Residential
Property
TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT COMMITTEE

LEASEHOLD VALUATION TRIBUNAL

LEASEHOLD REFORM, HOUSING & URBAN DEVELOPMENT ACT 1993 (the '1993 Act')

Case Number: CHI/OOML/OCE/2008/0025

Decision on an application made under section 24 of the Act

Premises	Ashdown, Eaton Road, Hove, East Sussex BNQ 3AQ
Applicant	Ashdown Hove Limited (nominee purchaser)
Representation	Mr Anthony Radevsky (counsel) instructed by Osler Donegan Taylor (solicitors) with expert evidence from Andrew Pridell FRICS (Andrew Pridell Associates Limited)
Respondent	Remstar Properties Limited (freeholder reversioner and landlord)
Representation	Wayne Clark (counsel) instructed by Howard Kennedy (solicitors) with expert evidence from Stewart Gray FRICS
Date of Hearing	7 June 2010
Date of Inspection	7 June 2010
Date of Decision	28 June 2010
The Tribunal	James Driscoll, solicitor (Lawyer Chair), Mr NJ Cleverton FRICS and Mr RA Wilkey FRICS

The Decision

The price payable by the nominee purchaser for the acquisition of the freehold of the subject premises is the sum of £ 1,732,109. This is based on applying a deferment rate of 6%.

Introduction

1. This is an application by the nominee purchaser under section 24 of the Act. It seeks a determination of the price payable for the acquisition of the freehold of the subject premises. The nominee purchaser is a company which was incorporated to act on behalf of the leaseholders who are participating in this claim. The Respondent is the owner of the freehold and it is the reversioner under the claim. Under the flat leases there is a management company which, as the name might suggest, has the responsibility for the management of the property. The landlord has the right under the lease to take over management should the management company fail to act properly or at all. (There is also a head lease of common parts).

2. An initial notice dated 2 October 2007 was given under section 13 of the Act seeking to exercise the right to acquire the freehold under the provisions in Part I of the Act. The notice claimed the freehold to the specified premises (that is the building containing the flats) and certain land and buildings lying to the north of the specified premises. A price of £940,000 was proposed for the freehold to the specified premises and the sum of £950 for the additional property.

3. In response a counter-notice dated 13 December 2007 was given under section 21 of the Act admitting that the participating leaseholders are entitled to exercise the right to enfranchise. However, the Respondent made counter-proposals on price by claiming £2,064,856 for the freehold to the specified premises and the sum of £272,500 for the freehold to the additional property. As the parties could not agree on the prices payable application was made to the Tribunal on 16 May 2008.

The application

4. Provisional directions were given on 17 May 2008 and further directions on 11 January 2010. The latter followed a period during which this Tribunal agreed to stay the hearing of the applications when it first appeared that the parties were likely to reach agreement on the price. When this proved unsuccessful, and the application for a hearing was renewed, these further directions were given. One hearing date was vacated at the request of the parties and shortly before the adjourned hearing fixed for 16 March 2010 it had emerged that unknown to the parties there exists a lease of the common parts (which has not been registered). The participating leaseholders considered an application in the County Court to amend their section 13 initial notice to include the acquisition of this lease, but in the event they decided not do so. They are not seeking to acquire this lease. A revised statement of facts was signed by the valuers in April 2010.

The premises

5. The subject premises were built in the early 1970's as a detached L-shaped block of flats on 7 floors holding 125 flats all but one of which is held on a long lease. The one exception is the flat which is used as a caretaker's flat.

6. There is a flat roof on top of the premises which is a brick-built building. The windows to the flats are single -glazed. The accommodation ranges from one-bedroom units to three-bedroom larger penthouses. Some of the flats on the upper floors have roof terraces. In addition to the flats, there is a basement flat (numbered 29) which is a caretakers flat and a separate caretaker's store and workshop. There is also a launderette and a sauna suite. The building has two lifts.

7. The accommodation consists of 23 one-bedroom flats; 69 two-bedroom flats, 24 three-bedroom flats and 8 penthouse flats. All the flat leases are co-terminus and expire by effluxion of time in 2094. At the valuation date (which the parties agree is the 2 October 2007) all the flat leases had 87 years unexpired. There is, therefore, no marriage value payable (see the Act, schedule 6, paragraph 4[(2A)).

8. A company called Ashdown (Eaton Road) (Hove) Limited holds a head lease, but as indicated above, this is not registered against the freehold title and its existence was only recently discovered by those advising the parties. This head lease includes all of the common parts, including the caretaker's store and workshop, the launderette and the sauna suite. It does not include, however, all of the car parking and excludes some of the surface parking and the underground parking. This head lease is dated 1 June 1976 and is co-terminus with the flat leases.

9. Outside the building are areas used as a communal garden and a hard surfaced car park with 40 parking spaces. There are also 17 other spaces to the north and the northwest of the main building. Further parking is to be found in an underground car park with an additional 60 car parking spaces. None of these car parking spaces are demised under the flat leases. In some cases the landlord leases them to the flat leaseholders; others are rented to traders.

The inspection

10. The Tribunal inspected the property prior to the hearing in the presence of representatives of the applicant and respondent (that is to say, the instructing solicitors, counsel and the valuers). Ashdown is a large residential development comprising 124 flats in a 7 storey block together with parking beneath part of the main building and additional parking on site. In addition, there is a caretakers flat and one of the flats has been converted into a sauna and meeting room. The block was probably built in the 1970s and occupies a central location within easy reach of shopping facilities and Hove railway station. The attention of the Tribunal was drawn to various parts of the property which were inspected in the presence of the parties. In particular an inspection was made of Flats 5, 44 and 15 which are typical of the one, two and three bedroom flats in the building. The internal standard of decorations, kitchen and bathroom fittings (and so on) varies in the three flats. The windows in each flat are the original single glazed sliding aluminium type. Some have been fitted with secondary glazing. It is apparent that the windows are in poor order and beyond economic repair. This will be a significant expense for the future management of the building.

11. We went onto a south facing sun terrace at roof level and were shown the problems that had arisen to this part of the block. Movement has occurred to a wall which as a result is crumbling. We understand that a firm of structural engineers had been consulted and the recommended work will soon be put in hand. The Tribunal was told that this is relatively minor problem and will not affect the main structure.

12. Flat 30 has at some time been converted into a sauna, launderette and meeting room for use of the residents. The sauna is no longer in use and the interior of this unit was tatty and in need of redecoration and upgrading.

13. The Tribunal inspected the parking beneath part of the main building. There are signs of water penetration through the concrete ceiling and this is a continuing problem.

14. On the north side of the block is open parking. It cannot be used for this purpose as the adjacent Cricket Ground have a right of way over the access road and, when a match is in progress, Media Vans and equipment block the access. This has been the case for many years.

The hearing

15. In their supplemental statement the valuers were able to agree the figure for the capitalisation of the ground rents at £714,274; the long unimproved values of the leasehold flats (set out in the spreadsheets accompanying this statement); the caretakers flat (£160,000); the car parking at £843,000. In addition at the end of the head lease the sauna suite and the north side parking spaces will revert to the landlord. The valuers are divided on one key factor - the deferment rate which according to the valuer for the nominee purchaser should be 6% whilst the valuer advising the landlord proposes 5%.

16. It follows that in the absence of disputes over the terms of the transfer (or payment of costs under section 33 of the Act) the sole issue for our determination is the deferment rate. Applying a deferment rate of 5% would produce a price of £1,956, 089; applying a rate of 6% produces a price of £1,732,109.

17. Those advising the parties are fully aware of the developments in the law and in particular the passage of the *Sportelli* litigation in which the Lands Tribunal (now called the Upper Tribunal) decided (amongst other matters) that generic rates should be used: 4.75% for house enfranchisement claims and 5% for flat new lease or collective enfranchisement claims (the additional fraction of 0.25% to reflect the greater potential risks caused by the problems of managing blocks of leasehold flats). The Lands Tribunal also decided that expert evidence from the financial markets was to be used instead of property market evidence as the latter is considered to have been (in a sense) 'tainted' by the very statutory rights that allow leaseholders to demand as of right new or extended leases or the freehold. In the valuation formulae in the Leasehold Reform Act 1967 (for house leases) and in Schedules 6 and 13 of the 1993 Act, one has to disregard several factors, including the statutory rights of leaseholders. This approach is sometimes referred to as valuing in the 'No Act' world.

18. The Lands Tribunal sanctioned the use of a different approach by adopting these generic rates based on the formula DR = Risk Free Rate (of 2.25%) **less** the Real Growth Rate (2%) **plus** Risk Premium (4.5%) and an increased figure of 0.25% for the management risks for flats rather than houses. If this was not noteworthy in itself, that Tribunal also stated that the generic rates should be used generally for all residential leasehold property regardless of its location. The properties which were considered by that Tribunal are all to be found in very expensive areas of London, called 'Prime Central London' (or the PCL). However, the Lands Tribunal emphasised that the generic rates should be used regardless of location.

19. Appeals and cross-appeals followed and the Court of Appeal upheld the approach of the Lands Tribunal holding that the rejection of property market evidence in favour of a generic rate approach drawn from the financial markets was not an irrational decision. Nor was the rule or guidance from the Lands Tribunal, that leasehold valuation tribunals across England and Wales apply the generic rates, irrational or wrong in law.

20. There was no appeal against these decisions of the Court of Appeal (though there was an appeal to the House of Lords against the Court's decision on an issue known as 'hope value', which is not an issue in this case).

21. There have been several Lands Tribunal decisions since the Court of Appeal's decision which upheld the use of the generic rates and until recently all such appeals urging the departure from the generic rates failed. But earlier this year the Lands Tribunal allowed an appeal in a decision called *Zuckerman v Trustees of the Calthorpe Estates* (2009) (unreported). It made three adjustments to the guideline rate of 5%: 0.5% to reflect different growth rates; 0.25% for obsolescence and 0.25% (in addition to the 0.25% sanctioned in *Sportelli)* to reflect management problems regarding flats as opposed to houses. The case concerned a number of claims for new leases.

22. A number of submissions were made in this application. These include written submissions by counsel representing the parties, an expert valuation prepared for the applicant nominee purchaser (undated), an expert report dated 12 March 2010 prepared for the respondent landlord. The two valuers later signed a 'supplemental statement of facts' signed and dated respectively on the 1st and 6th April 2010.

23. Mr Andrew Pridell FRICS advises the nominee purchaser. His company has completed over 1400 enfranchisement and lease extension cases. These have been mainly in the South East of England (including London) and as far north as Grimsby , East to Broadstairs and as far West as Cardiff. He carried out an inspection of the subject premises on 12 January 2005.

24. He is critical of the *Sportelli* decision as it was based on properties in the PCL which he argues it significantly different from the other parts of the country (report at 5.18). Before the decision, he says that he adopted a DR of 7% in many cases and this was upheld when challenged in the LVT. Now the *Zuckerman* decision has been made, he is of the opinion that the three elements that led to a departure from the generic 5% rate apply equally to the Ashdown development.

25. First, was the element based on obsolescence and deterioration . Mr Pridell argues that with the exception of the three penthouse flats, the average value of the flats is about £220,000 which are quite different to properties within the PCL. As with many blocks of this style and construction, Ashdown has a number of maintenance problems: these include flooding in the underground car park, the single glazed windows that will need a major renewal programme in the foreseeable future, that the energy efficiency of the building is poor, and the hot water system is communal and costly to maintain. Whilst there is a huge difference in the capital values of these flats and those in the PCL, this is not the case with the costs of repair and maintenance. Relying on his experience in building surveying Mr Pridell says that building costs are virtually the same in the PCL or elsewhere in the South East. On this point he concludes that 'there is no material difference between Ashdown and Kelton Court and I have accordingly adjusted the risk premium upwards by 0.25%.'

26. Turning to the capital growth factor, he argues that values in the PCL have risen at dramatically higher rates than elsewhere in the country, including Hove and Brighton. He has not found evidence of long-term property value in the changes in the PCL and the South Coast. Instead he has used a number of house price indices including those produced by the Nationwide and the Halifax.

27. With the agreement of Mr Rutledge (the valuer for the leaseholders in the *Zuckerman* case) he has adapted a graph based on various indices (including that produced by Knight Frank) by amending it to show growth in the Outer South East region and by 'superimposed sales evidence from Ashdown itself' (report at 5.67). With this information, he argues, a prudent investor would adjust his bid as he or she would be less confident of achieving the same growth rate outside the PCL. The same adjustment should be made here 'because there is no reason to make a distinction between Kelton Court and Ashdown in this respect' (report at 5.71).

28. As to the management issues Mr Pridell describes how complex leasehold management has become since the changes made by Part 2 of the Commonhold and Leasehold Reform Act 2002. He gives examples of leasehold properties he has had experience with. In his opinion, management of blocks of flats is a good deal more unpalatable than it used to be and he concludes that this should be reflected in the discount rate as it presents an investor with a less attractive investment than was the case before the law was changed.

29. But he notes, however, that as here there is a management company (under tripartite leasing arrangements) that the freeholder is somewhat removed from management . As against this point he refers to clause 7 of the flat leases which in terms states that if the management company is dissolved, or otherwise unwilling, or unable to manage, the freeholder is entitled to take over the management role. Mr Pridell then describes the many practical problems in managing Ashdown and gives many examples of serious problems that have emerged over the years. He points out that many of the leaseholders are older people on limited means and that finding suitable people to serve as Directors has been difficult. He believes that the current uncertainty over the management arrangements warrants an additional 0.5% adjustment but with the

management arrangements in place an additional 0.25% should be added. He maintained this position during vigourous cross examination.

30. Mr Stewart Gray FRICS gave evidence on behalf of the Respondents. Mr Gray is the principal in his firm and he has practised in the Hove and Brighton area over 20 years. He signed his report on 12 March 2010 and he describes the property as a 'very substantial building in a prime residential location in central Hove' (report at 10.4). His position is that there should be no departure from the *Sportelli* rate. Mr Gray suggests that the property market had been buoyant over a sustained period though just before the valuation date the market was affected by the crises that emerged in the Banking Sector in September 2007.

31. Turning to the real growth rate he is of the opinion that an investor in Hove and Brighton would be confident of achieving the 2% rate proposed by the Lands Tribunal in *Sportelli* though he accepts that this may not be true of the investor in the West Midlands. In his view the evidence of residential property sales since 1974 shows a higher rate of growth for properties in the Outer South East than the national average whilst those for the West Midlands are below that average. Other statistical evidence suggests that in 2007 the growth rate in Brighton was running at 11% in comparison with Birmingham where the rate was 1%.

32. As to the flats in Ashdown, looking at the growth rate, and allowing for inflation from the headline growth, suggests a real growth rate of 2.46%. The Lands Tribunal in *Sportelli*, he argues, concluded that the growth rates in different parts of the country converge long-term with the result that long-term growth comparisons between the PCL and other areas is largely irrelevant (a point he suggest that was not covered in the *Zuckerman* decision see Report at 11.1 b vii). In conclusion on these points, Mr Gray says that a long-term investor would be confident that given that Ashdown is a prestigious block of substantial size and in a good quality location the growth rate would easily exceed the Sportelli average .

33. Turning to the obsolescence and deterioration component of the risk premium, he argues that there is nothing in the design or the layout or construction that distinguishes Ashdown from thousands of other blocks of flats.

34. On the risk factor for flats, he points to the existence of the management lease and states that the Respondents have not had to be involved in management issues since the development was completed. He argues that it is not in the interests of the leaseholders, who are members of the management company, to allow it to fail. He therefore sees no reason to depart from the 0.25% adjustment for flats in *Sportelli*.

35. During the adjournment for lunch, the decision of this Tribunal in *7 Sudeley Street Brighton* in 2009 came to our attention. This was a missing landlord collective enfranchisement case where Mr Gray gave expert evidence on behalf of the claimant leaseholders. In that case he argued for a 6% deferment rate. This was because in the *Sportelli* decision, he argued, it was reasonable to reject market evidence for the PCL. But in Hove and Brighton, or elsewhere outside the PCL, he believes that the Lands Tribunal would have utilised market evidence to arrive at a higher deferment rate. He had looked at various recent sales investments in the locality and has found that

(ignoring hope value) the deferment rate is between 5.75% and 6.65%. He argued for a 6% deferment rate in that case and his submissions were accepted by the Tribunal.

36. Unfortunately this decision and his evidence in it was not referred to in the expert evidence he prepared for this application. In answer to questions on these omissions from his report he claimed that he had not properly understood the *Sportelli* decisions when he gave evidence to this Tribunal in 2009. Mr Gray was unable, in our view, to offer a convincing explanation for failing to mention the 2009 decision in his evidence to this Tribunal. Further he told us that he did not consider the *Sportelli* decision controversial. However, Mr Radevsky showed him a printout from his firm's website in which states the opposite.

37. We were surprised and disappointed with his failure to disclose that he had given a quite different analysis of the effects of the *Sportelli* decision in a different application to this tribunal only last year. If we had not discovered this decision we would not have known that Mr Gray had not only expressed a different opinion of the effects of the *Sportelli* case last year, but we would also have been ignorant of his view expressed then that there is local market evidence that higher rates higher than 5% are being realised for freehold reversions.

38. This inevitably casts some doubts on the value of his evidence to the Tribunal in this case. It is difficult to avoid the conclusion that in those areas where the experts differ Mr Pridell's evidence should be preferred.

39. Counsel addressed the tribunal and referred to the revised 'skeleton argument' they each prepared before the hearing. Mr Radevsky relies on the decision of the Upper Tribunal in *Zuckerman v Trustees of Calthorpe Estates* (18 November 2009) [2009] UKUT 235 (LC). That decision concerned Kelton Court part of an estate built in the 1970s in Edgaston in the West Midlands. Here the Upper Tribunal made three adjustments to the guideline rate of 5%. First, there was an upwards adjustment of 0.5%, to reflect the different growth rates between PCL and the West Midlands. Mr Radevsky argues that there is evidence in this case for the same adjustment. Second, the Upper Tribunal made an upwards adjustment of 0.25% for obsolescence and Mr Radevsky argues that given the similar profile of the building in this application to that in Kelton Court the same adjustment should be made. Third, he argues there should be an adjustment of a further 0.25% in this application, as there was in the Kelton Court matter, to reflect the special management problems with Ashdown house.

40. Mr Clark for the Respondent argues that there is no justification for the uplift in the risk premium. He does not accept that any adjustment need be made on the obsolescence and deterioration grounds. There is nothing unusual or extraordinary about Ashdown, he argues, which would not simply be reflected in the vacant possession value. On the flat management point, he argues that the risk of the current management arrangements collapsing is theoretical only. He does not consider that there is evidence that Ashdown suffers from far more onerous management problems that those considered in the *Sportelli* decision. He firmly rejects the arguments that there should be any adjustments to the generic rate.

41. Mr Radevsky called Mr Nicholas Beck a leaseholder in Ashdown since 1997 and chair of the Board of the nominee purchaser company and chair also of Ashdown (Eaton Road) (Hove) Management Limited to give evidence. Mr Beck signed a witness statement dated 28 May 2010. He describes in detail the problems that he has experienced in the management of the block. Mr Beck says that part of the problem is that many leaseholders are elderly and there is a general apathy amongst their ranks and it has proved difficult to persuade leaseholders to become directors. He told us that the running of the company is extremely fragile and that it could collapse at any time. A considerable sum needs to be spent on maintenance and repairs and he thinks that the management committee will have difficulty in collecting the necessary funds from the leaseholders.

The reasons for our decision

42. Having considered the evidence and the submissions we have concluded that the deferment rate to be applied to the freehold vacant possession value for Ashdown House is 6%. Our conclusions are that to the 5% generic rate should be added 0.5% for additional risk that growth will not be achieved, 0.25% for the obsolescence factor and an additional 0.25% for the risks involved in the management of this block of leasehold flats.

43. As noted above, the decision of the Lands Tribunal in the *Sportelli* cases that the usual deferment rate to be applied in flat lease claims should be 5% was upheld by the Court of Appeal ([2007] EWCA Civ 1042). However, the Court also stated that '*The issues within the PCL were fully examined in a fully contested dispute between directly interested parties. The same cannot be said in respect of other areas. The judgement that the same deferment rate should apply outside the PCL area was made, and could only be made, on the evidence then available. That must leave the way open to the possibility of further evidence being called by other parties in other cases directly concerned with other areas. The deferment rate adopted by the tribunal will no doubt be the starting point, and its conclusions on the methodology , including the limitations of market evidence, are likely to remain valid. However, it is possible to envisage other evidence being called, for example, on issues relevent to the risk premium for residential property in different areas.*' (paragraph 102).

44. Until recently the Lands Tribunal had consistently rejected appeals arguing the case for a different deferment rate. But different deferment rates have recently been sanctioned by the Lands Tribunal in two appeals concerning flat claims: the *Zuckerman* (2009) decision on new lease claims and the *Glyn Road* (2010) decision on a collective enfranchisement claim.

45. We will our explain our reasons for departing from the generic 5% rate in this case by comparing the conclusions of the Upper Tribunal in the *Zuckerman* and *Glyn Rd* decisions with our assessment of the evidence in this application. In *Zuckerman*, the first case where the Upper Tribunal sanctioned a departure from the generic rate in flat claims, it was said '..my conclusion in this appeal differs from the one reached by the

Tribunal in *Culley* namely that there was no justification for a departure from the *Sportelli* starting point. In *Culley*, as in the present appeal, the basis of the Tribunal's decision was the expert evidence adduced by the parties' (at paragraph 58).

46. In *Zuckerman* the Upper Tribunal heard evidence that the values of the properties in the *Sportelli* decision were of a different magnitude to those in Kelton Court. In the Ashdown case the difference between the value of the flats and those considered in the *Sportelli* case is very significant. Added to that is Mr Pridell's experience that building costs in the local area are comparable to those in London. It follows, in our view, that it is likely to remain economically viable to repair high value flats in PCL for much longer than will be the case for similar sized flats in Ashdown. Even though the flats are leased on full repairing covenants, it seems to this Tribunal that there is a much greater risk of deterioration at Ashdown than there is in PCL and this is not reflected in the vacant possession values. This leads us to the conclusion that a purchaser of the freehold reversion to Ashdown would expect an additional 0.25% in the risk premium to reflect this factor.

47. Turning to the prospects for future growth, Mr Pridell produced evidence which he argues shows a much slower growth rate for properties in the local area. He adapted the methodology used in the *Zuckerman* case in appendix 7 of his report. As the Upper Tribunal noted in *Zuckerman* , there are limitations on the use of statistical evidence but there, as in this case, the available evidence suggests a significantly lower rate than in the PCL. Conversely, in the *Glyn Road* decision the leaseholders did not produce any evidence to compare growth rates in East London (where that property is located) and the PCL. Mr Gray did not produce any such evidence in comparison with the PCL. The evidence put forward leads us to conclude that an investor who is examining long-term growth would not be confident that the PCL rate of growth would be achieved in the Hove and Brighton area and he would adjust his bid for Ashdown accordingly. Following the reasoning in *Zuckerman* we conclude that the prospect of such a reduction in an investors bid should be assessed by a further increase in the risk premium by 0.5 %.

48. This brings us to third factor that can affect the deferment rate, that is the difference between the rates for houses and flats to reflect the greater management risks with the latter. In *Sportelli* the Upper Tribunal concluded that an adjustment to the deferment rate should be made to reflect the greater management problems associated with flats. The Tribunal added '.. .although we do not consider it appropriate to differentiate between flats that are subject to head leases and those which are not.....Even where flats are efficiently managed, service charge and repairs problems inevitably occur, and the management exercise itself is, we feel, sufficiently more complex to warrant a generalised 0.25% additions for flats' (paragraph 95).

49. In *Zuckermann* the Upper Tribunal took this a stage further and decided that the impact of the Service Charges (Consultation Requirements) (England) Regulations 2003 meant that the market would have been more aware of the challenges that face landlords under the Regulations than was the case when *Sportelli* was decided. This time the Tribunal decided that 'in the eleven cases with which I am currently

concerned, investors would have required an addition of 0.5% to reflect the greater management problems associate with flats than with houses' (paragraph 56).

50. The Tribunal added that if the head lease had still been in existence it would not have considered it appropriate to depart from the *Sportelli* uplift. It is difficult to reconcile the two positions taken by the Lands Tribunal on the effects of there being a head lease on this aspect of the risk factor. We have concluded that we should apply the principle adumbrated by the Lands Tribunal in *Sportelli* as its decisions on the deferment rate were upheld by the Court of Appeal. In other words, one should not differentiate between cases where the flats have head leases and those who do not.

51. There is, nevertheless a difficulty in a case such as this where, although there is no head lease between the flat leases and the freehold, there is a leaseholder- controlled management company which, on the face of it, absolves the freeholder from the pressures and risks of flat leasehold management

52. In the *Glyn Road* decision the Tribunal did not make an additional uplift in a case where, with two flats, where the leaseholder's shared the repair and upkeep and roof and foundations of the building, the landlord's responsibilities in that case are minimal. The risk to the landlord was, therefore, much less than it was in *Zuckerman* where the landlord's responsibilities included the maintenance of the structure and common areas of the flats and a separate block of garages, private roads and amenity areas. We think that the *Glyn Road* case is quite different from this case, a complex development with 125 flats.

53. In this case there is no head lease. However, the complicating factors in this case are the leaseholder-owned management company and the lease of the common parts. Nevertheless, on balance we prefer the submissions and evidence (including Mr Beck's evidence) given by the Applicants and find that there is a clear risk that the management company could fold leaving the freeholder to consider assuming the management responsibilities (as they are entitled to do under the leases).

54. It is also the case that leasehold management responsibilities appear to be at least as complex (and probably greater) as they are in the *Zuckerman* case. We conclude that an investor would require an addition of 0.5% to reflect in this case, the greater management responsibilities with flats than with houses. An investor would take account of the possibility that he would have to intervene should the management company collapsed by exercising the right to take over management of the block. This is a substantial block of flats with a history of difficult management issues which pose a real risk to an investor.

55. The risks that apply to flat management were illustrated by another recent decision of the Lands Tribunal in *Daejan Investments Limted v Benson (and others)* [2009] where the landlord's appeal against the refusal of a leasehold valuation tribunal to exercise its discretion to dispense with the consultation requirements in section 20 of the Landlord and Tenant Act 1985 was dismissed. Lord Justice Carnwath, the senior president of the Upper Tribunal, stated '..The potential effects - draconian on the one side and a windfall on the other- are an intrinsic part of the legislative scheme' (paragraph 40). In that appeal the landlord's charges were some £270,000. As a result of their failure to

comply in full with the statutory consultation requirements they could only recover £250 from each of the five leaseholders. This is an example of how the stricter legal framework governing leasehold flat management carries additional financial risks. At the Lands Tribunal concluded in the *Zuckerman* case the market has become aware of the effects of the new legal framework.

56. In summary, we conclude that the evidence produced by the Applicants justifies a departure from the generic deferment rate by adding to that 5% rate, an additional 0.25% for obsolescence, an additional 0.5% because of the risk that the potential growth may not be achieved, and an additional 0.25% relating to the differences between managing houses and flats. This results in a 6% deferment rate in this particular case. We would add that this additional 1% reflects the fact that the evidence shows here that investors would require this by comparison to the risks of investing in dwellings in the PCL.

57. There is also indirect evidence to support this higher deferment rate. This is the evidence that Mr Gray gave last year in *7 Sudeley Street Brighton* (2009) that there is local property market evidence to support deferment rates between 5.45 and 6.50%. Based on this expert evidence, the tribunal determined that a deferment rate of 6% should be applied. The valuation date in that case was 26 June 2007 (the valuation date is 2 October 2007 in this case). Mr Gray told the tribunal in that case that he believes that outside PCL, comparable sales of ground rent investments is the most appropriate evidence available. 'He considers that if the Sportelli cases had been dealing with a provincial property in the Brighton area, the Lands Tribunal would have utilised market evidence to arrive at a higher deferment rate' (paragraph 19).

Summary

58. On the basis of the evidence adduced in this case we have concluded that the applicant's case for a departure from the generic rates propounded in the *Sportelli* case has been made out. The deferment rate to be applied in this case is 6%. This results in a premium of £1,732,109 to be paid in this claim. As the deferment rate is the only issue that divides the parties we did not consider it necessary to append a valuation to this decision.

James Driscoll

James Driscoll, solicitor (Lawyer Chair)

Dated: 28 June 2010