

4240



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : LON/00AX/OLR/2015/1676 and
LON/00AX/OC9/2015/0432

Property : Flat 15D Claremont Gardens, Surbiton,
Surrey, KT6 4TL

Applicant : Ms Claire McCarthy

Representative : In Person

Respondent : Plainworth Limited

Representative : Russell-Cooke LLP

Type of Application : Lease extension and landlord's recoverable
costs

Tribunal Members : Robert Latham
Ian Holdsworth BSc MSc FRICS

**Date and venue of
Hearing** : 9 February 2016
10 Alfred Place, London WC1E 7LR

**Appearance for
Applicant** : In person

**Appearance for
Respondent** : Mr I J Aisles BSc FRICS

Date of Decision : 15 February 2016

DECISION

1. The Tribunal determines that the premium payable by the Applicants in respect of the extension of her lease at 15D Claremont Gardens, Surbiton, Surrey, KT6 4TL is £18,000. We have determined that the unimproved freehold value of the subject flat is £285,000 and a relativity rate of 90.96%. Our working calculation is set out in the Appendix.

(2) The Tribunal finds that the following costs sought by the landlord are payable: (i) Legal Costs of £600 + VAT and disbursements (limited to £50); and (ii) Valuation Costs of £550 + VAT.

Introduction

1. This is an application made pursuant to Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”) for a determination of the premium to be paid and the terms for a new lease.

Background

2. The background facts are as follows:
 - (i) The flat: 15D Claremont Gardens, Surbiton, Surrey, KT6 4TL;
 - (ii) Date of Tenant’s Notice: 11 May 2015;
 - (iii) Valuation Date: 11 May 2015;
 - (iv) Date of Application to the Tribunal: 16 October 2015;
 - (v) Tenant’s leasehold interest:
 - Date of Lease: 30 September 1982;
 - Term of Lease: 99 years from 30 September 1982;
 - Ground Rent: £50pa increasing to £100 after 33 years; increasing to £200 on 29 September 2048.
 - (vi) Landlord: Plainworth Limited
 - (vii) Tenant: Ms Claire McCarthy
 - (viii) Tenant’s Proposed Premium: £14,187;
 - (ix) Landlord’s Proposed Premium: £23,620.

The Hearing

3. The hearing of this application took place on 9 February 2016. The Applicant, tenant, appeared in person. Ms McCarthy did not adduce any evidence from an expert. The Respondent, landlord, was represented by Mr I J Ailes, BSc, FRICS. Both Ms McCarthy and Mr Ailes gave evidence.
4. We were referred to two previous decisions in which Tribunals have made determinations in respect of this property:
 - (i) LON/001X/OLR/2013/0534 (11 September 2013 at 10.5 of the Bundle). The Tribunal determined the premium for an extended lease to be £14,187. After detailed evidence from Ms McCarthy, the parties agreed the extended leasehold value of the property to be £215,000. The Applicant did not proceed with this application expeditiously and it was deemed withdrawn.
 - (ii) BIR/00AX/OC9/2014/0005 (27 August 2014 at 14.2). The Tribunal assessed the costs to which the landlord was entitled under Section 60 of

the Act. Surveyor's fees were assessed at £705 and legal costs at £800. Both sums were net of VAT.

5. The parties have agreed the following:
 - (i) The subject flat is a one bedroom flat at the rear of a semi-detached house built in about 1900 and since converted into six units.
 - (ii) Unexpired Term: 66.39 years;
 - (iii) Capitalisation Rate: 6.5%;
 - (iv) Deferment Rate: 5%;
 - (v) Uplift from long leasehold to virtual freehold: 1%.
6. There are three issues which we are required to determine:
 - (i) The unimproved long leasehold value of the subject flat. The Applicant contends for £275,000; the Respondent for £300,000.
 - (ii) The rate to be adopted for relativity. The Applicant contends for 90.3%; the Respondent for 87.83%.
 - (iii) The costs to which the Respondent landlord is entitled pursuant to Section 60 of the Act. This Tribunal would not normally assess costs at this stage given that the grant of the new lease has not been executed. The future conveyancing costs to which the landlord is entitled, have yet to be incurred. Both parties ask us to make this determination and we are satisfied that it would be proportionate to do so.

Issue 1: The Unimproved Long Leasehold of the Subject Flat

7. The subject flat is a one bedroom flat at the rear of a semi-detached house built in about 1900 and since converted into six units. The flat looks out onto a garden, beyond which is Surbiton Hill Road. This is a relatively busy road. The front of the property looks out onto Claremont Gardens which is a quiet residential street. The flat is largely situated in a rear construction which lacks the character of the main part of the property. The front of the property has the original sash windows. There are single glazed casements at the rear. The ceilings may also be somewhat lower.
8. There is a dispute as to the size of the flat. The Applicant contends that the GIA is 505 sq ft based on the sales particulars prepared when she purchased the flat in 2006 (at 11.14). Mr Ailes measured the flat and computed it to be 529 sq ft. He provided his sketch drawing from his inspection which he carried out on 10 January 2013. The size of the main living areas corresponded with those in the sales particulars. We are satisfied that Mr Ailes' measurements are likely to be the more reliable.
9. The best evidence of a comparable would be a sale of a flat in the subject property at or around the valuation date. In this case, the best evidence is

Flat C which was sold for £305,500 on 9 January 2015. At that date, the unexpired term was 88 years.

10. An issue has arisen as to the size of Flat C. We have two particulars of sale, the particulars of sale in 2011 record the size as 520 sq m (at 11.17); and those in 2015 as 500 sq m (Tab 2 to Mr Ailes' Report). Ms McCarthy is the only person which has been into both flats. She stated that Flat C gave the feel of being the larger. We are able to compare the floor plans in the lease plan (at 7.2) and the sale particulars. We are satisfied that both flats are of a similar size and that no adjustment should be made for size.
11. Mr Ailes agreed that Flat C is the more desirable and would make a reduction of 7% to compute the value of the subject flat to reflect the lack of original features (sash windows and higher ceilings); and the greater noise from Surbiton Hill Road. He does not make any adjustment for either of the following: (i) Flat C has an unexpired term of only 88 years; or (ii) that the sale was some 4 months earlier. Both of these factors would have increased the value of the comparable. Mr Ailes suggests that we should use the Land Registry price indices for Kingston-upon-Thames to adjust for time. This would have increased the value of the comparable by 3%,
12. The Tribunal accepts Mr Ailes' evidence on this issue. We apply a 7% reduction to £305,500 and reach a figure of £284,115, which we round up to £285,000. Because we make no adjustment for size, this figure is higher than that proposed by Mr Ailes.
13. There are three other sources of evidence which we use as a check:
 - (i) Flat C was sold for £220,000 in April 2011 when the unexpired term was some 4 years longer. An adjustment of 37.5% needs to be made for time which gives a value £302,500. This confirms the consistency of the price that was paid for this property in January 2015.
 - (ii) The Applicant asks us to take 4 Surbiton Hill Road as the best comparable. This is a two bedroom first floor flat which was sold for £215,000 in December 2012. It is similar in size to the subject flat and has an unexpired term of 100 years. The subject property also looks out onto Surbiton Hill Road. The Applicant made no adjustment for time. Using the Land Register price indices, an adjustment of 32% would be required which would give a value of £283,800. This is consistent with our valuation, albeit that it is a less reliable comparable having a second bedroom, being in a somewhat different location and being a sale some 30 months before the valuation date.
 - (iii) At the Tribunal hearing on 11 September 2013, the parties agreed an extended lease value of £215,000. This agreement was reached after

detailed evidence from Ms McCarthy on the value of comparable properties. A 26.2% adjustment would need to be made for time which would give a value of £271,333. This is slightly lower than our figure. This is a less reliable comparable in that the price was not determined by either the market or a tribunal. We know not the quality of the evidence upon which the agreement was premised. Further, this agreement was reached some 21 months before our valuation date.

Issue 2: Relativity

Relativity

14. The following guidance on relativity is provided by the learned editors of “Hague on Leasehold Enfranchisement” (6th Ed, 2014) at [33.17]:

“The assessment of the value of the tenant’s existing lease is often problematic. Sales of flats in the locality on leases of a comparable unexpired term will invariably be “tainted” by being sold with 1993 Act rights, which have to be disregarded. If there is evidence of sales of flats in the locality on very long leases, valuers can assess the value of the flat on its existing lease by taking a proportion of the long lease value. The relative value of a lease when compared to one held on a very long term varies with the unexpired term. This “relativity” has not proved easy to establish. A number of organisations publish tables or graphs of relativity, representing their views, which views may be based on market transactions, settlements, expert opinion and/or tribunal decisions. This topic was recently considered in detail by the Lands Tribunal (in *Nailrite Ltd v Cadogan* [2009] 2 E.G.L.R. 151). It held that relativity is best established by doing the best one can with such transaction evidence as may be available and graphs of relativity (see *Nailrite Ltd* [2009] 2 EGLR 151 at [228] applying the guidance of the Lands Tribunal in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] R.V.R. 39).”

15. In a footnote, the Editors note:

“In October 2009, the RICS published its report on Graphs of Relativity, in response to the suggestion in *Arrowdell*. The Leasehold Relativities Group, chaired by Jonathan Gaunt QC and comprising eight surveyors, considered all the published graphs but were unable to agree upon definitive graphs to be used as evidence by tribunals as had been proposed by the Lands Tribunal. The report reproduced all the published graphs together with details of the data that lies behind each. In *Re Coolrace Ltd* [2012] UKUT 69 (LC); [2012] 2 E.G.L.R. 69, the Lands Chamber adopted the Lease graph of relativities, based on Tribunal decisions across the country, in preference to a local West Midlands graph, which had been applied by the LVT. A plea for a further attempt to agree a graph was made. In *Trustees of Sloane Stanley Estate v Carey-Morgan* [2011] UKUT 415 (LC); [2012] R.V.R. 92, the Lands Chamber assessed the value of short leases with 4.74 years unexpired by capitalising the unimproved rental value to the end of the term. This was appropriate for such a short lease, instead of using graphs of relativity.

In *Earl Cadogan v Cadogan Square Ltd* [2011] UKUT 154 (LC); [2011] 3 E.G.L.R. 127, the Upper Tribunal was faced with the difficulty of conflicting evidence as between evidence of adjusted transactions (producing a relativity of 53 to 56%) and evidence from graphs (producing a relativity of 38%). An analysis of the evidence from the Savills 2002 enfranchisable graph as against the Gerald Eve non-enfranchisable graph suggested that the adjustment of 10% made by the nominee purchaser to adjust the transactional evidence to reflect 1993 Act rights was too low and the Tribunal decided that a deduction of 25% was appropriate. The unexpired terms in that case were 17.75 years.”

The Submissions of the Parties

16. The Applicant asks us to have regard to the five graphs for Greater London and England which are published in the RICS Research dated October 2009. From the graphs, Ms McCarthy extracts a figure of 90.3%. To his credit, and having regard to his duty to the Tribunal, Mr Ailes stated that a more accurate figure of 90.96% could be extracted from the tables. In [9.3] of his report, Mr Ailes sets out criticisms of these tables which have been well rehearsed before this Tribunal in previous cases. However, he does not seek to suggest that any of the five are more or less relevant than the others.
17. The Applicant also asked us to have the regard to the LVT decision in *St Matthews Court* (LON/00AP/ORL/2012/0987) in which relativity was assessed at 92.16% as an average of the five graphs.
18. Mr Ailes rather seeks to persuade the Tribunal to adopt a figure of 87.83% extracted from his own Graph of Relativity as the best evidence which is at Appendix 5 of his report. He compiled this Graph in 2011 focussing on South and West London where his practice is based. It follows an analysis of 84 FFT decisions (including 12 absent landlord cases); 35 agreements and 5 sales in south and west London. This is the segment of Greater London between the A4 and A23. He argues that this evidence should be preferred because is geographically focussed; based on a combination of evidence and builds upon the RICS Research. It has been in the professional domain since 2011 and has been widely accepted by other valuers. Indeed, he states that since 2011, he has settled every case on the basis of his Graph. He considers it to be neutral between landlord and tenant, albeit that in this case it favours the landlord over the normal basket of RICS graphs outside Prime Central London.
19. Alternatively, Mr Ailes asks the Tribunal to follow the approach adopted by the Upper Tribunal (“UT”) in *Xue v Cherry* [2015] UKUT 651 (LC). This was a decision of HHJ Huskinson who was sitting with AQ.J.Trott FRICS. The basis of the decision on relativity is set out at [66] – [67]:

“66. To help overcome the problem of the use of settlements in the construction of Nesbitt & Co’s graph we have also used the South East

Leasehold graph which was rejected by the F-tT because it primarily comprised data from Bromley and Beckenham. But the South East Leasehold graph has the advantage of being based on transactions of flats with an even balance between acting for tenants and landlords.

67. The average value of the Nesbitt & Co, Andrew Pridell Associates and South East Leasehold graphs for an unexpired term of 72.167 years is 93.25%. The relativity derived from, the Cluttons PCL graph is 87.70%. Given that the appeal property is outside prime central London we consider it reasonable to produce a weighted average of these figures in the ratio of two (outer London) to one (PCL). This gives a weighted average relativity of 91.4% which is the same figure as that determined by the F-tT.”

20. Mr Aisles asks this Tribunal to adopt a similar approach. He suggests that an average should be taken of one Prime Central London Graph, Charles Boston, and two Greater London and England (Nesbitt & Co and South East Leasehold). He computes this figure to be 88.52%.
21. A number of recent decisions of the UTs have highlighted the problems that FTTs have to confront. As HHJ Huskinson noted in *Latifa Kosta v F.A.A.Carnwath and Others (47 Phillimore Gardens)* [2014] UKUT 0319 (LC), (at [143]):

“We would conclude by saying that this Tribunal, its predecessor, the LVTs and indeed the profession at large has, unsuccessfully thus far, been seeking to find a settled position on relativities for leasehold properties”.

22. We ask ourselves whether in *Xue v Cherry*, HHJ J Huskinson has now provided the required practical guidance as to how FTTs should approach relativity. We regret that he has not. This case rather turns on the evidence adduced before the UT involving a flat in Shepherd’s Bush. The FTT had erred in failing to give adequate reasons for its decision. The UT therefore conducted an appeal by way of rehearing. The tenant had produced data for sales of leases with a range of unexpired terms, but no evidence of freehold values. Consequently, the necessary comparison between leasehold and freehold values could not be made. The tenant had also relied on a case in which a LVT had determined that the relativity of a lease with an unexpired term of 67.91 years was 94%. The UT considered that the mere percentage figure for relativity adopted in one particular case was of no evidential value, relying on *Arrowdell*. Nor was the tenant’s theoretical model reliable. Therefore, it was necessary for the UT to consider surveyors’ graphs of relativity. The average value of the graphs of relativity for an unexpired term of 72.167 years in outer London was 93.25%, while the relativity derived from a prime central London graph was 87.70%. Given that the appeal property was close to but outside prime central London, the UT concluded that it was reasonable to produce a weighted average of those figures in the ratio of two outer London to one prime central London. That gave a weighted

average relativity of 91.4%, which was the same figure as that determined by the FTT.

23. We must therefore determine what evidence to accept in this case. We regret that we are unable to accept Mr Aisles' Graph of Relativity as the best evidence. He was unable to point to any case in which his data has been accepted by a FTT in preference to the RICS graphs. His report gave no adequate details of the source material upon which his Graph is based. Neither was he able to explain how his raw data was transposed into his graph. It seems that he has achieved an even curve by relying on data from Nesbitt & Co and Charles Boston. His graph has not been peer reviewed. Mr Aisles stated that he had submitted his graph to the RICS in 2011. They have not published it or given it any approval. We were interested in the approach that he has adopted. But, before we would be willing to accept it in preference to the RICS graphs, we would need to be satisfied of the robustness of both the data and the methodology. The Applicant is a litigant in person. The first that she saw of this data was on 28 January when she received Mr Aisles' report. The Tribunal asked a number of questions to better understand the approach that Mr Aisles has adopted. These questions merely raised greater uncertainty in our minds as to the robustness of his approach. It is not the role of a Tribunal to validate a Graph, the basis of which is so uncertain.
24. We therefore fall back on the RICS graphs. In *Xue v Cherry*, the UT was dealing with a property in Shepherd's Bush which was considered to be close to, albeit not in, Prime Central London (see [64]). It was therefore appropriate for the UT to give some weighting to a Prime Central London graph.
25. We are dealing with a property in Surbiton. We prefer to have regard to the five RICS graphs for Greater London and England which we consider to be more appropriate for this location. We therefore adopt a figure of 90.96% for relativity.

Issue 3 - Costs

26. Section 60 of the Act provides, insofar as relevant for the purposes of this decision:

“(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely—

(a) any investigation reasonably undertaken of the tenant's right to a new lease;

(b) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56;

(c) the grant of a new lease under that section;

but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

(2) For the purposes of subsection (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

.....

(5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a leasehold valuation tribunal incurs in connection with the proceedings.

(6) In this section "relevant person", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter... or any third party to the tenant's lease."

The Principles

27. *Drax v Lawn Court Freehold Limited* [2010] UKUT 81 (LC) dealt with costs under section 33 of the 1993 Act, rather than section 60, but the principles established in *Drax* have a direct bearing on costs under section 60. In summary, costs must be reasonable and have been incurred in pursuance of the section 42 notice in connection with the purposes listed in sub-paragraphs 60(1)(a) to (c). The nominee purchaser is also protected by section 60(2), which limits recoverable costs to those that the lessor would be prepared to pay if he were using his own money rather than being paid by the nominee purchaser.
28. This does, in effect, introduce what was described in *Drax* as a "(limited) test of proportionality of a kind associated with the assessment of costs on the standard basis". It is also the case, as confirmed by *Drax*, that the lessor should only receive his costs where it has explained and substantiated them. It does not follow that this is an assessment of costs on the standard basis. That is not what section 60 says, nor is *Drax* an authority for that proposition. Section 60 is self-contained.

Our Determination on Costs

29. Legal Costs: The Respondent claims £430 for the period 19 May 2015 to 4 February 2016 and assesses the further conveyancing costs to be £255. A

total of £685 is claimed (+ VAT) which the Respondent is willing to reduce to £600 + VAT and disbursements. It seems that no disbursements have been paid to date and no estimate has been made of the likely cost of future disbursements. We must assess costs on the basis of the materials before us. We therefore limit any disbursements to £50.

30. The Respondent has provided a detailed summary of the work carried out up to 4 February 2016. The Applicant does not dispute the hourly rates of £255 and £200 hours. She points out that the time required to investigate the right to the new lease would be limited given that the same matters had been considered in 2012. She suggests that an excessive amount of time has been spent on some items, for example 18 minutes claimed for taking initial instructions and preparing an attendance note. Other items fall outside the scope of Section 60(1), such as 6 minutes claimed for perusing a letter from the FTT with Directions. This seems to be the only item that falls within this category. We have regard to the overall size of the bill which seems to be proportionate. We accept that one or two minor items may have been wrongly included. We therefore reduce the sum claimed from £430 to £400.
31. £255, or one hours work, is claimed for the outstanding conveyancing work. Ms McCarthy suggests that this could be done in 20 minutes, or 30 minutes at the most. We disagree. However, we are willing to reduce the sum to £200. The effect of this is to reduce the total sum claimed from £685 to £600 + VAT. This is the reduction which the Respondent accepts.
32. Valuation Costs: The Respondent claims £685 + VAT. Mr Ailes estimates the time engaged on the report to be 2.5 hours. This is charged at £275 per hour. Mr Ailes did not need to re-inspect the property as he had valued it in 2012. Ms McCarthy suggested that it was not necessary for Mr Ailes to prepare a written report; he was merely required to provide a valuation. We do not accept this. The landlord would require some brief explanation as to how the valuation had been reached. This is also required by the rules of the RICS and for professional insurance purposes. However, we consider that the required valuation report could reasonably have been completed in two hours and reduce the sum claimed to £550 + VAT.

Conclusion

33. We make the following determinations on the three issues in dispute:
 - (i) The unimproved freehold value of the subject flat is £285,000;
 - (ii) Relativity is to be taken as 90.96%;

(iii) We determine the premium payable to be £18,000. Our working calculation is set out in the Appendix.

(iv) The following costs sought by the landlord are payable: (i) Legal Costs of £600 + VAT and disbursements (limited to £50); and (ii) Valuation Costs of £550 + VAT.

Robert Latham
Tribunal Judge

15 February 2016

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix: Premium Calculation

Property: 15D Claremont Gardens KT64TL
Reference No: MR/LON00AX/OLR/2015/1676

Lease and Valuation Data

Lease Term: 30/09/1982
Lease Expiry date: 29/09/2081
Unexpired term as at valuation date: 66.39 years
Date of Valuation: 11/05/2015

Rent receivable by landlord:
Payable from valuation date for 0.39 years £ 50
Payable from valuation date for 33 years £ 100
Payable from valuation date for 33 years £ 200

Values
Extended Long lease value £ 285,000
Notional Freehold £ 287,879
LHVP £ 261,855 Relativity 90.98%

Capitalisation rate (%) 6.50
Deferral rate (%) 5.00

Value of Freeholders present interest

Term 1
Ground rent payable £ 50
YP @ 0.39 years @ 6.5% 0.37325 £ 18.66

Term 2
Ground rent payable £ 100
YP @ 33 years @ 6.5% 13.45909
Deferred @ 0.39 years @ 6.5% 0.97574 £ 1,313.26

Term 3
Ground rent payable £ 200
YP @ 33 years @ 6.5% 13.45909
Deferred @ 33.39 years @ 6.5% 0.12212 £ 328.73

Reversion
Freehold in vacant possession £ 287,879
Deferred @ 66.39 years @ 5% 0.03920 £ 11,283.71

Total £ 12,944

Less
Freehold value after leasehold extension £ 287,879
PV of £1 in 156.39 years at 5% 0.0004855 £ 140

Freeholders interest value £ 12,805

Calculation of Marriage Value

Value of flat with long lease £ 285,000
Landlord's proposed interest £ 140 £ 285,140
Less
Value of Leaseholders existing interest £ 261,855
Value of Freeholders current interest £ 12,944 £ 274,799

Marriage value Total £ 10,341

Division of Marriage Value equally between

Freeholder £ 5,170
Leaseholder £ 5,170

Price payable to Freeholder

Value of freeholders current interest £ 12,805
Share of marriage value £ 5,170
Total £ 17,975
Say £ 18,000