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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**8 Valerie Court Catsey Lane Bushey Herts WD33 4HU**
Applicant	:	**Janet Kirby**
Respondent	:	**Daejan Investments Limited**
Case number	:	**CAM/26UE/OLR/2007/0013**
Date of Application	:	**1st March 2007**
Type of Application	:	**To determine the terms of acquisition and costs of the enfranchisement of the property (Ss 42 and 60 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"))**
The Tribunal	:	**Mrs Joanne Oxlade (lawyer chair) Mr J. Raymond Humphyrs FRICS Mr Neil Martindale FRICS**
Date of Hearing	:	**14th May 2007**
Venue	:	**The White House Hotel, Upton Road, Watford, Herts, WD18 OJF**

DECISION

The price payable by the Applicant to the Respondent for a new lease shall be £27,817.

The application for an assessment of costs be dismissed.

Reasons

Introduction

1. Janet Kirby ("the Applicant") acquired the lease of 8 Valerie Court, Catsey Lane, Bushey ("the premises") for a term of 99 years from 29th September 1957.

2. She sought to extend the length ("the term") of the lease, and proposed terms for a new lease (as a variation of the existing terms) by serving a notice on the freeholder, Daejan Investments Limited, ("the Respondent") pursuant to section 42 of the Leasehold Reform, Housing, and Urban Redevelopment Act 1993 ("the Act"), on 13th July 2006. She proposed a premium of £17,500 and new terms.

3. The Respondent served a counter-notice dated 21st September 2006, pursuant to section 45 of the Act, admitting the right to a new lease, proposing a premium of £33,000, but disputing the proposed terms of the new lease, save that the rent reserved under the lease be at a peppercorn rent and save as necessary to comply with section 57 of the Act.

4. The parties were unable to reach an agreement and so the Applicant made an application dated 1st March 2007, for the LVT to determine the matter. In that application she indicated that no terms had been agreed with the Respondent; that the premium/consideration and terms of the new lease were in dispute; that she considered £17,500 to be the appropriate price. At the date of the notice, the lease had just over 50 years left to run.

5. Directions were issued on 22nd March 2007, and the timetable for compliance was varied at the request of the Respondents by letter of 3rd April 2007.

Inspection

6. The members of the Tribunal inspected the premises, prior to and on the day of the hearing in the presence of the Applicant only.

7. They consist of a two bedroom, one reception room first floor flat, in a block of 10, constructed in the 1950's. The block is set back from the road, with a communal garden to the front, and access to the flat at the rear via a set of open ironwork steps. The flat does not have a garage, nor private parking. The parties indicated that there was no dispute about the accommodation of the premises.

8. The flat is in a residential area, some 2 miles or so from Bushey Railway Station, which serves the locality and London.

9. We were told by the Applicant that she had access to flat 4, Valerie Court, which was vacant, and which had internal cracking which was believed to be caused by subsidence. We were further told that the vendor had accepted an offer of £120,000, the personal circumstances of the vendor being that she was an elderly lady, who had gone into a residential home. We viewed the flat, and observed some cracking to the plasterwork in the living room and to the kitchen ceiling.

The Hearing

10. The Applicant was represented by Mr Scott of Kirkwoods Solicitors, and relied on the evidence of her expert witness, Mr McMellin MRICS. Mr Shapiro Bsc (Est Man), FRICS, IRRV, FCIArb, acted as both advocate and expert witness for the Respondent, who was not otherwise represented.

11. At the outset the parties distilled the issues as follows:

12. The parties said that they agreed:

(a) the accommodation of the premises, as stated in the reports,
(b) that although the parties had not agreed terms of the new lease, they did not require the Tribunal to do so, as the Applicant indicated that a further application would be made, if necessary
(c) the capitalisation rate had been agreed at 7.5%.

13. The parties indicated that the price payable for the new lease was in dispute, and that the following matters which influenced price were in dispute (as per the experts reports dated 13th April and 24th April 2007):

(a) the value of flat with an extended lease (Applicant says £165,000, Respondent says £187,000)
(b) the value of flat with the current lease (Applicant says £135,000, Respondent says £140,250)
(c) the relativity rate (Applicant says 84% - or 90% if Sportelli applies, Respondent says 75%)
(d) the deferment rate (Applicant says 8%, Respondent says 5%).

Preliminary Matters

14. We notified the parties that we had inspected flat 4, and that we had been told by the Applicant that an offer of £120,000 had been accepted for it.

15. Mr Scott made an application for the exclusion of the report of Mr Shapiro dated 8th May 2007, on the basis that the late service of the document had caused prejudice in the preparation of the Applicant's case. He said that the document was not served on him until the Friday (11th) prior to the hearing on Monday (14th), and although it was hand-

delivered to his expert on Wednesday lunchtime (9th) they had not had sufficient time to take instructions on it. He emphasised that he did not seek an adjournment to consider it, because the Applicant wished for the matter to be heard today.

16. Mr Shapiro said that the reason for the delay was that the parties were attempting to reach a settlement, which agreement would obviate the need for a report and the hearing. He said that the report amplified the case as set out in his earlier report of 13th April 2007; that the new report answered the report of Mr McMellin, and simply referred to the legal arguments on which he would rely, which would advantage the Applicant; that the comparables referred to therein were disclosed during the course of negotiations; that he (Mr Shapiro) was available in his office to discuss the matter.

17. Mr McMellin made the point that until receipt of the report he thought that he was dealing with Mr Kotac (Mr Shapiro's assistant) and so would have no reason to make contact with Mr Shapiro because he did not know that was the expert whom he was dealing with. To receive a document of over 100 pages, in the middle of a week where he could not just drop everything, made considering the evidence very difficult.

18. We acceded to the application to exclude the written report of Mr Shapiro dated 8th May 2007, and confined Mr Shapiro to his earlier report, considering that the Applicant was prejudiced by the late service of the report. We observed that the new report was not merely a fleshing out of the earlier "bare bones" and noted that different figures were used, and amounted to a reply to the Applicants expert report, which was not the function of this report. The point of making directions is to ensure that each party is aware of the case advanced by the other party in good time to prepare their case; it assists negotiations if both parties put their "cards on the table"; it enables the Tribunal to prepare the case. The directions made it clear that a failure to comply may lead to the evidence being rendered inadmissible. We did not consider the reason given to justify a unilateral departure from the directions made. It is not a complete answer for the Respondent to say that the parties were in the process of negotiating – because compliance actually aids a party's understanding of the strengths and weaknesses of both cases and assists settlement. It goes without saying that the function of the expert is to assist the Tribunal to make the right decision, not to take a partisan approach or to exercise brinkmanship, and late service of evidence does not assist the Tribunal.

Evidence

19. We therefore received the following evidence:

(a) oral evidence from and written report of Mr Ian Kevin McMellin MRICS dated 24th April 2007, and

(b) oral evidence from and written report of Mr Eric Shaprio Bsc (Est Man), FRICS, IRRV, FCIArb dated 13th April 2007.

20. During the course of giving evidence, Mr McMellin, provided copies of the estate agents particulars for the comparables referred to in his report. Mr Shapiro helpfully met the request of the Tribunal to provide a map, on which the comparable properties were marked.

21. In his closing submissions, Mr Shapiro reminded us that as an expert Tribunal, it was for us to consider all the evidence before us, and other available evidence. As we indicated at the time, none of the members of the Tribunal had any comparable evidence which they had obtained, nor would we be seeking to get it. For the reasons previously given, the evidence of Mr Shapiro in his written report was excluded from our deliberations.

22. For the sake of clarity we should add that those exhibits to the written report of Mr Shapiro dated 8th May 2007 which are in the public domain, were available and considered by us: namely, the Lands Tribunal decision in the case of **Earl Cadogan and Cadogan Estates Limited and Michele and Lara-Lynn Sportelli and others** LRA/50/2005 ("the case of Sportelli"); the LVT decision relating to **Noel Court, Bath Road, Hove** LON/NL/5421-5424/06 ("the Bath Road case") ; the Lands Tribunal decision in the case of **Arrowdell v Coniston Court** LRA/72/2005 ("Arrowdell"); the Land Registry House price index for Hertfordshire from 2001-2007; the Beckett & Kay Graphs of Relativity.

Law

23. Section 91(2) of the Act provides the LVT with jurisdiction to set the price payable, and schedule 13 part II provides that the premium payable shall be the aggregate of:

(a) the diminution in value of the landlord's interest
(b) the landlord's share of the marriage value
(c) any compensation payable under paragraph 5.

24. The Respondent did not argue that (c) applied, and so in this case, the premium must be the aggregate of (a) and (b).

Findings

25. Having considered all of the evidence filed, and submissions made, we make the following findings:

i. Value of flat with extended lease

26. Both parties produced evidence of comparable premises, from which we could assess the value of the subject premises with a long lease.

27. Whilst all were of use in giving a general overview, in our view, the most useful comparable transactions were sales of 53 Highland Drive (at £181,000 on 30th June 2006) and 19 Alpine Walk (at £188,000 in April 2006), which were produced by Mr McMellin. Both transactions were completed close to the relevant valuation date for the subject premises (13th July 2006), were reasonably comparable in terms of accommodation, and local to the subject premises. Both are purpose built 2 bedroom flats with long leases, with a private section of garden, and some provision for parking. They are more visually appealing than Valerie Court, looking rather more like private dwellings that Valerie Court, which is built in the same style as many Council flats. The accommodation is similar although the bedroom sizes in Valerie are bigger.

28. 53 Highland Drive is close to the subject premises, and has off-street parking. 19 Alpine Walk is close to the common and so considered to be in a better location, and has a garage (albeit too narrow to use and with poor vehicle access), its own front and rear gardens, and a new fitted kitchen and bathroom.

29. We adjusted the selling price of Highland Drive by £11,000 to £170,000 for the following reasons: £6,000 for central heating and double glazing; £3000 for parking; £2000 for private garden. We have not made a deduction for the installation of the kitchen and bathroom, which age we could not discern.

30. We adjusted the selling price of Alpine Walk by £19,000 to £169,000 for the following reasons: £6000 for the garage; £6000 for central heating and double glazing; £2000 for better location; £2000 for garden; £3,000 for newly fitted kitchen and bathroom. This reflects our opinion of the effect on value, not the costs of making the improvements

31. On the evidence before us we therefore consider that the value of the subject premises with the benefit of a long lease would be **£170,000**. By making the adjustments in paragraphs 30 and 31, we need not make adjustments to the value of the subject premises, to allow for tenants improvements – to do so in addition would be double accounting.

32. Both parties referred to transactions at 4, 6, and 10 Valerie Court. Flat 6 Valerie Court (on a short lease) was sold for £120,000, being a forced sale because of the personal circumstances of the seller. Flat 4 (on a short lease) has not yet exchanged, being a sale by an elderly lady who wanted to move into a residential home. Mr. Shapiro adduced in evidence as a comparable, the sale of 10 Valerie Court, albeit conceding that it was not a concluded transaction, the offer had been made and at the point that the sale was in the hands of Solicitors. There was no evidence that a mortgage valuation had been done.

33. We did not consider the transactions for number 6 and 10 provided comparables on which we could place reliance: the sales had not completed, and could unravel for any number of reasons, and so it is not safe to rely on them.

34. Although the sale of 4 had completed, we note that it was a forced sale, because of the personal circumstances of the seller. Neither expert advanced an argument that it was a reliable indicator of the market value or that we should rely on it. Neither expert knew whether it had been sold with the benefit of a section 42 notice having been served.

35. As we consider that we have good comparable evidence of the market price as at the valuation date, we do not need to adjust the price by indexation, nor do we not need to resolve the conflicting evidence from the experts as to the appropriate rate of indexation.

36. Finally, we should address the issue of movement/subsidence in the building. In 1998 it appears that some redecoration of some of the flats (including the subject flat) was undertaken by the insurance company, and in 2003 the Applicant noted evidence of movement in the living room of flat 4. Apparently the insurance company are monitoring the situation. We were advised that no structural work was done in 1998. On inspection of the subject premises, our attention was drawn to cracks in the kitchen and living room ceilings of No 8 and No 4. Mr McMellin says that his firm has attempted to sell flats in the building, without success because of this very issue. However, neither party referred us to a structural engineers report, or any other document from which we could draw conclusions about the condition of the building. Internal cracking can be caused by a number of different things, and it would be an enormous leap to conclude that the building had subsidence, on the evidence that has been put before us. We do not so conclude, and we do not consider that the cracks to which our attention was drawn would influence price. It may well be that the sellers and (perhaps more importantly) the seller's Agents' fear of what might be, has "informed" the market, and has had an effect in a forced sale situation to drive prices down further, but we do not consider that this reflects the true market worth of the subject premises.

37. Coincidentally, as will become clear later, our finding as to the value of the subject flat with its short lease, is within a 10% tolerance of the forced transactions, which is usually an acceptable tolerance for valuers to work on.

ii. Value of flat with the current lease

38. Mr McMellin said that he sought to use local transactions of sales of short leases, or settlements of lease extensions, to establish the value

of the subject flat with a short lease - in preference to using relativity graphs. However, he did in his report, acknowledge that there were few transactions of both long and short leases within the same time frame and same estates from which to make comparisons. He did in his report make reference to the LVT published graphs.

39. Mr Shapiro argued that the starting point must be to set the value of the subject flat on a long lease, and making use of relativity tables, establish the value of the subject flat. He criticised the use of the LVT graphs as being (in effect) the Tribunal giving evidence to itself.

40. Although we had evidence of transactions of two flats on short lease in the building, namely No 4 and No 6, both at £120,000, neither expert invited us to place weight on these transactions, as the prices were agreed for reasons specific to both vendors, and for the reasons given above we did not consider that they are reliable indicators of the value of the subject flat on the open market. In addition the Act requires that we make an assessment on the basis of a "no Act" world – meaning that we have to assess the value of the subject premises on the assumption that there would be no right under the Act to force the freeholder to extend the lease. The lease is therefore a diminishing asset which any purchaser in the open market would have regard to – and knowing that he had a wasting asset, he would pay less for it. If we simply took a comparable sale (of say No 4 or 6 Valerie Court) of a flat with a short lease, but which has the right to extend the lease under the Act, it would be a false comparison. We would not be comparing like for like. Whilst are aware that valuers do adjust such evidence to reflect the value in a "no Act world" we treat market evidence of comparables (with the right to extend, and so more valuable) with considerable caution.

41. We bear in mind the **Arrowdell case**, which dictum points out the error of relying on LVT graphs, and the **Bath Road case** which encourages the use of graphs as general guidance.

42. Mr Shapiro relied on the Beckett and Kaye graph of graphs as showing a relativity of 75%, although the Moss Kaye graph suggests 77%.

43. Mr McMellin relied on sales transactions of numbers 4 (short lease) and 18 Alpine Walk (long lease), which supported a relativity of 84%. However, for the reasons given in paragraph 41 the underlying assumption of a "No Act world" would distort the price of the short lease and so the relativity percentage.

44. Mr McMellin also referred to an agreed lease extension of 8 flats in Alpine Walk (with short leases of 49 years) at a premium of £23,000. In cross-examination by Mr Shapiro, Mr McMellin said that the relativity worked out at 76% (although the parties did not specifically agree a % for relativity).

45. Having considered all of the available evidence, and in particular the Beckett & Kay graphs of graphs and settlement figure of lease extensions of Alpine Walk (referred to in paragraph 44), and having made the assumptions that we are required by the Act, we conclude that the value of the subject premises with the current short lease is **£129,200**, being **76%** of the value of the subject premises with a long lease.

46. We should address the proposition advanced by Mr McMellin, namely that if a deferment rate of 5% applied (as argued for by the Respondent in applying the case of Sportelli) as opposed to 8% (as argued for by the Applicant), that the relativity would rise to 90% or order to achieve the correct premium. His argument can be summarised thus: local surveyors have been applying a deferment rate of 8% but if they now apply 5%, the cost of extending the lease will go up, and so relativity will change upwards.

47. We reject that suggestion for the following reasons: firstly, there is no evidence that the application of the deferment rate of 5% has in fact affected relativity rates; secondly, the proposition does not stand up to analysis. If a deferment rate of 5% is universally applied, with the effect of pushing up the costs to the lessee of buying a lease extension, buyers in the open market will pay less for a flat with a short lease because it will cost them more money to extend. The value of the flat with a short lease will therefore reduce, and so be a smaller percentage of the value of a long lease. Therefore, logically, the relativity would be expected to reduce – the opposite effect to that argued by Mr McMellin. Finally, Mr McMellin was not able to establish why he argued that the relativity rate would be 90% (as opposed to say 85% or 92%). It seems to us that he was saying that the premium must remain the same, and that if one adjusted one figure then another had to change in order to come up with the same premium - which approach simply cannot be correct.

iii. Deferment rate

48. Mr McMellin, gave evidence that locally a deferment rate of 8% was still being applied, and that the "one size fits all approach" of a deferment rate of 5% advocated in Sportelli, should not apply. He said what was appropriate for properties in Mayfair and the like was not appropriate for Bushey.

49. He advanced the following arguments as to why Sportelli should not apply: the section 42 notice in this case was served before the decision in Sportelli was made; the case of Sportelli is itself subject to appeal, and so applying it now would prejudice the Applicant in the event that the appeal in Sportelli moved away from the generic deferment rate; the change in deferment rate should result in a change of the relativity rate.

50. Mr Shapiro vigorously asserted that Sportelli applied and so we should apply a deferment rate of 5%, although had it not been for Sportelli he would have agreed a rate of 7%. He made the point that Sportelli itself provided for instances in which the deferment rate might be different from the generic rate – and that none of the points made by Mr McMellin was referred to therein.

51. We consider that we are obliged to follow the guidelines in Sportelli, and so to apply a deferment rate of 5%, there being no compelling evidence or particular features which suggest a departure there from. We do have misgivings about applying a "one size fits all" rate, as we think most valuers do, particularly in the light of the evidence of Mr Shapiro that he would have settled on 7% (had Sportelli not been decided as it had) and Mr McMellin would have agreed 8%. Our misgivings arise, because the risks to an investor vary from property to property and location to location, and so the compensation for taking the risk, which is reflected in the rate or return, should adjust accordingly. A relatively small change in the deferment rate translates into a great change in the costs to the lessee in extending a lease – and this can be seen in the workings produced by the experts. Nonetheless, we accept that the Lands Tribunal is entitled to issue guidelines, and that it is not for us to say that Sportelli was wrongly decided, and that we should follow the guidelines.

52. We reject the arguments raised by Mr McMellin, in seeking to dis-apply the Sportelli deferment rate: that an appeal is pending does not change the force of any decision; the decision is treated as having retrospective effect, as with all decisions; the third argument has been dealt with under the previous heading.

53. We should add that Mr Shapiro wished to keep the door open, to be able to argue that hope value applied, in the event that Sportelli was overturned on appeal. The argument being that were it not for Sportelli, which excluded "hope value" from the equation, he would have wished to argue it. We rejected that submission: firstly, there was no mention of "hope value" until his closing speech; secondly, it was completely contrary to his argument that Sportelli applied; thirdly, that there is no general right to come back to the Tribunal after the event to argue a point which you may have liked to argued but chose not to at the time.

Conclusions

54. We therefore determine that the material component parts of the premium are as follows:
(a) price of subject flat with extended lease £170,000
(b) price of subject flat with short lease of 50 years in a "no act world" £129,200
(c) a relativity rate of 76%
(d) a deferment rate of 5%
(e) a capitalisation rate of 7.5 % (agreed with the parties),

which produced a premium payable of £27,817.

55. We attach the Tribunal's valuation, as appendix 1.

Terms of the Lease

56. It is apparent from the notice and counter-notice served in this case, that the parties were in dispute about the terms of the new lease, and had not reached an accord by the date of the hearing. The Tribunal has jurisdiction to determine the terms of the new lease, by virtue of and as limited by section 57 of the Act. However, the Applicant indicated that they would not invite the Tribunal to determine that aspect of the case, and so we make no determination on this aspect of the case.

57. Whilst the Applicant indicated that a further application may be made in due course, as the time limit for doing so is set out in section 48(2) of the Act the Tribunal would have no jurisdiction to consider such an application made under the Act.

Costs

58. The Directions, as varied, provided that if costs were sought by the Respondent, then by 20th April 2007, the Respondent should serve on the Applicant a statement of costs. No schedule was served and at the hearing the Respondent did not seek costs. It follows that we have no evidence on which to assess the Respondent's costs, and so dismiss the application for an assessment of costs.

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Joanne Oxlade
(Chairman)

3rd June 2007

8 Valerie Court
Catsey Lane,
Bushey
Herts
WD23 4HU

Valuation date	13th July 2006
Lease	99 years from 29.09.1957 expiring 28.9.2056
Unexpired term	50.21 years (at date of notice)
Ground Rent	£12.60
Capitalisation Rate	7.5% agreed
Deferment rate	5%
Value of Extended Lease	£170,000
Value of Existing Lease @ 76% relativity	£129,200

Value of Freeholders Current Interest

Term Ground Rent	12.60		
YP 50.21 @7.5%	12.9802	164	
Reversion to	170,000		
50.21 years @5%	0.0863	14,671	
			14,835

Marriage Value

Value of extended Lease		170,000	
Less:			
Value of Freeholders current interest	14,835		
Value of short lease	129,200	144,035	
		25,965	
Freeholder's share of marriage value			12,983
Total Premium Payable			**£27,817**