FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AE/OLR/2018/1016**
Property	**:**	**2 Hillview Close Basing Hill Wembley HA9 9QW**
Applicant	**:**	**Omar Jad Assaf**
Representative	**:**	**Michael Pryor of Counsel**
Respondent	**:**	**Newton Estates Limited**
Representative	**:**	**Mr Sirmak Chakaveh**
Type of application	**:**	**Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	**:**	**Judge Professor Robert M. Abbey** **Marina Krisko FRICS**
Date of determination and venue	**:**	**5th February 2019 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**12th February 2019**

DECISION

Summary of the tribunal's decision

(1) The appropriate premium payable for the new lease is **£18,000**. The basis for this valuation is set out in detail in this decision.

Background

1. This is an application made by the applicant leaseholder pursuant to section 48 of the Leasehold Reform, Housing and Urban Development

Act 1993 ("the Act") for a determination of the premium to be paid for the grant of a new lease of **2 Hillview Close Basing Hill Wembley HA9 9QW** (the "subject property") and to determine the commencement date of the lease.

2. By a notice of a claim served pursuant to section 42 of the Act, the applicant exercised the right for the grant of a new lease in respect of the subject property. At the time, the applicant held the existing lease of the subject property. The applicant subsequently proposed to pay a premium of £7,500 for the new lease.

3. The respondent freeholder served a counter-notice admitting the validity of the claim and subsequently counter-proposed a premium of £23,100 for the grant of a new lease.

4. On 30 July 2018, the applicant applied to the tribunal for a determination of the premium.

The issues

Matter not agreed

5. The following matter was not agreed:

   (a) The premium payable, (did marriage value apply or was the lease term over 80 year and hence the marriage value should be 0%).

The hearing

6. The hearing in this matter took place on 5th February 2019. The applicant was represented by Mr Pryor of Counsel, and the respondent by Mr Chakaveh.

7. Neither party asked the tribunal to inspect the subject property and the tribunal did not consider it necessary to carry out a physical inspection to make its determination.

8. The representatives advised the Tribunal that they had reached agreement on all issues save for one outstanding issue namely the premium payable and whether or not marriage value would apply. The Tribunal was informed that the parties had agreed that if marriage value applied the agreed premium was £18,000 and if marriage value was at 0% then the agreed premium was £9,500. Marriage value for a lease extension has a different meaning than for collective enfranchisement. Here it means the difference in values of the interests before and after the lease extension is granted. However, under the Act there is no marriage value if the lease has more than 80 years

unexpired. If marriage value applies then it is taken as the potential for increase in the value of the flat arising from the grant of the new lease; the Act requires that this 'profit' should be shared between the parties. The proportion of the split of marriage value is fixed by the legislation at a 50:50 split between the landlord and the tenant.

9. The cut off point for marriage value is the 80 year mark, Schedule 13 Part II section 4(2A) of the Act states that "*Where at the relevant date the unexpired term of the tenant's existing lease exceeds eighty years, the marriage value shall be taken to be nil.*" So the Tribunal was asked to consider if the tenant's lease term exceeded 80 years at the time the claim was made.

10. The reason that this point arose is because the tenant's notice was served on or around the 80 year mark and there was a difference of opinion on the lease provisions regarding the description of the term and indeed linked to the lease term, when the tenant's notice was actually served.

The tribunal's determination

11. The tribunal determines that the appropriate premium payable for the new lease is **£18,000.**

Reasons for the tribunal's determination

12. The single unresolved issue for the tribunal as set out above depended on the length of the lease term at the date of the service of the tenant's notice. The Tribunal therefore carefully considered the terms of the lease in that regard. The lease of the subject property was dated 11 December 1998 and was expressed to be "*….from the 11th day of December on thousand nine hundred and ninety-eight for a term of ninety-nine years….*". The lease then sets out the rents to be paid yearly in advance and then states that "*….the first of such payments being a proportionate payment to be made on the execution hereof….*", namely the 11th December 1998. Counsel for the applicant made an argument that the lease term started on the 12 December 1998. The respondent said the term included 11 December 1998.

13. The leading book on the interpretation of leases is *"Woodfall:Landlord and Tenant"*. At paragraph 5.068 thereof consideration is given to the meaning of "from" a certain date. This states :-

> "*The word "from" may mean either inclusive or exclusive, according to the context and subject-matter; and the court will construe them so as to effectuate the intention of the parties. The decisions on limitations from a certain date are by no means unanimous as to the inclusion or exclusion of the day*

named. One useful pointer is the dates for payment of rent, for it will normally be the case that the tenant will pay rent for the whole of the term, but not for a period which falls outside the term. ….Where a term of three years was granted "from" May 1, 1963, at a rent payable quarterly in advance on May 1, August 1, November 1 and February 1 in each year, the first payment being due on May 1, 1963, it was held that the term began on May 1, 1963, and ended on April 30, 1966. (See Ladyman v. Wirral Estates [1968] 2 All E.R. 197, approved in Whelton Sinclair v. Hyland [1992] 2 E.G.L.R. 158, CA). The fact that a lease was granted to follow immediately on the termination of an earlier lease may also assist to determine whether the word "from" is used inclusively or exclusively of the specified date. (Whelton Sinclair v. Hyland, ante.)

14. As has been noted earlier in paragraph 11 of this decision the lease required the tenant make the first payment of rent on the execution of the lease i.e. 11 December 1998. The Tribunal was satisfied that this clearly confirmed the lease term started and included 11 December 1998. As *Woodfall* observes the tenant will pay rent for the period of the lease and will not pay rent for a period outside the term.

15. Furthermore when the Tribunal looked at the agreed terms of the new lease to be granted it observed that it stated that the lease was "for a term of 99 years beginning on and including 11 December 1998 and ending on and including 10 December 2097. In these circumstances the Tribunal was satisfied that the lease term started on and included 11 December 1998.

16. The Tribunal then had to consider when the tenant's notice had been served. The solicitor for the applicant in fact issued two copies of the notice, one sent by ordinary post and the other sent by recorded delivery. Both letters were worded the same and both were dated 7 December 2017. Both were addressed to the respondent but both contained a spelling error in the address as "Maidenhead" was misspelt as "Maisenhead".

17. One letter stated it was by recorded delivery the other did not as it was sent by ordinary post. The parties agree that the recorded delivery letter did not get served on the respondent until 16th December and the post office records confirm the date. If this date for service applies then the lease term at the 16th December is such that it is below the 80 year mark and marriage value applies. However, there is still the matter of the other letter sent by ordinary post.

18. The tribunal then had to consider how and when the letter sent by ordinary post may have been served. Section 99 of the Act says that

> *"(1) Any notice required or authorised to be given under this Part—*
>
> *(a) shall be in writing; and*
>
> *(b) may be sent by post.*

Accordingly ordinary post will be covered by this provision. Then section 7 of the Interpretation Act 1978 provides that

> "*Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post*."

This makes "the ordinary course of post pertinent to this case and the service of the tenant's notice of claim.

19. So in this case the notice to the respondent would have been served in the ordinary course of post. The solicitor for the applicant confirmed that the post was sent first class mail on the 7th December. So the Tribunal needs to consider when the letter was actually delivered at the address of the respondent. What was the ordinary course of post was a question of fact. But what is the position where there is no evidence of the ordinary course of post.

20. There is a helpful Practice Direction issued in the High Court ([1985] 1 All ER 889) that says to avoid uncertainty as to the date of service it will be taken that delivery in the ordinary course of post was effected in the case of first class mail on the second working day after posting. The Practice Direction also confirms that working days are Monday to Friday, excluding any bank holiday, see *Bannister v SGB Plc and Others* [1998] 1 WLR 1123 (CA). (Also see *Richardson v HMRC* TC/2014/02707 in the First-tier Tribunal Tax Chamber to confirm the two day period and days in a working week and how a Tribunal may take notice of a High Court Practice Direction).

21. Counsel for the applicant invited the tribunal to find as a matter of fact that the first class letter was delivered on 8 December. He did so because the solicitor for the applicant had been in contact with the post office and was able to advise the tribunal that he was told by the Wembley Post Office Delivery Manager that if the two letters were collected for posting together then the postman delivering would have delivered the recorded and ordinary letters together.

22. Then to confirm this took place on Friday 8th December Counsel produced to the Tribunal Post Office records showing what happened to the recorded delivery letter. The record show that on the 8tth December "Delivery attempted – no answer"" Counsel said that this being so the letter by ordinary post would have been delivered on the 8th December. Unfortunately the record also show "Stonehaven DO" which apparently is in Scotland! No explanation was readily apparent for this extraordinary record. Subsequent record show that the recorded delivery letter was back in Maidenhead on Saturday 9th December and the record shows "Available for collection or re-delivery". The recorded delivery letter was then delivered on 16 December.

23. The tribunal was not persuaded by this argument as it felt that there was little or no meaningful evidence of the actual date of delivery of the first class letter. There is insufficient evidence of delivery/receipt of the first class letter on 8 December. There is too much supposition required to enable the Tribunal to make this finding. Therefore the tribunal felt constrained by the practice direction and therefore found as a matter of fact that the date of delivery was the second working day after delivery. The letter was issued on the 7th December, a Thursday. Friday, a working day, was 8th December, Saturday the 9th and Sunday 10th are not working days and so the second working day was Monday 11th December. The Tribunal were able to make a finding that service was therefore made on Monday 11th December 1997. This being so the 80 year mark had passed and therefore the marriage value applied. This being so the agreed valuation to apply had to be £18,000.

Name: Judge Robert. M Abbey **Date:** 12th February 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not

complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).