

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2017] UKUT 494 (LC)
Case No: LRA/27/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – flat – whether adjustments to be made for time, freehold/long leasehold interest, and “Act rights” – market evidence v graphs – market evidence preferred – premiums determined at £19,200 – Schedule 13, Leasehold Reform, Housing and Urban Development Act 1993

**IN THE MATTER OF AN APPEAL AGAINST A DECISION
OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

BY:

**SINCLAIR GARDENS INVESTMENTS
(KENSINGTON) LTD**

Appellant

**Re: Flats 9 and 11, George Court
37 George Street
Chelmsford
CM2 0JU**

DECISION ON WRITTEN REPRESENTATIONS

P D McCREA FRICS

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The following cases are referred to in this decision:

Trustees of the Sloane Stanley Estate v Mundy [2016] UKUT 223 (LC)

Elmbirch Properties plc, Re 51 and 85 Humphrey Middlemore Drive [2017] UKUT 314 (LC)

Arrowdell v Coniston Court (North) Hove Limited [2007] RVR 39

Southwark Council v Various lessees of the St Saviours Estate [2017] UKUT 0010 (LC)

Mallory and Ors v Orchidbase Ltd [2016] UKUT 468 (LC)

Contactreal Ltd v Smith [2017] UKUT 0178 (LC)

The Earl Cadogan v Farrokh Faizapour & John Stephenson [2010] UKUT 2 (LC)

DECISION

Introduction

1. The appellant, Sinclair Garden Investments (Kensington) Ltd (“Sinclair”) is the freehold owner of flats at George Court¹, 37 George Street, Chelmsford, CM2 0JU. By Notices of Claim dated 9 March 2016 the tenants of flat 9, Christopher and Stella Willey, and the tenant of flat 11, Joseph McCann, each gave notice under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”), claiming new extended leases. I will refer to flats 9 and 11 as the appeal flats.

2. At the valuation date, 10 March 2016, the leases of each of the appeal flats had 66.81 years unexpired.

3. The premiums payable under Schedule 13 to the 1993 Act could not be agreed, and in its substantive decision on 18 January 2017 the First-tier Tribunal (Property Chamber) (“the FTT”) determined that in each case the premium should be £12,485.11, corrected on 25 January 2017 to £12,572.61. Following an application by Sinclair, in a decision dated 10 February 2017 (“the refusal decision”) the FTT declined to review its decision and refused permission to appeal.

4. Sinclair’s subsequent application to the Tribunal was granted by the Deputy President on 15 June 2017, to be dealt with as a review of the FTT’s decision with a view to rehearing, under the Tribunal’s written representations procedure. As I explain below, in the event I am satisfied that the FTT’s decision was flawed, and have determined the premiums based on the evidence submitted.

5. Mr Oliver Radley-Gardner of counsel made written submissions on behalf of Sinclair, which, as it did before the FTT, relies upon expert evidence from Mr Geoffrey Holden FRICS, the senior partner of Parsons Son & Basley LLP. Before the FTT, the tenants were represented by Ms Katie Gray of counsel, who relied upon expert evidence from Mr Stephen Watson MRICS and Mr Mark Klesel FRICS. The tenants have chosen not to respond to the appeal, but I have seen and had regard to Messrs Watson and Klesel’s written evidence to the FTT.

The FTT’s decision

6. The two valuer members of the FTT panel inspected the appeal flats (the chair having been delayed in traffic), and the exterior of one of the main comparables – 108 Bradford Street, which is a short walk from the appeal flats.

7. In its substantive decision, the FTT described the appeal flats as follows:

¹ The development is variously described in the evidence as George Court, George’s Court and, on one Land Registry document, King George’s Court. I have used George Court throughout.

“6. The building appears to have been erected in the early 1980’s of cavity block/brick under a fibre cement slate roof and is on a site behind commercial accommodation on the New London Road in Chelmsford which is the county city of Essex. The properties are within easy walking distance of the city centre and rather a long walk to the railway station which has trains to central London.

7. Flat 9 is on the first floor. It has 2 bedrooms, a kitchen, a living room and a bathroom/WC all of which are unimproved. The heating is by electric storage heaters. Flat 11 is on the 2nd floor with the same basic facilities. However, it has double glazing and [a] modernised kitchen and bathroom. There were also more modern electric heaters and fittings.

8. There are two buildings in the development with parking spaces for residents. The common parts were in need of decoration and repair. The walls were plastered and painted with emulsion but needed repainting. The floors were tiled and many were breaking up. One of the front retaining walls was partially collapsed. The site is accessed from George Street which is a fairly narrow one way ‘street’ which is the only access to, and forms part of, a large public ‘pay and display’ car park. All of these issues would undoubtedly, in the Tribunal’s view, act as deterrents to prospective purchasers, at least those who would want to live in the flats themselves. Surveyors and lawyers employed by lenders would also be concerned about the terms of the leases and the lack of maintenance.”

8. As regards the lease terms, the FTT commented:

“10. The regime for the maintenance of the building and the payment of service charges is not particularly helpful in the sense that much of the burden for arranging these things is placed on the shoulders of the lessees. It is clear that the original landlord and developer did not really want to be involved in the management of the building.”

9. The only aspects of the valuation which were in dispute before the FTT were the notional freehold value of each flat with assumed vacant possession, and relativity – i.e. the relationship (expressed as a percentage) which the value of the unexpired leasehold interests bore to the value of the freehold interests at the valuation date.

Notional freehold value with vacant possession

10. The FTT heard expert evidence from Mr Watson MRICS, Mr Klesel FRICS and Mr Holden FRICS. Mr Holden also acted as advocate for Sinclair (a dual role which can create difficulties for a witness in maintaining the required objectivity, but which is in no way improper). The substantive decision noted that:

“14. The 3 surveyors gave their evidence. It became clear that all 3 relied mainly on the comparables at 42 George Court and 108 Bradford Street which were built at about the same time by the same builder and with leases containing the same repairing and maintenance regime as the subject flats. It was agreed that the improvements to flat 11 would be worth about 2½ % of the value and, excluding such improvements, the values were the same.

...

16. In respect of the value, both sales of both of the significant comparables were completed after the valuation date of the 10th March 2016. The evidence from Mr. Klesel was that 42 George Court was marketed with a guide price of £165,000. It was empty. On the 26th July 2016 an offer of £157,000 from a ‘cash buyer’ was accepted. Mr. Holden’s evidence was that this transaction completed on the 15th November 2016. A sale of 108 Bradford Street was completed on the 18th August 2016 with a sale price of £195,000. None of these ‘facts’ were contested.

17. All 3 valuers agreed that the completion date did not necessarily reflect the valuation date as comparables. An indicative valuation date for a comparable was the date when contracts were exchanged i.e. the date when there was an offer, an acceptance and a contractual commitment. However, even then, the offer and acceptance may have been some time beforehand. Some more relevant information about these dates was available about 42 George Court but none about 108 Bradford Street.

18. There was also evidence about the market at the time. It seemed to be agreed that in March 2016 i.e. the month of the valuation date, there were 2 important events on people’s minds i.e. the referendum vote and the Chancellor of the Exchequer’s intention to impose a 5% increase in stamp duty for ‘buy to let’ investors. Either or both had the potential to distort the market particularly in the short term. It also seemed to be agreed that in March 2016 sales of flats in the property market slowed dramatically – no doubt affected by the new stamp duty provisions. Prices did not go up although they did not seem to fall to any appreciable extent.

19. The Tribunal noted with interest that the comparable of 42 George Court was on the market for £165,000 and sold for £157,000 to a cash buyer. A 5% reduction in the offer price from an investor who did not want to pay the extra stamp duty would have been £156,750.”

11. The FTT concluded that the notional freehold value with vacant possession was £175,000 based on the following rationale:

“22. Based entirely on the evidence, the inspection and collective experience of the Tribunal members and the submissions of the parties, it is the Tribunal’s decision that as it agrees the 2 comparables, Mr. Holden’s approach should be looked at first....

23. Taking the comparable of 108 Bradford Street, this appears to have been sold on the open market for £195,000. The Tribunal considered that a buyer, particularly a potential owner occupier, would be far more likely to be attracted by that property than the subject properties. It is in a much more attractive ambience, access and location with well kept gardens and what appeared to be a proper maintenance and repair arrangement which had presumably been set up by the lessees. The sales particulars indicated that it had been improved.

24. As to proper maintenance and repairs, Mr. Holden suggested that as the terms of the leases for the subject properties and the comparables were the same, the freeholder should not be ‘punished’ by having to accept less just because the lessees of George Court had not complied with their maintenance obligations. The answer is quite simple.

Firstly, the landlord made a positive commercial decision to own this block when it knew or ought to have known that the management arrangements were far from ideal. Secondly, it presumably made the further commercial decision not go to the expense of enforcing the terms of the leases. There was no evidence that the landlord of Bradford Street has put a management regime into operation which means that the lessees have presumably decided to do this themselves. The Respondent should not therefore benefit from this.

25. The Tribunal's view is that 10% should be deducted from the sale price of 108 Bradford Street to reflect both the difference in real world value between that property and the subject properties and also the improvements. As valuation cannot be an exact science, this will be rounded down slightly to £175,000."

Relativity

12. The FTT summarised the evidence from the three surveyors, and submissions from Mr Holden and Ms Gray, thus:

"20. As far as the law was concerned, Mr. Holden argued that the case of *The Trustees of the Sloane Stanley Estate v Mundy* [2016] UKUT 223 (LC) created a change in the way that relativity was to be considered with the Upper Tribunal giving guidance. The view of Ms. Gray, which was accepted by the Tribunal, was that the Upper Tribunal was saying, in effect, that market evidence should be looked at first but that the various graphs and indices referred to before should be considered to provide some sort of counterbalance or check.

21. In summary, the Applicants' experts say that relativity should be calculated by looking at the graphs supplied by the College of Estate Management (93.13%) and the Leasehold Advisory Service (92.99%) and a midpoint of 93.06% has been applied. Mr. Holden, on behalf of the Respondent argues that the 'differential' is capable of calculation from the evidence of the comparables which in fact produces a relativity figure of 78.8% which he has rounded up to 79%. Graphs, in his view, should be ignored."

13. The panel concluded that:

"22....[The determined figure of £175,000] should then be compared with the several graphs considered by the Royal Institution of Chartered Surveyors to reflect a broad brush overview of the relativity evidence. It should be emphasised that these are not, as has been suggested, figures 'produced by' the RICS. They are produced by others and collated by the RICS.

...

25. If one then looks at the RICS graph analysis, it is noted that the Beckett & Kay graph is the most recent (2014) which takes account of the changes in the policies of lenders following the financial crisis. The relativity for a lease of 66.81 years unexpired would be around 90%. Applying this to the sale price of 42 George Court, one reaches a

figure of £157,500. It seems to this Tribunal that this analysis and comparison confirms the view that these figures are correct.”

14. The FTT set out its calculations in a schedule to the substantive decision, from which it arrived at premiums in each case of £12,485.11, amended to £12,572.61 in a correction certificate dated 25 January 2017.

The FTT’s refusal decision

15. The reasons contained in the substantive decision might neutrally be described as concise. Further explanation of the panel’s thinking can be gathered from the refusal decision, in which this brevity was justified partly on the basis that “there is no requirement on a Tribunal to set out every single argument in its reasons”. That is obviously true, but it is necessary for a tribunal to deal with the substantial areas of dispute so that its reasoning can be understood by the parties (and if necessary by this Tribunal). To omit part of its reasoning from the decision, and to provide it only in the refusal decision risked creating the impression that the refusal decision contained additional reasons to justify the original decision, rather than explaining the reasons which had led the FTT to make that decision.

16. As regards the “no Act world”, the refusal decision recounts how it was put to Mr Holden that there were different approaches to any no Act world adjustment – which he accepted. He “could not justify his choice of 2.5% with any specific evidence *because every surveyor knows that such evidence does not exist.*” (It is not clear whether the element which I have italicised was Mr Holden’s comment or that of the panel). The panel said that there was a specific suggestion that some valuers made an adjustment of 1%, but that some made no adjustment at all, as many buyers did not understand and [did not] take the differences into account. It was put to Mr Holden that the evidence was that the purchaser of 42 George Street was a cash buyer and such people are “usually investors who take little or no notice of any such difference in values”.

17. The refusal decision indicates that there was a lengthy discussion about the valuation date, and the relevant dates of comparable transactions “because it is the date when the price is agreed that is the only relevant date”. The completion date can be some months later, recorded by the Land Registry, “which makes their figures completely unreliable in terms of pinpointing a comparable date of any ‘agreed price’”. The facts about the market place described in the substantive decision formed part of the discussion, and the FTT made it clear to Mr Holden that it considered that the market did not move appreciably during the relevant period for the reasons stated – he had every opportunity to put his case in respect of these points and did so.

18. The refusal decision demonstrates the risk Mr Holden and his client took by giving him the dual role of advocate and expert witness – the FTT said that it found his position confusing because it had no idea whether the comments he was making were as an expert or advocate.

19. The refusal decision casts further light on the FTT’s approach to graphs. It indicates that the panel reached a preliminary decision on the evidence, and it “then looked at the most up to date graph for comparison”, although in the next sentence it says that the panel “did not

rely on any graph to make its decision as is clear from the reasons given”. The FTT pointed out that during the hearing, there was continuous reference to various graphs, and said that “for the grounds of appeal to suggest that Mr Holden was unaware of and unable to comment upon the graphs is disingenuous”.

20. The panel commented that the Beckett and Kay graph contains more than one line, several of which reach a relative of 90% for leases having an unexpired term of 66.81 years. The proposed appellant chose to focus only upon the mortgage dependent graph, but the other lines are just as much part of the graph.

21. Finally, the refusal decision refers to a complaint that it had relied inappropriately on its own knowledge and experience, but says that there was no such reliance – the panel simply followed the proposed appellant’s representative’s methodology by looking at the factual evidence and reaching a conclusion; it then looked at the graphs as a counterbalance or check. Looking at the graph did not cause the panel to change its decision.

Grounds of appeal

22. Mr Radley-Gardner set out the grounds of appeal in a helpful written submission.

Notional freehold value with vacant possession

23. The appellant first submits that the FTT made inappropriate adjustments to the sale price of 108 Bradford Street – which it accepts is the best comparable. The appellant case is that there is little difference between 108 Bradford Street and the subject block, and that when short tenancies were granted in each the rents were broadly the same. The FTT made factual assertions in relation to the repair and management regime at George Court, but repair is subjective, and the effect on value is not significant. Mr Holden’s view is that the maximum adjustment to the price achieved at 108 Bradford Street should be 2.5% rather than the 10% adopted by the FTT.

24. Secondly, the sale of the flat at 108 Bradford Street was five months after the valuation date – yet the FTT failed to make an adjustment for time. The appellant submits that a suitable adjustment would be by reference to the relevant Land Registry house price index. In its refusal of permission to appeal, the FTT commented that indices might be unreliable.

25. Thirdly, the FTT made no adjustment to reflect the assumption that the leases were granted in the “no Act world”, i.e. the assumption that the appeal flats did not enjoy the benefit of rights under the Act which was enjoyed in the real world by the purchasers of the comparable properties. This was contrary to the Tribunal’s decisions in *Mundy* at [127], and *Elmbirch Properties plc, Re 51 and 85 Humphrey Middlemore Drive* [2017] UKUT 314 (LC) at [29] onwards. It also, erroneously, assumed that since 42 George Court was purchased for cash, the purchaser must have been an investor, to whom “Act rights” were irrelevant. The appellant asserts that an adjustment of 3.19% for “Act rights” is appropriate.

Relativity

26. The appellant complains that the FTT applied a relativity of 90% using the graph produced by the firm Beckett and Kay, without alerting the parties to its intention to do so or inviting their comment. This was said to be procedurally irregular. Of more importance the appellant asserts that the FTT should not have relied on a graph at all, given that there was transactional evidence available. The sale of 42 George Street at £157,000 in November 2016 could be adjusted for time and “Act rights” to arrive at £146,351 which would give rise to a relativity of 81.13%.

27. In any event, the appellant argues, the FTT misused the Beckett and Kay graph. The panel noted that the graph, from 2014, “reflected changes in lending policies following the financial crisis”, but appeared to look simply at 2009 graphs from other contributors which had not been amended. If the correct line in the Beckett and Kay graph is used, relativity for a 66-year unexpired term falls from 90.6% (the 2009 figure) to about 83% (2014).

Review of the FTT’s decision

28. Ordinarily an appeal mounted on grounds that an expert tribunal had taken a different view of the main comparable would have little chance of success. Where the issue is one of valuation and assessment of the evidence, and the FTT makes no errors of principle, this Tribunal is unlikely to substitute its own view.

29. However, I accept Mr Radley-Gardner’s submission that in this case the FTT made some fundamental errors of principle. The first was that it made no allowance for the benefit of the 1993 Act, which is contrary to normal practice and to a series of decisions of this Tribunal. There was no evidence that the purchaser of the comparable property was an investor, and in any event no evidence that investor purchasers do not differentiate between long leasehold and freehold interests. Finally, its dismissal of the use of Land Registry indices is contrary to principle, and was inconsistent with the evidence. The FTT found that in the period between the sale of the main comparable and the valuation date “prices did not go up although they did not seem to fall to any appreciable extent”, but the Land Registry data available to the panel showed a steady increase in values for the months before and after the valuation date. Accordingly, I consider the FTT’s reasoning to be flawed, and that its calculation of the premiums cannot stand. I therefore now consider the matter afresh.

Evidence

30. The bundle of evidence submitted to the Tribunal includes a number of expert reports. First, there is Mr Holden’s report to the FTT dated 8 December 2016, in which he contended for a premium of £23,130, based on an unimproved freehold value of £182,500. Secondly, there is his report to the Tribunal dated 15 August 2017, in which this figure reduces to £20,795, based on an unimproved freehold value of £180,000. I have taken his later report to be his evidence, but have referred to his earlier report as source material.

31. There are also two documents prepared by Mr Watson. The first is a “market valuation report” (but only in respect of flat 11) dated 20 December 2016, in which he assessed the appropriate premium to be £8,739. It is not clear whether this was his evidence to the FTT or advice to his clients. Secondly there is a copy of valuation report – to whom it is not clear – dated 10 January 2017, in which he assessed the premium payable in respect of flat 11 to be £9,628. The difference between the two figures stems from different assumed unexpired terms – which in themselves have a minor effect on the premium – and different values for the unimproved freehold interest - £173,000 in his first report, and £165,000 in his second.

32. Each of Mr Holden’s reports included a joint statement of agreed facts, purportedly prepared by him and Mr Watson, although Mr Watson has not signed either document, and the figures therein do not feature in either of his reports. In the version appended to Mr Holden’s first report, the premium contended for by Mr Watson is not stated. The version attached to his second report is again unsigned by Mr Watson but was signed by Mr Holden on 5 January 2017. It suggests that the following items were agreed:

- (1) The valuation date was 10 March 2016.
- (2) The unexpired lease term was 66.81 years (this figure was not used by Mr Watson in either of his reports, but is correct).
- (3) The annual ground rent was £50, rising to £70 on 1 January 2017, and to £100 on 1 January 2050.
- (4) The capitalisation rate to be applied to the ground rent is 7%.
- (5) The deferment rate to be applied is 5%.

33. It seems to be common ground that there are two main comparable transactions: 108 Bradford Street, which is helpful in calculating the value of the unimproved freehold interest of the appeal flats; and 42 George Court (within the same development) which is helpful in valuing the existing leasehold interests.

34. The elements of the calculation remaining in dispute were, and are, the assumed freehold vacant possession value excluding improvements, and the value of the existing leasehold interests, which depends on the appropriate relativity figure. I deal with these in turn.

Freehold value with vacant possession

Mr Holden

35. In his December 2016 report, Mr Holden relied upon the sale of the long leasehold interest in 108 Bradford Street at £195,000 in August 2016, at which point there were 156.36 years unexpired on the lease. He considered Bradford Street to be comparable to George Court and therefore made no adjustment for location. To reflect changes in values during the five-

month period between the valuation date and the sale date of 108 Bradford Street, Mr Holden applied the Land Registry index for flats in Chelmsford (at that point the index showed average prices at £191,760 for March 2016, and £202,429 for August 2016) to arrive at a value, adjusted for time, of £184,722. Deducting a nominal amount (around 1.2%) for improvements, he arrived at a long leasehold value for the appeal flats of £182,500.

36. Mr Holden's August 2017 expert report featured a number of minor changes to his approach. First, the Land Registry index had been updated (this is not uncommon - the index changes when further data becomes available), and showed an average price of £201,657 for August 2016. Secondly, he accepted that 108 Bradford Street was in a marginally better residential location than the appeal flats. He reflected this, and an allowance for improvements, by making a composite deduction of 2.5%, giving £190,125 which when adjusted for time produced a long leasehold value of £180,000².

Mr Watson

37. Mr Watson's reports were only in respect of flat 11, and not flat 9. It would appear that since the lease terms were identical the FTT took the evidence in respect of flat 11 as equally applicable to flat 9, at least as far as the unimproved values are concerned, and I make the same assumption.

38. Mr Watson relied upon the opinions of local surveyors. His evidence included a report dated 9 June 2016 from Mr Klesel; a letter dated 20 December 2016 from Mr Klesel to Mr McCann (in which Mr Klesel commented on Mr Holden's report); and a letter/marketing report dated 18 May 2016 to Mr and Mrs McCann from a Mr Brian McGovern of McCartney Estate Agents of Chelmsford.

39. Mr Klesel's opinion of the long leasehold value, assuming the unexpired lease "exceeds say 125 years", was £180,000. He put the existing lease value at £165,000. In his letter of 20 December 2016, Mr Klesel said that he considered Mr Holden's (then) figure of £182,500 to be "slightly optimistic". In his marketing letter, Mr McGovern recommended an asking price of £170,000 - £175,000 for a 157-year lease.

40. Mr Watson's method of arriving at the notional long leasehold value was to divide a relativity figure into his existing lease value. His report states that:

"to calculate relativity from an assumed "extended lease" value gives an incorrect result. If there is evidence available from a flat in the same block, then surely that is the best evidence and the relativity should be calculated from that evidence. Calculating "downward" also gives an inflated result."

² There was no explanation for the change in the order of calculation – i.e. making the deduction for improvements and location *before* the application of the index, but since the adjustments are commutative there is no difference to the end result. However, it is generally preferable to make adjustments for non-physical factors (eg time and relativity) before making allowances for physical factors – see for instance *The Earl Cadogan v Farrokh Faizapour & John Stephenson* [2010] UKUT 2 (LC) – when there are spot figure or fixed deductions.

41. However, rather than making appropriate adjustments to the sale price of flat 42 at £157,000, Mr Watson seems to have either taken Mr Klesel's view of the existing leasehold value of £165,000, or the asking price of flat 42 at the same level, and deducted 2.5% for improvements, to arrive at £160,875. He then divided this by a relativity of 93.06% to arrive at an equivalent long leasehold figure of £172,873. His relativity percentage was taken from an average of the relativity graphs of the College of Estate Management (93.13%) and the Leasehold Advisory Service (92.99%).

Discussion

42. In summary, the evidence for the appellant is Mr Holden's updated opinion that the freehold value of the appeal flats was £180,000; the evidence for the tenants, as presented to the FTT, comprised Mr Watson's £172,873 (based on what might be termed reverse-relativity); Mr Klesel's £180,000, and Mr McGovern's asking price range of £170-£175,000, all of which were on a long leasehold basis assuming no differential to reflect the difference between long leasehold and freehold values.

43. I reject Mr Watson's approach. Whilst I have some sympathy for his view that a sale in the same block should provide a reliable guide to value, the difficulty is that in order to make proper use of the transaction he has relied on two graphs which in its recent decisions the Tribunal has found to be of little assistance (see *Mallory and Ors v Orchidbase Ltd* [2016] UKUT 468 (LC) at [39], *Contactreal* at [37] and *Sloane Stanley* at [67] of Appendix C).

44. In considering the sale of 108 Bradford Street, several adjustments are required to reflect: a location factor; improvements; changing market conditions over time; and finally the advantages of a notional freehold compared with a long leasehold.

45. The FTT made a 10% deduction to the £195,000 "real world value" of 108 Bradford Street to reflect differences in location and improvements. This arrived at £175,500 which it rounded down to £175,000. Mr Holden's evidence, having acted for the tenant in claiming a new lease in 2013, was that 108 Bradford Street was built by the same developer as the subject flats. The sales particulars describe it as "nicely presented", with a refitted bathroom and double glazing. He said that these improvements had been carried out when he inspected the flat in November 2013, and commented that the flat was modest and the quality of bathroom fittings reflected this – hence his nominal deduction for improvements.

46. As regards the subject flats, the FTT records that flat 9 was unimproved, but flat 11 had the same basic facilities but had double glazing, and a modernised kitchen and bathroom, with more modern electric heating and fittings. The valuers are recorded as having agreed [14] that the improvements to flat 11 were "worth" about 2.5% of its value, but excluding these improvements the values were the same.

47. It is necessary to consider the increase in values over the five-month period between the valuation date and the date of the sale of 108 Bradford Street. I accept Mr Holden's

adjustment, based on the increase in the Land Registry index of average prices from £191,760 at the valuation date to £201,657 in August 2016, equating to around 6%.

48. If one accepted for a moment the FTT's 10% adjustment, before rounding, for location and improvements, and then applied to the £175,500 an adjustment for changes in values over time (£191,760/£201,657) a figure of £166,886 is arrived at. This suggests that the FTT's deduction was too great, since all of the expert evidence outlined in paragraph 42 points to a range of £170,000 - £180,000.

49. The FTT was quite entitled to make an adjustment for location based upon their inspection of the appeal flats and their external view of 108 Bradford Street. Whilst it appears that the maintenance provisions in the leases were the same, the panel was right to make an appropriate adjustment if the general impression at the subject flats was that common parts had not been maintained to the same degree as at those at 108 Bradford Street. However, I consider the deduction that the FTT applied resulted in a figure for the unimproved long leasehold interest that was too low when the Land Registry Index is applied. Doing the best I can, allowing 5% for location and improvements, and then adjusting for time, the appropriate value for the long leasehold interest is £176,158 (see first part of calculation in paragraph [52]).

50. However, there must also be a further adjustment to reflect the difference between a long leasehold and a notional freehold value, unless there is clear evidence to the contrary (as there was, unusually, in *Orchidbase*). In *Elmbirch* the Tribunal commented at [23]:

“Where the landlord's interest is the freehold reversion to the existing lease, as it is in these cases, the statutory assumption on the basis of which the diminution in the value of that interest is to be ascertained is of a sale of the freehold interest in which the tenant is not a buyer and enjoys no rights under the Act. On those assumptions (which are artificial and rarely encountered in reality) the purchaser of the landlord's interest would anticipate that on the expiry of the lease the flat would return to the then freeholder with vacant possession...

24. It cannot sensibly be suggested that the unencumbered freehold interest which will come into the hands of the landlord at the end of the term is no different to a long lease, under which the tenant has liabilities, restrictions and obligations to the freeholder, irrespective of the length of lease. To assume that the two interests, which are different in nature, are nevertheless no different in value requires a substantial justification. The FTT's justification was that an investor would be unlikely to differentiate between the two interests, but it cited no evidence in support of that proposition; nor was it in a position to cite direct evidence, as the sale which the statute requires must be assumed is not one encountered in reality.”

51. In both *Elmbirch* and in *Contactreal Ltd v Smith* [2017] UKUT 0178 (LC) the Tribunal accepted that long leasehold interests of 158 years and 157 years would be worth 99% of the respective notional freehold values. In my view that is also an appropriate adjustment in this case. Accordingly, I calculate the appropriate notional unimproved freehold value for each flat as follows:

| | | | | | |
|-----------------|---|-----------------------------|---|----------|--|
| £195,000 | x | $\frac{£191,760}{£201,657}$ | = | £185,430 | (taking the sale price of 108 Bradford Street, and adjusting for time using the Land Registry index) |
| £185,430 | | less 5% | = | £176,158 | (adjusting for location and improvements) |
| <u>£176,158</u> | | | = | £177,938 | (adjusting for the differences between a long leasehold and a freehold) |
| | | 99% | | | |
| (say) | | | | £178,000 | |

Existing leasehold values and relativity

52. In calculating the premiums payable, there are no transactions on the subject flats that might have been the convenient starting point envisaged by the Tribunal in *Mundy* [168]. However, as identified at the FTT, there is a transaction on another flat within the same development – flat 42³. It was common ground that this property, which was vacant, was marketed at a guide price of £165,000, and on 26 July 2016 an offer of £157,000 from a “cash buyer” was accepted, with the sale completing on 15 November 2016, at which point there were 66.13 years unexpired on the lease.

Mr Holden

53. Mr Holden had not inspected flat 42, but he noted from the sales particulars that there appeared to be nothing remarkable about the quality of the bathroom or kitchen, and although double glazing had been installed, he considered that insufficient to merit an adjustment for tenant’s improvements.

54. He adjusted the sale price for time, again using the Land Registry index, (Nov 2016 £199,152; March 2016 £191,760) to arrive at £151,173. However, since this was a real world figure, with the benefit of the Act, he made a further adjustment, which he based on the difference between the relativity of 87.89% for an unexpired term of 66.81 years shown in the Savills 2002 graph (with “Act rights”), and the relativity of 85.09% shown in the Gerald Eve 1996 graph (without “Act rights”). The difference in absolute terms was 2.8%, or in relative terms 3.18%.

55. Mr Holden considered that a deduction for “Act rights” of 3.19% for an unexpired term of 66.81 years was broadly in line with previous decisions of the Tribunal, eg between the deductions accepted in *Orchidbase* of 5.5% for an unexpired term of 57.68 years and the figure of 3.5% in *Contactreal* for a term of 67.49 years.

³ This property is variously described in the evidence as either 42 George Court, 42 George’s Court, or 42 George Street, but having reviewed the Land Registry title plan I am satisfied that it is within the same development as the appeal flats.

56. He therefore reduced his £151,173 by 3.19% to arrive at an adjusted figure of £146,351 which represented a relativity of 81.31%. He was aware that this was a lower percentage than that suggested by the published graphs, but noted that the Tribunal had adopted relativity percentages of 81% for leases having 68.62 and 68.67 years unexpired. He considered the difference served to highlight the shortcomings in the published graphs.

57. From all of the above, he concluded that an appropriate relativity figure is 81.25% - giving a leasehold value of £146,250, which resulted in a premium in each case of £20,795.

Mr Watson

58. Mr Watson's approach was based on the opinion of Mr Klesel, which was that the existing lease would have a value of £165,000, or £160,875 after a deduction of 2.5% for improvements. He made no adjustment for time, or for "Act rights".

Discussion

59. As regards Mr Holden's approach, I accept his adjustment for time, and accept that an adjusted sale price for flat 42 would be £151,173 at the valuation date. I also accept that there should be a deduction for "Act rights". The requirement to make such an adjustment was discussed earlier this year in *Elmbirch*:

"29. The valuation exercise must be carried out on the basis of an artificial assumption. Chapter II of the Act provides that qualifying tenants may claim the right to a new lease, but paragraph 3(2)(b) of Schedule 13 requires that in determining the diminution in value of the landlord's interest as a result of the exercise of that right it must be assumed that no such right exists. Moreover, the right conferred on tenants of flats collectively by Chapter I of the Act to acquire the freehold of the building must also be disregarded. Traditionally these assumption were referred to as the "no Act world", but since the assumption applies only to the subject property (the flat itself in the case of the tenant's right to a new lease, and the building in which it is contained in the case of collective enfranchisement), and not to the rest of the market (ie it is not assumed that the legislation was never enacted), it has more recently been termed the "no Act building" (see, for example, *Crown Estate Commissioners v Whitehall Court London Ltd* [2017] UKUT 0242 (LC) at [21] to [57]).

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 legal 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.

31. Where comparable transactions concerning premises with the benefit of the Act have been used to determine the value of the various interests, the statutory direction that the diminution in the landlord’s interest is to be ascertained on the basis of notional transactions in which the benefit of the Act is assumed not to be available would seem in principle to require an adjustment to be made to the values suggested by the comparables....”

60. That is the principle, but what level of discount should be applied? In order to put Mr Holden’s opinion into context, it is useful to consider a shorthand (but not necessarily exhaustive) table of discounts accepted or made by the Tribunal for unexpired terms of 40 years or more, as follows:

| Unexpired term | Adjustment for “Act rights” | Decision | Reference |
|----------------|-----------------------------|--------------------|-----------------------|
| 41.32 | 10% | <i>Mundy</i> | [2016] UKUT 0223 (LC) |
| 45 | 7.50% | <i>Nailrile</i> | [2009] RVR 95 |
| 57.68 | 5.50% | <i>Orchidbase</i> | [2016] UKUT 0468 (LC) |
| 67.49 | 3.50% | <i>Contactreal</i> | [2017] UKUT 1078 (LC) |
| 68.62/68.67 | 3.50% | <i>Elmbirch</i> | [2017] UKUT 314 (LC) |
| 77.7 | 2.50% | <i>Sarum Props</i> | [2009] UKUT 188 (LC) |

61. This appeal is one of a number in the recent years to deal with the issue of relativity in which only the appellant has participated. Whilst the Tribunal seeks to adopt a consistent approach, each case must be considered on its own merits, having regard to the evidence adduced. Some caution is therefore required when relying on decisions on valuation in cases where there was no respondent (as in *Elmbirch*) or where one party was unrepresented or not supported by expert valuation evidence (as in *Orchidbase*). The Tribunal never accepts the evidence of an appellant in an unopposed appeal without subjecting it to careful scrutiny and critical analysis, but the absence of cross-examination, counter-argument and the additional evidence upon which a respondent might rely, are limiting factors.

62. For that reason, I do not consider it appropriate in an appeal conducted on written representations case where only one side is represented to embark on an extensive analysis of Mr Holden’s proposed 3.19% by reference to, say, the Savills 2015 graphs, or the extent to which the gap between it and the Gerald Eve graph has narrowed, as observed by the Tribunal in *Mundy*. It is sufficient to observe that 3.19% for an unexpired term of 66.81 years is inconsistent, to an extent, with the decisions in *Elmbirch* and *Contactreal*. In my judgment there would in reality be little difference between the present day value of the reversion in these

cases which are 66.81 years away at the valuation date, compared with say 67.49 years in *Contactreal*. The difference in time in reality is around 8 months, but two generations away. Accordingly, I consider the appropriate adjustment for the absence of Act rights is 3.5%. Applying this to £151,173, a value of £145,881, say £145,750, is arrived at.

63. Thus, a notional freehold value of £178,000, and a current lease value of £145,750 would represent a relativity of just under 82% for the unexpired term of 66.81 years. I am satisfied that this is a credible relativity based on the market evidence.

Conclusion and Determination

64. The Tribunal's valuation is attached as an appendix, from which it will be seen that the following elements make up the calculation:

| | |
|----------------------------------|-----------------------|
| Freeholder's Current Interest: | £7,847 |
| Leaseholder's Current Interest: | <u>£145,750</u> |
| | £153,597 |
| Freeholder's Proposed Interest: | £85 |
| Leaseholder's Proposed Interest: | <u>£176,158</u> |
| | £176,243 |
| Marriage Value: | £22,646 |
| Premium Payable: | |
| 50% of marriage value: | £11,323 |
| Freeholder's current interest: | <u>£7,8347</u> |
| | £19,170 (say) £19,200 |

65. I therefore determine that the premiums payable by the tenants of each of the appeal flats is £19,200.

Dated: 29 December 2017



P D McCrea FRICS

Appendix – Tribunal’s Valuation

| Flats 9 & 11 Georges Court, Chelmsford, CM2 0JU | | | | | | |
|--|---|--------------|-------|--|---------------|----------------|
| <i>Current Interests</i> | | | | | | |
| Landlord: | | | | | | |
| | Present rent: | | | | £50 | |
| | yp | 0.81 yrs @ | 7.00% | | 0.76522 | £38 |
| | Reversion to: | | | | £70 | |
| | yp | 33 yrs @ | 7.00% | | 12.7538 | |
| | pv £1 | 0.81 yrs @ | 7.00% | | 0.94643 | £845 |
| | Reversion to: | | | | £100 | |
| | yp | 33 yrs @ | 7.00% | | 12.7538 | |
| | pv £1 | 33.81 yrs @ | 7.00% | | 0.10149 | £129 |
| | Reversion to: | | | | £178,000 | |
| | pv £1 | 66.81 yrs @ | 5.00% | | 0.03839 | £6,834 |
| | | | | | | £7,847 |
| Tenant: | | | | | | |
| | £151,173 | | | | | |
| | less Act rights @ | 3.50% | | | -£5,291 (say) | £145,750 |
| <i>Interests after lease extension</i> | | | | | | |
| Landlord: £178,000 | | | | | | |
| | pv £1 | 156.81 yrs @ | 5.00% | | 0.00048 | £85 |
| Tenant: £176,158 | | | | | | |
| <i>Marriage Value</i> | | | | | | |
| | Combined interests after lease extension: | | | | £176,243 | |
| | Combined current interests: | | | | £153,597 | |
| | Marriage Value: | | | | £22,646 | |
| | Premium at 50% of marriage value | | | | | £11,323 |
| | plus LL's current interest: | | | | | £7,847 |
| | | | | | | £19,170 |
| | | | | | (say) | £19,200 |