UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0182 (LC)

UTLC Case Number: ACQ/14/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – empty house – sale by auction on building lease – whether auction price was key to value of freehold interest – comparable evidence – indexation – open market value determined at £800,000

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN AYSIN BEHCHET Claimant

and

LONDON BOROUGH OF SOUTHWARK Acquiring

Authority

Re: 91 Kennington Park Road

London

SE11 4JJ

Before: P D McCrea FRICS

Sitting at: Royal Courts of Justice, Strand, London, WC2A 2LL

on 12 February 2015

James Winbourne, Winbourne Martin French, for the Claimant

Mary Cook, instructed by London Borough of Southwark, for the acquiring authority

The following cases are referred to in this decision:

Joshua v London Borough of Southwark [2014] UKUT 0511 (LC)

Sachikenye and Others v London Borough of Greenwich CON/105/2006 and CON/18/2007 unreported

Stephenson and Stephenson v East Riding of Yorkshire Council [2013] UKUT 064 (LC)

Anthony Keith Allen v Leicester City Council [2013] UKUT 016(LC)

Jevric v London Borough of Southwark CON/123/2011 unreported

Adrian Allen Walker v Blackburn with Darwen Borough Council [2014] UKUT 0421 (LC)

DECISION

Introduction

1.
This is a reference by Mr Aysin Behchet (“the claimant”) to determine the compensation payable upon the compulsory purchase of 91 Kennington Park Road, SE11 4JJ (“the reference property”) by the

London Borough of Southwark (“the acquiring authority”). The reference property was compulsorily acquired under the London Borough of Southwark (91 Kennington Park Road, London) Compulsory Purchase Order 2008 (“the CPO”). The CPO was made by the acquiring authority on 27 November 2006 under s17 of the Housing Act 1985 and was confirmed by the Secretary of State on 15 August 2007.

2.
The CPO was made on the basis that the reference property was on the acquiring authority’s empty homes register, had remained unoccupied for a lengthy period of time, and was in disrepair. The authority wished to bring it back into a state of repair, suitable for residential occupation.

3.
The acquiring authority made a general vesting declaration in respect of the reference property on 7 March 2008. The vesting date was 20 March 2008, which is the date of valuation.

4.
The claimant was represented by Mr James Winbourne MRICS. In addition to giving evidence himself he called Mr Nigel Field MNAEA and Mr David Holland MRICS. The acquiring authority was represented by Ms Mary Cook of Counsel, who called Mr Patrick McGreal MRICS, Principal Surveyor of the acquiring authority.

5.
I subsequently received written closing submissions from the parties.

Facts

6.
From a statement of agreed facts and the evidence, I find the following facts. The reference property is a five storey Georgian terraced house on Kennington Park Road, Southwark. It is of brick construction under a pitched tiled roof. At the vesting date the reference property was unused and uninhabitable. On the lower ground floor were two rooms, on the ground floor there were two rooms and a bathroom, on the first floor there were three rooms and a bathroom, and on each of the second and third floors, three rooms. The gross internal area was 262 sqm. There were gardens to the front and rear.

7.
The reference property was Grade II listed, and situated in a conservation area. At the vesting date it had been on English Heritage’s At Risk register since December 2003 (it has since been removed from the register). Listed Building consent was granted on 11 April 2006 to convert the property into three flats.

8.
In late 2007, the claimant requested marketing and valuation advice from several estate agents. Their letters were submitted in evidence. In December 2007, Mr Bhoday of Kinleigh Folkard and Hayward’s Kennington office thought that the reference property, refurbished, would achieve £950,000 - £1 million as a house, or in aggregate £1.225 million as three flats. Mr Griffiths of Barnard Marcus’s Kennington office, again in December 2007, thought that in its condition at that time the property would achieve £800,000, or £1.1 million if converted to three flats. In January 2008, Mr Nigel Field of Winkworth’s Kennington office considered that in its condition at the time, the property could have been sold for £800,000 - £850,000. In January 2009, the claimant commissioned a formal valuation

report from Haywards. In that report, Mr Gibson FRICS gave his opinion of value at the vesting date of £950,000, and referred to various transactions in Kennington Park Road.

9.
Following vesting, the acquiring authority commissioned a survey and valuation from Frederick Holt and Company, Chartered Surveyors. Mr Coffey of that firm issued his report on 16 April 2008, following an inspection on 10 April 2008. He described the reference property as derelict and uninhabitable, being in very poor condition and requiring extensive refurbishment work. He noted that planning consent had been granted for conversion to three self-contained flats. Using a residual methodology, his valuations in existing condition were £550,000 with the benefit of that planning consent, or £535,000 as a single house. As three refurbished flats, he valued the property at an aggregate of £1,030,000; and as a single refurbished house at £900,000. His estimated repair costs as a single dwelling were £329,000 including fees, VAT and finance. To convert and refurbish the property into three flats, his estimated costs totalled £329,955 including fees, VAT (on fees only) and finance. His valuations assumed that the cost of conversion to three flats would be exempt from VAT, whereas the refurbishment of the house would not.

10.
In commenting on his valuation, Mr Coffey said that his firm had relied upon comparable evidence of similar single houses and self-contained flats, both currently on the market in the area, and which had been sold within the last six months. He went on to say that market conditions were quite difficult at that time, and would “soften further” in the coming months as funding became more restricted.

11.
Armed with that valuation, the acquiring authority instructed Messrs Andrews Roberts to auction the reference property. The property was entered into that firm’s auction of 5 June 2008. However, following representations from the claimant regarding the lack of reference to the listed building consent, the lot was withdrawn, and the property re-entered into the firm’s auction of 16 July 2008, with a guide price of “£535,000+” and a reserve price of £550,000. The property was offered for sale by way of a building lease, with the subsequent transfer of the freehold interest available within 28 days of completion of refurbishment works at £1.00.

12.
There were published conditions of sale, one of which precluded a bid from or on behalf of the claimant. The draft building lease was available for inspection.

13.
The leasehold interest in the property was sold at the 16 July auction at a premium of £580,000. The lease was completed on 13 August 2008. It was for a term of 125 years at an annual rent of £200 per annum, rising to £20,000 per annum on 3 January 2010, then subject to RPI indexation, upwards only, from 2 January 2015. The tenant was “forthwith to commence execution of” prescribed works of repair and improvement and thereafter to “diligently complete them no later than [3 December 2009] or such extended period as shall be agreed”. The prescribed works were set down in a schedule to the lease, but were defined as “such works necessary to restore the [property] to a condition ready for immediate residential occupation as either a single unit or as separate residential units…”

14.
Assignment or subletting of the lease was not permitted, save by a mortgagee in possession, and the lessee was not permitted to occupy the property save for carrying out the refurbishment works.

15.
On 23 December 2011, the freehold interest of the reference property was transferred to the long leasehold tenant. This was later than the date scheduled in the lease, and was by agreement with the acquiring authority.

16.
On 6 March 2009, an advance payment of £554,699.70 was made to the claimant. On 18 March 2009, the claimant purchased 34 Riverside Court, Elms Lane, London (a property in which he was at that point residing) from Production Technology Consultants Ltd ("PTC"). The claimant owned 80% of the share capital of PTC at the time of the transfer of Riverside Court.

The Issues

17.
The parties' positions were outlined in a statement of agreed facts as follows:

Claimant Acquiring Authority

Open Market Value: £850,000 £590,000

Basic Loss payment: £75,000 £44,250

Pre-reference costs: £2,000 "plus VAT to be

confirmed" £0

SDLT, legal and associated

re-investment costs: £13,740.75 £0

Legal and Counsel's fees: £4,591.50 £0

Valuation Fees: £1,437.50 £1,437.50

Open Market Value

18.
In valuing the reference property, Mr Winbourne used three approaches. The first was by reference to the auction price. He applied an indexation amount (7.28% using the Nationwide house price index), to reflect changes in the market between the auction date and the valuation date, then applied two adjustments of 5%, one to reflect the restricted market of an auction, and the other to reflect the "strong conditions" upon which the property was sold, to arrive at £684,446.

19.
His second approach was reliant upon the agent's views of the value of the property as a house in existing condition, outlined above, from which he valued the property at £850,000, less sale costs – which at the hearing he said would be 5.75%.

20.
His third approach adopted a residual method. The agents' valuations on a refurbished basis, ranged from £1.1 million to £1.25 million. Even adopting Mr Coffey's costs, this pointed to a residual value in the order of £880,000.

21.

Of the three, he preferred his second method, but said that the residual approach provided a useful check method.

22.
For the acquiring authority, Mr McGreal's valuation took the price achieved at auction of £580,000. Like Mr Winbourne, he adjusted by reference to an index (using the Land Registry index for Southwark), which increased it by 1.5%, to arrive at £588,750. He then added £300 to reflect the rent that had been paid under the building lease until the point at which the freehold interest was transferred. On this basis, his opinion of value at the vesting date was £589,050 but say £590,000. There appeared to be no reflection that the freehold interest was not transferred until December 2011, nor that by that stage the rent was scheduled to have risen to £20,000 per annum.

23.
In support of his valuation, Mr McGreal submitted a schedule of three comparable transactions again using the Land Registry index, to arrive at the equivalent value of his comparable transactions at the valuation date. This was subject to significant revision at the hearing.

24.
The principal issue between the valuation experts was whether the sale price achieved at auction provided a reliable guide to the open market value of the unencumbered freehold interest. Ms Cook submitted that the circumstances of the subject claim were similar to those in Stephenson and Stephenson v East Riding of Yorkshire Council [2013] UKUT 064(LC), in which the Tribunal (Mr P Francis FRICS) endorsed the openness of auctions as a method of disposal, and Anthony Keith Allen v Leicester City Council [2013] UKUT 016(LC) in which the Tribunal (Mr A J Trott FRICS) used the price achieved at auction as the first step in arriving at value. Both cases involved derelict residential properties being acquired compulsorily and then sold on by tender or auction with conditions relating to refurbishment.

25.
In Stephenson, had the purchaser not carried out an agreed schedule of works on the property to the council's satisfaction within 12 months of exchange of contracts, the contract would have been rescinded, the buyer would have lost his 10% deposit (£20,500), and would be liable for the council's fees up to £4,000. However, he could have walked away at that point.

26.
In Allen the consequences of the purchaser not refurbishing the property to the council's private sector empty homes standard, was not in issue. However in that case the council's estimate of the cost of those works was in the order of £35,000.

27.
For the successful bidder for the reference property, the stakes were rather higher, not least owing to the likely cost of refurbishment. In addition, the bidder was locked into the lease until he carried out refurbishment work. The tenant could not assign or underlet, and after a period of relatively nominal rent, was liable for a rent of £20,000 per annum, subject to upward-only indexation, for the remainder of the 125 year term, in respect of a property that could not be occupied until the refurbishment works had been completed.

28.
I endorse the Tribunal's previous decisions that, in principle, auctions provide a transparent and reliable guide to value at the date of the auction. The nuance in this case, however, is the nature of

the interest that was sold at auction. I reject Mr Winbourne's contention that the auction in some way restricted the market. There can be no doubt that £580,000 represented the open market value at July 2008 of a building lease in the form ultimately completed by the tenant. The question is to what extent, if any, the price achieved differed from that which would have been achieved for an unencumbered freehold sale.

29.
A sale of the property to be valued usually provides important evidence of value, but in my judgement the lease terms upon which the reference property was auctioned are sufficiently unusual to cause me doubt the auction price as reliable evidence of value of the unencumbered freehold interest without reference to further comparable evidence.

30.
Both valuers have relied, in part, on indexation - albeit using different indices. The Tribunal has previously expressed its reluctance to place weight upon indexation – see the Tribunal's (Mr A J Trott FRICS) comments in Joshua v London Borough of Southwark [2014] UKUT 0511 (LC) which referred to the unreported cases of Sachikenye and Others v London Borough of Greenwich CON/105/2006 and CON/18/2007. However in those cases the period of indexation was very long (1987 to 2006 in Sachikenye and 2002 to 2013 in Joshua). In this instance the time period over which the index is applied is much shorter. However the choice of index also makes a significant difference –Mr Winbourne's 7.28% compared with Mr McGreal's 1.5%.

31.
Indexation is useful in bringing the comparable evidence into line, and in that respect I prefer Mr McGreal's choice of the Land Registry Index for Southwark to Mr Winbourne's Nationwide index, as it is more likely to provide an accurate indication of the movement of prices in the borough. However, in my judgement, applying an indexation rate to the auction sale price simply arrives at an indication of what the long leasehold interest, on the terms entered into under the lease, might have been at a different date.

32.
I have placed very limited weight on the valuations that were arrived at using a residual method. Given the Tribunal's reluctance, stated in many past decisions, to place weight on the residual valuation method other than in exceptional circumstances, it is perhaps surprising that parties still regularly submit valuations that are based upon it.

33.
One of the key ingredients of the residual method in this case is the cost of refurbishment. Mr Coffey's estimate of refurbishment cost was in the order of £330,000, whether as a house or as flats (owing to different levels of VAT). Mr Holland's (whom I found to be a credible and impartial witness), without inspection, was in the order of £170,000 as a house, or £190,000 as flats. This divergence of view is indicative of the fragility of the approach.

34.
In any event, there are questions in my mind over Mr Coffey's valuation. His value as refurbished flats aggregated to £1,030,000, with costs of £330,000 yet his residual amount was only £550,000. There was no explanation of the extent to which the remaining £150,000 represented developer's profit.

35.

Mr McGreal's schedule attempted to support his adjusted auction price approach by reference to other transactions, which he had indexed to attempt to arrive at a value of those comparables at the vesting date of the reference property. These were 140 Kennington Park Road, sold for £707,500 in October 2007 (indexed to £721,367); 103 Kennington Park Road, sold for £795,500 in September 2008 (indexed to £767,375); and 143 Kennington Park Road, sold for £622,500 in December 2009 (indexed to £563,348).

36.
Under cross-examination, he accepted that he had miscalculated two elements of indexation, which had a significant effect on the indexed sale prices of two of his comparables. His indexed figure for 103 Kennington Park Road changed from £767,375 to £823,620. His indexed figure for 143 Kennington Park Road changed from £563,348 to £678,525. On this revised basis, his three comparables, which he said were to demonstrate that an indexed auction sale figure of £590,000 was in the right "ball park", stood at £721,367; £823,620; and £678,525. Perhaps unsurprisingly, Mr McGreal accepted that I should place less weight on his schedule as a result of these changes, although he still considered that it supported his view. In any event, even had the original schedule been correct, it was of limited assistance. There was no analytical attempt to reflect size or condition, as Mr Winbourne correctly observed.

37.
Mr McGreal agreed that the nub of his case was that if there were two identical properties, side by side, in the same state of disrepair, one offered freehold with vacant possession, and the other offered on the building lease described above, they would in normal market conditions each achieve a similar sale price. I reject that somewhat surprising opinion. From the evidence, I am satisfied that the price achieved for the leasehold interest on the terms stated was considerably less than could have been achieved for the freehold interest with vacant possession. In essence, I did not derive much assistance from Mr McGreal's approach to the valuation exercise.

38.
That leaves Mr Winbourne's three approaches. For the reasons outlined above, I have placed limited weight upon the "adjusted-auction price" method, or the residual method. In my judgement Mr Winbourne's second, and in fairness to him his preferred, method, provides the route to the most reliable assessment of value. This was based on the views of the various agents.

39.
The opinions of Messrs Bhoday, Griffiths and Gibson were untested, and the evidence comprised marketing or valuation reports to the claimant, rather than expert evidence to the Tribunal. However I consider that Mr Bhoday's and Mr Griffiths' reports represented the contemporaneous opinions of agents in the local market at that time – only three months before the valuation date. Mr Gibson provided details of some comparable sales, which were not challenged by the acquiring authority as being factually inaccurate.

40.
Mr Field did give evidence before me. Whilst his January 2008 marketing report to the claimant was not clear on the point, I accept Mr Field's oral evidence that he had inspected the reference property at that time. In an updating letter to Mr Winbourne of December 2014, he said that at the time he wrote to the claimant, he was the office manager of Winkworth Estate Agents, and had practised in the area since 1995. He said that at the time no comparable houses, in any condition, were selling for more than £800,000. However his higher parameter of £850,000 reflected the benefit of planning

permission for conversion to flats. On a refurbished basis he considered that the three individual flats would sell for something in the region of £1.1 million.

41.
In my judgement, Mr Field provided the most credible and reliable evidence. He has been an estate agent in Kennington for the last twenty years – if not quite "man and boy" then not far from it. He was able to provide the marketing advice letter that he had sent to the claimant in January 2008, a few months prior to the valuation date, having inspected the reference property. I have placed significant weight on the fact that, of the witnesses that gave oral evidence to me, Mr Field was the only one that had actually carried out an internal inspection of the reference property. I do not accept the criticism levelled at him that he is not a chartered surveyor – he is a practitioner in the market, and in my judgement was in the best position to express a view as to value. All of the other agents or valuers that reported to the claimant suggested values considerably in excess of that contended for by the acquiring authority. Whilst their evidence was untested, I do not discount it.

42.
Mr Winbourne, relying upon Mr Field's evidence, submitted that the open market value of the reference property at the vesting date was £850,000 less sale costs of 5.75%. Mr Field's original letter was in January 2008. I accept that, but have made a small adjustment for the two months between then and the valuation date, using Mr McGreal's index (January 2008: 414.88, March 2008 414.01), to arrive at a rounded value of £800,000 after costs. I therefore determine that the open market value of the subject property at the valuation date was £800,000.

43.
I should add for completeness that Mr Winbourne submitted evidence in the case of a previous settlement in the matter of H L Wolfe. He made no reference to it in his oral submissions and evidence, and I derived no assistance from it.

Basic Loss Payment

44.
On behalf of his client, Mr Winbourne claimed a basic loss payment of £75,000 – on the basis that this was 7.5% of the total (ie including disturbance) claim subject to a maximum of £75,000. Mr McGreal said that the basic loss amount was calculated as 7.5% of the market value of the land acquired – hence his basic loss amount of £44,250.

45.
In cross-examination, Mr Winbourne appeared to concede that the appropriate amount is 7.5% of the land acquired. In my judgement that is a correct reading of s33A of the Land Compensation Act 1973, as amended by the Planning and Compulsory Purchase Act 2004. Following my determination above, I allow a basic loss payment of £60,000, being 7.5% of £800,000.

Pre-reference Costs

46.
The statement of agreed facts indicated that the claimant claims pre-reference costs of £2,000 "plus VAT to be confirmed". Mr Winbourne said that an invoice of £1,500 plus VAT had been issued to his client as an interim amount, based upon an hourly rate of £250 plus VAT per hour.

47.

For the acquiring authority, Ms Cook submitted that no evidence had been produced in support of the claim for pre-reference costs, and no proof of any payment by the claimant. Mr Winbourne accepted in cross-examination that some of the elements that made up the original claim were the work of his client, rather than himself. He also accepted that there was nothing in the evidence regarding a fee agreement, or a copy of his invoice.

48.
I do not consider that sufficient evidence has been submitted in support of this element of claim, and I disallow it.

Re-investment costs

49.
The claimant claims £13,740.75 under s10A of the Land Compensation Act 1961, as the costs of acquiring 34 Riverside Court, Nine Elms Lane, London – in which he resided – from PTC.

50.
Section 10A provides that:

“Where, in consequence of any compulsory acquisition of land—

(a) the acquiring authority acquire an interest of a person who is not then in occupation of the land; and

(b) that person incurs incidental charges or expenses in acquiring, within the period of one year beginning with the date of entry, an interest in other land in the United Kingdom,

the charges or expenses shall be taken into account in assessing his compensation as they would be taken into account if he were in occupation of the land.”

51.
Mr Winbourne said that, owing to delays in the claimant receiving an advance payment, the only alternative property that was realistically available to him to purchase within the few weeks remaining of the one year period allowed by s10A was 34 Riverside Court. An independent valuation was carried out, and the claimant purchased 34 Riverside Court from PTC just within the 12 month period. The costs of acquiring that property, including stamp duty, are claimed.

52.
The claim comprises Stamp Duty Land Tax of £12,300; various land registry and search fees of £300.75, and solicitor’s fees of £1,140.00. They were outlined in a Financial Statement, apparently drafted by the claimant’s solicitors prior to completion.

53.
Mr McGreal accepted that 34 Riverside Court was purchased within 12 months of the date of entry of the subject property, and accordingly the claim was, in principle, payable. However he questioned whether 34 Riverside Court could really be regarded as a new replacement property since it was effectively already owned by the claimant. As the 80% shareholder, the claimant could have ensured that at least 80% of the money spent would come back into his own hands. At best, he should only be able to claim the costs of acquiring 20% of the interest.

54.

Ms Cook submitted that the claim was contrived, in that the claimant was effectively purchasing from himself, to take advantage of s10A. She stressed that s10A refers to the incurring of incidental charges or expenses in acquiring an alternative property in consequence of any compulsory acquisition of land. No evidence of causation was submitted from the claimant himself, and Mr Winbourne was not acting for him at the time. The burden of proof, which lay with the claimant, had not been discharged.

55.
In my judgement the claim should not fail as a result of the claimant having an interest in the company that owned 34 Riverside Court. The claimant and the company are two separate legal entities. To my mind the fact that there was a link is irrelevant. The fact that the claimant had a relatively short window, he said owing to the acquiring authority's dilatoriness in making an advance payment, is also of little consequence, even if it was the reason for the purchase.

56.
The real question is whether the claim falls within the circumstances envisaged by s10A. The claimant should, under the principle of equivalence, be no better nor worse off as a result of the CPO. He did own an investment property at Kennington Park Road. The CPO deprived him of it. I am satisfied that, as a result of the CPO, he purchased 34 Riverside Court as an alternative investment, albeit one that he lived in. Accordingly his purchase of it is, in my judgement, in consequence of the CPO. The items claimed for fall squarely within those envisaged by s10A, and I allow them.

Legal and Counsel's fees

57.
These comprise the fees of Mr Stephen Whale of counsel in the sum of £1,468.75; and those of Mr Barry Denyer-Green of counsel in the sum of £2,012.50, both inclusive of VAT.

58.
In cross examination, Mr Winbourne accepted that Mr Whale's fees related to advice in respect of the merits of any challenge to the CPO. Mr McGreal referred to my decision in Adrian Allen Walker v Blackburn with Darwen Borough Council [2014] UKUT 0421 (LC) in which I determined that similar costs did not fall to be reimbursed under Rule (6) of s.5 of the Land Compensation Act 1961, and submitted that Mr Whale's fees are similarly not recoverable. I agree with this and do not allow them.

59.
In respect of Mr Denyer-Green's fees, the claim was confused by Mr Winbourne submitting advice from Counsel in respect of the Jevric case. However Mr Denyer-Green's fee note, dated 1 May 2009, was in respect of the subject appeal, for his advice by telephone conference on 16 March 2009 and further advice on 8 April 2009. Mr Gibson, in a letter to the claimant dated 2 May 2009 referred to Mr Denyer-Green's advice.

60.
On balance, I accept that Mr Denyer-Green's fees were reasonably incurred in connection with the CPO, and I allow them.

61.
I therefore allow £2,012.50 for this element of the claim.

Valuation Fees

62.
These are agreed at £1,437.50

Determination

In summary, I determine that the compensation payable to the claimant is as follows:

Market Value: £800,000

Basic Loss: £60,000

Pre-reference fees: £0

Re-investment costs: £13,740.75

Legal & Counsel's fees: £2,012.50

Valuation Fees: £1,437.50

Total: £877,190.75

63. In addition the claimant is entitled to statutory interest, allowing for the advance payment.

64. This decision is final on all matters other than the costs of the reference. The parties may now make submissions on such costs and a letter giving directions for the exchange of submissions accompanies this decision.

Dated 24 April 2015

P D McCrea FRICS

Addendum on Costs

65. I have now received submissions on costs.

66. The acquiring authority made two offers to settle the claim, on 8th April 2014 and 14th July 2014, both of which were lower than my determination. Accordingly the acquiring authority accepts that it should meet the claimant's costs of the reference.

67. I therefore determine that the acquiring authority shall pay the costs of the claimant on the standard basis, such costs if not agreed to be subject to detailed assessment by the Registrar.

Dated: 12 May 2015

P D McCrea FRICS