UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 463 (LC)
UT Case Numbers: (1) LRA/18-23/2017
(2) LRA/26/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – lease extension – maisonettes – whether deferment rate should be increased by 0.25% to reflect an additional risk of deterioration – whether the Leasehold Reform, Housing and Urban Development Act 1993 confers any benefit in "unsophisticated" West Midlands market – whether a discount should be made to the FHVP value to reflect the risk of lessee remaining as an assured tenant at the expiry of the lease under Schedule 10 to the Local Government and Housing Act 1989 – appeals allowed

IN THE MATTER OF SEVEN APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BY

(1) MIDLAND FREEHOLDS LIMITED

and

(2) SPEEDWELL ESTATES LIMITED

(1) Re: 2, 4, 8, 36, 55 and 57 Lomas Drive,
Northfield,
Birmingham,
B31 5LR

and

(2) Re: 39E Walmley Ash Road,
Sutton Coldfield,
B76 1JA

Before: A J Trott FRICS

Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
on
Thursday 2 November 2017

Anthony Radevsky, instructed by Grove Tompkins Bosworth, for the Appellants

The following cases are referred to in this Decision:

Re Midland Freeholds Limited's Appeal [2011] UKUT 173 (LC)
Re Sinclair Gardens Investments (Kensington) Limited [2014] UKUT 79 (LC)
Earl Cadogan v Sportelli [2007] EWCA Civ 1042
Zuckerman v Trustees of the Calthorpe Estate [2009] UKUT 235 (LC)
JGS Properties Limited v King [2017] UKUT 233 (LC)
Re Elmbirch Properties plc's Appeal [2017] UKUT 314 (LC)
Contactreal Limited v Smith [2017] UKUT 178 (LC)
Trustees of the Sloane Stanley Estate v Mundy [2016] UKUT 223 (LC)
Nailrile Ltd v Earl Cadogan [2009] RVR 95
Kosta v The Trustees of the Phillimore Estate [2014] UKUT 319 (LC)
82 Portland Place (Freehold) Limited v Howard de Walden Estates Limited [2014] UKUT 133 (LC)
Arrowdell Limited v Coniston Court (North) Hove Limited [2007] RVR 39
Re Midland Freeholds Limited's Appeal [2014] UKUT 304 (LC)
Cadogan Estates Limited v McGirk [1998] LRA/6/1997 (unreported)
West Hampstead Management Co Ltd v Pearl Property Ltd [2002] 1 EGLR 115
Re Clarise Properties Limited's Appeal [2012] UKUT 4 (LC)

DECISION

Introduction

1. These seven appeals, heard together, concern six maisonettes in Lomas Drive, Northfield, Birmingham B31 5LR (Nos. 2, 4, 8, 36, 55 and 57) and one maisonette at 39E Walmley Ash Road, Sutton Coldfield B76 1JA.

2. The six Lomas drive appeals are made by the freeholder, Midland Estates Limited, against six contemporaneous and identical decisions of the First-tier Tribunal (Property Chamber) ("FTT") dated 8 November 2016 determining the premiums payable for the grant of new leases under the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") at £9,689 in each case.

3. The appeal in respect of 39E Walmley Ash Road is made by the freeholder, Speedwell Estates Limited, against a decision of the FTT dated 21 December 2016 determining the premium payable for the grant of a new lease under the 1993 Act at £19,312.

4. Permission to appeal in the case of the Lomas Drive properties was granted by the Tribunal on 31 March 2017 and was limited to two issues:

(i) Whether the FTT was wrong to add 0.25% to the deferment rate to reflect an additional risk of deterioration; and

(ii) Whether the FTT was wrong in principle to make no deduction for the effect of rights under the 1993 Act when determining the value of the existing leases.

5. Permission to appeal in the case of 39E Walmley Ash Road was granted by the Tribunal on 4 April 2017 and again was limited to two issues:

(i) Whether the FTT was wrong to make a "nominal deduction" of 1% for the effect of rights under the 1993 Act when determining the value of the existing lease; and

(ii) Whether the FTT was wrong to make a deduction of 6% from the extended lease value for the risk of the lessee remaining in possession at the expiry of the lease as an assured tenant under Schedule 10 to the Local Government and Housing Act 1989 (the "1989 Act").

6. In both cases the Tribunal directed that the appeals should be dealt with as a review of the FTT decision with a view to a rehearing.

7. Mr Anthony Radevsky of counsel appeared for the appellants and called Mr Ed Fielding MRICS, a Director of Savills (UK) Limited, as an expert valuer.

8. The lessees of all seven maisonettes participated fully in the hearing before the FTT. The applicants in the six Lomas Drive applications were represented by three advisors: Mr A Rutledge FRICS (2 Lomas Drive); Mr A W Brunt FRICS (Nos. 4, 8 and 55); and Mr N Plotnek LLB (Nos. 36 and 57). The lessee of 39E Walmley Ash Road was represented by Mr Brunt. None of the applicants before the FTT elected to respond to these appeals and they therefore proceeded unopposed.

Facts

The Lomas Drive maisonettes

9. Lomas Drive is a cul-de-sac in an established residential area. It comprises mainly terraced blocks of maisonettes built by Bryant Homes Limited in the mid 1970s. There are two garage courts and a total of 55 garages. The maisonettes are

brick built with tiled pitched roofs. Four of the appeal properties are ground floor maisonettes (even numbers) and two of them are first floor maisonettes (odd numbers). The accommodation typically comprises a living room, kitchen, bathroom and two bedrooms. The demise of each maisonette includes a garage in one of the garage courts. The garages in each court are brick built terraces with corrugated asbestos roofs, up and over doors and are accessed from a communal concrete apron leading from Lomas Drive.

10. Each maisonette was demised for a term of 99 years from 25 March 1974. The dates of each of the notices served under section 42 of the 1993 Act exercising the right to acquire a new lease (which is the valuation date in each appeal) are shown in Appendix 1. The unexpired terms vary from 57.31 to 57.42 years.

11. Each lessee covenanted to keep the demised premises (including the garage) in good and substantial repair and to insure the same against the usual perils. The lessor covenanted to keep the garage access area in good repair and in a clean and tidy condition, with the lessees indemnifying the lessor against the cost on an equal basis. The lessor also covenanted, if so required by the lessee for the reasonable protection of the demised premises, to enforce similar lessee's covenants against other lessees of maisonettes in the same building providing the lessee indemnified the lessor against all the costs and expenses of such enforcement.

12. The lessees of each pair of upper and lower maisonettes had mutual rights and obligations concerning the repair of the roof, gutters and rainwater down pipes (upper maisonette) and foundations (lower maisonette) with the other lessee paying an equal proportion of any expense.

39E Walmley Ash Road

13. Walmley Ash Road lies to the south of Sutton Coalfield and runs from Eachelhurst Road in the west to the A38 in the east. 39E is a first floor maisonette in one of three similar 1960s buildings, each with maisonettes on the ground and first floors. They are constructed from brick with tiled pitched roofs and partially rendered front elevations. The entrance to each maisonette is from the side of the building. There is no garage.

14. There was no copy of the lease in evidence but the unexpired term was said by the FTT to be 46.19 years and this was not in dispute. The valuation date (the date of service of the section 42 notice) was 4 February 2016.

Issue 1: was the FTT wrong to add 0.25% to the deferment rate in the Lomas Drive appeals to reflect an additional risk of deterioration?

Review of the FTT's decision

15. The FTT dealt with this issue at paragraphs 54 to 63 of its decision. It said it was aware that a deferment rate of 5.75% had been used in negotiated settlements but was not privy to the details and attached little weight to the lessees' evidence on this point. It noted that in *Re Midland Freeholds Limited's Appeal* [2011] UKUT 173 (LC) the Tribunal determined the deferment rate in respect of 44 Lomas Drive at 5.75%, but in *Re Sinclair Gardens Investments (Kensington) Limited* [2014] UKUT 0079 (LC) the Tribunal said that the FTT had failed to justify the addition of 0.25% to the deferment rate to reflect the additional risk of deterioration. In that case the Tribunal determined the deferment rate at 5.5%.

16. The FTT took the deferment rate in *Earl Cadogan v Sportelli* [2007] EWCA Civ 1042 (4.75%) as its starting point. It added 0.25% to reflect the additional management required for flats compared to houses; 0.5% to reflect the relative lack of long term capital growth in the West Midlands compared to prime central London; and 0.25% "to reflect the risk of deterioration and obsolescence of this property located in the West Midlands".

17. In reaching its decision the FTT considered whether there was anything about the application properties which would cause an investor to perceive a greater risk of deterioration and obsolescence than was already allowed for in the 5% risk premium for flats adopted in *Sportelli* or reflected in the freehold vacant possession value. The FTT compared the application properties with the flats at Kelton Court which were the subject of the Tribunal's decision in *Zuckerman v Trustees of the Calthorpe Estate* [2009] UKUT 235 (LC) where an additional 0.25% was added to the deferment rate to reflect a greater risk of deterioration compared to prime central London. It said that the application properties were a different form of construction to Kelton Court (which comprised six three-storey blocks of flats) and more akin to a house "but [have] no less a risk of deterioration". This was said to be compounded by "the current lack of maintenance of the garages" which had asbestos roofs and would have a "significant impact" on any repairs to be carried out. The FTT placed the onus on the landlord to show why the risk of deterioration was any less for the application properties than it was for Kelton Court. The landlord having failed to do so the FTT "applied its own mind to the question" and concluded that there was a "striking difference" between the application properties and those considered in *Sportelli* such that the greater risk of deterioration was not reflected in the present freehold vacant possession value or in the *Sportelli* risk premium.

18. In *Sinclair Gardens* the Tribunal (Martin Rodger QC, Deputy Chamber President, and A J Trott FRICS) reviewed the authorities subsequent to *Sportelli* for both Greater London and the West Midlands. It concluded from this review at paragraph 82 that:

> "…it will only be in exceptional cases that the risk of deterioration will not be reflected in the vacant possession value of a property. Something more than age or a current poor condition is required to justify any additional allowance."

19. The appeal property in *Sinclair Gardens* was an early 1960s maisonette in Halesowen in the West Midlands and was more akin to the properties in the current appeals than was Kelton Court. Like the Halesowen property the maisonettes in Lomas Drive are "typical of thousands of similar age and design" and in my opinion the FTT did not sufficiently justify the 0.25% addition to the deferment rate for the risk of deterioration in the appeal properties. The FTT distinguished the appeal properties by reference to what it described at paragraph 60 as "the current lack of maintenance of the garages" and the presence of asbestos roofs. But at paragraph 9 of its decision the FTT described the garages as being "generally in average condition". I do not consider that the FTT has shown the Lomas Drive properties to be an exceptional case where the risk of deterioration is not reflected in their freehold vacant possession value and I think the FTT was wrong to have added 0.25% to the risk premium in this regard.

Rehearing

20. Mr Fielding relied upon the Tribunal's decisions in *Sinclair Gardens*; *JGS Properties Limited v King* [2017] UKUT 0233 (LC); and *Re Elmbirch Properties plc's Appeal* [2017] UKUT 0314 (LC), to support his view that unless exceptional circumstances existed there were no grounds for adding 0.25% to the deferment rate to reflect an assumed greater risk of deterioration and obsolescence in the West Midlands compared to prime central London.

21. Mr Fielding said that Mr Fell, who represented the appellant before the FTT, had agreed and completed two other claims in Lomas Drive (Nos. 25 and 46) based on a deferment rate of 5.5%. Mr Fell had also agreed lease extensions on three Bryant Homes built maisonettes, similar to those in Lomas Drive, in Myton Drive, Solihull (Nos.126, 132 and 157) on the basis of a 5.5% deferment rate.

22. In April 2015 the Calthorpe Portfolio in Edgbaston was sold. The portfolio comprised the freehold interest in 446 underleases (166 of which were unextended) in 13 properties. Mr Fielding had priced the portfolio for sale and advised the client that it was worth £2.9m. That figure was not disclosed to the market and no guide price was issued. Eight bids were received and the portfolio was sold for £2.95m. The underbids all fell within £300,000 of this figure. Mr Fielding priced the portfolio using the *Sportelli* deferment rate for flats of 5%. Using a deferment rate of 5.75% while leaving all other variables constant would reduce the price by £0.5m and Mr Fielding said that anyone using a deferment rate as high as that would have been considerably outbid. The fact that all eight bids fell within such a narrow range suggested that no bidder used a 5.75% deferment rate.

23. Mr Fielding said it was the lessees' responsibility to repair the demised premises under the Lomas Drive leases and that if it became uneconomical for a lessee to repair the building it would revert to the freeholder far earlier than were the lease to run to expiry.

Discussion

24. It is only in exceptional cases that the risk of deterioration will not be reflected in the freehold vacant possession value of a property. Age or current poor condition are insufficient to justify any additional allowance. As I have said above when reviewing the FTT's decision, the Lomas Drive maisonettes are unexceptional and their attributes are fully reflected in their market value. The presence of corrugated asbestos roofs on the garages does not affect that conclusion. In any event the FTT was contradictory in its comments about the state of repair of those garages.

25. There are cases where exceptional circumstances may exist in the West Midlands; see, for instance, *Contactreal Limited v Smith* [2017] UKUT 0178 (LC) at 54. But there are no such circumstances in these appeals, a conclusion which is supported by Mr Fielding's evidence about other settlements in Lomas Drive and Myton Drive and by the analysis of the sale of the Calthorpe Portfolio.

26. In my opinion the appropriate deferment rate in the Lomas Drive appeals is 5.5%.

Issue 2: should an allowance be made for the benefit of the 1993 Act and, if so, how much?

Review of the FTTs' decisions

27. In the Lomas Drive appeals the FTT said:

> "67. After considering the submissions and evidence at the hearing, the Tribunal consider that, in theory, there could be a difference in the value of a property depending on whether the 1993 Act rights had crystallised, for example in the form of a Notice of Claim which could be assigned. This could occur in PCL [prime central London] due to the nature of the market and property values.
>
> 68. The anecdotal evidence before the Tribunal, from experienced advisers who work both extensively in the Midlands and nationally, was that the issue of such a deduction had not been raised by landlords or tenants in the Midlands area, and that in the property market in the Midlands, there was no difference in practice in the value of properties with and without the benefit of the crystallisation of the rights.
>
> 69. The Tribunal considers that the PCL property market is markedly different from that of the Midlands, particularly in relation to the characters (sic) of the properties, the values and the levels of sophistication regarding the knowledge and exercise of the rights. The Tribunal has been provided with limited evidence to demonstrate that the point in issue in practice leads to a difference in value within the Midlands area. Further, the Tribunal has not been provided with any reliable evidence to indicate the quantum of any such difference. The

Tribunal would wish to see a series of statistics over a substantial period with differing starting dates to ensure that it had been provided with robust and reliable evidence. In the absence of any evidence on either of those points, the Tribunal does not make a deduction."

28. In my opinion the FTT in the Lomas Drive appeals considered the wrong question. Instead of asking whether the 1993 Act conferred benefits which would be reflected in the market value of the existing lease and therefore fell to be disregarded, it asked whether the value of a lease where the vendor had *exercised* those rights by service of a section 42 notice would be worth more than a lease – with rights – where no such notice had been served. What matters is whether there is a difference between a lease with rights and a lease (on the statutory assumptions) without those rights. The FTT did not address the relevant point and its decision must be set aside on this issue.

29. In the Walmley Ash Road appeal the FTT said:

"37. The Tribunal finds that the decision in the *Trustees of the Sloane Stanley Estate v Mundy* [2016] UKUT 223 (LC) gives clear guidance on whether or not there is a difference in value between properties in the market with rights under the 93 Act and the 'No Act World' which excludes such rights. The Upper Tribunal concluded that a difference did exist. It accepted, with reservations, the Savills research but that research related to properties in the London area (not defined in the research but taken from the LonRes database) and this Tribunal is not persuaded by Mr Fell's proposition that Graph 2 can simply be transcribed into the Midlands market. This Tribunal notes the Upper Tribunal's reservations about the Savills 2015 Graph (Graph 1 in the research paper) and further has its own reservations about Graph 2 which it considers to be speculative. To quote from the report: '*The evidence available to assess the discount required from the real world curve shown in Graph 1 is scarce. We have compiled a range of reference points for the discount required from the current market relativity under the statutory assumption (Graph 2).*' The report contains no explanation as to why Graph 2 correctly reflects the 'No Act World'. This Tribunal concurs with the report in so far as Graph 1 reflects the maximum relativity (subject to the reservations noted in *Sloane Stanley*) that would be applied in the real world in the 'London' area. This does not mean that either of these two Graphs can simply, and without explanation, be applied to the very different market conditions experienced in the Midlands.

38. In conclusion, the Tribunal follows the Upper Tribunal in finding that a deduction to reflect the 'No Act World' should be made from the relativity curve but finds that neither party have substantiated a case for the amount of such deduction. Further, the Respondent has failed to convince the Tribunal that the Savills 2015 Graph 1 can simply be applied to the Midlands area when it is based on transactional evidence in the London area and this alone throws the blanket use of Graph 2 for all areas of the (sic) England into considerable doubt. The Tribunal therefore, concludes that a nominal deduction to reflect the Upper Tribunal decision is appropriate and accordingly, finds that 1.00% should be deducted from the existing lease value. The result is that the figure for the

> Existing Lease Value (above) is adjusted to 76.00% of the Extended Lease Value (i.e. £91,162.00)."

30. The FTT did not explain why a nominal 1% deduction for the benefit of the Act was appropriate. The evidence before it from Mr Brunt for the lessee, as summarised by the FTT at paragraph 35 of its decision, was not to the point. When asked whether "in the West Midlands" the property would be worth more with or without rights Mr Brunt said it depended on the location (presumably within the West Midlands) and went on to talk about senior citizens in Solihull down-sizing to flats who "did not consider the length of unexpired lease to be a prime factor." He thought a similar situation would apply in Sutton Coldfield and went on to say that the market in the Midlands is "less sophisticated than in some other areas". The sophistication of the market is irrelevant to the question of whether a hypothetical purchaser would pay more for a lease with Act rights compared with one without them.

31. This Tribunal has consistently said that, regardless of location, there is a quantifiable benefit of the Act to the owner of a short leasehold and there is no Tribunal decision where the said benefit to an owner of a lease with an unexpired term at or around 40 years has been determined as a nominal amount (1%). The Act benefits leaseholders wherever they may be and however sophisticated the market in which the property is being sold. As the Tribunal (Mr A J Trott FRICS) said in *Contactreal* at [31]:

> "It is beyond doubt that Act rights confer a benefit which is reflected in the value of leases in the actual market and which falls to be disregarded when calculating the premium payable for a new lease under the 1993 Act. This applies through England and Wales without exception: the West Midlands is no different to any other region in this respect and the FTT gave no persuasive reason why it should be."

32. The FTT accepted the Tribunal's guidance that there should be a deduction for the benefit of the Act, but it paid lip service to it by only making a nominal adjustment and referring to "the very different market conditions experienced in the Midlands". The FTT is an expert tribunal and it should be aware of the tone of adjustment determined by this Tribunal in similar cases. The FTT's decision is at odds with that tone and also with the evidence of the freeholder who did focus on the relevant issue and argued for a deduction of 8% based on the Savills' graphs. The FTT should also have considered whether a leasehold deduction of 1% for the benefit of the Act made sense in the context of its freehold adjustment of 6% for the risk of the lessee obtaining an assured tenancy at the end of the lease. I do not think the FTT could reasonably have concluded that these respective figures were consistent and its decision to make only a nominal adjustment for the benefit of the Act must be set aside.

Rehearing

33. Mr Fielding identified the benefits of the Act to the leaseholder by reference to the recent decision of the Tribunal (Martin Rodger QC, Deputy Chamber President, and Mr P D McCrea FRICS) in *Re Elmbirch Properties plc's Appeal* at [30]:

> "The benefits of the Act to a qualifying tenant are significant. They have been outlined in many of the Tribunal's decisions. In *Nailrile Ltd v Earl Cadogan* [2009] RVR 95 they were said to include: the right to enfranchise or extend the lease at a time of the leaseholder's choosing; a price fixed by an independent tribunal in the absence of agreement; the exclusion of the tenant's overbid whilst guaranteeing the tenant 50% of the marriage value; a fixed valuation date and delayed payment of the purchase price. The Tribunal contrasted these benefits with the position of a tenant assumed to be without the benefit of the Act who has no certainty of being granted a new lease and whose landlord is in an overwhelmingly strong negotiating position."

34. The valuation of the existing leasehold interest had to be made in accordance with paragraph 4A(1)(b) of Schedule 13 to the 1993 Act which required it to be assumed that the Act conferred no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease. Mr Fielding said that the application of this disregard meant that the subject lease would be offered for sale without Act rights in a market where all other leasehold interests would have such rights. The consequence would be a "clear difference" between the market value of the two types of asset, as was stated in *Kosta v The Trustees of the Phillimore Estate* [2014] UKUT 0319 (LC) where the Tribunal (HHJ Huskinson and Mr P D McCrea FRICS) said about a similar disregard in section 9(1A) of the Leasehold Reform Act 1967 at [129]:

> "… we consider that it would have a significantly negative impact upon the value of the existing lease of the property that the lease (52.45 year lease) must be assumed to be offered for sale without any Act rights in circumstances where other leasehold premises were being offered for sale with Act rights."

35. Mr Fielding said that it was irrelevant whether or not the West Midlands market was more or less sophisticated than that in prime Central London because the market for leases without Act rights was a hypothetical one. As the Tribunal said in *Contactreal* at [31]:

> "Sales of leases without the benefit of the Act are, to all intents and purposes, hypothetical so there can be no direct comparison between sale prices with and without Act rights."

In the absence of any evidence of sales of leases without Act rights Mr Fielding said that it was necessary to consider the detailed analysis of the question undertaken by the Tribunal in *Mundy* where the Tribunal held that the benefit of the Act was 10% in respect of a lease with an unexpired term of 41.32 years.

36. One way in which Mr Fielding thought the West Midlands and prime central London markets could be distinguished was in what he considered to be the relative

mortgage dependence of the former. In his experience mortgagees did not lend on unexpired lease terms of less than 70 years and for shorter terms the benefit of the Act would be significantly greater in a mortgage dependent area. Mr Fielding produced an analysis of Land Registry data for the number of transactions and mortgages in both Greater London and the West Midlands in 2016/17. The data did not distinguish between Greater London and prime central London but Mr Fielding inferred that since the average value of mortgaged properties was lower than the overall average value (i.e. including cash purchases), those properties bought without a mortgage were often much more valuable than those bought with a mortgage. He said that "logic would dictate" that the most valuable properties would be in prime central London and he concluded that prime central London would therefore be less mortgage dependent than the West Midlands.

37. Mr Fielding relied upon the Savills 2015 enfranchiseable graph and an unenfranchiseable graph produced by Savills in June 2016. He said that the criticisms of the 2015 graph that had been made by the Tribunal in *Mundy* had been addressed in a Savills Research Report dated 7 July 2017 and in a report annexed to Mr Fielding's evidence, Professor Andrew Harvey, Emeritus Professor of Econometrics at the University of Cambridge, said that the Savills 2015 enfranchiseable model was statistically robust. The difference between the two graphs showed, for any unexpired lease term, the benefit of the Act.

38. The Savills unenfranchiseable graph was based on such market evidence as could be found of sales without the benefit of the Act together with Upper Tribunal decisions. Mr Fielding acknowledged that the evidence was scarce but said that it was the only evidence available and that no new evidence was being created. There was no equivalent data for the West Midlands and Mr Fielding said "how the market in the Midlands would operate in this hypothetical world is speculative". But he said his analysis of the mortgage dependency of the two markets suggested that the benefit of the Act would be greater in the West Midlands than in prime central London and therefore his analysis of the latter would represent a minimum figure.

39. Using the Savills graphs Mr Fielding said that the relativity of a 46.19 year lease (39E Walmley Ash Road) was 75.4% (enfranchiseable) and 67.5% (unenfranchiseable). This represented a 10.48% reduction due to the benefit of the Act.

40. Mr Fielding used an unexpired term of 57.39 years in respect of the six Lomas Drive properties although this figure was only applicable to No.2. (The other unexpired terms were marginally different, ranging from 57.31 to 57.42 years.) The relativity was 82.1% (enfranchiseable) and 76.45% (unenfranchiseable). This represented a 6.88% reduction due to the benefit of the Act. (These are the corrected figures produced by Mr Fielding after the hearing at the request of the Tribunal.)

41. Mr Fielding concluded that the appropriate discount for the benefit of the Act was 10% for 39E Walmley Ash Road and 7.5% for the Lomas Road properties. He

thought it would be appropriate for the Tribunal to consider adopting 10 year bands for discounting the benefit of the Act and said that the evidence suggested the following such bands for unexpired terms ranging from 40 to 80 years:

Unexpired term	Discount for Act rights
40-50 years	10%
50-60 years	7.5%
60-70 years	5%
70-80 years	2.5%

Discussion

42. The Tribunal has consistently said that there is a quantifiable benefit of the Act. A lease with Act rights is worth more than one without such rights. That applies to the West Midlands no less than to anywhere else in England and Wales. Mr Fielding's evidence is based on extensive research but there are two problems with it: (i) it is based on transactions in prime central London only; and (ii) the unenfranchiseable graph is based on what Savills recognise is scarce evidence. I accept that prime central London transactions are less likely to be dependent on mortgages than those in the West Midlands and I agree with Mr Fielding that the benefit of the Act in the West Midlands is likely to be at least that of prime central London.

43. The comparative sophistication of the respective markets (by which I understand the FTT to mean the level of understanding of the statutory provisions) is not to the point when considering a comparison between an actual (enfranchiseable) market and a hypothetical (unenfranchiseable) one. In my view the evidence adduced by Mr Fielding is appropriate for use in these appeals and I adopt it.

44. In the 39E Walmley Ash Road decision the FTT allowed a 1% deduction for the benefit of the Act and took 76% instead of the enfranchiseable figure of 77%. That means the allowance for the benefit of the Act was actually 1.3%[1]. I note that the FTT's enfranchiseable relativity is close to that derived from the Savills enfranchiseable graph (75.4%). The allowance for the benefit of the Act is 10.48% using the Savills graphs and I accept Mr Fielding's rounded figure of 10%.

[1] (1-(76/77)) x 100

45. In the Lomas Drive appeals the FTT adopted a relativity of 83.33%[2] for an unexpired lease term which it rounded down to 57 years. Mr Fielding adopted an unexpired term of 57.39 years which is the length of the existing lease at 2 Lomas Drive only. The average unexpired term of the six appeal Lomas Drive properties is 57.36 years but I adopt Mr Fielding's figure as being representative. Mr Fielding said that the enfranchiseable relativity was 82.1% (The equivalent figure for 57 years is 81.9%) which is close to the FTT's figure of 83.33%. The FTT said this was the relativity of the existing leases compared with their freehold value but it assumed that the freehold value and the long leasehold value were the same. That finding is not challenged in this appeal although Mr Fielding said that in accordance with previous Tribunal decisions it was his expert opinion that the long leasehold value should be 99% of the freehold vacant possession value and that the freehold value should therefore be £90,909[3]. If that figure had been used (which I think is correct) the FTT's relativity would have been 82.5% which is even closer to Mr Fielding's figure.

46. There is no material difference in these appeals between the enfranchiseable relativity of flats/maisonettes in the West Midlands and prime central London.

47. Mr Fielding calculated the benefit of the Act to be 6.88% for the Lomas Drive properties (see paragraph 40 above) which he rounded to 7.5% in accordance with his proposed table for calculating the benefit of the Act. In my opinion the figure should be rounded to 7%.

48. The use of ranges for the benefit of the Act depending upon the length of the unexpired term is an idea which has been suggested before: see *82 Portland Place (Freehold) Limited v Howard de Walden Estates Limited* [2014] UKUT 0133 (LC) at [126] and [143]. Given the very limited and historic nature of the evidence of no Act world transactions, some form of standardisation when assessing the benefit of the Act would be useful. But I do not consider it is appropriate or necessary to consider the issue further in these unopposed appeals.

Issue 3: was the FTT wrong in the 39E Walmley Ash Road appeal to deduct 6% from the extended lease value for the risk of the lessee remaining in possession at the expiry of the lease as an assured tenant under Schedule 10 to the 1989 Act?

Review of the FTT's decision

49. The FTT dealt with this issue shortly in its decision. The applicant's case was that in *Re Midland Freeholds Limited's Appeal* [2014] UKUT 0304 (LC) the Tribunal (Mr N J Rose FRICS) held that a deduction of 4% should be made to reflect the risk of the tenant being granted an assured tenancy at the end of a lease with an unexpired term of 60 years. The applicant argued that a higher figure of 6% was appropriate in the case of the subject lease which had an unexpired term of some 46 years. The

[2] (£75,000/£90,000) x100
[3] £90,000/0.99

respondent said that it was unaware of any evidence to show there was any risk at all and therefore no allowance should be made.

50. The FTT concluded at paragraph 34:

> "The Upper Tribunal in *Midland Freeholds Limited* identified a risk to be taken into account and this Tribunal agrees with Mr Brunt [for the applicant] that given the shorter lease a greater deduction should be made. In this case, there being no other evidence than Mr Brunt's expert opinion, the Tribunal adopt 6.00%"

51. In its valuation at paragraph 42 the FTT deducted the 6% from the value of the extended leasehold interest. It should have deducted this from the freehold vacant possession ("FHVP") value. But in this case it makes no difference because the FTT took the extended leasehold value to be the same as the FHVP value and there is no appeal on this point.

52. The FTT was obliged to take Mr Brunt's evidence into account but in reaching its decision it should also have considered whether an increase of 50% in the risk factor (from 4% to 6%) made sense in the context of *Re Midlands Freehold Limited* [2014], a case heard by written representations where the FTT's rationale for adopting a discount of 4% was not fully explained, and given the difference in length of the unexpired terms in the two cases (60 years and 46 years). The context also required the FTT to explain why it considered it appropriate to award only a nominal deduction of 1% for the benefit of the Act but four times as much for a risk which, by any analysis, was far less certain, if indeed it was a risk at all. Mr Fell, the respondent's representative, said he was unaware of any evidence to demonstrate such a risk. In my opinion it was for the applicant, who was claiming the benefit of the discount, to support it. I do not consider that the FTT gave an adequate explanation of its decision on this issue and I think it was wrong to determine the risk factor at 6%.

Rehearing

53. Mr Fielding said that the hypothetical purchaser of a freehold interest subject to a lease would have to be an investor, since vacant possession was not available. An investor was concerned with the present value of future cash flows. As such any risk of the tenant holding over as an assured tenant at the end of the lease would have to be factored into such an analysis.

54. Mr Fielding said that an assured tenancy would be at a market rent and was therefore different to, and far less onerous than, a regulated tenancy subject to a fair rent. The landlord could have the rent reviewed every year by the FTT. Unlike the grant of an assured shorthold tenancy there were no letting fees involved and, depending on the terms of the tenancy, service charge and repairing obligations were often the responsibility of the assured tenant. Most investors would relet the property on an assured shorthold tenancy at the expiry of the lease. That would usually require

significant renovation expenditure prior to letting and this would not be necessary if the existing tenant held over under an assured tenancy. There were also qualifications on who could hold over as an assured tenant: the property must be the lessee's principal residence, the lessee could not be a company and rental value limits applied (although these are too high to be relevant in this appeal).

55. In the light of these characteristics Mr Fielding considered that the FTT had attributed non existent negative factors to assured tenancies and he saw no reason why a hypothetical purchaser of a freehold interest subject to a 46 year lease would attribute any weight to the risk of a lessee holding over on an assured tenancy at the end of the existing lease.

56. Mr Fielding went on to consider whether there was any discount applied in practice in the market. He referred again to the sale of the Calthorpe Estate portfolio and said that none of the bidders had made any adjustment for the risk of a lessee becoming an assured tenant at the expiry of a lease. He said that he continued to act for two of the under bidders and such a discount simply was not made. Anyone who made such a discount would be outbid.

57. Mr Fielding thought there were circumstances where an allowance for the risk of an assured tenancy being granted would be taken into account by the hypothetical freehold purchaser. This was when there was only a very short unexpired term. He referred to an application before the FTT (reference LON/00AW/OCE/2015/0340) in September 2016 concerning the collective enfranchisement of the freehold interest in 14 Lennox Gardens, London SW1. Mr Fielding appeared as an expert witness for the applicant, The Wellcome Trust Limited. The lessee of Flat A, which was her principal home, met the conditions for claiming an assured tenancy. At the valuation date the lease on Flat A had just two months unexpired. The respondent (the nominee purchaser) argued that a discount of 25% should be made (including a *Vale Court*[4] end allowance of 1%) while Mr Fielding said that a 5% discount was appropriate. The FTT preferred Mr Fielding's evidence and made a 5% discount for the risk of the lessee holding over on an assured tenancy. The case is now subject to an appeal to the Tribunal but leave to appeal was not sought on this point.

58. Mr Fielding said that if 5% was an appropriate discount for a two-month unexpired term where the lessee satisfied the conditions for the grant of an assured tenancy it was inconceivable that a greater discount (6%) should be applied to a lease with an unexpired term of over 46 years.

Discussion

59. The issue of whether a discount should be made for the risk that a lessee might remain in occupation at the end of the lease under an assured tenancy was first considered by the Tribunal, Bernard Marder QC, President, in *Cadogan Estates*

[4] *Carey-Morgan v Trustees of the Sloane Stanley Estate* [2012] EWCA Civ1181

Limited v McGirk [1998] LRA/6/1997 (unreported). That appeal concerned the extension of a lease with an unexpired term of 6.75 years. The appellant landlord challenged the Leasehold Valuation Tribunal's decision to discount the FHVP value by 2.5% to reflect the risk of an assured tenancy arising at the expiry of the lease. It did so on two grounds: (i) because the rental value of the flat was far too high for an assured tenancy to arise; and (ii) because there was no evidence that the risk of an assured tenancy would reduce the value of the landlord's interest, since an assured tenant would be required to pay a market rent as opposed to the fair rent payable by a statutory tenant. The respondent tenant said that even in cases where such a risk was remote a discount was applied in the market. The Tribunal recorded the respondent's expert evidence at 15:

> "With a reversion as short as 6.75 years, [the respondent's expert] thought it absurd to assume that an investor faced with a choice of properties would make no price distinction whatever between a property where such a risk existed and one where vacant possession was guaranteed."

The LVT's decision to discount the freehold value by 2.5% reflected what it described as a "sufficiently ambiguous" legal position "to raise an element of doubt in the mind of a purchaser". The Tribunal found no such ambiguity and said it "would have been plain to a properly advised purchaser at the relevant date" that the rental value of the flat "was far in excess of £25,000 per annum" and therefore the tenant did not qualify for an assured tenancy.

60. *West Hampstead Management Co Ltd v Pearl Property Ltd* [2002] 1 EGLR 115 concerned three leases which expired 12 days after a claim was made to exercise the right to collective enfranchisement under section 13 of the 1993 Act. The Tribunal, Mr P R Francis FRICS, found that all three lessees qualified to claim assured tenancies and said at 120[63]:

> "…[The respondent's expert] assessed the risk factor at 5% of the freehold value…on the basis that risks associated with assured tenancies were far less than those that applied when statutory Rent Act protected tenancies could be claimed, and gave reasons why investors would not necessarily look at the prospects of assured tenancies in a particularly negative light. In referring to *Shahgholi*[5], where a 15% discount was applied to the risk of statutory tenancies being claimed, he said that because some investors were attracted by assured tenancies, any risk factor would be very substantially less.
>
> 64. While I prefer [the respondent's] arguments, I do not believe that an investor would see assured tenancies as being particularly attractive, although they are, of course, much less risky than 1954 Act tenancies. In my judgment, a 10% discount is fair in all the circumstances."

61. *McGirk* and *West Hampstead* were both cases where the unexpired term was very short, but in *Re Clarise Properties Limited's Appeal* [2012] UKUT 4 (LC) the Tribunal (George Bartlett QC, President, and Mr N J Rose FRICS) considered

[5] *Cadogan Estates Limited v Shahgholi* [1999] 1 EGLR 189; [1998] RVR 266

whether a hypothetical purchaser would make a discount to reflect the risk of a lessee continuing in possession under an assured tenancy at the expiry of a 50 year lease extension when determining the price payable for the freehold interest in a dwellinghouse under section 9(1) of the Leasehold Reform Act 1967. The unexpired term of the existing lease was 28.5 years and so the risk of an assured tenancy being granted would be realised (if at all) 78.5 years after the valuation date. The appellant landlord's expert allowed 1.75% to reflect this risk. The Tribunal said at [40]:

> "It is true that the purchaser of the freehold would have no means of knowing whether vacant possession would be gained at the end of the 50-year lease extension. In our view, however, the fact that there can be no certainty of obtaining vacant possession would have a significant depressing effect on value and a substantially greater effect than that suggested by [the appellant]. In the absence of any comparable evidence to indicate the scale of the appropriate deduction we conclude that a purchaser would assume that the value of the eventual reversion would be … equivalent to 80% of the full standing house value…"

62. The Tribunal has not adopted a discount rate as high as 20% in any subsequent decision. In *Re Midland Freeholds Limited's Appeal* [2014] the Tribunal upheld the FTT's deduction of 4% from the FHVP value for the risk of an assured tenancy where the unexpired term was 60 years. No explanation was given for this choice of percentage or why it should be so much smaller than the award of 20% in *Clarise*. In *Contactreal* the Tribunal, Mr A J Trott FRICS, made a "nominal discount of 2.5%" in respect of an unexpired term of 67 years.

63. *Clarise* was an unopposed appeal in respect of a house valued under section 9(1) of the 1967 Act. Only one expert gave evidence and he suggested that a 1.75% discount was appropriate. The Tribunal referred at [40] to "the absence of any comparable evidence to indicate the scale of the appropriate deduction". *Hague Leasehold Enfranchisement* (Sixth Edition) says about *Clarise* in footnote 21 to paragraph 33-07:

> "That deduction is controversial, not only because it is inconsistent with the deductions made in earlier cases but also because there was no evidence adduced to support it"

I do not find *Clarise* to be helpful in these appeals.

64. I have the benefit of some, albeit limited, evidence about the approach of purchasers in the market to the risk of an assured tenancy being granted at the expiry of an existing lease. That evidence indicates that in the case of a very short unexpired term in circumstances where the right of a lessee to an assured tenancy had been established, only a 5% discount was made. And in the sale of the Calthorpe Estate portfolio Mr Fielding's analysis suggested that no discount had been made by either the purchaser or the under bidders. Similar evidence was apparently not available to the Tribunal in *West Hampstead, Re Midland Freeholds Limited's Appeal* [2014] or *Contactreal*.

65. In these circumstances I am not persuaded that a hypothetical purchaser would make any discount to the FHVP value where there the lease has an unexpired term of 46 years. I therefore make no deduction in respect of Schedule 10 rights under the 1989 Act.

Determination

66. I determine the three issues in this case as follows:

Issue 1: the deferment rate in the Lomas Drive appeals is 5.5%.

Issue 2: the deduction for the benefit of the Act is 7% for the Lomas Drive leases and 10% for the 39E Walmley Ash Road lease.

Issue 3: I make no allowance for the risk of the grant of an assured tenancy at the end of the 39E Walmley Road lease.

67. I therefore determine the premium payable for each of the Lomas Drive properties at £12,025 (see Appendix 2) and the premium payable for 39E Walmley Ash Road at £23,221 (see Appendix 3).

Dated 29 December 2017

A J Trott FRICS
Member

APPENDIX 1

PROPERTY	LESSEE	DATE OF S42 NOTICE	UNEXPIRED TERM (YEARS)
2 Lomas Drive	Ms E Kenny	2 November 2015	57.39
4 Lomas Drive	Mr R J Guess Ms C McQuoid	12 November 2015	57.37
8 Lomas Drive	Mr D Williams	23 October 2015	57.42
36 Lomas Drive	Ms C Knight	2 December 2015	57.31

55 Lomas Drive	Mr R Griffin	20 November 2015	57.34
57 Lomas Drive	Mr C J Mould	2 December 2015	57.31

APPENDIX 2

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION: LOMAS DRIVE

1. Diminution in value of freehold interest

(i) Capitalisation of ground rent			
Rent until 25.3.2040:	£52.50		
xYP 24.39 years @ 6.5%:	12.073		
		£634	
Rent until 25.3.2073:	£70		
xYP 33 years @ 6.5%:	13.459		
xPV of £1 in 24.39 years @ 6.5%:	0.2152		
		£203	
			£837
(ii) Loss of freehold reversion			
Unencumbered freehold value:	£90,000[1]		
Less 4% for risk of assured tenancy being granted under 1989 Act[2]:	£ 3,600		
Adjusted freehold value:	£86,400		
xPV of £1 in 57.39 years @ 5.5%	0.0463		
		£4,000	
(iii)Proposed freehold interest			
Unencumbered freehold value:	£90,000		
xPV of £1 in 147.39 years @ 5.5%	0.0004		
		(£36)	
Diminution in value of freehold interest:			£4,801

2. Marriage value

(i) Value of proposed interests			
Leasehold:	£90,000		
Freehold:	£ 36		
		£90,036	
Less			
(ii)Value of present interests			
Present leasehold value:	£75,000		
Less benefit of Act at 7%:	£ 5,250		
	£69,750		
Present freehold value:	£ 4,837		
		£74,587	
Marriage value:		£15,449	
50% of marriage value to freeholder:			£7,224
Premium payable:			£12,025

[1] The FTT equated the unencumbered freehold and long leasehold values but the point was not appealed.

[2] Permission to appeal was refused on this issue.

APPENDIX 3

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION OF 39E WALMSLEY ASH ROAD

1. Diminution in value of freehold interest

(i) Capitalisation of ground rent

Agreed at:		£291[1]	

(ii) Loss of freehold reversion

Unencumbered freehold value:	£119,950[2]		
Less improvements:	£ 3,000		
Adjusted freehold value:	£116,950		
xPV of £1 in 46.19 years @ 5.5%:	0.0843		
		£9,859	

(iii) Proposed freehold interest

Adjusted freehold value:	£116,950		
xPV of £1 in 136.19 years @ 5.5%:	0.0007		
		(£82)	
Diminution in value of freehold interest:			£10,068

2. Marriage value

(i) Value of proposed interests

Leasehold:	£119,500		
Freehold:	£ 82[3]		
		£119,582	
Less			

(ii) Value of present interests

Present leasehold value:	£92,361		
Less benefit of Act at 10%:	£ 9,236		
	£83,125		
Present freehold value:	£10,150[4]		
		£93,275	
Marriage value:		£26,307	
50% of marriage value to freeholder:			£13,153
Premium payable:			£23,221

[1] Rounded up from £290.85.
[2] The FTT equated the unencumbered freehold and long leasehold values but the point was not appealed.
[3] The FTT wrongly took the proposed value of the freehold interest at zero.
[4] The FTT wrongly took the value of the reversionary freehold interest as being the value of the present freehold interest. In doing so it ignored the value of the freehold term (agreed at £291).