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Case No: CO/2313/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 10th July 2013

Before:

MR JUSTICE OUSELEY

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Between:

THE QUEEN **(on the application of)** **WELLCOME TRUST LIMITED**	**Claimant**
- and –	
UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)	**Defendant**

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Mr T Gaunt QC (instructed by CMS Cameron McKenna) appeared on behalf of the **Claimant**
Mr P Rainey QC (instructed by Pemberton Greenish) appeared on behalf of the **Defendant**

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JUDGMENT (As Approved by the Court)

MR JUSTICE OUSELEY:

1. This has been an interesting excursion into the hypothetical world, of valuation of the freeholds of properties to be acquired by tenants or nominee purchases from landlords and in particular the world of the deferment rate. I am grateful to Mr Gaunt and to Mr Rainey for their respective submissions.

2. The case arises as a challenge to the refusal of permission to appeal by the Upper Tier Lands Chamber from the Leasehold Valuation Tribunal. This is a challenge to which the principles set out in R (on the application of) Cart v Upper Tribunal [2012] 1 AC 663, [2011] UKSC 28 apply. Not merely does it have to be shown that the refusal was arguably erroneous in law with material prospects of success, it also has to be shown that an appeal satisfies the second appeal criteria either that there is an important point of principle or practice in the case or that there is some other compelling reason. The arguments had focused on the first limb of the second appeals test.

3. At the heart of this case lies the effect of a guideline decision of the Lands Tribunal in Earl Cadogan v Sportelli [2007] 1 Estates Gazette Law Reports 153.

4. The President of the Lands Tribunal, Mr George Bartlett QC, presided over this hearing which was designed to provide guidance in relation to a number of valuation issues in relation to the acquisition of freeholds by tenants under the Leasehold Reform Housing and Urban Development Act 1993 (as amended). This decision was upheld as a guideline decision in the Court of Appeal [2007] EWCA Civ 104, [2008] 1 WLR 2142.

5. The Lands Tribunal considered three components of the deferment rate, namely, the risk free rate, the real growth rate and the risk premium. The cases involved four properties in what surveyors call "Prime Central London" (PCL). Between paragraphs 68 to 79 the Tribunal considered those three components, coming to the conclusion that the risk premium should be 4.5, in combination with a risk free rate of 2.25 and a real growth rate of 2 per cent, producing what it described as a generic deferment rate of 4.75 per cent. There is a close relationship between the real growth rate and the risk premium, an increase in the one being counterbalanced by a decrease in the other and vice versa.

6. Having considered the evidence on a generic basis the Tribunal then turned to consider five specific factors. It introduced its consideration of those factors in paragraph 80. It said:

> "So far we have concentrated on identifying what we have called a 'generic deferment rate', one that is applicable to long term residential property reversions in general. We must now consider whether such a generic rate needs to be adjusted in any particular case for specific factors. It is to be borne in mind that the valuer's evidence has been directed at establishing the appropriate rate for the particular reversions that fall to be valued in the present appeals and that these are flats and houses in the PCL area."

7. The Tribunal also said that their later answers on specific factors had been of more general application.

8. The particular specific factor of relevance here is location, because the issue which underlies this particular challenge is whether the deferment rate for PCL properties is wrong. The Tribunal clearly invited the witnesses to give oral evidence on this point because these topics were not covered in their proofs of evidence. It says in paragraph 86 that the Tribunal invited the witnesses to say whether they thought that the deferment rate would vary according to the location of the property. Differing views were expressed. Three of the financial experts took the view that there would be no such difference. It was specifically said by a Professor Lazear that the differences in growth rates leading to markedly different valuations of property would over time be corrected by a convergence effect. He thought this would apply most clearly within an urban area or region but would apply more generally across regions. Mr Cullam, a valuer, also said that locational considerations did not affect the application of the deferment rate to the appeal properties, which as I have said were all in Prime Central London. He noted that there were regional variations within national figures relating to house price growth. Others took the view that that there could be differences within different locations in London as well as in other parts of the country compared to Central London. There was a general expression of a view that location would make a difference by two other surveyors who were unable to provide any statistical justification. The

Tribunal concluded at paragraph 88:

> "Although we accept the view of the valuers that the deferment rate could require adjustment for location, on the evidence before us we see no justification for making any justification to reflect regional or local considerations either generally or in relation to the particular cases before us. The evidence of a financial expert suggests that no adjustment to the real growth rate is appropriate given the long-term basis of the deferment rate. Locational differences of a local nature are, in the absence of clear evidence suggesting otherwise, to be assumed to be properly reflected in the freehold vacant possession value."

9. The latter reference to "locational differences" is a difference to far more local differences than are material to this case.

10. Having reached its view in relation to specific factors, the Lands Tribunal considered the significance of its decision on all topics including the deferment rate, its components and other specific factors, and particularly explained the significance of its decision for the method by which the deferment rate was arrived at. This issue about method, rather than the rate itself, had been a matter of controversy and inconsistency for some time and it appears was the primary reason why guidance was to be given in this case.

11. In paragraphs 114 to 122 the Tribunal addressed its function in giving guidance. It observed at paragraph 114 that it was the function of the Tribunal as a specialist Tribunal to promote consistent practice in the application of the law in the decisions it made within its particular and specialist jurisdiction. It supported that by citing Court of Appeal decisions supporting precisely such an approach, including the warning that unexplained consistency could amount to an error of law.

12. At paragraph 117 the Tribunal said that a function of the Tribunal was to make decisions on points of law and what may be called "principles of practice" to which regard should be had by the First-Tier Tribunals and by practitioners dealing with claims in any of the Tribunal's original or appellate jurisdictions. Such principles were not to be confined to valuation methodology but could extend to matters of quantification if the considerations underlying the quantification were of general application. The Tribunal then gave a number of instances where that might arise.

13. The Tribunal continued at paragraph 120, applying those comments to the deferment rate. It said:

> "The function of this Tribunal in determining a deferment rate is to be treated as a guideline in other enfranchisement cases is similar to the court's determination of a discount rate for the purpose of reaching the present value of the loss of future earnings in personal injury cases."

14. It set out the appropriate passage from the relevant House of Lords authority. The same considerations applied in relation to the promotion of predictability in the deferment rate. The Tribunal continued:

> "It is obviously undesirable and it would be impossible for the sort of financial and valuation evidence that we have heard to be called and considered in every enfranchisement case. It is in our judgment unnecessary that it should be because LVTs and this Tribunal are entitled to rely upon their own expertise guided by this decision. The prospect of varying conclusions on the deferment rate in different cases, reached on evidence that was less comprehensive than that before us, can therefore be avoided by LVTs adopting the practice of following the guidance of this decision unless compelling evidence to the contrary is adduced. This is justified because, as we have explained above, the deferment rate is unlikely to vary according to factors particular to the individual case. Some factors including in particular the prospect of long-term growth will not vary from case to case while other factors such as location and obsolescence will already be reflected in the vacant possession value."

15. He then referred to hope value.

> "[121] … The case for adopting a single deferment rate (with a standard adjustment for flats) for all reversions in excess of 20 years is thus in our view strong indeed. Indeed we think that statutory prescription could well be appropriate and could usefully give a greater certainty to the market than a decision of the Tribunal setting a guideline is capable of doing.

> [122] It is a necessary part of the concept of guideline applicable to future cases that the deferment rate should be stable although clearly its potential for change needs to be recognised."

16. The Tribunal then referred to evidence that it had received about the extent to which the rate could vary over time, concluding that the rate could be treated as stable over time unless a trend movement in the risk free rate could be identified or the long term prospects of growth in residential property could be established to have changed, or the attraction of investment in residential reversions could be shown to have increased or diminished. In other words, the Tribunal was clearly saying that it had reached a view on what the deferment rate should be, which would be stable over time, to be applied by the LVTs and the Lands Tribunal and which should be applied absent the sort of evidence of change to which I have referred, or particular features outside those reflected in the vacant possession value of the property or in the deferment rate itself and which were shown to justify a departure.

17. The Court of Appeal dismissed appeals on points of law including a challenge to the decision on the deferment rate itself. The Court of Appeal, in the judgment of Carnwath LJ, with which Sir Peter Gibson and Ward LJ agreed, also dealt with the guidance effect of the decision. Mr Jordan, for the appellant, had challenged the decision of the Tribunal as being an unprecedented step which went beyond its function. The Court of Appeal disagreed. It is important in the context of this case to note that it divided its disagreement with those submissions into two categories. The first is headed "within the PCL". For these purposes the Court of Appeal quoted extensively from the decision of the Tribunal and referred to a comparable example in the former Immigration Appeal Tribunal and its successor of giving guidance on conditions in particular the countries, what are called country guidance appeals. Carnwath LJ then concluded in paragraphs 98 and 99:

> "98.Although the present context is very different, there is an equal public interest in avoiding wasted expenditure, and the risk of inconsistent results, in successive LVT appeals on an issue such as that of deferment rates. The Tribunal could hardly have done more to ensure that the issues were fully ventilated and exhaustively examined. They had already been discussed in detail in Arbib. I have already referred to the steps taken by the Tribunal to bring together the present group of cases. Furthermore it is difficult to envisage a better qualified panel of experts for the purpose than those called in this case, or of specialist counsel on both sides of the argument.
> 99.I agree with the Tribunal that an important part of its role is to promote consistent practice in land valuation matters. It was entirely appropriate for the Tribunal to offer guidance as they have done in this case, and, unless and until the legislature intervenes, to expect leasehold valuation tribunals to follow generally that lead. Mr Munro invited us to go further, and to consider the status of Lands Tribunal decisions respectively on issues of law, valuation and fact. However, I bear in mind that under the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the Lands Tribunal is likely in the near future to be subsumed into that of the new Upper Tribunal, which will be a "superior court of record" under the Act. It will be principally for the new tribunal to lay down guidelines as to the precedent effect of its decisions for different purposes."

18. He then turned to the second section under this head which was entitled "outside of the PCL". He noted that the cases before the Tribunals had related entirely to properties in PCL and said that the evidence had been directed principally to the market within that area. It seemed that the Tribunal of its own motion had invited the experts to say whether the deferment rate would vary with location. It referred to the variety of views that I have already referred to. It then commented that the Tribunal's later comments on the significance of their guidance did not distinguish in terms between the PCL area and the other parts of London or the country, but the Court of Appeal held that there had to be an implicit distinction. It said so for this reason:

> "The issues within the PCL were fully examined in a fully contested dispute between directly interested parties. The same cannot be said in respect of other areas. The judgement that the same deferment rate should apply outside the PCL area was made, and could only be made, on the evidence then available. That must leave the way open to the possibility of further evidence being called by other parties in other cases directly concerned with different areas. The deferment rate adopted by the Tribunal will no doubt be the starting point; and their conclusions on the methodology, including the limitations of market evidence, are likely to remain valid."

19. It will be a matter for the parties and Tribunals to consider other topics that might be raised.

20. I should add that the Wellcome Trust Limited, the present claimants, were not parties to that decision or appeal and gave no evidence and made no submissions to it.

21. As the decision of the Court of Appeal anticipated there has indeed been further consideration of the deferment rate outside PCL in Zuckerman v Trustees of the Crowthorne Estate [2009] UKT 235 (LC) . Importantly, in Earl Cadogan v Erkman [2009] 13 EG 144 , the Lands Tribunal, presided over by Mr Bartlett again, held that while adducing evidence that the deferment rate determined in Sportelli was wrong, was not an abuse of process, nonetheless such evidence should not be admitted as it would undermine the concept of guidance if a party could insist upon adducing evidence to show that the guidance was incorrect. Such evidence ought in general to be excluded because of the public interest in avoiding wasted expenditure and the risk of inconsistent results, but such evidence could be admitted in the exercise of the Tribunal's discretion if it was satisfied that exceptional circumstances justified such a course. That is spelt out in paragraph 20 of the decision. This referred to the relevant powers of the LVT and the Tribunal to exclude irrelevant evidence.

22. This instant case came on at the LVT in September 2011. The only point at issue was the deferment rate. The LVT described it in this way when setting out the argument in summary that the claimant wished to advance. It wished to contend that the Sportelli decision was incorrect, first, because the Upper Tribunal had failed to take account of the greater growth in prices for the PCL than in other parts of the country, and second, it had overstated the applicable risk premium. The lower deferment rate would increase the amount of the purchase price in this case by the order of some £800,000. That is what this instant case turns on. This is clearly more at stake for the claimant which is a large estate owner than there is for nominal purchaser, the interested party, who is only concerned with this particular building.

23. Before the LVT each party had financial and valuation reports. Professor MacGregor and Mr Roberts supported the contention on behalf of the claimant and Professor Numellbauar and Mr Ewing presented reports on behalf of the purchaser.

24. The LVT first had to decide if it would admit the reports of Professor MacGregor and Mr Roberts. If not, there was no need for the reply reports and the deferment rate would be clear. The aspects of the deferment rate at issue were, as I have said, the RGR and the RP rather than the method.

25. The LVT records the case advanced by the landlord as being that the decision in Sportelli, as it affected PCL properties, was wrong. It was not arguing that there had been a change in circumstances since the decision, or that the valuation date had justified the departure. It was, as has been emphasised here by Mr Rainey QC, on behalf of the interested party, a straightforward attack on the deferment rate on the basis that it was wrong at the time of Sportelli and remained wrong. The claimant's contention was that, although the Sportelli decision, following the Court of Appeal decision, was not so firm a guideline in relation to areas outside PCL as it was within PCL, Sportelli was in fact accurate for the area outside the PCL but incorrect for the PCL.

26. The LVT noted that the claimant had not been a party to the Sportelli decision and could not therefore have deployed such evidence as it would have wished to. It set out the contention that the evidence was important new evidence, in particular because of the growth rates now available from surveyors Knight Frank, going back to 1976. Taken with the other material Professor MacGregor contended that the Sportelli approach to convergence was wrong in which he had the support of Mr Roberts, who said that that approach to convergence was not generally supported by surveyors.

27. **The LVT rejected these arguments having - and I emphasise this - read the four reports. It said that the expert professors had radically different approaches to the issues: one (Professor MacGregor) being of the opinion that the available data suggested that the Upper Tribunal had reached the wrong conclusion in** Sportelli **, Professor Numellbauar that it had been correct in its decision. They had reached v ery different conclusions from the same data. At paragraph 27 the LVT said this:**

> "We do not consider that the fact that the landlord has obtained an expert opinion that the UT

reached an incorrect decision is a ground for allowing a challenge to the Sportelli decision. Nor do we consider that this is one of those exceptional cases where such evidence should be admitted."

28. The LVT applied Erkman, coming to the decision that the proposed evidence was inadmissible, because it suggested the Sportelli decision was wrong, unless there were exceptional circumstances. Such exceptional circumstances had not been defined by the Upper Tribunal but the LVT rejected the landlord's submission that such exceptional circumstances existed in this case. There was nothing exceptional in the fact that the landlord had not been a party to nor had provided evidence to the Tribunal in Sportelli. It said this as paragraph 35:

> "If we were to allow the evidence put forward on behalf of the landlord this would be contradicted by evidence adduced on behalf of the nominee purchaser. We do not think it would be appropriate to allow this in light of the extensive evidence and legal submissions heard by UT in Sportelli. Although Professor MacGregor suggests that the Knight Frank data was not considered by the UT on the growth rate for PCL properties our reading of the UT decision is that it did consider extensive evidence on growth rates. It is not surprising that the valuers who gave evidence on behalf of the landlord sought much lower deferment rates than the 5 per cent conclusion reached by the UT."

29. The LVT then turned to what it saw as a number of potential practical difficulties. These are particularly, in my judgment, to be read in light of the fact that the LVT was a first instance Tribunal bound by decisions of the Upper Tribunal. There would be difficulties in the light of the fact that a recent Upper Tribunal decision in Erkman, the follow on from the one to which I have just referred, would have to be re-examined, shortly after it had decided that the Sportelli rate should apply or, in certain circumstances, (for leases less than 10 years unexpired), should apply as a starting point. Erkman illustrates the receipt of evidence to suggest that a particular aspect of the deferment rate required further evidence, this affected different unexpired lease terms in relation to where the valuation date fell within the property cycle. It illustrates that a requirement for exceptional circumstances can be met.

30. There was then also a practical difficulty in the LVT's eyes because it would mean that the Tribunal would be holding that the non PCL deferment rate was correct, and the PCL deferment rate incorrect, which was the opposite of what the Court of Appeal had upheld.

31. It then rejected the application for permission to appeal to the Upper Tribunal. That application however was renewed to the Upper Tribunal. I note in passing that the challenge to the LVT decision did not its face contend that the application of an exceptional circumstances test was wrong in law, although Mr Bartlett himself had used in Sportelli a language of compelling justification for the admission of evidence tending to show the deferment rate was wrong.

32. Mr Bartlett refused permission to appeal in these terms:

> "The LVT was correct to refuse to admit evidence designed to show that the 5% deferment rate determined in *Sportelli* was wrong. The reasons given by the LVT for its refusal are full and cogent, and I agree with them. The function of *Sportelli* as a guideline decision was clearly stated by the Court of Appeal in that case. It is necessarily a consequence of that function that the guidance applies both to the parties of the appeals that were the subject-matter of that case and to all those who were not parties to those appeals but are concerned with enfranchisement of leases with over 20 years to run in the PCL area. The Wellcome Trust is in no different a position in this respect from other major estates that were not party to *Sportelli* or indeed from smaller landlords or the multitude of tenants who are affected by the guidelines.
>
> It is also a consequence of the function of *Sportelli* as a guideline decision that the issues that it determined should not be revisited in subsequent cases unless there is compelling justification for doing so. Inevitably experts who did not give evidence in that case (as well as those that did) will have different views about the correctness of the decision, and the data on which the decision was based, and additional data, will be capable of analysis to support such differing views. It does not appear that Professor MacGregor's report, interesting and impressive though it is, is founded on data that differs substantially from that addressed in *Sportelli*, nor is there anything to suggest that his analysis is one that has come, since that decision, to command significant support among experts in the field. There are in my view no compelling reasons for admitting it."

33. The matter then comes on here following an unsuccessful foray to the Court of Appeal to see whether or not it was in fact the Court of Appeal which had jurisdiction to deal with an appeal or challenge to a decision refusing permission to appeal to the Upper Tribunal. It is a matter for this court applying Cart principles. I ordered the application to be dealt with at an oral hearing to avoid any debate over whether, if refused, there would be no entitlement to oral renewal under the new provisions dealing with Cart cases, even though the application had in fact been lodged many months ago.

34. I was concerned at the lack of identification of what the Cart point truly was and in particular what the important point of principle or practice was which should engage the court's attention. I queried whether the correctness of the approach to the admission of fresh evidence tending to show that Sportelli or other guideline cases were wrong only in exceptional circumstances was that point.

35. Before this court Mr Gaunt QC, for the claimant, has sought to address those points. He contends that the LVT erred in excluding evidence capable of altering the guidelines. That error of law was capable of having a material effect on the outcome. The important point of principle was whether the role of Sportelli as a guideline decision meant that evidence could not be adduced to challenge the correctness of its guidance except in exceptional circumstances. Putting it another way: should the Tribunal admit such evidence rather than exclude it, if the Tribunal was satisfied that the evidence was significant or substantial new evidence which, if accepted, would require modification of the guidance rather than excluding it at the outset?

36. Mr Gaunt accepted that the Tribunal was entitled to issue decisions as guideline decisions, but he said it was wrong to give effect to that by excluding otherwise relevant and admissible evidence. The evidence could be appraised for its significance as sufficient potentially to set aside a guideline decision, but it was wrong to apply an exceptional circumstances test to that decision. The test should be one of a compelling justification.

37. The evidence of Professor MacGregor and Mr Roberts was powerful evidence, he submitted, that the real growth rate was higher in PCL than outside. This was new and substantial evidence not before the Tribunal in Sportelli, which was capable, if accepted, of leading to a change in the guidance. The evidence before the Tribunal in Sportelli had not been adequately focused on the PCL and was generic. Against that background, the evidence put forward on the landlord's behalf was clearly compelling. The country guidance cases permitted departure from the guidance in such circumstances.

38. Mr Rainey, for the landlord, submitted that, in reality, there was no significant new data, that when the data considered in Sportelli was examined, the Knight Frank data series was similar to that of Savills, although it went back further in time. There were other time series data on real growth rates, both from building society and government sources which included at least in part a regional break down.

39. The interpretation of that data was simply that of one person and it was disputed. Mr Rainey showed me the extent of the cogency of Mr Roberts' evidence that surveyors did not agree that property values outside PCL would converge towards PCL values over time. There was, he said, no error of law or point of principle. Each Tribunal was entitled to devise a method for giving effect to its guideline cases and there had to be a high hurdle in order to overturn a guideline. Mr Bartlett QC was well placed to judge whether or not the evidence of Professor MacGregor and Mr Roberts was sufficient, not merely because he was President of the Lands Tribunal but he had presided over the Tribunal which decided the Sportelli case.

40. In my judgment, there can be no dispute but that that the Upper Tier is entitled to have guideline cases. So much, if it had been in doubt before, was made clear by the Court of Appeal in Sportelli. There are reasons relating to consistency, both as an aspect of justice and for the avoidance of errors of law through inconsistency. There is a strong public interest in the avoidance of the waste of money, hearing the same point or minor variants time after time.

41. The mere fact that a party to subsequent proceedings is affected by a guideline decision to which it was not party cannot mean the guideline is inapplicable, and Mr Gaunt did not pursue such a suggestion. It follows that the mere fact that a party may wish to adduce evidence or make submissions not previously made cannot of itself require the guideline to be reassessed. What is necessary in challenging a guideline

is not just to present some piece of new evidence but to present such new evidence in the context of all the evidence previously considered, so as to show that the appropriate test for admitting further evidence involving a reconsideration of the guideline is satisfied.

42. Each Tribunal faces their own circumstances which derive from the differing nature of their specialist jurisdictions. Each is best placed to decide how to give effect to the common purpose of guideline decisions. The means whereby it does so may include setting a threshold for the admission of further evidence, or setting a threshold which the totality of the evidence has to meet before the guideline is reconsidered. There is no reason, in principle, why evidence should not be excluded, provided it had been read and understood, if it is not capable of altering the deferment rate or being persuasive in the light of all the evidence which has previously been considered.

43. In my judgment it was plainly lawful for the LVT to exclude evidence as irrelevant if, having examined and understood that evidence, it concludes that, if admitted, it could not persuade the Tribunal to alter the deferment rate. The same would apply to the Upper Tribunal. But it is also plainly lawful for a Tribunal to admit that evidence but to require it, before altering a guideline, to be sufficiently strong that it persuades the Tribunal to take so significant a step. The choice of test depends upon the Tribunal, the topic and strength of evidence. What the Tribunal did here is, in my judgment, plainly lawful. Plainly whichever course one adopts there has to be a threshold for deciding what is the basis upon which that evidence is going to be admitted. It is perfectly proper to express the test as requiring a compelling justification to be shown for admitting it or if admitted, for altering a guideline in reliance upon it.

44. A more relaxed test may be appropriate if the question is whether there is some specific feature in a particular case which is said make to the guideline inapplicable, although otherwise correct. It may again be different if it is said that there is a particular aspect of the guideline that the guideline itself recognises requires further analysis. In the Sportelli case this applied to the area outside PCL or to the stage in the property cycle which might bear upon the deferment rates for certain unexpired lease terms. More however may be required if it is said there has been a change of circumstance which warrants a re-examination of the guideline on the basis that what was correct has now become inapplicable through the passage of time and change of circumstance.

45. However, where, as here, the attack is on correctness of the guideline, from the start and without change of circumstance, a high threshold is entirely appropriate. There is no real difference in those circumstances between a compelling justification test and an exceptional circumstance test. When it comes to excluding evidence on the grounds that it is not relevant, it is no more than saying that the Tribunal, having considered the evidence, is satisfied that it could not bring about an alteration in the deferment rate. It is saying that, if admitted, it would not be sufficient to revise the guideline, so there is no point in admitting it.

46. I turn then to the reasoning of of Mr Bartlett refusing permission to appeal to the Upper Tier. Mr Bartlett looked at the evidence. I have no reason to suppose that having read the LVT decision and having considered Professor McGregor's proof that he did not also go on to consider Mr Roberts'. He was entitled to apply to that evidence an appropriate test, bearing in mind that the evidence made it clear that it was challenging the correctness of the very guideline itself as having been incorrect when made and remaining incorrect. He applied the compelling justification test. That, Mr Gaunt accepted, was a test which it was appropriate for him to apply. The President reached the view that the evidence did not amount to a compelling justification because it was neither different nor new nor compelling enough. That is the point at which Mr Gaunt's criticism really lie.

47. But that is not a challenge on a point of law. Where an expert Tribunal appraises evidence as not being sufficiently compelling because it does not differ substantially in data from previously considered evidence, nor show that the new analysis commands significant support, it is very difficult to see how one party's differing view that it was compelling can demonstrate that the President's view involved an arguable error of law. But even if there were an arguable error of law in his appraisal of that evidence, it is impossible to extract from that decision an important point of principle or practice. Even if there was a significant error in the President's appraisal, which has simply not been shown, that could not satisfy the second appeal criterion that there was an important point of principle or practice at stake.

48. I make this further observation. The exceptional circumstances test referred to by the President in Erkman was not intended as I read it to be a substitute for the compelling justification test, used by the President in Sportelli. He saw the two as the same. Of course experience suggests that exceptional circumstances, as a test, can become misunderstood as requiring some very peculiar or particular circumstance to exist. In reality it is no more than the expression of an expectation that a compelling justification test will rarely lead to the admissibility of evidence which seeks to challenge the correctness of the conclusion reached in a guideline decision.

49. Whilst there may be reservations about the significance of all the practical reason given by the LVT, it is to be borne in mind that it was expressing itself as a Tribunal bound by the decisions in Sportelli and Erkman. The Upper Tribunal may sometimes have have to examine whether there is a possible practice developing which might be wrong which the Tribunal ought to be alert to. But I am satisfied that that particular corrective function of the Tribunal, which goes beyond considering merely whether it agrees with the First Tier Tribunal, was not engaged in the circumstances of this case. Accordingly, I have come to the conclusion that there is no arguable error of law but more importantly, if there is, it does not satisfy the second appeal test. Accordingly this claim is dismissed. Thank you.

50. MR RAINEY: My Lord, I am well aware of the general principle that interested parties are not entitled to their costs on a permission application. I would wish to trespass on at least 30 seconds of your Lordship's time to try to persuade your Lordship that this case is one in which perhaps there are compelling reasons as to why the general rule ought not to apply. The reasons were are threefold effectively. For reasons which I am unclear about the Tribunal has in this case not taken any interest in it at all which is unlike what appears to happen in some of the immigration cases -

51. MR JUSTICE OUSELEY: Tribunals very rarely appear unless they have a particular axe to grind, which they rarely do. It is commonplace on Cart cases or any case involving the Tribunal you do not get the Tribunal appearing even though they are the nominal defendant.

52. MR RAINEY: In that case I will not say any more about that my Lord.

53. Secondly, there is an unusual aspect to this in that as your Lordship has averted to this is in effect a continuation of a process of attempting by one means or another to overturn this particular decision which affects my clients personally. This was a parallel case with an attempt, as your Lordship noted, to go to the Court of Appeal. So my clients had been faced with LVT then obviously did not get very far in the Upper Tribunal so I cannot make much of that, then the attempt to appeal the refusal of permission to appeal which was I think preceded by an application to the Upper Tribunal to review on the basis that it could be reviewed. There are two, as you will have noted, there are two applications within the bundle. We then had to go to the Court of Appeal, we then had a jurisdiction hearing fully contested last summer. True my clients got their costs but nevertheless they were faced with defending it. The failure of that challenge then breathed life into this challenge which is then being pursued and your Lordship will have seen that Foskett J in October last year, specifically directed of the court's own motion that my clients to be joined as interested party and said that the court wanted to know what position we had taken and then of course I understand the reasons and I do not mean in any way to be ... I am not intending a criticism, then your Lordship adjourned it into open court. So my presence here I would submit was if not inevitable was -

54. MR JUSTICE OUSELEY: It would have been in open court if they could have got into open court. If there had been a debate about whether they could get into open court, they would have gone to the Court of Appeal challenging -

55. MR RAINEY: I fully appreciate.

56. MR JUSTICE OUSELEY: The entitlement to go to the Court of Appeal because they lodged their application well before the new rules came into force so you are going to be here anyway actually.

57. MR RAINEY: I can see that and in any event this is not an appeal against the decision of the First-tier Tribunal so you can make an argument that 54.7A applied in the first place. Nevertheless, this is an unusual case given its procedural history and in those circumstances I would submit that this is a case to which the general rule in practice, which is set out in the Practice Direction, ought not to apply and that

my client ought to have their costs.

58. MR JUSTICE OUSELEY: Mr Gaunt?

59. MR GAUNT: My Lord, the general rule is indeed set out in the Practice Direction on page 1887 of the CPR.

60. MR JUSTICE OUSELEY: Yes.

61. MR GAUNT: Rule direction 8.5 says this: "Neither the defendant nor any interested party need attend the hearing on permission unless the court directs otherwise." The court has not directed otherwise. The attendance by the interested party while wholly understandable was not compulsory, it was voluntary.

62. MR JUSTICE OUSELEY: Yes.

63. MR GAUNT: And 8.6: "Where the defendant or any party does attend the hearing the court does not generally make an order for costs against the claimant." There is no justification, in my submission, for the party. My learned friend did not preface his first point.

64. MR JUSTICE OUSELEY: There are certain bases upon which the general rule is set aside and one of those is where there has been significant argument which effectively has amounted to the substantive hearing, which is pretty much the situation of Cart cases.

65. MR GAUNT: My Lord, we did make the suggestion that there should be a substantive hearing if leave were granted so that it would be a rolled up hearing but that does not find favour with the interested party -

66. MR JUSTICE OUSELEY: But it did not find favour with the court.

67. MR GAUNT: It did not find favour with the interested party, it was suggested to the interested party. Why do you not treat this as a rolled up hearing so that if we are given permission we deal with the whole thing. So we have not done that. My learned friend says it is a continuation of attempt overturn the decision and that is perfectly right but the attempt to go to the Court of Appeal cannot feature because the costs of that were awarded to them.

68. MR JUSTICE OUSELEY: Yes.

69. MR GAUNT: So put that.

70. MR JUSTICE OUSELEY: It is a very straightforward issue on costs. The question is whether there is a basis for not following the normal rule. The normal rule would be no order as to costs.

71. MR GAUNT: Yes.

72. MR JUSTICE OUSELEY: The question of whether there is a basis seems to me to depend on in this case, on whether this is to be regarded as effectively a substantive hearing or very close to it given the amount of time and you say: well, you offered them the opportunity to treat this as a rolled up hearing which would have been what the situation pretty much beyond doubt and they declined which I gather is correct.

73. MR GAUNT: Yes.

74. MR JUSTICE OUSELEY: Thank you. Do you want to say anything in reply?

75. MR RAINEY: Yes, it is entirely right that proposition was put to us and we declined. We declined on the possibility and your Lordship may have a view on this but we declined on the basis that those two immigration cases, Rejus and Khatoon had suggested that you should deal with the Cart test as a final hearing at a preliminary stage and so in those circumstances it had appeared on this side that effectively one would be removing Cart as a filter and simply requiring this court to hear the full argument even if it was satisfied that no matter what was said one could not get over the Cart hurdle which, although there

has been a very long judgment, in effect that is what has been said at the very end of your Lordship's judgment so that was the basis on which it had been refused. If that prevents me from saying we had full argument then we will have to take it on the chin.

76. MR JUSTICE OUSELEY: You are saying it was not necessary. I am not sure that is right because if permission is granted it is open to the Tribunal to contest it. It does not have to chuck its hand in.

77. MR RAINEY: The position in respect of the HS Khatoon case, I do not know whether it has been thrown into doubt anyway because I saw on Lawtel there was an attempt made in the Nicolas case, which the Court of Appeal heard on Monday, by the Secretary of State to suggest that the concession which was made in Khatoon was wrongly made and that they do want it challenge HS. So maybe there is some doubt about it.

78. MR JUSTICE OUSELEY: It is quite a complicated decision I seem to remember.

79. MR RAINEY: Yes. The thrust of my proposition is that it is really one of the general context of it is that it may not have been inevitable if my clients were here and they were not directed to be here but it is very, very close, it is a hair's breath given the way this particular case developed and that if one looked at the two sets of directions which were made and the fact that -

80. MR JUSTICE OUSELEY: Just remind me of what -

81. MR RAINEY: Foskett J ordered that we be added as an interested party.

82. MR JUSTICE OUSELEY: You to have been anyway.

83. MR RAINEY: We then had to indicate whether we wished representations and then lodge them and he indicated although papers sent to 1920 freehold limited there does not appear to have been any indication of a wish to intervene in these proceedings. That is surprising. I have been reluctant to sanction further delay and so forth. The difficulty with that is that to any litigant reading that when the court says that one's conduct is surprising it is very difficult to resist the temptation to remove the surprise and to participate in the hearing.

84. MR JUSTICE OUSELEY: Yes. It is not a direction.

85. MR RAINEY: It is not a direction. I fully accept that.

86. MR JUSTICE OUSELEY: Yes.

87. MR RAINEY: But given the procedural history I would submit that we are in a situation where it would have been difficult to advise, it would be difficult for any litigant safely to think: well, I can just ignore this and trust that the application would be refused because the court will see that it does not meet the Cart test. This is my submission.

88. MR JUSTICE OUSELEY: I appreciate there is a right to reply but he has made one or two points going beyond what you have dealt with. I will hear you if there is anything you want to say in addition Mr Gaunt.

89. MR GAUNT: Yes my Lord essentially it is the same points that there is of course no direction that the intervention was voluntarily. It is perfectly understandable that it was voluntarily, it was not necessary and this was only an application for permission, it did not deposit further (inaudible) that and we were not inviting the court to look at the evidence and make a careful comparison or anything like that, we were simply dealing essentially with the Cart test.

90. MR JUSTICE OUSELEY: Yes.

91. MR GAUNT: Your Lordship has held and applications fail but the presence of the interested party was not compelling in any way. I do not criticise them in the least for being here but that of on the basis of the terms of the Practice Direction which no doubt they bore in mind.

92. MR JUSTICE OUSELEY: The successful interested party seeks an order for the payment of its costs following my refusal of permission to apply for judicial review in this contested Cart hearing.

93. Mr Gaunt points out that there was no direction that the interested party appear and that the general rule is that the interested party in these circumstances would not normally get their costs. There are circumstances in which the general rules do not apply. Although there is no direction Foskett J, in ordering the interested party be joined, expressed surprise that they had not made representations or were not seeking to do so, which Mr Rainey says, and I understand this, was seen as rather more than a green light to do so but a significant suggestion that they ought to do so albeit falling short of direction. Secondly, the hearing of this matter has taken just over half a day and the court, one way or the other, has effectively had to hear argument on the Cart point in what has been rather more than, if I can put it this way, the usual half hour of case with the usual restricted reading time. Although the interested party refused the claimant's suggestion of a rolled up hearing, which would have put the question of costs pretty much beyond doubt, the hearing has in effect proceeded much like that. The papers are as full as they would be. The court has benefited from all the submissions and arguments in dealing with whether there is an important point of principle in this case and it is my judgment that this is a case in which the general rule ought not to apply and accordingly I make an order for the payment by the claimant of the interested party's costs to be assessed, if not agreed unless there is a detailed schedule.

94. MR RAINEY: We do have a summary assessment schedule.

95. MR JUSTICE OUSELEY: Have I got it? Yes. Have you got it Mr Gaunt?

96. MR GAUNT: I have my Lord, yes.

97. MR JUSTICE OUSELEY: Is it contested.

98. MR GAUNT: My Lord, may I make this suggestion? That an order is made for interim payment to ... the schedule shows I think £19,000, something over £19,000.

99. MR JUSTICE OUSELEY: Yes.

100. MR GAUNT: Could I suggest an interim payment of £10,000, leaving the rest to be determined by a detailed assessment if not agreed. The chances are it will be agreed.

101. MR RAINEY: I have no objection to that.

102. MR JUSTICE OUSELEY: I will make an order for payment of £10,000 costs on account, balance to be dealt with by way of an order following detailed assessment.

103. MR GAUNT: Thank you my Lord.

104. MR JUSTICE OUSELEY: Thank you.