

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LEASEHOLD ENFRANCHISEMENT – Flat – Premium – whether FTT wrong to use average of five RICS Report graphs from outside prime central London – whether updated Savills and Gerald Eve prime central London graphs should also have been considered – appeal allowed – premium determined at £89,428*

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

BETWEEN:

TRUSTEES OF THE BARRY AND PEGGY HIGH  
FOUNDATION

Appellants

and

CLAUDIO ZUCCONI and  
MIRELLA ZANRE

Respondents

Re: 26 Barrydene,  
Oakleigh Road North,  
Whetstone,  
London N20 9HG

Determination on written representations

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The following cases are referred to in this decision:

*Re Sinclair Gardens Investments (Kensington) Limited's Appeal* [2017] UKUT 494 (LC)

*Reiss v Ironhawk Limited* [2018] UKUT 311 (LC)

*Mallory v Orchidbase Limited* [2016] UKUT 468 (LC)

*Kosta v Trustees of the Phillimore Estate* [2014] UKUT 319 (LC)

*Roberts and Thain v Fernandez* [2015] UKUT 106 (LC)

*Xue v Cherry* [2015] UKUT 651 (LC)

*Contactreal v Smith* [2017] UKUT 178 (LC)

*Re Elmbirch Properties Plc's Appeal* [2017] UKUT 314 (LC)

*Re Midland Freeholds Limited's and Speedwell Estates Limited's Appeals* [2017] UKUT 463 (LC)

## **DECISION**

### **Introduction**

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber) (“FTT”) dated 18 September 2018 determining the relativity of an existing leasehold interest with 52.56 years unexpired in Flat 26, 30 Barrydene, Oakleigh Road, North Whetstone, London, N20 9HG at 78.93%.
2. The appellants are the freeholders, the Trustees of the Barry and Peggy High Foundation. The respondent lessees are Claudio Zucconi and Mirella Zanre.
3. The FTT determined the freehold vacant possession (“FHVP”) value of the subject property at £558,586. That figure is not challenged on appeal. Only the relativity is disputed although this has consequential effects upon the existing lease value and the premium payable.
4. The FTT refused permission to appeal. On 23 January 2019 the Tribunal granted permission to appeal as a review of the FTT’s decision under the written representations procedure.
5. Mr Piers Harrison of counsel made written representations and a reply on behalf of the appellants and Ms Katie Helmore of counsel made written representations on behalf of the respondents.

### **Facts**

6. The subject property is a two-bedroom first floor flat forming part of a four-storey 1960s purpose-built block. It has exclusive use of a garage. The respondents hold a leasehold interest which was granted from 24 June 1971 for a term of 99 years. At the valuation date of 29 November 2017 there were 52.56 years unexpired.

### **The FTT decision**

7. In the absence of any transaction evidence of the sale of comparable flats with similar unexpired terms to the subject property both parties relied upon the use of graphs of relativity

before the FTT. The respondents' expert, Mr Peter Loizou MRICS, calculated a relativity of 79.21% by taking what the FTT described as "the exact average of all seven CEM Graphs published by the RICS in October 2009".<sup>1</sup> The appellants' expert Mr Anthony How FRICS, IRRV, considered the Gerald Eve 1996 graph (without rights); the Gerald Eve 2016 table of relativities (without rights); the Savills 2002 graph and table (with rights) and the Savills graph and table 2016 (both with and without rights). The FTT said Mr How obtained a relativity of 79.5% (Gerald Eve) and 72.8% (Savills) from these graphs. Mr How is recorded as having told the FTT that he had reached a relativity of 74.8% by deducting 6% for "no Act rights" from the higher (Gerald Eve) figure in accordance with the approach and examples set out by the Tribunal in *Re Sinclair Gardens Investments (Kensington) Limited's Appeal* [2017] UKUT 0494 (LC).

8. The FTT concluded at paragraph 13 of its decision:

"The tribunal preferred Mr Loizou's approach to that of Mr How in respect of relativity. The property is not located in prime central London and for this reason the Gerald Eve and Savills graphs are not relevant here and the tribunal preferred the use of the five RICS Greater London and England graphs. The tribunal took the average of these five graphs, discounting the two published research graphs prepared by the College of Estate Management and LEASE as these are purely research based. This provided a relativity of 78.93%."

## **Submissions**

9. Mr Harrison said the FTT were wrong to rely on an average of five graphs taken from the RICS report and that they should have obtained the relativity (79.5%) from Savills 2016 enfranchiseable graph and made a deduction for Act rights (6%); an approach said to have been approved by the Tribunal in *Reiss v Ironhawk Limited* [2018] UKUT 0311 (LC) which concerned a property in North London outside prime central London. (The FTT said Mr How had obtained the relativity of 79.5% from the Gerald Eve graph 2016, but that is incorrect. That figure comes from the Savills 2016 enfranchiseable graph. The corresponding figure in the Gerald Eve 2016 (unenfranchiseable) graph is 72.6%).

10. Mr Harrison reviewed the five graphs relied on by the respondent and said they were unreliable because, firstly, they relied on opinion evidence and on LVT decisions both of which had been found by the Tribunal to be unreliable<sup>2</sup>; and, secondly, they measured historic

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<sup>1</sup> It is assumed CEM refers to the College of Estate Management. The CEM only produced one of the Graphs in the RICS publication.

<sup>2</sup> See *Reiss* at paragraph 48.

relativity whereas recent decisions of the Tribunal recognised that relativity had diminished over time<sup>3</sup>. The Tribunal had consistently determined relativities at lower figures than those given in the Gerald Eve 1996 unenfranchiseable graph: e.g. in *Mallory v Orchidbase Limited* [2016] UKUT 468 (LC) the Tribunal determined a figure of 76.25% compared to Gerald Eve's figure of 79.61% for an unexpired term of 57.68 years; in *Sinclair Gardens* respective figures were 81.88% and 85.09% (66.81 year unexpired term); and in *Reiss* they were 86.9% and 90.12% (75.23 year unexpired term). Had the average of the five graphs relied upon by the FTT been used the equivalent figures would have been higher still: 83.8% (*Orchidbase*), 90.49% (*Sinclair Gardens*) and 95.16% (*Reiss*).

11. Mr Harrison said that Mr How had paid particular regard to the suggestion at paragraph 169 of *Mundy* that in cases where there was no reliable transaction evidence valuers should “use a graph to determine the relative value of an existing lease with rights under the 1993 Act and then to make a deduction from that value to reflect the absence of those rights under the statutory hypothesis.” Mr How identified the Savills 2016 enfranchiseable graph as being the most authoritative “with rights” graph and had made a deduction for Act rights by reference to the table that appeared at paragraph 60 of *Sinclair Gardens*. The Tribunal had used the Savills 2016 enfranchiseable graph to calculate relativity outside of prime central London in *Reiss*. It was adopted there in preference to the Nesbitt & Co Graph which was one of those graphs included in the FTT's five graph average.

12. Although the decision in *Reiss* post-dated the FTT's decision, their attention had been drawn to it in the appellant's application for permission to appeal but the FTT declined to review its decision. Mr Harrison said the FTT's approach was inconsistent with that applied by the Tribunal in *Reiss*. By relying on an average of five graphs and ignoring the Savills 2016 enfranchiseable graph with a discount for Act rights, the FTT had wrongly applied a relevant principal of valuation. Alternatively, the FTT had taken account of irrelevant considerations (the average of the five graphs) and failed to take account of relevant evidence (Savills 2016 enfranchiseable graph).

13. Ms Helmore submitted that there was no one method of determining relativity, as had been recognised in *Mundy* at paragraph 164. The starting point was market evidence, but if that was not available then more than one approach may be appropriate. In *Mundy* at paragraph 169 the Tribunal had identified two valuation approaches:

- (i) to use the most reliable unenfranchiseable (without Act rights) graph; or
- (ii) to use an enfranchiseable (with Act rights) graph and make an appropriate deduction for the benefit of the Act.

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<sup>3</sup> See *Trustees of the Sloane Stanley Estate v Mundy* [2016] UKUT 223 (LC) at Appendix C, paragraph 60

14. The FTT had properly excluded the CEM and LEASE Graphs from its analysis and averaged the result of the five other graphs published in the RICS Report that were outside of prime central London. Both the Gerald Eve and Savills graphs were based on data wholly within prime central London and were therefore not relevant. Ms Helmore noted that the appellant no longer seemed to be relying on the Gerald Eve 2016 graph.

15. Furthermore, the parties' experts had not agreed or discussed an appropriate deduction to make for the benefit of the Act. In *Reiss* the Savills 2016 enfranchiseable graph was broadly supported by relevant market transactions and the experts had agreed the appropriate deduction for Act rights. It was not appropriate simply to adopt the approach in *Reiss* which was a different case decided on different evidence. Questions of valuation had to be decided on the facts and evidence adduced in a particular case and should not be generalised.

16. Miss Helmore submitted the FTT had adopted a sound valuation approach on the evidence before it and it could not be said to have made a wrong decision.

## **Discussion**

17. I do not accept that by taking an average of the five relativity graphs for Greater London and England published in the 2009 RICS Report the FTT took account of an irrelevant consideration.

18. In *Kosta v Trustees of the Phillimore Estate* [2014] UKUT 0319 (LC) the Tribunal adopted the average of the seven<sup>4</sup> prime central London graphs contained in the RICS Report for an unexpired term of 52.5.

19. In *Mundy* the Tribunal held that at the valuation dates (March and April 2014) a perspective purchaser would not have taken an average relativity from the RICS graphs but would have referred to the Gerald Eve 1996 graph first and foremost. It said at Appendix C, paragraph 71:

“The evidence was that the market had only started to adopt an average relativity from the graphs following the decision in *Kosta*”.

20. The Tribunal adopted an average of the RICS graphs in some decisions following *Kosta*. In *Roberts and Thain v Fernandez* [2015] UKUT 0106 (LC) the Tribunal said at paragraph 19:

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<sup>4</sup> Cluttons' Graph was sub-divided into flats and houses and these were included as separate graphs.

“On the other hand the F-tT was in our view entitled to base its decision on six graphs taken from the RICS report. This Tribunal has previously held that, although the RICS itself drew attention to certain deficiencies in the graphs, they do provide evidence of some value when deciding the relativity in any particular case (see *Kosta ...*)”.

21. In *Xue v Cherry* [2015] UKUT 0651 (LC) the Tribunal took the average relativity from three Greater London and England graphs (93.25%) and that from the Cluttons prime central London graph (87.70%) and derived a weighted average of 91.4%.

22. In adopting an average relativity from the RICS graphs the FTT, correctly in my view, excluded the relativities contained in the published research of the College of Estate Management and the Leasehold Advisory Service, both of which had been criticised by the Tribunal in a number of cases, e.g. *Orchidbase* at paragraph 39; *Contactreal v Smith* [2017] UKUT 178 (LC) at paragraph 37; and *Re Elmbirch Properties Plc’s Appeal* [2017] UKUT 0314 (LC) at paragraph 44.

23. In my judgment, although the FTT did not err by having regard to an average of the relativities contained in the relevant RICS graphs, they were wrong not to have considered the Gerald Eve and Savills graphs as well, solely because the property was not located in prime central London.

24. The RICS graphs were published in 2009 since when several of them have been updated, including the Gerald Eve and Savills graphs. The fact that a graph is based on data from prime central London does not automatically invalidate its use outside that area; see, for instance, the use of the prime central London Cluttons Graph in *Xue*, where the appeal property was in Shepherd’s Bush; or in *Sinclair Gardens*, where the Tribunal referred to Savills 2015 Graph (see paragraph 62).

25. In *Re Midland Freeholds Limited’s and Speedwell Estates Limited’s Appeals* [2017] UKUT 0463 (LC), which concerned maisonettes in Northfield and Sutton Coldfield, the Tribunal considered the problem of using the Savills 2015 (enfranchiseable) and 2016 (unenfranchiseable) graphs for properties outside prime central London and determined by reference to the evidence (paragraphs 42 to 46) that they could be appropriately used in those appeals.

26. The appellant referred to *Reiss* in their application to the FTT for permission to appeal. *Reiss* involved a maisonette near White Hart Lane, London, N17. It was outside prime central London. The Tribunal determined that the most reliable method of valuation was to use Savills 2015 enfranchiseable graph.

27. In my opinion the FTT did not pay proper regard to the more recent cases, outside of prime central London, where the Savills enfranchiseable and unenfranchiseable graphs have been preferred by the Tribunal to the use of an average of the RICS 2009 Graphs. In *Mundy* the Tribunal identified two valuation methods where there was no reliable market transaction concerning the existing lease value with rights: either use the most reliable unenfranchiseable graph or use an enfranchiseable graph and make a deduction for the benefit of the Act. Had the FTT considered the most reliable (and recent) graphs they would have taken into account the Savills 2015 enfranchiseable graph, the Savills 2016 unenfranchiseable graph and the Gerald Eve 2016 (unenfranchiseable) table and graph. They should have been aware of the Tribunal's previous decisions adopting the Savills graphs outside of prime central London.

### **Determination**

28. In my opinion the FTT were wrong to exclude the Savills and Gerald Eve graphs from their consideration and the appeal is therefore allowed.

29. On the evidence before the FTT I consider they should have preferred Mr How's approach and adopted his relativity of 74.8% for the reasons he gave in his expert report. That figure is higher than the relativities given in both the Savills 2016 and Gerald Eve 2016 unenfranchiseable Graphs (72.8% and 72.5% respectively) and therefore, to a limited extent, reflects the average of the graphs approach favoured by the FTT.

30. I therefore determine the relativity at 74.8% rather than remit the issue to the FTT for further consideration. The premium payable is £89,428 as shown in the attached appendix.

Dated 30 August 2019

A J Trott FRICS  
Member, Upper Tribunal (Lands Chamber)



## APPENDIX

### Upper Tribunal (Lands Chamber) Valuation: 26 Barrydene, Oakleigh Road North, Whetstone, London, N20 9HG

#### 1. Diminution in value of freehold interest

(i) Capitalisation of ground rent

Ground rent:	£70	
x YP 19.56 years @ 6%:	<u>11.335</u>	
		£793

Reversion to:	£95	
x YP 33 years @ 6%:	14.230	
x PV of £1 in 19.56 years @ 6%:	<u>0.320</u>	
		<u>£433</u>

£1,226

(ii) Freehold reversion

Unencumbered FHVP value:	£558,586	
x PV of £1 in 52.56 years @ 5%:	<u>0.077</u>	
		<u>£43,011</u>
		£44,237

(iii) Less proposed FHVP value

Unencumbered FHVP value:	£558,586	
x PV of £1 in 142.56 years @ 5%:	<u>0.001</u>	
		<u>(£559)</u>

£43,678

#### 2. Marriage Value

(i) Value of proposed interests

(i) Leasehold	£553,000	
(ii) Freehold	<u>£559</u>	
		£553,559

(iii) Less value of present interest

(i) Leasehold	£417,822	
(ii) Freehold	<u>44,237</u>	

	<u>(£462,059)</u>
Marriage value:	£91,500
50% of marriage value to freeholder:	<u>£45,750</u>
Premium payable:	£89,428