Call v Brannan; Call v Kozak and another

[2015] EWHC 920 (Admin)

Administrative Court

Mr Justice Morgan

1 April 2015

Mark Westmoreland Smith (instructed by Solicitor’s Office, HM Revenue & Customs) for the Appellant in each case

Ms Brannan and Dr Kozak appeared in person

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE MORGAN:

*Introduction*

1. This judgment relates to two separate appeals against two decisions of the Valuation Tribunal for England (“the Tribunal”). The decisions concerned the appropriate valuation band, for the purposes of council tax, for the dwellings in question. The cases before the Tribunal were heard separately on the same day and the subsequent written decisions of the Tribunal also have the same date. The composition of the Tribunal was the same in each case. The evidence was not the same in the two cases. The connection between the two cases is that in both cases the Tribunal was asked to consider two dwellings (two flats) which were the subject of shared ownership leases and also to consider comparables, some of which were the subject of shared ownership leases and some of which were the subject of conventional long leases.

2. The Listing Officer has appealed to the High Court against both decisions and the two appeals have been listed and heard together. It is appropriate to deal with both appeals in a single judgment.

3. The appeals in these cases are brought under regulation 43 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 (“the Tribunal Regulations”) which confers a right of appeal against a decision of the Tribunal “on a question of law arising out of a decision or order given or made” by the Tribunal, in a case such as the present cases. On these appeals, the Listing Officer contends that the Tribunal went wrong in law when purporting to apply regulation 6 of the Council Tax (Situation and Valuation of Dwellings) Regulations 1992 (“the Valuation Regulations”) to the facts of these cases.

4. The Listing Officer has explained that these appeals have been brought to obtain clarity as to the meaning and effect of regulation 6 of the Valuation Regulations in a case where the subject property, or comparable properties, are the subject of shared ownership leases. As it happens, I consider that there is no real doubt as to the meaning and effect of the relevant part of regulation 6 of the Valuation Regulations. Any difficulty in these appeals arises not from the meaning and effect of regulation 6 but rather from the need to identify exactly what the Tribunal did in these two cases and, in particular, to determine whether the Tribunal acted in accordance with the correct legal position under regulation 6. For this reason, and in order to provide clarity on the matters which concern the Listing Officer I will first consider the meaning and effect of regulation 6 in the context of shared ownership leases and only when I have done that will I turn to the reasoning in the two decisions of the Tribunal.

*The basis of valuation*

5. The basis of valuation is laid down by the Valuation Regulations which were made under section 21(2) of the Local Government Finance Act 1992 (“the 1992 Act”). Regulation 6 of the Valuation Regulations provides, so far as material for present purposes:

“6.— Valuation of dwellings: general

(1) Subject to regulation 7, for the purposes of valuations under section 21 (valuations for purposes of lists) of the Act, the value of any dwelling shall be taken to be the amount which, on the assumptions mentioned in paragraphs (2) and (3) below, the dwelling might reasonably have been expected to realise if it had been sold in the open market by a willing vendor on 1st April 1991.

(2) The assumptions are-

(a) that the sale was with vacant possession;

(b) that the interest sold was the freehold or, in the case of a flat, a lease for 99 years at a nominal rent;

(c) that the dwelling was sold free from any rent charge or other incumbrance;

(d) except in a case to which paragraph (3) or (3A) applies, that the size, layout and character of the dwelling, and the physical state of its locality, were the same as at the relevant date;

(e) that the dwelling was in a state of reasonable repair;

(f) in the case of a dwelling the owner or occupier of which is entitled to use common parts, that those parts were in a like state of repair and the purchaser would be liable to contribute towards the cost of keeping them in such a state;

(g) in the case of a dwelling which contains fixtures to which this sub-paragraph applies, that the fixtures were not included in the dwelling;

(h) that the use of the dwelling would be permanently restricted to use as a private dwelling; and

(i) that the dwelling had no development value other than value attributable to permitted development.

(3) In the case of a valuation carried out for the purposes of an alteration of the valuation list resulting from a material reduction in the value of the dwelling, it shall be assumed that-

(a) the physical state of the locality of the dwelling was the same as on the date from which the alteration of the list would have effect; and

(b) the size, layout and character of the dwelling were the same-

(i) in the case of an alteration resulting from a change to the physical condition of the dwelling, as on the date from which the alteration of the list would have effect;

(ii) in a case where there has been a previous alteration of the valuation list in relation to the dwelling, as on the date from which that alteration had effect;

(iii) in a case where in relation to the dwelling, there has been a relevant transaction within the meaning of section 24, not resulting in an alteration of the valuation list, as on the date of that transaction;

(iv) in a case to which more than one of sub-paragraphs (i) to (iii) applies, as on whichever is the latest of the dates there mentioned; and

(v) in any other case, as on 1st April 1993.

(3A) In the case of a valuation carried out for the purposes of an alteration to correct an inaccuracy in a list which arose-

(a) in the course of making a previous alteration which resulted from a material reduction in the value of the dwelling, or

(b) since the date of such an alteration by reason of an alteration which was the next alteration to be made and was neither the result of a material reduction in the value of the dwelling nor the occurrence of any of the events described in paragraph (5B) below,

it shall be assumed that the physical state of the locality of the dwelling, and the size, layout and character of the dwelling are the same as on the dates which were applicable in respect of the previous alteration in accordance with paragraph (3) above.

…”

6. The part of regulation 6 which is of principal relevance for present purposes is the direction that the value of the subject dwelling is taken to be the amount which the dwelling might reasonably have been expected to realise if sold in the open market by a willing vendor on 1 April 1991 and, in the case of a flat, on the assumption that the interest sold is a lease for 99 years at a nominal rent. Apart from a direction as to the length of the term of the lease and the amount of the rent, nothing is said about the terms of the lease. It must have been considered that other terms in the lease (apart from duration and rent) would not have a significant effect on the amount to be realised.

*Shared ownership leases*

7. As will be seen, the Tribunal in both cases referred to “shared ownership schemes” but did not describe what it meant by a shared ownership scheme or what a shared ownership lease was. As I understand it, there was no specific evidence before the Tribunal as to what precisely was involved. As the appeal to the High Court is an appeal on a point of law, there was no evidence before me as to what a shared ownership lease is. However, in order to be able to say something which might be helpful in this context, I consider that I ought to put forward a basic description of what I consider to be a typical shared ownership lease.

8. For present purposes, I proceed on the basis that a shared ownership lease is a long lease, for a term of years similar in length to a conventional long lease in relation to a flat. It is not necessary to be more precise as to the length of such leases. The principal difference between a conventional long lease of a flat and a shared ownership lease of a flat lies in the sum paid at the outset by the lessee for his rights under the lease. Under a conventional long lease, the lessee pays the market value of the flat held on such terms. Under a shared ownership lease, the lessee pays a percentage only of the market value of the flat. I will discuss later in this judgment whether “the market value of the flat” in the last two sentences is to be taken to be the same amount or whether the market value of the flat might be different depending on whether the flat is let on a conventional long lease or let on a shared ownership lease.

9. It is open to the lessor and the lessee to agree between themselves on the percentage of market value which is paid by the lessee on the grant of the shared ownership lease. If, say, the lessee pays to the lessor, on the grant of the lease, a sum equal to 50% of the sum which they agree is the market value of the flat, then typically the lessee will pay to the lessor a rent which reflects the economic position whereby 50% of the flat is owned by the lessee (and in relation to which no rent need be paid) and 50% of the flat is not owned by the lessee (and in relation to which rent is to be paid).

10. It is also possible for a shared ownership lease to have what are called “staircasing” provisions. These provide for the possibility that the lessee will during the term pay further capital sums to the lessor and increase the initial percentage share of the lease which is regarded as being owned by the lessee. As that percentage share is increased, the share which the lessee is not regarded as owning, and in relation to which he is to pay rent, decreases with the result that the rent itself decreases.

11. Shared ownership leases have been, and are, the subject of legislation which gives some indication of their usual features. By way of examples, I refer to the (now repealed) provisions of schedule 8 of the Housing Act 1985, dealing with a secure tenant’s Right to Buy, to paragraphs 2 - 5 of schedule 9 to the Finance Act 2003, dealing with stamp duty land tax, and to the Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009.

*Matters arising in relation to shared ownership leases*

12. It is next useful to consider the type of points which might need attention in a case where the subject property or the comparable properties are the subject of shared ownership leases. I stress that, in so far as these points give rise to questions of valuation, I do not intend to comment on the correct valuation response to such questions. However, it is necessary to refer to these points in order to indicate the correct legal response to them.

13. There is nothing to prevent parties agreeing on a shared ownership lease of a house. However, I expect that most shared ownership leases are of flats. The subject properties in these two cases are flats. The issue is as to the meaning and effect of regulation 6 when it directs, in the case of a flat, that the interest being sold is a lease for 99 years at a nominal rent. In the remainder of this judgment, I will proceed on the basis that the property which is to be valued is a flat, rather than a house.

14. In some cases, a flat which is intended to be sold on a shared ownership lease, is built to a specification which is not as good as the specification of an otherwise comparable flat, which is intended to be sold on a conventional long lease. The submissions in these appeals gave examples of differences in the finishes of kitchens or of bathrooms and differences in relation to the specification of the floor or the windows. The specification and finishes of the subject flat (and of comparable flats) ought to present no legal difficulty. For the purposes of regulation 6, the valuer is to value the subject property so as to reflect its actual physical circumstances. Regulation 6 directs assumptions which differ from reality as regards physical circumstances in some respects (e.g. pursuant to sub-paragraphs (e), (f) and (g) of regulation 6(2)) but those matters do not affect the general point which is made that the valuation should reflect the actual physical circumstances of the subject property.

15. Just as one should reflect in the valuation the actual physical circumstances of the subject property one may need to take account of the actual physical circumstances of an allegedly comparable property, whether it is said to be superior to or inferior to the subject property. Of course, not every difference in physical terms makes a significant difference in terms of value.

16. It was suggested in the course of argument that there can be a difference in value depending on whether a flat is let on a conventional long lease or let on a shared ownership lease. It was suggested that if a flat could be let on a conventional long lease in the open market for a premium of £X, the same flat would be let on, say, a 50% shared ownership lease for a premium which was 50% of £Y, where X was greater than Y. Various reasons were put forward for this being the case. On this appeal, it is not possible for me to assess those matters but it is sufficient to note this suggested possibility. The legal question which could arise in such a case is whether, for the purposes of regulation 6 of the Valuation Regulations, the valuation should be on the basis that the subject property is to be let on a conventional long lease or on the basis that it is to be let on a shared ownership lease. I consider that the answer to that question is clear. Regulation 6(2)(b) directs the assumption that, in the case of a flat, the interest in the flat which is sold is a lease for 99 years at a nominal rent. A shared ownership lease is not a lease at a nominal rent. Accordingly the required assumption rules out the possibility that the flat is to be let on a shared ownership lease. It is irrelevant that in reality the flat has been let on a shared ownership lease.

17. The other matter referred to in the course of argument is that the value of a flat which is available for sale on a conventional long lease might be affected by the tenure of other flats in the same block. It was suggested that the value of the flat will be greater if all of the flats in the same block are let on conventional long leases as compared with a case where the other flats in the block, or a significant number of them, are the subject of shared ownership leases and/or short tenancies. Regulation 6 clearly directs that the subject property is to be sold on a conventional long lease but does not say anything as to the tenure of the other flats in the same block. Accordingly, the actual position in that respect is to be reflected in the valuation.

18. I can summarise the above discussion as follows:

(1) the physical condition of the subject flat is to be reflected in the valuation;

(2) the subject flat is assumed to be let on a conventional long lease at a nominal rent and not on a shared ownership lease;

(3) the tenure of other flats in the same block may be taken into account in so far as that affects the value of the subject flat.

19. The question then is whether the Tribunal in these cases adopted an approach which did not conform to the foregoing summary. The Listing Officer has submitted that the Tribunal departed from the above summary. In particular, it is submitted that the Tribunal valued the subject flats on the basis that they were to be let on shared ownership leases rather than conventional long leases. It is said that the Tribunal preferred to use comparables of flats which were the subject of shared ownership leases rather than conventional long leases. In order to answer this question, I need to consider each decision separately.

*The first case*

20. The property in the first case is Flat 34, Southstand Apartments, Highbury Stadium Square, London N5 1EY. Although the decision of the Tribunal does not spell out how the case came before the Tribunal, I understand that what happened was as follows. The flat is in a block which was built in around 2008. A shared ownership lease of the flat was granted in December 2013. At some point, the listing officer entered the flat in the valuation list. The listing officer listed the flat in valuation band E for the purposes of section 5 of the 1992 Act. The council tax payer did not agree that the flat should be placed in band E and made a proposal to alter the list to place the flat in the lower band D. As this proposal was not agreed, the question as to the appropriate band for the flat was the subject of an appeal to the Tribunal under the Council Tax (Alteration of Lists and Appeals) (England) Regulations 2009. In accordance with regulation 6 of the Valuation Regulations, although the block of flats was built in 2008, the valuation date is 1 April 1991. The appeal was heard on 2 October 2014 and the Tribunal gave a written decision dated 16 October 2014.

21. The decision of the Tribunal refers in a number of places to the fact that the subject flat is the subject of a shared ownership lease and to the fact that some of the comparables were also subject to such leases. The question which arises on this appeal is whether, as the appellant Listing Officer now contends, the Tribunal went wrong in law by assuming that the notional sale of an interest in the flat on 1 April 1991 involved the grant of a shared ownership lease rather than the grant of a conventional long lease at a nominal rent. The Listing Officer contends that if the Tribunal did go wrong in this way, then the valuation arrived at would have been by reference to £Y rather than the higher £X, to refer back to the example I gave in paragraph 16 above.

22. In order to determine whether the Listing Officer’s criticism of the decision is justified, the more important parts of that decision are as follows:

(1) the subject flat is described in paragraph 4 of the decision but there is no reference to the standard of specification or finishes;

(2) the basis of valuation is referred to in paragraph 8 by mentioning regulation 6 of the Valuation Regulations and stating that the relevant value “shall be taken to be the amount which the dwelling would, subject to certain assumptions, reasonably have been expected to realise if sold in the open market by a willing vendor on 1st April 1991”; this is accurate as far as it goes but it does not specifically mention the assumption, in the case of a flat, of the relevant interest being a lease for 99 years at a nominal rent;

(3) paragraphs 9 - 12 of the decision commented on the evidence in a way which does not bear on the present issue;

(4) paragraph 13 contains the statement: “The Panel was not convinced that a purpose built flat in private ownership located in the post code area N1 could be compared with a purpose built flat in shared ownership located in the post code area N5”; this statement suggests that the panel considered it should value a flat in shared ownership rather than a flat in private ownership;

(5) paragraph 14 refers to another flat in Southstand Apartments, namely, number 27, and refers to that flat being purchased through the shared ownership scheme and being in band D; paragraph 14 also referred to a decision of the Tribunal in relation to 27 Southstand Apartments where there was evidence of a difference between the values of flats which were described as “privately owned” and those subject to shared ownership leases; in that other decision, the Tribunal appeared to accept that the difference in value was attributable, primarily if not exclusively, to differences in size and in specification;

(6) paragraph 15 referred to the subject flat being “valued” in December 2013 at £400,000 under the shared ownership scheme while, in February 2014, two “similar flats” located in Northstand Apartments had been sold “privately” at £600,000;

(7) paragraph 16 referred to a schedule of shared ownership prices (i.e. before the percentage to be paid by the lessee was considered) for flats in Northstand Apartments and Southstand Apartments; this schedule was principally referred to for the purpose of comparing one bedroom and two bedroom flats;

(8) paragraph 17 appeared to give less weight to a suggested comparable (relied on by the Listing Officer) because it was not in shared ownership;

(9) in paragraph 18, the Tribunal stated that it found “that the Appellant successfully challenged the Respondent’s contention that the value of two bedroom, one bathroom flats purchased under the shared ownership scheme would have achieved [antecedent valuation date] values of above £88,000”; accordingly, the Tribunal valued the flat within band D.

23. On a fair reading of the decision, I consider that the Tribunal valued the flat on the basis that it would be, following the notional sale, the subject of a shared ownership lease. The repeated references to shared ownership leases both in relation to the subject flat and the suggested comparables do not appear to have been for the purpose of discussing the specification and the finishes of the various flats nor for the purpose of assessing the effect on the subject flat of the fact that other flats in the same block were held on a tenure different from a conventional long lease. It seems to be adequately clear that the Tribunal thought, wrongly, that it should assess the value of the subject flat on the basis that it would be subject to a shared ownership lease rather than subject to a conventional long lease at a nominal rent. Of course, the Tribunal did not make the further mistake of determining the figure which would be paid by the lessee under a shared ownership lease as a percentage (say 50% only) of the full value of £Y (using the letters from the example given in paragraph 16 above) but I find that it did make the mistake of assessing £Y rather than £X.

24. Accordingly, I find that the Tribunal was wrong in law in its approach to the valuation of the subject flat. It follows that I should set aside its determination and remit the matter to the Tribunal for it to made a fresh determination in accordance with regulation 6 of the 1992 Regulations as interpreted in this judgment. It goes without saying that I am not in any position to assess whether the subject flat should be placed in band D or band E as that is a matter for the Tribunal on its fresh determination.

*The second case*

25. The property in the second case is Flat 145, Xchange Point, 22 Market Road, London, N7 9GT. As with the first case, the decision of the Tribunal does not spell out how the case came before the Tribunal. As I understand it, the flat is in a block which was built in around 2014. A shared ownership lease of the flat was granted in February 2014. At some point, the listing officer entered the flat in the valuation list. The listing officer listed the flat in valuation band E for the purposes of section 5 of the 1992 Act. The council tax payer did not agree that the flat should be placed in band E and made a proposal to alter the list to place the flat in the lower band D. As this proposal was not agreed, the question as to the appropriate band for the flat was the subject of an appeal to the Tribunal under the Council Tax (Alteration of Lists and Appeals) (England) Regulations 2009. In accordance with regulation 6 of the Valuation Regulations, although the block of flats was built in around 2014, the valuation date is 1 April 1991. The appeal was heard on 2 October 2014 and the Tribunal gave a written decision dated 16 October 2014.

26. The Listing Officer makes the same criticism of the decision in this case as was made in the first case. In order to determine whether the Listing Officer’s criticism of the decision is justified, the more important parts of that decision are as follows:

(1) the subject flat is described in paragraph 4 but there is no reference to the standard of specification or finishes;

(2) the basis of valuation is referred to in paragraph 8 by mentioning regulation 6 of the 1992 Regulations and stating that the relevant value “shall be taken to be the amount which the dwelling would, subject to certain assumptions, reasonably have been expected to realise if sold in the open market by a willing vendor on 1st April 1991”; this is accurate as far as it goes but it does not specifically mention the assumption, in the case of a flat, of the relevant interest being a lease for 99 years at a nominal rent;

(3) paragraphs 9 - 14 of the decision commented on the evidence in a way which does not bear on the present issue;

(4) paragraph 15 of the decision appeared to give less weight to two suggested comparables (relied on by the Listing Officer) because they were not in shared ownership;

(5) paragraph 16 of the decision stated that the subject flat was within a mixed development of flats in private or shared ownership together with some properties in the ownership of a housing association;

(6) paragraph 17 of the decision stated: “the Panel preferred to consider the evidence of other flats in shared ownership;

(7) in paragraphs 18 and 19, the Tribunal referred to three suggested comparables where the flats were the subject of a shared ownership scheme; the flat referred to in paragraph 19 was then contrasted with the two flats referred to in paragraph 15 which appeared to have been discounted because they were not the subject of a shared ownership scheme;

(8) in paragraph 21, the Tribunal referred to the Listing Officer’s evidence as to three “privately owned flats” and then stated: “[f]rom this evidence, the Panel [there is a word missing which should probably be “considered”] that in today’s market, the privately owned flats in the locality were achieving much higher values than those in shared ownership”;

(9) in paragraph 22, having referred to the values for “privately owned flats”, the Tribunal then stated: “[h]aving determined that similar 2 bedroom flats in shared ownership would not be as valuable, the Panel found that the [antecedent valuation date] value of the appeal dwelling, had it existed in April 1991, would have been lower”;

(10) in paragraph 23, the Tribunal held that the evidence supported a tone of band D for dwellings in shared ownership;

(11) the Tribunal concluded that the flat should be placed in band D.

27. On a fair reading of the decision, I consider that the Tribunal valued the flat on the basis that it would be, following the notional sale, the subject of a shared ownership lease. I make the same comments about the decision in the second case as I made, in paragraph 23 above, about the decision in the first case.

28. Accordingly, I find that the Tribunal was wrong in law in its approach to the valuation of the subject flat. It follows that I should set aside its determination and remit the matter to the Tribunal for it to made a fresh determination in accordance with regulation 6 of the Regulations as interpreted in this judgment. As before, it goes without saying that I am not in any position to assess whether the subject flat should be placed in band D or band E as that is a matter for the Tribunal on its fresh determination.

*The overall result*

29. For the reasons given above, I will allow both appeals. I will set aside the earlier decisions of the Tribunal and remit both matters to the Tribunal for further determination.

30. At the conclusion of the hearing, counsel for the Listing Officer told me that if the appeals were allowed, the Listing Officer would not make any application for orders for costs against the Respondents. Accordingly, I will make no orders for costs.