FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AT/OLR/2020/0924
HMCTS	:	V: CVPREMOTE
Property	:	Flat 5, Harrier Court, Siddeley Drive, Hounslow, TW4 7DL
Applicant	:	***Sreemal*** Perera and Rita Perera
Representative	:	In person
Respondent	:	Notting Hill Home Ownership Limited
Representative	:	John Crosbie FRICS
Type of Application	:	Enfranchisement
Tribunal Members	:	Judge Robert Latham Duncan Jagger MRICS
Date and venue of Hearing	:	28 April 2021 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	30 April 2021
Date of Revised Decision:		2 June 2021

REVISED DECISION

By an e-mail, dated 7 May 2021, the Applicants have pointed out some typographical errors relating the spelling of the first name of the First Applicant and the omission of their titles. We have corrected these errors pursuant to Rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The corrections are highlighted in ***bold italics type*** in the revised decision. The Tribunal have not attached a valuation to its decision as we have confirmed the valuation made by Mr Crosbie. The Tribunal does not put the title of the parties on its front sheet

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Decision

The Tribunal determines that the premium payable by the Applicants in respect of the extension of their lease at Flat 5, Harrier Court, Siddeley Drive, Hounslow, TW4 7DL is £19,510.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents for the hearing.

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: 5 Harrier Court, Siddeley Drive, Hounslow, Middlesex, TW4 7DL;
(ii) The subject flat has two bedrooms, a living room, kitchen and bathroom.
(iii) Date of Tenant's Notice: 10 March 2020;
(iv) Date of Application to the Tribunal: 2 September 2020;
(v) Tenant's leasehold interest:

- Date of Lease: 18 February 1998;
- Term of Lease: 99 years from 12 February 1998;
- Ground Rent: Peppercorn.

The Hearing

3. The Applicants, ***Mr Sreemal*** Perera and ***Dr*** Rita Perera, appeared in person. They produced their own valuation report, albeit that seems to be based on a valuation report which they had obtained from South East Leasehold prior to the issue of their application.

4. The Respondent, landlord, was represented by Mr John Crosbie, FRICS. He provided a report dated, 31 March 2021.

5. The parties agreed the following:

(i) Valuation Date: 10 March 2020;
(ii) Deferment Rate: 5%;
(iii) The long leasehold value of the subject flat is £300,000;
(iv) There should be a 1% uplift to the long lease value to determine the FVPV; and
(v) the terms of the new lease.

6. The parties differed as to the unexpired term, the Applicants contending that it is 76.99 years and the Respondent that it is 76.93 years. This difference is insignificant to the premium payable. This is an arithmetical calculation. The Tribunal computes that the unexpired term is 26 days short of 77 years, so that it is 76.9288 years, which Mr Crosbie has round up to 76.93 years.

7. The single issue in dispute is the figure to be adopted for relativity. The Applicants contend for a figure of 95% to be derived from the five 2009 RICS Greater London and England graphs. The Respondent contends for 88.45% to be derived from the Gerald Eve – 2016 and the Savills Unenfranchiseable graphs. The difference in the premium is substantial, the Applicants contending for £9,600, whilst the Respondent contend for £19,510.

Preliminary issues

8. The Applicants were indignant that the Respondent had failed to agree a premium and that thy had been obliged to incur the cost of issuing their application. They argued that the Respondent should be required to waive the "without privilege" protection" which applied to these negotiations. The Tribunal encourages parties to seek to settle any dispute without the need to issue an application. In order to achieve this, any such negotiations are treated as privileged, up to the stage that a settlement is reached. No party should be inhibited from making concessions as part of the negotiations, for fear that it might later be held against them. In this case the parties have been unable to agree the premium. In the absence of such agreement, the Tribunal must determine the premium on the basis of the evidence that has been adduced.

9. Dr Perera complained that the Respondent had sent a copy of Mr Crosbie's report directly to the tribunal, without copying it to the Applicants. The Directions provided for the parties to exchange their expert reports at least three weeks before the hearing. The Respondent sent the Applicants a copy of the report on 7 April. It was not copied to the tribunal. The Applicants only included an incomplete version of Mr Crosbie's report in the Bundle of Documents. The Tribunal requested that the Respondent's Solicitor provide a complete copy on the morning of the hearing.

Relativity - The Unimproved Existing Lease Value

10. Relativity is the value of the current lease of a dwelling divided by the freehold value of the same dwelling with vacant possession ("FHVP"), expressed as a percentage. The legislation requires the current lease value to disregard any value arising from the benefit of Act rights to extend the lease or to enfranchise. The longer the term of the current lease, the higher is relativity to the notional freehold: conversely the shorter the lease, the lower the relativity. The reason that relativity is so important, is that it is used to calculate the marriage value. Marriage value is the additional value an interest gains when the interests of the landlord and the leaseholder are coalesced or "married" into a single interest. Marriage value is payable where the current lease term (or terms) is less than 80 years. So, for example, if a leaseholder of a flat seeking a new lease under the 1993 Act and its existing term is of 70-years, marriage value is payable

11. The assessment of relativity has proved problematic. Even where there is evidence of sales of flats or houses in the locality reflecting both the FHVP and the short lease value, these will be tainted by being sold with 1993 Act rights. A number of further adjustments will need to be made to any basket of comparables to reflect the date of the sale, condition and locality. In *Arrowdale Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39, the Lands Tribunal noted the difficulty in reaching satisfactory conclusions on relativity in the light of the inadequacy of the available evidence as a result of which tribunal decisions were "varied and inconsistent". The Tribunal suggested that Graphs of Relativity could provide most useful guidance. Whilst relativities might vary between one type of property and another and from area to area, the predominant factor was the length of the term. The Tribunal recommended that the RICS might produce standard graphs, distinguishing between mortgage-dependent markets, and those not so dependent, on the basis of a survey of assessments made by experienced valuers addressing themselves to the hypothetical no-Act world.

12. 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 in valuations. These graphs are based on the expert opinion of the authors having regard to market transactions, settlements and/or tribunal decisions. In October 2009, RICS published their research. Different experts produced six sets of graphs for Prime Central London and five for Greater London and England. In *Nailrite Ltd v Cadogan* 2 [2009] EGLR 151, the Lands Tribunal concluded that relativity is best established by having regard to such transaction evidence as may be available and the RICS Graphs of Relativity.

13. The Upper Tribunal reviewed the assessment of relativity and gave extensive guidance in *The Trustees of the Sloane Stanley Estate v Mundy*

[2016] UKUT 223 (LC); [2016] L&TR 32, a decision subsequently upheld by the Court of Appeal reported at [2018] EWCA Civ 35; [2018] 1 P&CR 18. The three cases considered by Mr Justice Morgan and Mr Andrew Trott FRICS, involved Prime Central London ("PCL"). At the end of an extensive judgment, the UT gave guidance for future cases at [163] – [170]. We are assisted by the following passages:

> "168. Fourthly, in some (perhaps many) cases in the future, it is likely that there will have been a market transaction at around the valuation date in respect of the existing lease with rights under the 1993 Act. If the price paid for that market transaction was a true reflection of market value for that interest, then that market value will be a very useful starting point for determining the value of the existing lease without rights under the 1993 Act. It will normally be possible for an experienced valuer to express an independent opinion as to the amount of the deduction which would be appropriate to reflect the statutory hypothesis that the existing lease does not have rights under the 1993 Act.
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> 169. Fifthly, the more difficult cases in the future are likely to be those where there was no reliable market transaction concerning the existing lease with rights under the 1993 Act, at or near the valuation date. In such a case, valuers will need to consider adopting more than one approach. One possible method is to use the most reliable graph for determining the relative value of an existing lease without rights under the 1993 Act. Another method is to use a graph to determine the relative value of an existing lease with rights under the 1993 Act and then to make a deduction from that value to reflect the absence of those rights on the statutory hypothesis. When those methods throw up different figures, it will then be for the good sense of the experienced valuer to determine what figure best reflects the strengths and weaknesses of the two methods which have been used.
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> 170. In the past, valuers have used the Savills 2002 enfranchisable graph when analysing comparables, involving leases with rights under the 1993 Act, for the purpose of arriving at the FHVP value. The authority of the Savills 2002 enfranchisable graph has been to some extent eroded by the emerging Savills 2015 enfranchisable graph. The 2015 graph is still subject to some possible technical criticisms but it is likely to be beneficial if those technical criticisms could be addressed and removed. If there were to emerge a version of that graph, not subject to those technical criticisms, based on transactions rather than opinions, it may be that valuers would adopt that revised graph in place of the Savills 2002 graph. If that were to happen, valuers and the tribunals might have more confidence in a method of valuation for an existing lease without rights under the 1993 Act which proceeds by two stages. Stage 1 would be to adjust the FHVP for the property to

the value of the existing lease with rights under the 1993 Act by using the new graph which has emerged. Stage 2 would be to make a deduction from that value to reflect the absence of rights under the 1993 Act on the statutory hypothesis."

14. The Upper Tribunal (Martin Rodger QC, Deputy Chamber President and Mrs Diane Martin MRICS FAAV) has most recently given guidance in *Deritend Investments (Birkdale) Limited v Ms Kornelia Trekonova* [2020] UKUT 164 (LC) ("*Deritend")*, a case involving a flat in Sutton Surrey. The Tribunal concluded:

> "56. In our judgment the FTT was wrong as a matter of valuation practice to rely on an average of the RICS 2009 graphs and to ignore the more recent graphs for PCL, and the appeal is therefore allowed. We set aside the FTT's determination.
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> 57. In view of the relatively modest sum in issue we will reach our own conclusion on the basis of the material before the FTT, rather than remitting the issue to it for further consideration.
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> 58. The guidance given by this Tribunal endorses the use of the Savills and Gerald Eve 2016 graphs where there is no transaction evidence, notwithstanding that the subject of the valuation is outside PCL. If persuasive evidence suggests that the resulting relativity is not appropriate for a particular location a tribunal would be entitled to adjust the figure suggested by the PCL graphs. The RICS 2009 graphs do not provide that persuasive evidence and, if it is to be found, it is likely to comprise evidence of transactions; if those are available it may be unnecessary to make use of graphs at all. In any event, no such persuasive evidence was presented to the FTT.
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> 59. We are satisfied that the outcome justified by the evidence provided to the FTT was a determination based on the average of the two 2016 PCL graphs. For the reasons we have already explained we do not endorse Mr Sharp's averaging of the resulting relativity figure by reference to the Beckett and Kay 2017 graph."

The Upper Tribunal determined relativity at 75.4% for a lease with an unexpired term of 55.95 years.

The Submissions of the Parties

15. The parties agreed that there was no evidence of any relevant transactions of short leases with an unexpired term of 76.9 years. In Appendix 5 of his report, Mr Crosbie provided details of all relevant graphs for an unexpired term of 76.92 years.

16. The Applicants rely on the five 2009 RICS Greater London and England graphs: (i) Beckett & Kay: 95.26%; South East Leasehold: 95.77%; Nesbitt & Co: 94.46%; Austin Gray: 96.8%; and Andrew Priddell: 96.27%. The average is 95.71%, but the Applicants were willing to take a lower figure of 95%.

17. Mr Crosbie rather took the average of the more recent: Gerald Eve – 2016: 88.93% and Savills Unenfranchiseable: 87.97%, the average being 88.45%. This was the approach favoured by Andrew Trott FRICS in *Trustees of Barry and Peggy High Foundation v Claudio Zucconi and Another* [2019] UKUT 242 in respect of a property in Whetstone, London N10. Mr Crosbie rehearsed the well-known criticisms of the 2009 graphs,

18. In the current case, there is a marked difference of 7% between the two sets of graphs, resulting in a difference in the premium of some £10,000 (£19,510 as opposed to £9,600). The Applicants asked whether there is any science to the concept of relativity. They questioned why it should now be considered that PCL graphs are relevant to Outer London when this was not considered appropriate in the past. They noted that in 2009, the graphs for PCL (including the Gerald Eve graph) were 5% lower in PCL than in Greater London and England. Why is there not a similar difference in 2021?

19. Mr Crosbie suggested that purchasers were now better informed ("more savvy"), that there had been changes in the financial climate and that lenders were now more reluctant to lend in respect of shorter lease terms. However, these explanations do not adequately explain the impact on relativities where the unexpired term is as long as 76.9 years.

20. The Applicants also referred the Tribunal to the recent report of the Law Commission "Leasehold home ownership: buying your freehold or extending your lease" (July 2020). The government has stated its intention to simplify the process and reduce the cost of seeking lease extensions.

The Tribunal's Determination

21. It is the role of the Upper Tribunal to give First-tier tribunals guidance on the principles of valuation which we should apply. It is a matter for parliament to change the law if it considers that the costs paid by tenants for lese extensions are too high. Mr Perera suggested that the Respondent was unreasonable in refusing to agree a premium in line with the 2099 RICS Graphs. We disagree. The Respondent, as a social landlord, has a responsibility to ensure that the premium for any lease extension is assessed properly in accordance with law.

22. The parties are agreed that there is no relevant evidence of local transactions involving short leases with unexpired terms in the region of

76.9 years. We must therefore have regard to the most reliable graphs. The methodology used in all the 2009 RICS Greater London and England graphs has been criticised by many commentators. The Deputy President summarised these criticisms in *Deritend* at [40] to [41]:

> "A major criticism of the RICS 2009 graphs is that they overstate relativity in post financial crisis markets. …….. The data in the RICS 2009 graphs is not only historic, but suffers variously from limitations of scale and source. The 2009 Beckett and Kay graph used opinion data, with no defined geographical area other than non-PCL. The South East Leasehold graph used analysis from 1997 of transaction data for flats in Bromley and Beckenham. The Nesbitt and Co graph used evidence of some 250 settlements and LVT decisions, for predominantly flats, between 1995 and 2008 in Greater London and a proportion of provincial towns. The Austin Gray graph used a mix of pre and post 1993 transactions, settlements and LVT decisions for some 250 flats, predominantly in Brighton and Hove. The Andrew Pridell Associates graph used a mix of opinion, settlements, transactions and LVT and Tribunal decisions for 500 flats in the south east and suburban London"

23. Of the five 2009 RICS Greater London and England graphs, only the Beckett and Kay mortgage dependent graph has been updated to take account of the very different circumstances which existed after 2009. The 2017 version of the Beckett and Kay graph places relativity at 55 years at 67%, compared with 79% in the 2009 graph. Where the authors themselves no longer consider their original graph reflects current relativity it is not possible to justify its continued use. The Beckett and Kay 2017 graph is said to be based on less than 100 sales, decisions and settlements and that the line is hand drawn. This graph therefore suffers equally from limitations of scale and source. The Upper Tribunal concluded that this graph should not be used.

24. We are sympathetic to the Applicants' argument that the concept of relativity has become ever more refined and artificial. However, in the light of the recent guidance provided by the Upper Tribunal, we accept that Mr Crosbie has adopted the correct approach. On the basis of the evidence adduced by the parties, we have no option but to adopt his figure of relativity of 88.45%. Mr Crosbie's methodology in computing the premium has not been challenged. We have checked his calculation and confirm his computation of the premium at £19,510.

<u>Tribunal Fees</u>

25. At the end of the hearing, the Applicants made an application for a refund of the tribunal fees of £300 that he had paid in respect of the application pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Having heard the

submissions from the parties and taking into account the determinations above, the Tribunal does not such an order. The Applicants have failed in their application.

26. The Applicants have suggested that the Respondent has acted unreasonably in their conduct of their application. There is a high threshold that any party must meet in establishing such a claim under Rule 13(1)(b) of the Tribunal Rules, see *Willow Court v Alexander* [2016] UKUT 290 (LC). If the Applicants wish to pursue such an application, they must make an application to the tribunal. However, we have seen no evidence of conduct by the Respondent which would justify such an order.

Judge Robert Latham
30 April 2021
(Revised on 2 June 2021)

RIGHTS OF APPEAL

(The time limits for any appeal run from the date of the Original Decision)

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 s 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.