculation. However we decided to rise for a period to consider certain points and, upon our returning into court, Mr Jourdan confirmed that he had had sufficient time to consider the point and he further confirmed that he did now accept that there was an error as alleged by Mr Munro made by the LVT in the calculation of marriage value in that the LVT had wrongly introduced the value of Flat D as an ingredient in the value of the freeholders' interest. Accordingly we find (without reference to any without prejudice material) that the mistakes as alleged by the Appellant were in fact made by the LVT. We also conclude that these mistakes can properly be said to fall within the following words:

> "… any clerical mistakes in a document or any errors arising in it from an accidental slip or omission".

9. Accordingly the LVT had power, had application been made to it, to correct these mistakes. Mr Jourdan argued that, despite the provisions of section 175(4) of the 2002 Act, the Tribunal did not enjoy the power to correct these mistakes. He contended that regulation 18(7) was exhaustive such that the only person who had power to correct such clerical mistakes or errors arising from an accidental slip or omission was the LVT and that even the LVT could only correct the mistakes on an application made within a reasonable timescale. He submitted that there was no provision for applying to the Upper Tribunal to correct any such mistake and he submitted that the function of the Upper Tribunal is to determine appeals and not to correct clerical mistakes. He further argued that, if his argument that there was no power in the Upper Tribunal to correct the mistakes was wrong, we could only do so on the basis of a proper

application served on the other party a reasonable time before the hearing with proper particulars and there had been no such application in the present case.

10. We accept Mr Munro's arguments. This matter has come before the Tribunal on an appeal from the LVT to whom an application under section 24 of the 1993 Act had been made. The application was for the determination of various matters in dispute including the amount payable as the purchase price. It is necessary for us, by agreement, to make alterations to the price payable to reflect this Tribunal's decision as to the appropriate deferment rate. The parties are agreed as to the extent of the variation required to deal with this deferment rate point. However what ultimately the Tribunal is required to do on these appeals is to decide the amount to be paid as the purchase price. In our judgment it would be wrong for us deliberately to fix as the purchase price a price which we know to be incorrect. This is what the Respondent is inviting us to do. It is clear an accidental slip or omission or a clerical mistake was made by the LVT in the manners identified by the Appellant and it is clear what the correct price would be – we do not understand the Respondent to dispute that the correct price is £2,021,700, but insofar as there is still a dispute regarding this we find that this is the correct price, being the price which is consistent with the reasoning in the LVT's decision, but making the necessary alteration for the changed deferment rate. The Tribunal enjoys the powers of the LVT. The LVT could have corrected these mistakes had it been asked to do so. It is not a pre-requisite of our exercising this power that a formal application has first been made to the LVT.

The McHale point

11. It is agreed between the parties that the Court of Appeal in *McHale* decided that the rights under the 1993 Act should not be taken into account when valuing the existing leases for the purposes of the marriage value. It is further agreed that a necessary consequence of this is that the Tribunal must dismiss the Respondent's appeal insofar as that appeal seeks to argue the contrary.

12. The Respondent is concerned that permission to appeal to the Supreme Court may be (a) applied for and (b) granted and may (c) result in an ultimate hearing in which the Court of Appeal's decision in *McHale* is reversed in whole or in part. If ultimately this decision is reversed then the price payable on the enfranchisement in the present case would be less than £2,021,700 if the price were assessed on the basis (contrary to the decision of the Court of Appeal in *McHale*) that rights under 1993 should be taken into account when valuing the existing leases for the purposes of marriage value. The Respondent invited the Appellant to enter into a side agreement to the effect that, if *McHale* were reversed, then the Appellant would repay to the Respondent the difference between the price paid on completion (which would be £2,021,700) and the price which would have been payable if the Supreme Court's decision in *McHale* had been known before the price was finally decided. The Appellant declined to enter into any such side agreement. In these circumstances the Respondent argued that the Tribunal, having dismissed the Respondent's appeal on the *McHale* point, should immediately grant the Respondent permission to appeal to the Court of Appeal on the *McHale* point. The Respondent indicated that if such permission to appeal were granted then the Respondent would notify the Court of Appeal that the Respondent would only pursue the

appeal if permission to appeal to the Supreme Court was granted in the *McHale* case. Mr Jourdan did not accept Mr Munro's argument that an application for permission to appeal made at this stage was premature and that it was necessary for the Respondent to receive the written decision of the Tribunal dismissing the Respondent's appeal on the *McHale* point and for the Respondent then, but only then, to put in a written application for permission to appeal in accordance with Rule 55 of the Tribunals Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, but Mr Jourdan further submitted that if strictly the application for permission to appeal was premature then the Tribunal was invited to treat the documents he had put in as constituting an application for permission to appeal as at the earliest date that they could properly be treated as such an application, eg the day after the decision on the appeal was sent out.

13. As an alternative (and indeed as the Respondent's primary position as the argument ultimately developed) Mr Jourdan invited the Tribunal to follow a course which had been put forward by the Tribunal in argument as a possibility so that the parties could make their respective submissions upon it. The possible course of action was this, namely for the Tribunal to order under section 24 that the terms of acquisition should include a clause that (putting it broadly) if the *McHale* decision was reversed then the parties would agree (or the Tribunal would decide) how much less the purchase price would have been if calculated on the basis of the Supreme Court decision. The clause would then provide for the repayment by the Appellant to the Respondent of the difference between the price paid and the price that would have been payable on this basis.

14. In response Mr Munro submitted that the law on the *McHale* point was as decided by the Court of Appeal in that case. The Court of Appeal had refused permission to appeal to the Supreme Court. It would be wrong for the Tribunal to grant permission to appeal to the Court of Appeal on precisely the point which the Court of Appeal had just itself decided adversely to the Respondent and upon which the Court of Appeal had refused to grant permission to appeal to the Supreme Court.

15. Quite apart from the foregoing Mr Munro pointed out that, if permission to appeal was granted, then the timetable for moving towards a contract and, ultimately, completion under section 24 would be frozen. The valuation date in the present case was as long ago as 3 October 2005, so the price to be payable was fixed by reference to values pertaining as at that date but the Respondent was not required to pay any interest in the meantime. He submitted there should not be further delay introduced by the granting by the Tribunal of permission to appeal to the Court of Appeal. Mr Munro suggested that the appropriate way forward for the Respondent was as follows:

(1) make no application to the Tribunal for permission to appeal unless and until the application to appeal to the Supreme Court in *McHale* is granted (if the former application is then out of time the Respondent can apply for an extension); or

(2) make an application to the Tribunal for permission to appeal and agree to it being dismissed – the application can then be renewed to the Court of Appeal if permission to appeal in *McHale* is granted; or

(3) make an application to the Tribunal for permission to appeal and agree to its being dismissed and then make an application to the Court of Appeal for permission to appeal on the *McHale* point and invite the Court of Appeal (a) to grant permission to appeal, (b) to dismiss the appeal, (c) to refuse the Respondent permission to appeal to the Supreme Court. In these circumstances the Respondent would be able to seek from the Supreme Court permission to appeal and permission to be joined to the *McHale* case (supposing that permission to appeal had been granted by the Supreme Court in *McHale*).

Mr Munro said that the Appellant would reserve all his rights and arguments to require the present matter to proceed to completion in accordance with section 24 if in the meantime the present appeal fell to be treated as finally disposed of. However Mr Munro did indicate that (although speaking entirely without instructions) he thought it unlikely, supposing that the Supreme Court did grant permission to appeal in *McHale*, that the Appellant would take steps to force completion of the present purchase while the outcome of the Supreme Court's decision in *McHale* was awaited. He was however not to be taken to be giving any concession binding on the Appellant on these points and, as already stated, all the Appellant's rights and argument were reserved.

16. As regards the possibility of an extra clause being included within the terms of acquisition (so that the Respondent could recover contractually any overpayment if it ultimately turned out that *McHale* was reversed in whole or part) we asked Mr Munro whether the Appellant would agree to a clause such as this being included. If it were included then the Respondent had indicated that it would not seek permission to appeal and the matter could move to completion and the purchase price could be paid over to the Appellant. Mr Munro accepted that such a clause could perfectly properly be included in the terms of acquisition if both parties agreed to it. He also recognised that the Appellant, in the absence of any such clause being included, faced substantial delays because Mr Jourdan made clear during the course of the hearing that the Respondent would (a) apply to the Tribunal for permission to appeal to the Court of Appeal and (b) if that were refused, the Respondent would apply to the Court of Appeal for permission to appeal and (c) if that were refused the Respondent would apply to the Court on any application made under section 24(4) for the hearing to be adjourned pending the ultimate hearing in *McHale* (supposing permission to appeal had been granted).

17. However Mr Munro submitted that the Tribunal has no power to order the introduction of such a clause into the terms of acquisition and (if that were wrong) that the Tribunal ought not to order the inclusion of any such clause. He argued that the duty of the LVT (and the Tribunal on appeal from the LVT) was to fix the amount payable as the purchase price, see section 24(8) – it was not a duty to fix some provisional price which could then be displaced subsequently. He further argued that if the price was capable of being revisited in x months time (and after completion of the transfer) in the light of an eventual Supreme Court Decision in *McHale* (supposing that permission to appeal is granted) then there is no logical reason to limit the reconsideration of the price merely to the question of the extent to which the Supreme Court's decision in *McHale* might affect the price. Thus if the price were to be reconsidered in the light of circumstances after the Supreme Court's decision in *McHale* it should be reconsidered in the

light of all relevant changed circumstances as at that date (which might effect the price upwards as well as downwards).

18. Mr Munro further argued that if a clause such as contemplated (requiring repayment of a part of the purchase price in certain circumstances) was permissible then such a clause could be included where the future possibility which was sought to be catered for was an increase in price rather than a decrease in price. However in such circumstances the clause would involve the landlord being forced to complete early in return for the payment of the lower sum (ie calculated on a basis less favourable to the landlord) and the landlord would merely have the prospect of a contractual claim for the amount representing the increase in price supposing that the outstanding appeal in some other case were decided favourably to the landlord. This would mean that a landlord was being asked to convey away the freehold for less than the proper price and would not have the security of being able to withhold the conveyance unless and until the full price were paid – the landlord would merely have a contractual claim for the balance. Difficulties of enforcement could also arise if what was contemplated was the possibility of the nominee purchaser becoming entitled to be repaid part of the purchase price by the landlord – this would not occur in the present case where the landlord is known to be available in the United Kingdom and is known to be good for the money, but in some cases there could be real problems of enforcement.

19. In summary Mr Munro submitted that there should be an end to litigation, that the Court of Appeal had decided *McHale* in the way it had, that as a result the proper price was £2,021,700, that the Tribunal should so decide, that the Tribunal should refuse permission to appeal and should leave it to the Respondent to pursue some other course such as one of those described in subparagraphs 15(2) or (3) above. He submitted we could not, alternatively should not, fix the price at a provisional figure which could be revisited and litigated about further pursuant to a contractual claw-back clause. The whole structure of this part of the 1993 Act was designed for the participating tenants to acquire, through the nominee purchaser, a greater interest in the relevant premises in return for the payment of fixed price. The "terms of acquisition" were to be agreed or determined by the LVT (or the Tribunal on appeal) pursuant to section 24 – these terms were not to be left undetermined in the sense that they could be revisited with a party being compelled against its will to take part in some form of arbitration proceedings if the altered terms could not be agreed. He pointed out that if a clause such as presently contemplated (a draft of which Mr Jourdan had prepared) could be imposed as part of the terms of acquisition in the present case then a similar such clause could be imposed in many other different circumstances to cover other possible future events or legal decisions which, if only they had been known about at the date of the hearing before the LVT or the Tribunal, would have made a difference to the terms of acquisition.

20. In response Mr Jourdan pointed to the wide wording of section 24(8) which defines "the terms of acquisition" as meaning the terms of the proposed acquisition by the nominee purchaser whether relating to the matters expressly set out in subparagraphs (a) to (e) "or otherwise". He submitted that this wording was very wide and accordingly permitted the Tribunal to order that the terms of acquisition should include a clause of the type contemplated whereby part of the purchase price could be clawed back in certain circumstances.

21. We accept that the wording of section 24(8) is indeed very wide. However the present case is concerned with a clause dealing with the price which is payable in accordance with Schedule 6. Whatever may be the limits of jurisdiction regarding clauses contemplating the revisiting of the terms of acquisition upon other topics, we conclude that we must accept Mr Munro's argument that there is no jurisdiction in the LVT or this Tribunal to order the inclusion into the transfer of a clause which leaves as only provisionally decided (and not finally decided) the price which is payable in accordance with Schedule 6. We consider Mr Munro is correct in saying that this follows from the structure of the Act. Mr Munro pointed out that, if such a clause were permissible, it would be permissible in circumstances where the adjustment to the price payable which might be made in the future was an adjustment which involved the nominee purchaser being asked to make an additional payment as well as an adjustment which contemplated the nominee purchaser being able to claw back part of the price paid. However as regards a clause contemplating the possibility of the nominee purchaser being asked to make, after completion, an additional payment, it seems to us that the provisions of Schedule 5 to the Act (although not expressly referred to in argument before us) are inconsistent with any such clause being properly capable of being ordered to be included in the transfer. Schedule 5 contemplates that "the appropriate sum" will be agreed or determined, being an amount which includes "such amount as is fixed by the relevant terms of acquisition as the price which is payable in accordance with Schedule 6 in respect of that interest". Then paragraph 4 of Schedule 5 provides:

> "Where any interest is vested in the nominee purchaser in accordance with this Schedule, the payment into court of the appropriate sum in respect of that interest shall be taken to have satisfied any claims against the nominee purchaser or the participating tenants, or the personal representatives or assigns of any of them, in respect of the price payable under this Chapter for the acquisition of that interest."

Accordingly it is contemplated that the relevant interest will be vested in the nominee purchaser upon the payment into court of the appropriate sum and once this has been done the nominee purchaser will obtain the freehold interest and (by virtue of paragraph 4) will not have to satisfy any further claim against the nominee purchaser or the participating tenants in respect of the price payable. Accordingly if the Tribunal ordered the inclusion in a transfer of a clause which envisaged the nominee purchaser being asked to make a further payment towards the price payable after the transfer had been effected, this would be contrary to the provisions of Schedule 5. If it is impermissible for the terms of acquisition merely provisionally to fix the price in circumstances where what is contemplated is a further payment by the nominee purchaser to the freeholder, then it seems to us to be equally impermissible to order the inclusion of such a clause where the price payable is provisionally fixed and what is contemplated is a claw back by the nominee purchaser from the freeholder of part of the price paid in return for the transfer.

22. Accordingly we decline to order the inclusion of a clause enabling the purchase price to be revisited (and repayment made by the Appellant to the Respondent) in the event of the Supreme Court reversing the Court of Appeal's decision in *McHale* either in whole or in part. We consider we have no power to do so. We also consider that even if we did have such power we should not exercise it for the reasons advanced by Mr Munro.

23. So far as concerns the application for permission to appeal, Mr Munro pressed the point upon us that it was premature for the Respondent to make any application for permission to appeal to the Court of Appeal on the *McHale* point until after the Tribunal had sent the Respondent its decision in this case, being a decision including its written reasons – Mr Munro relied upon Rule 55 of the 2010 Rules. Mr Jourdan responded that if this point really was pressed against him then he invited the Tribunal to treat the documents he had already put in for the purposes of seeking permission to appeal as notionally lying on the Tribunal's desk until the day after the Tribunal had sent out its decision on the appeal. Mr Jourdan then invited the Tribunal to treat these documents on the desk as being before the Tribunal on this day after the decision had been sent out and he asked the Tribunal to spare the Respondent the necessity of sending in the same document again. Bearing in mind that the Appellant apparently presses this technical point of prematurity we consider that, rather than further prolong this decision by deciding some point of principle on the interpretation of the Rules, we will adopt Mr Jourdan's suggestion. After this decision is sent out we shall consider the Respondent's application for permission to appeal the *McHale* point to Court of Appeal. The decision which we are then likely to give is that it would be wrong for the Tribunal to give permission to appeal to the Court of Appeal on a point which the Court of Appeal has recently decided adversely to the Respondent's argument and on which the Court of Appeal has refused permission to appeal to the Supreme Court. There are other potential avenues open to the Respondent as contemplated in paragraph 15 above.

Order

24. We allow the Respondent's appeal to the following extent only, namely we order that the purchase price of £2,021,700 is substituted for the purchase price of £2,050,000 as decided by the LVT. Save as aforesaid and save for the correcting of errors as described under the errors point above we dismiss the appeals.

Dated 16 February 2011

His Honour Judge Nicholas Huskinson

A J Trott FRICS