



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : LON/00AY/OCE/2014/0080

Property : 33 Rattray Road, London SW2 1BA

Applicant : 33 Rattray Road Freehold Ltd

Representative : Robert Clifford (Richard John Clarke,
Surveyors)

Respondent : Croydon (Unique) Ltd

Representative : Jonathan Dean (Forbes Dean
Associates)

Type of Application : Enfranchisement

Tribunal Members : Robert Latham
Helen Bowers BSc(Econ) MSc MRICS

**Date and venue of
Hearing** : 23 July 2014
10 Alfred Place, London WC1E 7LR

**Appearance for
Applicant** : Robert Clifford MRICS

**Appearance for
Respondent** : Jonathan Dean MRICS

Date of Decision : 4 August 2014

DECISION

1. The Tribunal determines that the premium payable by the Applicant in respect of the purchase of the freehold interest at 33 Rattray Road is £42,400. This is premised on the relativity rates being 93.13% for Flat 1 and 93.24% for Flat 2.

Introduction

1. The Applicant, as nominee purchaser, seeks a determination of the price payable by it for the freehold of 33 Rattray Road, London SW2 1BA ("the premises") pursuant to a notice served under to Section 13 of the Leasehold Reform, Housing & Urban Development Act 1993 (the Act).
2. The Tribunal gave directions on 1 April 2014. Pursuant to the Directions, the expert surveyors called by each side have met and reached a measure of agreement. This is set out in the Statement of Agreed Facts and Issues:
 - (i) The valuation is to be carried out in accordance with Section 13 of the Act.
 - (ii) The valuation date is 5 September 2013.
 - (iii) At the valuation date, the unexpired terms were 70.54 years (Flat 1) and 70.80 years (Flat 2).
 - (iv) The investment yield on the ground rent is 7%.
 - (v) The deferment rate is 5%.
 - (vi) Freehold values of the flats are £355,000 (Flat 1) and £465,000 (Flat 2).
3. The one issue in dispute is the relativity rate that should be adopted:
 - (i) Mr Clifford, for the lessees, argued for rates of 93.13% for Flat 1 (70.54 years unexpired) and 93.24% for Flat 2 (70.80 years unexpired).
 - (i) Mr Dean, for the freeholder, argued for rates of 89.9% for Flat 1 (70.54 years unexpired) and 90.0% for Flat 2 (70.80 years unexpired).

The Hearing

4. The parties were represented by their expert surveyors, Robert Clifford MRICS for the Applicant and Jonathan Dean MRICS for the Respondent. We are grateful for the assistance provided by both experts. They both demonstrated that they were aware of their responsibilities as independent experts. They presented their cases cogently and in measured terms. They each had a diametrically opposing view as to the how the Tribunal should approach the issue of relativity. Both were able to demonstrate that their approach had been adopted by others. This is a rare case where the Tribunal has to determine which approach is to be preferred.

Relativity

5. The following guidance on relativity is provided by the learned editors of "Hague on Leasehold Enfranchisement" (5th Ed) at [33.06]:

"The assessment of the value of the tenant's existing lease is often problematic. Sales of flats in the locality on leases of a comparable unexpired term will invariably be "tainted" by being sold with 1993 Act rights, which have to be disregarded. If there is evidence of sales of flats in the locality on very long leases, valuers can assess the value of the flat on its existing lease by taking a proportion of the long lease value. The relative value of a lease when compared to one held on a very long term varies with the unexpired term. This "relativity" has not proved easy to establish. A number of organisations publish tables or graphs of relativity, representing their views, which views may be based on market transactions, settlements, expert opinion and/or tribunal decisions. This topic was recently considered in detail by the Lands Tribunal (in *Nailrite Ltd v Cadogan LRA/114/2006 [2009] 2 EGLR 151*). It held that relativity is best established by doing the best one can with such transaction evidence as may be available and graphs of relativity (see *Nailrite Ltd [2009] 2 EGLR 151* at [228] applying the guidance of the Lands Tribunal in *Arrowdell*)."

6. Two decisions to which the parties referred us, highlight the problems that Tribunals have to face. We highlight the passages from the judgments which we find to be most helpful.
7. *Arrowdell Ltd v Coniston Court (North) Hove Limited [2007] RVR 39*, is a decision of the President (George Bartlett QC) and NJ Rose FRICS. The Upper Tribunal identified the difficulty in determining relativity at [36]:

"Moreover, said Mr Gallagher, since there were inherent limitations in all forms of valuation evidence in enfranchisement cases, in particular because of the difficulties in giving effect to the no-Act world assumption, there were good policy reasons for not excluding any potentially probative evidence. If, as was the case here, there was no direct market evidence, whether transactional or settlement, that was untainted by the 1993 Act, that pointed towards the admissibility of previous tribunal decisions. Even if previous decisions were not admissible, however, it was nevertheless appropriate for an expert like Mr Pridell to have regard to previous LVT decisions because the reality was that the market took such decisions into account and an expert ought to have regard to factors that affected the market."

8. The Upper Tribunal went on to consider the relevance of LVT decisions (emphasis added):

“37. In our judgment LVT decisions on relativity are not inadmissible, but the mere percentage figure adopted in a particular case is of no evidential value. The reason for this is that each tribunal decision is dependent on the evidence before it, and thus, in order to determine how much weight should be attached to the figure adopted in a decision, it would be necessary to investigate what evidence the LVT had before it and how it had treated it. Such a process of investigation is potentially lengthy, and it is inherently undesirable that LVT hearings should resolve themselves into rehearings of earlier determinations.

38. It is certainly understandable that valuers negotiating the settlement of an enfranchisement claim should have regard to LVT decisions on relativity, since these might seem to them to be the best guide of the likely outcome if they were unable to reach agreement, even though, as Mr Pridell said, the decisions are disparate and fail to show any established pattern. But the decisions themselves can constitute no useful evidence in subsequent proceedings.”

9. The Upper Tribunal went on to consider other sources of evidence:

“39. The difficulty that confronts every LVT, as it now confronts us, in seeking to determine the appropriate relativity to apply in a particular case is the inadequacy of the available evidence. If no assistance is to be derived from earlier LVT decisions for the reasons we have just given, the same will go for settlements that have themselves been based on such decisions. In such circumstances, in our view, it is necessary for the tribunal to do the best it can with any evidence of transactions that can usefully be applied, even though such transactions take place in the real world rather than the no-Act world. Regard can also be had to graphs of relativity, as we say below, and later on we suggest that greater guidance could be derived from this particular type of evidence.”

10. The Upper Tribunal finally gave the following guidance:

“57. As we have said above, we have been acutely aware of the difficulty of reaching a satisfactory conclusion on relativity in the light of the inadequacy of the available evidence, and it is clear that this is a problem that is liable to confront LVTs in all such cases. The likelihood is that decisions will be varied and inconsistent, while if local perceptions of relativities are built up as the result of decisions and settlements it is improbable that these will properly reflect no-Act values. Against this background we consider that graphs of relativity are capable of providing the most useful guidance. While it may be that relativities will vary between

one type of property and another and from area to area, we think that there is little doubt that the predominant factor is the length of the term. It ought, we believe, to be possible to produce standard graphs, distinguishing between mortgage-dependent markets and those that are not so dependent, on the basis of a survey of assessments made by experienced valuers addressing themselves properly to the hypothetical no-Act world. We express the hope that the Royal Institution of Chartered Surveyors may find itself able to carry out such an exercise and to produce guidance in the form of standard graphs that can readily be applied by valuers in carrying out enfranchisement valuations. Such graphs could be used as evidence by LVTs, with the relativities shown being applied by them in the absence of evidence compelling the adoption of other figures.

11. In October 2009, the RICS published its report on Graphs of Relativity, in response to the suggestion in *Arrowdell*. The Leasehold Relativities Group, chaired by Jonathan Gaunt QC and comprising eight surveyors, considered all the published graphs but were unable to agree upon definitive graphs to be used as evidence by LVTs, as had been proposed by the Lands Tribunal. The report reproduced all the published graphs together with details of the data that lies behind each.

12. In *Re Coolrace Ltd* [2012] UKUT 69 (LC); [2012] 2 EGLR 69, the Upper Tribunal considered four consolidated appeals. The Appellant freeholder appealed against decisions of the Midlands Leasehold Valuation Tribunal concerning the premiums payable for lease extensions on five properties in the West Midlands. At the tribunal hearings, no relevant evidence of current leasehold values had been available in relation to four of the properties, and the tribunal had decided that the limited transactional evidence available in respect of the fifth property was insufficient. In each case, the lessees' representative had proposed the application of Lawrence and Wightman's Midlands Graph of Relativity, which had been constructed using 40 to 50 Midlands LVT decisions extracted from the LEASE graph. The LEASE graph was a composite graph of relativity compiled by the Leasehold Advisory Service from 717 LVT decisions throughout England, including prime central London, between 1994 and 2007. It contained no settlement evidence. The freeholders' representative adopted the Nesbitt & Co Graph in the 2009 RICS research paper. That graph included Greater London, a proportion of provincial towns covering the south coast of England and the Midlands region, and also included settlement evidence. In each case the tribunal preferred and applied the Midlands graph in reaching its decision. The Appellant argued that although reliance on a suitable graph of relativity had been appropriate in the circumstances, the tribunal had made erroneous determinations as to relativity because of its reliance on the Midlands graph. They argued that the LEASE graph provided the most accurate and reliable evidence.

13. In granting permission to appeal, the President had said that it was strongly arguable that, having regard to the observations in *Arrowdell*, the LVT was wrong to base its determination of relativity on previous LVT decisions. The President directed that the appeal be limited to the issue of relativity and be by way of rehearing. None of the Respondent lessees responded to the appeal.
14. Paul Francis FRICS allowed the appeal. He explained the basis of his decision:

“25 The LVT rejected the evidence that was based upon the Nesbitt graph which, it transpires, was based solely upon settlement evidence. It was, in my view, right to do so. However, I have to conclude on the evidence before me that the LVT was wrong to base its determination upon the Lawrence and Wightman Midlands graph (the Midlands graph), which was based upon a small sample extracted from the LEASE graph. I accept Mr Davis's evidence (which I found to be well researched, logical and convincing) that the Midlands graph was very much out of kilter with any of those reproduced in the RICS Research Report, and there was no evidence to support the argument that there were particular regional variations in relativity percentages (other than in PCL). I accept his arguments as to the suitability of the LEASE graph by comparison. It is a broad geographical analysis of a large number of LVT decisions.

26 Further, Mr Davis produced examples of a number of cases where partners in Lawrence & Wightman have adopted the LEASE graph and their arguments have been accepted by the LVT. As the LVT said in the Whittington Close case (para 18 above), “there is very little evidential value in the analysis of a small number of LVT decisions” and that “the Lawrence & Wightman figure is considerably out of line with other methods of determining relativity.” Mr Cannon of Lawrence & Wightman, in the Abingdon case, said that his preference was to use the LEASE graph as “the most commonly used”, “the best independent evidence” and that he considered no further adjustment necessary for the no-Act world.

27 Therefore, in the instant cases, I find that I am persuaded by Mr Davis's evidence and arguments, allow the appeal, and adopt the figures based upon the LEASE graph as set out in the attached valuations. It is, of course, and with *Arrowdell* in mind, with some reluctance that I make a determination that clearly relies upon a graph that is based only upon past LVT decisions, but with the absence of any reliable transactional evidence, it is the only option open to me and the LEASE graph is clearly, in my view, more representative of appropriate relativities than the Midlands graph. However, it needs to be stressed that this decision should not be

seen as setting a precedent in other cases where evidence which is more reliable than the LEASE graph is available.”

15. Mr Francis finally gave the following guidance for future cases:

“28 Finally, in connection with graphs generally, it is a fact that the Research Paper produced by the RICS Leasehold Relativities Group in October 2009 contained details of a variety of graphs prepared by surveyors and firms that act for both landlords and tenants. As such, in total, they provide a graphical analysis based upon a large number LVT decisions, settlements and valuation opinion. Collectively, therefore, they represent the broadest currently available study relevant to the issue of relativity. It may be that the production of a composite graph representing, by a single curve, the mid-point of what would be a very substantial body of evidence over a wide area might well be of assistance to valuers and tribunals in cases where reliance upon such information is the only available option.”

16. In *Earl Cadogan v Cadogan Square Ltd* [2011] UKUT 154 (LC); [2011] 3 E.G.L.R. 127, the Upper Tribunal was faced with the difficulty of conflicting evidence as between evidence of adjusted transactions (producing a relativity of 53 to 56 per cent) and evidence from graphs (producing a relativity of 38 per cent). An analysis of the evidence from the Savills 2002 enfranchisable graph as against the Gerald Eve non-enfranchisable graph suggested that the adjustment of ten per cent made by the nominee purchaser to adjust the transactional evidence to reflect 1993 Act rights was too low and the Tribunal decided that a deduction of 25 per cent was appropriate. The unexpired terms in that case were 17.75 years.

The Submissions of the Parties

17. In the absence of any market evidence of sales of leases without 1993 Act rights, Mr Clifford, on behalf of the lessees, relied upon the RICS Graphs of Relativity. He has excluded the graphs for Prime Central London. He has therefore relied upon the seven graphs of Beckett and Kaye; South East Leasehold; Nesbitt and Co; Austin Gray; Andrew Pridell Associates Ltd; CEM Report 2000 and Leasehold Advisory Service. He provides an analysis of these tables at 42-127 and 42-128. He computes an average of 93.13 for a term of 70.54 years and 93.24 for one of 70.80 years. It is noticeable that the variation between the seven graphs is not great. For 70.54 years, the lowest is 91.27 (Nesbitt & Co) whilst the highest is 94.09 (CEM Report 2000).
18. Mr Clifford also relied on two LVT decisions in which the approach of his firm had been adopted:

(i) 82 Twickenham Road, London E11 (LON/00BH/OLR/2012/0810) – 31.10.12. The Tribunal concluded that reference to a wider number of graphs would provide a broader view of relativity.

(ii) 135 Maybank Road, London E18 (LON/00BC/OLR/2012/0850) – 7.11.12. The Freeholder had appeared in person. The Tribunal discounted three graphs, (i) the South East Leasehold – based entirely on transactional evidence in the “Act” world; (ii) the LEASE – based solely on LVT decisions; and (iii) Andrew Pridell – based on transactional evidence in the Brighton area. The Tribunal took an average of the remaining graphs.

19. Mr Dean accepted that it had been appropriate to exclude Prime Central London. However, he criticised each of the remaining graphs. Thus (i) Beckett and Kaye was based on opinion, included both mortgage and non-mortgage dependent markets whilst the former was biased towards markets for landlords; (ii) South East Leasehold seemed to be based on “an analysis of sales and questionnaires completed by estate agents” – he suggested that this seemed to be an anomaly; (iii) Nesbitt and Co was based on settlements and was arguably a landlord’s graph; it included the South coast and the Midlands; (iv) Austin Gray was based on the South East, primarily on Brighton and Hove; (v) Andrew Pridell Associates Ltd was a tenant’s table (90% of the data); (vi) CEM Report 2000 was based on data from 1994 to 1999 which was not relevant to the current market; and (vii) and Leasehold Advisory Service which was based on LVT decisions from 1994 to 2007.

20. Mr Clifford accepted that each of the seven graphs were open to criticism. It was for this reason that he argues for an average of them all.

21. Mr Dean rather relied on the J D Wood Pure Tribunal Graph which records decisions of both LVTs and the Upper Tribunal (at 42-156). From these, he extracted 89.9% for 70.54 years and 90.0% for 70.80 years. It is not entirely clear when this table was produced or the period of time over which the 601 Tribunal decisions were determined. It includes a number of cases for Prime Central London. Mr Clifford suggested that this could be as high as 90%. Mr Dean responded that these represented no more than 33%. This is an issue which this tribunal is unable to resolve.

22. Mr Dean also relied on five settlements in which his firm had been involved, in four of which they had acted for the tenant:

(i) 17 Brockley Park, SE23 – 89% for 69.35 years. The Agreed Settlement is at 42-157. Mr Dean stated that this was based on local transactions. We had no evidence of the transactions upon which this was based.

(ii) 23 Tamar House, Kennington Lane – 90% for 69.70 years. No settlement calculation is available. Mr Dean stated that this was based on local settlements. There were no local transactions.

(iii) 22 Montana Close, South Croydon – 90.5% for 70.17 years. The settlement is recorded at 42-159. ;

(iv) Worple Court, SW19 - 91% for 70.9 years. The relativity figure had been agreed. Other valuation issues were determined by a LVT.

(i) 139 Trevelyan Road, SW17 – 92% for 72.03 years. The settlement agreement is at 42-162.

23. Mr Clifford cautioned us against relying on a small basket of local settlements secured by one firm. He suggested that these could be affected by the “Delaforce” effect, namely that the tenant may be more willing to concede a higher figure than a landlord in order to secure a settlement.
24. Mr Dean urged us not to rely on the RICS’s Relativity Graphs. He argued that the best evidence available was recent settlements. The market was very different now than when the RICS’s Graphs had been prepared. The situation had changed in 2008 as a result of the collapse of Northern Rock in June 2007. Whilst mortgages were still available for leases of 70 years unexpired, they attracted higher interest rates or low loan to value ratios. As a result, relativity rates had widened since the RICS’s Graphs had been published. The Tribunal inquired as to the effect of the government’s Assisted Mortgage Scheme. There was no evidence in respect of this.
25. Mr Dean further argued that this change in the market was confirmed by the Second Revision of the Beckett and Kay graph which had been published in 2013. This suggested that relativity for leases with 70 years unexpired should be 80% compared with their previous assessment of 92.8%. We understand that, as with the original graph, this is based on opinion and that most of the firm’s instructions in non-mortgage-dependent markets are for tenants whilst most in the mortgage-dependent market are for landlords. This revised figure is far outside the range of any of those suggested by any of the RICS’s graphs. It is also far outside the range of those of 89.9% and 90.0% for which Mr Dean was contending in this case. It is a figure which requires a rational explanation. No evidence was adduced to explain this.

The Tribunal’s Decision

26. In determining the figure that we adopt for relativity, we must have regard to the guidance provided by the Upper Tribunal. However, whilst

we are provided with assistance with the approach that we should adopt, the problem is one of evidence. In *Cooltrace*, Mr Francis suggested that the RICS produce a composite graph. Our task would be the more straightforward were such a graph to be published.

27. We are satisfied that the best evidence is that to be derived from local transactions. However, that evidence is not, and rarely is, available. Even were it to be available, it would be tainted by the "Act" world, which would need to be discounted. We must therefore determine a figure for relativity having regard to the expert evidence that has been adduced, applying our knowledge and experience as an expert tribunal,
28. We are persuaded that we should adopt the approach adopted by Mr Clifford. The RICS's Graphs continue to represent the broadest study on the issue of relativity. The graphs reflect a source of different materials: local transactions, expert opinion, settlements and LVT decisions. On the evidence before this Tribunal, we are satisfied that these graphs are the best available evidence.
29. We are satisfied that it is appropriate to exclude those relating to Prime Central London. These represent a different market. Mr Dean was equally dismissive of all the RICS's Graphs upon which Mr Clifford sought to rely. He did not suggest that there was any reason to exclude any of the seven graphs. We accept that an average of the seven graphs reflects the best basket of evidence that is available. We note that the variation between the seven graphs is not significant.
30. Mr Dean's argument that the market had fundamentally changed as a result of the financial meltdown in 2008 was interesting. However, we would have required clear and cogent evidence of such a change in relativity. Mr Dean was unable to adduce such evidence.
31. We have had regard to the John D Wood Table. However, it includes decisions in respect of Prime Central London which would distort the table. Further, it is unclear when it was produced and the timescale of the decisions upon which it is based.
32. We are satisfied that we should give limited weight to the small basket of settlements negotiated by one particular expert. This is likely to be distorted by the "Delaforce" effect. One particular expert may have a settled view as to the figures that should be adopted for relativity. That expert may be able to persuade colleagues that their view is correct. However, we were far from satisfied that this reflected the local market.

Conclusions

33. The Tribunal prefers the evidence of Mr Clifford and therefore determines rates of relativity of 93.13% for Flat 1 (70.54 years unexpired) and 93.24% for Flat 2 (70.80 years unexpired).
34. The other factors relevant to the computation of the premium are agreed. The Tribunal therefore determines that the premium payable by the Applicant in respect of the purchase of the freehold interest at 33 Rattray Road is £42,400. This is the figure set out in Mr Clifford's computation.

Robert Latham
Tribunal Judge
4 August 2014