



LRA/28/2006

**LANDS TRIBUNAL ACT 1949**

*LEASEHOLD ENFRANCHISEMENT – maisonette – premium for grant of new lease – use of LVT's own expertise as expert tribunal – value of improvements – use of single house price index rejected – price determined at £12,121 – Leasehold Reform, Housing and Urban Development Act 1993, Sch. 13*

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD  
VALUATION TRIBUNAL FOR THE MIDLAND RENT ASSESSMENT PANEL**

**BY**

**ELMBIRCH PROPERTIES PLC**

**Re: 43 Rednall Drive  
Four Oaks  
Sutton Coldfield  
West Midlands  
B75 5LG**

**Before: His Honour Judge Gilbert QC and A J Trott FRICS**

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL  
on 21 December 2006**

Paul Alexander Church FCA for the appellant landlords  
The tenant did not respond to the appeal

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The following cases are referred to in this decision:

*Cadogan v Sportelli* (Lands Tribunal reference LRA/50/2005)

*Fairmount Investments Ltd v The Secretary of State for the Environment* [1976] 1 WLR 1255.

*Arrowdell Limited v Coniston Court (North) Hove Limited* (Lands Tribunal reference LRA/72/2005)

The following case was referred to in argument:

*Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] All ER 975

## DECISION

### Introduction

1. This is an appeal by the respondent landlord, Elmbirch Properties plc (the appellant), from the decision of the Leasehold Valuation Tribunal for the Midland Rent Assessment Panel on 15 November 2005, whereby it determined an application by the tenants David Andrew McGibbon and Christine Ann McGibbon under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993. The LVT determined that the premium payable for the grant of a new lease of the appeal premises at 43 Rednall Drive, Sutton Coldfield, West Midlands, B75 5LG was £8,586.

2. The appeal is made under section 175(2) of the Commonhold and Leasehold Reform Act 2002. Permission to appeal by way of rehearing was granted by the President of this Tribunal on 30 March 2006.

3. We heard the appeal on 21 December 2006. The appellant was represented by Paul Alexander Church FCA, who also gave evidence with the permission of the Tribunal. The respondent tenants were not represented, having elected not to appeal on economic grounds, and having so informed the Tribunal by letter dated 17 March 2006.

4. The appellant served its grounds of, and reasons for, appeal on the tenants. In these Mr Church did not challenge the capitalisation yield and the deferment rate of 7% which had been determined by the LVT. Nor did he do so in either the Statement of Case or his expert report dated 6 July 2006. However in the light of this Tribunal's decision in the case of *Cadogan v Sportelli* (Lands Tribunal reference LRA/50/2005) on 15 September 2006, Mr Church submitted a supplemental report dated 23 October 2006 which applied a deferment rate of 5% to the reversion but kept the capitalisation yield unchanged at 7%. The effect of this amendment was to increase the premium payable by approximately £2,500. There was no evidence on the Tribunal's file that Mr Church's supplemental report had been served on the tenants, whose decision not to respond to the appeal had been made in the context of the deferment rate of 7% as determined by the LVT having been unchallenged in the appellant's grounds of appeal. At the hearing we asked Mr Church if he could confirm whether his supplemental report had been served, and we adjourned to allow him to make enquiries of his client by telephone. He was unable to provide such confirmation. We then asked him if he wished to rely on his supplemental report, in which case we would adjourn the hearing to allow service. If he did not rely on it, then he could continue with the hearing on the basis of the deferment rate of 7% which he had accepted and adopted in his original expert report dated 6 July 2006. Mr Church elected not to rely upon his supplemental report and proceeded on the latter basis.

## Facts

5. The new lease in question relates to the premises at 43 Rednall Drive, Sutton Coldfield which is a maisonette located on the ground floor of a two-storey brick built block of four such units. It was constructed in the 1960s. There is a communal parking area at the front of the property but no allocated spaces. Rednall Drive is a cul-de-sac which consists principally of nine similar blocks, each comprising either two or four maisonettes.

6. The original lease was granted from 25 March 1964 for a term of 99 years and as at the valuation date of 24 August 2004 had 58½ years to run. The tenants sought the grant of a new lease at a peppercorn rent under which the existing term would be extended by 90 years.

7. The valuation exercise to be undertaken is that set out in Schedule 13 of the 1993 Act and requires the determination of the premium payable for the grant of the new (extended) lease by aggregating the diminution in the value of the landlord's interest and 50% of the marriage value. In the present case no further compensation is due to the landlord under paragraph 5 of Schedule 13 to the 1993 Act.

8. The diminution in the value of the landlord's interest is the difference between the value of the landlord's interest in the tenant's flat prior to the grant of the new lease and the value of its interest in the flat once the new lease is granted. In the present case the value of the landlord's proposed reversionary interest in the flat is effectively nil and so the diminution in the value of its interest is calculated as the sum of the capitalised value of the existing ground rent and the deferred value of the existing reversion. The marriage value is found by deducting the aggregate values of the tenant's and the landlord's existing interests in the flat from the value of the tenant's interest under the new lease. In every case the value is to be determined as though the right to a new lease under the 1993 Act does not exist (the no Act world assumption) and disregarding any increase in the value of the flat which is attributable to an improvement carried out at their own expense by the tenants or by any predecessor in title.

9. The premises had been let previously to Ms Julie Anne Richards. She served a notice under section 42 of the 1993 Act on 24 August 2004 claiming to exercise her right to acquire a new lease and proposing a premium of £5,000. The landlord admitted her right to claim a new lease but counter-proposed a premium of £14,870. Ms Richards assigned her lease to the current tenants for £119,950 on 2 September 2004. She also assigned the benefit of the section 42 notice. Under section 39 of the 1993 Act (as amended) a tenant must be a qualifying tenant of the flat for two years before he can make a claim for a new lease. By making such a claim before assigning her leasehold interest Ms Richards conferred the benefit upon the purchasers of not having to satisfy this requirement themselves.

10. For the purpose of the LVT hearing, the respective expert witnesses for the parties (Mr D J Coleman MRICS for the tenants and Mr Church for the landlord) prepared a statement of agreed facts that included, among other matters, the agreed value of the existing leasehold interest, net of any tenant's improvements, at £113,000.

## **The LVT hearing**

11. The main issues before the LVT were:

- (a) The value of the flat with an extended lease. Mr Church argued for £131,000 while Mr Coleman argued for £124,500.
- (b) The effect of the no Act world assumption upon the valuations.
- (c) Whether the capitalisation rate applied to the existing ground rent and the deferment rate on the reversion should be 6.5% and 7% respectively (Mr Church) or 7.5% for both (Mr Coleman).

12. The parties agreed at the LVT that the value of the unimproved, unextended lease was £113,000. Mr Coleman uplifted this figure by 10% to give £124,500 (rounded) as the value of the extended lease. He considered that this uplift included an allowance for the no Act world assumption. It follows from the technique used that Mr Coleman's valuation of the new lease is net of any improvements although this was not stated in terms in Mr Coleman's evidence to the LVT. Mr Coleman placed no reliance upon the sale price of £119,950 paid by the tenants for the appeal premises in September 2004. Mr Church on the other hand contended that this sale price reflected the benefit to the purchasers of the section 42 notice having been served. He also deducted 5% from the unimproved value of the existing lease (£113,000) to allow for the no Act world assumption. This gave a figure of £107,350 for the value of the existing lease without the benefit of the Act.

13. Before the LVT Mr Church contended that the unimproved value of the extended lease was £131,000. This figure was based upon the unimproved value of an extended lease at 25 Rednall Drive that he said had been agreed at £129,375 in early 2005 (and confirmed in June) between Mr Church, acting for the landlord, and Mr A Herbert FRICS, the agent acting on behalf of the tenant. Mr Church adjusted the agreed value of No.25 to the valuation date by reference to the Nationwide House Price Index. No.25 was subsequently sold on 9 December 2005 for £133,500 with the benefit of a new lease. Neither Mr Church nor Mr Coleman sought to differentiate between the values of No.25 and 43 Rednall Drive.

14. Mr Coleman did not attend the site inspection and so Mr Church declined to enter 43 Rednall Drive with the members of the LVT.

## **The LVT's decision**

15. The LVT determined the value of the flat with an extended lease at £130,000. In doing so they stated:

“Weighing the evidence before them they have reduced Mr Church's figure of £131,000, in part because in their view No.25 enjoys a better position.”

No other reason for this reduction was given. The LVT went on to say that in reaching his figure Mr Church had not allowed for tenant's improvements. The Tribunal noted that No.43 had been sold for £119,950 in September 2004 but that the agreed value of the unimproved, unextended leasehold interest as at the valuation date was £113,000. They concluded that:

“The agreed value of the improvements at the time of purchase is therefore £6,950.”

The LVT therefore deducted this amount from £130,000 to give a valuation of £123,050 for the leasehold interest in the flat with the benefit of the extended lease. The Tribunal accepted Mr Church's argument that a deduction should be made from the value of the unimproved unextended lease to allow for the no Act world assumption. They made a reduction of 4% from this figure to give a resultant valuation of £108,480.

16. The Tribunal determined that both the capitalisation yield and the deferment rate should be 7% and stated that they had received no persuasive argument as to why there should be any difference between the two.

17. The LVT determined the premium payable in the sum of £8,586. A copy of its valuation is at Appendix 1.

### **The case for the appellant**

18. Before this Tribunal Mr Church accepted the LVT's decision to discount the value of the unimproved existing lease by 4% rather than 5% to allow for the no Act world assumption (although, unlike the LVT, Mr Church did not include an allowance in this figure for the benefit of the section 42 notice to the tenants which he allowed for separately). He also accepted (given our ruling regarding the *Sportelli* decision described above) the LVT's choice of 7% for both the capitalisation yield and the deferment rate. However he was critical of the deduction for improvements that had been made by the LVT from the value of the extended lease and of the way in which it was calculated. He also criticised the deduction made by the LVT for the difference in value between Nos.25 and 43 Rednall Drive.

19. Mr Church said that Mr Coleman had not given any evidence nor made any submissions to the LVT about the amount to be deducted in respect of improvements. There was therefore no evidence before the LVT that, at the valuation date, such improvements had been carried out and paid for by the tenants or their predecessors in title. The LVT had seemingly reached its own conclusion about the improvements to the property following its site inspection. In its decision it stated that:

“6. The flat benefits from gas central heating and UPVC double glazed windows. These improvements were provided by the Applicants or their predecessors, as were modern kitchen units, modernised bathroom, rewiring and a new fireplace and surround.”

Mr Church said that the LVT could not have concluded that these were improvements for the purposes of the 1993 Act from the evidence before it. The members must have taken evidence directly from the tenants (Applicants) during their site inspection. Neither Mr Church nor Mr Coleman were present during that inspection and neither of them were given the opportunity to comment upon the Tribunal's conclusions that were based upon it. In any event Mr Church felt that some of the items listed by the LVT were repairs or renewals rather than improvements.

20. The LVT stated that "... in their view No.25 enjoys a better position [than No.43]". Mr Church stated that neither he nor Mr Coleman had sought to distinguish the two properties and that the LVT had not considered any evidence or argument on the matter. They had reached their conclusion after their site inspection but had not given either party the opportunity of commenting upon it. Mr Church pointed out that the anomalous effect of the LVT's decision on this point was to produce a valuation for the unimproved extended lease (£123,050) that was lower than the figure sought by the tenants (£124,500).

21. Mr Church gave three alternative figures for the value of the extended lease in his evidence before us. These differed according to the assumptions made about the value of any improvements. The options were:

- (a) nil, on the basis that the tenants had failed to satisfy the requirements of the 1993 Act in this regard;
- (b) £2,500, a figure which Mr Church said that he had factored into his calculations throughout the negotiations with Mr Coleman and which was in respect of double glazing and a modern kitchen; and
- (c) £4,125 which he took as the value of improvements in respect of No.25 Rednall Drive, ie the difference between the sale price of £133,500 and the agreed value of the unimproved extended lease of £129,375.

The starting point for all three options, before adjusting for improvements, was a valuation of the extended lease at the valuation date in the sum of £134,900. Mr Church derived this figure by adjusting the sale price of £133,500 for No.25 in December 2005 by the Nationwide House Price Index, arguing that there had been a drop in values since 2004.

## **Conclusions**

22. Our determination of the premium payable appears below. It is based on the evidence put before us in what was a rehearing. However we must deal firstly with the way in which the LVT made its decision, which in our opinion did not accord with the proper approach in a number of important respects.

23. The LVT is a tribunal which will have at least one, and sometimes more, specialist members. It is not bound to accept the evidence given by witnesses who appear before it, including expert witnesses. That does not imply that it can simply substitute its own view

without giving the parties a chance to comment upon it. It is axiomatic in this area of the law that if points are to be taken, or conclusions reached by a specialist tribunal, which do not arise from the evidence before it, or which represent a conclusion or judgment which have not been put forward by the parties (including those matters which arise from a site inspection), then it must invite the parties to make representations upon them before it reaches a settled conclusion. A failure to do so is a breach of natural justice; see *Fairmount Investments Ltd v The Secretary of State for the Environment* [1976] 1 WLR 1255.

24. The use of an LVT's own knowledge and experience was recently considered by this Tribunal in the case of *Arrowdell Limited v Coniston Court (North) Hove Limited* (Lands Tribunal reference LRA/72/2005). The Tribunal stated at paragraph 23:

“...It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision.”

25. In our opinion the LVT has failed to satisfy the first two of these requirements in reaching its decision. It erroneously described the difference between the sale price of £119,950 and the agreed value of £113,000 for the unimproved existing lease, ie £6,950, as being the agreed value of the improvements. There was no such agreement between the parties. In evidence before us Mr Church stated that he had informed the LVT during cross-examination that he considered that most of this difference reflected the benefit to the purchasers of the section 42 notice. Indeed, as he pointed out, the purchasers made it a precondition of their purchase that Ms Richards served such a notice, the implication being that it was a benefit to them that she should do so. Mr Coleman made no reference to the value of the tenant's improvements in the synopsis of his case dated 9 November 2005 (a copy of which Mr Church included in his evidence to this Tribunal). We understand from Mr Church's evidence that when Mr Coleman was asked by the LVT as to the reason for the difference between the sale price and the agreed value of the unimproved existing lease he said that part of it reflected the benefit of the section 42 notice although he was not specific as to how much.

26. It is clear from the LVT's decision that it placed reliance upon the site inspection. It unilaterally identified a number of works as being improvements but gave no opportunity for the parties to comment upon these. Indeed neither Mr Church nor Mr Coleman accompanied the members of the LVT on the inspection. Nor did the parties make any written submissions about the nature or extent of any tenant's improvements at No.43. The agreed valuation of the unimproved existing lease at £113,000 was not qualified by any reference to whether the parties had agreed, or otherwise, that any improvements had in fact been taken into account and, if so, how. Before us Mr Church stated that, during the course of their negotiations, he did not recollect Mr Coleman suggesting that any material adjustment need be made for improvements. He also said that Mr Coleman had not raised the issue before the LVT.



27. The LVT stated that Mr Church had not allowed for tenant's improvements in his valuation of the extended lease at £131,000. It gave no reason for reaching this conclusion which was rejected by Mr Church who stated that the unimproved value of the extended lease of No.25 had been agreed by him in June 2005 at £129,375. Copies of the relevant correspondence were apparently before the LVT although Mr Church acknowledged that this did not refer to improvements. This figure had then been indexed back to the valuation date to give the unimproved value for No.43 of £131,000. Mr Church said that he confirmed this to the LVT at the hearing. By deducting the sum of £6,950 from the value of the extended lease the LVT were double counting the allowance for improvements.

28. Finally, the LVT determined that Mr Church's valuation of the extended lease at £131,000 was too high because it was based on a comparable property, 25 Rednall Drive, which it considered enjoyed a better position. This conclusion was not based upon any evidence submitted at the hearing but appears to have been reached following the site inspection. Neither party had sought to distinguish the values of Nos.25 and 43.

29. We conclude from the above that the LVT based its decision upon evidence that either had not been submitted by the parties or upon which those parties were not given an opportunity to comment. It was wrong to have done so.

30. We turn now to the evidence presented to us by Mr Church and to our determination of the premium payable for the extended lease. No issue arises on the following figures, which were determined by the LVT and are now accepted by Mr Church in the circumstances that we have explained above:

- (a) Value of the unimproved existing lease: £113,000
- (b) Capitalisation yield and deferment rate: 7%
- (c) Allowance (deduction) for the no Act world assumption: 4%

That leaves the only item to be determined as the value of the unimproved extended lease. In his evidence to this Tribunal Mr Church argued for a higher figure for that value (£134,900) than he had used in his evidence before the LVT (£131,000). He said that his revised figure was based upon the sale price of £133,500 for 25 Rednall Drive in December 2005 indexed back to the valuation date using the Nationwide House Price Index. This had then to be further adjusted to allow for improvements. He gave us three alternative figures for the premium payable depending upon the assumptions to be made about the appropriate allowance for such improvements. These were £13,424 (assuming no allowance), £13,390 (assuming an allowance of £2,500) and £12,563 (assuming an allowance of £4,125).

31. We do not favour this approach for two reasons. Firstly, Mr Church had agreed the unimproved value of the extended lease of No.25 with Mr Herbert in June 2005 in the sum of £129,375 (although the parties had apparently started using this figure in the first quarter of 2005). That agreement resulted from an arms length negotiation which in our opinion carries equal weight to the similar negotiation and agreement between Mr Church and Mr Coleman of

the unimproved value of the existing lease at No.43. Mr Church's reason for not using this figure was that the subsequent sale of the extended lease of No.25 in December 2005 for £133,500 suggested that the allowance for improvements had been £4,125 (the difference between £133,500 and £129,375) which he felt was excessive. He said that he had negotiated on the assumption that the value of the improvements was between £2000 to 3000. He therefore preferred to use the sale price, indexed back to the valuation date, and then to deduct an appropriate allowance for improvements. But this approach introduces the further complication of having to decide what allowance for improvements we should make without having any substantive evidence upon which to do so. Nor does it seem that the value of such improvements was discussed in terms by Mr Church and Mr Herbert. The sale of No. 25 also took place a considerable time after the relevant valuation dates, eight months in the case of No. 25 and 16 months in the case of No. 43.

32. Secondly, Mr Church submitted that Nos.25 and 43 Rednall Drive are comparable properties and no evidence was put to us, nor it would seem the LVT, that they were not. That being so we conclude that the agreed value of the unimproved extended lease of No.25 accurately represents the same value of No.43 as at the valuation date for No. 25, ie 20 April 2005, the date of service by the tenant of the section 42 notice in respect of that property.

33. We therefore prefer to rely upon the agreed valuation of the unimproved extended lease for No.25 because it was agreed close to the relevant valuation date, involves the fewest assumptions and postulates the fewest adjustments.

34. Mr Church relied upon the use of the Nationwide House Price Index to adjust values to the valuation date. We consider this approach to be unsatisfactory for two main reasons. Firstly, the index used covers the whole of the West Midlands region and all types of residential property. It does not reflect the variations within the regional market due to location and type of residence. It is a very blunt instrument to use when determining value and is a method of last resort to which we attribute little weight. Secondly, and because of these drawbacks, we expressed surprise that Mr Church had not at least used other indices as a check or to try and obtain a more accurate analysis of relevant price changes. We suggested that other indices such as the Halifax House Price Index (which provides some information about average house price changes in Sutton Coldfield as well as for the West Midlands region as a whole) and the Land Registry's House Price Index (which gives a breakdown into household type, including flats and maisonettes) could have been used in order to verify the information that Mr Church derived from the single source of the Nationwide House Price Index.

35. We note that in his report to the LVT Mr Church adjusted his values by comparing the relevant index figures for the third quarter of 2004 with the first quarter of 2005. The result indicated a fall in value of 0.79% between those two dates. If Mr Church had used the second quarter of 2005 rather than the first quarter (since the valuation date of No. 25 was in April 2005) the result would have been significantly different and would have shown a rise of 1.26%. We think that this illustrates the difficulties of relying upon such an index.

36. We note, however, that Mr Church stated that his discussions with local surveyors had confirmed that the Birmingham residential market generally, including Sutton Coldfield, had come back from values in 2004. Furthermore, Mr Herbert had agreed with Mr Church the unimproved value of the existing lease at No.25 in the sum of £112,500 rather than £113,000 (as per No.43) to reflect the fall in market prices between the two valuation dates.

37. We do not consider that the asking price of £134,000 at which Mr Church said No.43 was marketed (before the selling agents realised that the lease had not been extended) is good evidence in support of Mr Church's valuation of the improved extended lease at £134,900.

38. We therefore determine, in the absence of any other relevant evidence, that the unimproved value of the extended lease of No.43 at the valuation date should be calculated by applying the same ratio to the agreed unimproved value of the extended lease of No.25 as is represented by the unimproved value of the existing lease of No.43 compared with that of No. 25. Using this ratio gives a value of £129,950 which we have rounded to £130,000.

39. Adopting this figure we determine the premium to be paid for the new lease of 43 Rednall Drive at £12,121. Our workings are shown at Appendix 2.

Dated 17 January 2007

His Honour Judge Gilbert QC

A J Trott FRICS

**LVT'S CALCULATION OF THE PREMIUM FOR A NEW LEASE OF  
43 REDNALL DRIVE**

Diminution of landlord's interest

Ground rent receivable £18 YP 58.5 years @ 7%	£252	
Reversion to £123,050 PV of £1 in 58.5 years @ 7% = 0.0191 0.00191 x £123,050	<u>£2,350</u>	£2,602
Value of flat after extension	£123,050	
Less freehold value	<u>£2,602</u>	
	£120,448	
Less value before extension	<u>£108,480</u>	
Marriage value	£ 11,968	
50% of marriage value		<u>£5,984</u>
Premium payable		£8,586

**LANDS TRIBUNAL VALUATION OF THE PREMIUM PAYABLE FOR A NEW  
LEASE AT 43 REDNALL DRIVE  
UNDER SCHEDULE 13 TO THE LEASEHOLD REFORM,  
HOUSING AND URBAN DEVELOPMENT ACT 1993**

**Diminution in value of freehold interest**

**Term**

Ground rent receivable, pa	£18	
YP 58.5 years @ 7%	14.013	£ 252

**Reversion**

Freehold in possession	£130,000	
x PV £1 in 58.5 years @ 7%	0.019	<u>£2,470</u>
		<b>£2,722</b>

**Marriage Value**

Value of flat with lease extension	£130,000	
Less		
Value of Tenants' existing interest	£108,480	
Value of Landlord's existing interest	£ 2,722	<u>£111,202</u>
Marriage value	£18,798	
Share of marriage value @ 50%		<u>£9,399</u>
Total premium payable by the tenants		£12,121