

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2010] UKUT 86 (LC)  
LT Case Number: LRA/168/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – flats – price – deferment rate – appeal allowed – deferment rate increased from 5% to 5¼%.*

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD  
VALUATION TRIBUNAL OF THE LONDON RENT ASSESSMENT PANEL

BY

(1) DEAN RICHARD LETHABY  
AND  
(2) NORMAN JAMES REGIS

Re: Fats 1 and 2  
245 Glyn Road  
London  
E5 OJP

Before: N J Rose FRICS

CASE DECIDED UPON WRITTEN REPRESENTATIONS

The following cases are referred to in this decision:

*Cadogan v Sportelli* [2007] 1 EGLR 153

*Cadogan v Sportelli* [2008] 1WLR 2142

*Zuckerman and Others v Trustees of the Calthorpe Estates* LRA/97/2008, unreported

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## DECISION

1. This is an appeal by Dr Dean Richard Lethaby and Mr Norman James Regis, the leaseholders of the two flats (Nos.2 and 1 respectively) comprising a house known as 245 Glyn Road, London, E5 OJP (the appeal property) against the decision of the Leasehold Valuation Tribunal of the London Rent Assessment Panel, determining that the price payable for the collective enfranchisement of the appeal property was £12,000. In arriving at that price, the LVT adopted a deferment rate of 5%. The appellants' case is that the deferment rate should be 6.5%, or alternatively 6%.

2. On 25 July 2006 Deputy District Judge Clarke, sitting at Clerkenwell and Shoreditch County Court, ordered that the freehold interest in the appeal property be vested in Mr Regis as nominee purchaser and that the matter be transferred to the LVT to determine the price payable. The freeholder, Mr Ian Wallace, could not be traced and took no part in the LVT proceedings or in this appeal.

3. The LVT's determination was dated 27 June 2007. On 21 December 2007 the President granted the appellants permission to appeal by way of rehearing. The proceedings were subsequently stayed pending the outcome of certain other appeals. On 7 December 2009 the appellants were ordered to file any expert report, witness statement of facts or other documentary evidence that they wished to rely upon by 29 January 2010. At the appellants' request, the Tribunal then ordered that the appeal be determined in accordance with the Tribunal's written procedure. I inspected the appeal property, accompanied by Dr Lethaby, on the morning of 12 March 2010.

4. In the light of the written submissions and my inspection I find the following facts. The appeal property is a terraced house on lower ground, ground and first floors. It is situated on the west side of Glyn Road, two doors north of the junction with Lockhurst Street. There is a large local authority housing estate on the opposite side of Glyn Road. The property is divided into two self-contained flats. Flat 2 is situated on the ground and first floors. It contains two living rooms and a kitchen on the ground floor (with staircase leading down from the kitchen to the rear garden) and two bedrooms and a bathroom/wc on the first floor. Flat 1, on lower ground floor level, contains one bedroom, one living room, kitchen and bathroom/wc. It includes a small patio at the rear.

5. Each flat is occupied under a full repairing lease for 99 years from 29 September 1987 at rents of £75 per annum for the first 25 years, £150 for the next 25 years, £200 for the next 25 years and £400 for the residue of the term.

6. Dr Lethaby's principal submission was the letter he had written to the Tribunal setting out the appellants' case on 12 January 2010. He explained that, although he had paid surveyor's fees of over £1,400 in connection with the LVT hearing, the LVT had expressed disappointment at the quality of the surveyor's report and concluded that it could not be relied upon. In view of this; the small amount at issue in the appeal, and the fact that the appellants

had incurred legal costs in connection with the LVT hearing which exceeded the original quote by 400%, Dr Lethaby said that he had decided to present the appellants' case himself.

7. Dr Lethaby submitted that the deferment rate should be 6.5% for the following reasons. Firstly, the freehold interest falls to be valued at the valuation date, 8 August 2006. The LVT had based its decision on the Lands Tribunal decision in *Cadogan v Sportelli* [2007] 1 EGLR 153, since it considered there were no exceptional circumstances to justify a departure from the rate of 5% for flats which had been determined in that case. Dr Lethaby said that, if the freehold interest in the appeal property had been sold on the market on the valuation date, it would have achieved a price comparable with deferment rates being adopted pre-*Sportelli*, making the *Sportelli* ruling irrelevant to the price obtained. It should, therefore, not form a relevant consideration in the case of the appeal property. Secondly, it was clear from the judgment of the Court of Appeal in *Sportelli* [2008] 1 WLR 2142 that for cases outside the Prime Central London area (PCL), it was not sufficient simply to rely on *Sportelli* to produce a predefined deferment rate, ignoring any evidence that might be presented to the contrary.

8. Dr Lethaby pointed out that three of the five experts who had given evidence in *Sportelli* believed that properties outside the PCL area should not be deferred at the same rate as those inside it. He said that this evidence

“seems to have been overlooked in the decision”.

9. He also said that, in *Sportelli*, the LVT decided that the deferment rate should be calculated according to the following formula:

Deferment rate = risk - free rate – real growth rate + risk premium.

He considered that the real growth rate should differ according to location. He produced data based on the Nationwide House Price Index between the fourth quarter of 1973 and the fourth quarter of 2009, which he said showed that there had been very considerable differences in the rate of growth between London and other regions over the previous 36 years. He suggested that the real growth rate of 2% – which the Lands Tribunal had found in *Sportelli* to be appropriate for properties in the PCL area – should be adjusted as follows:

<b>Region</b>	<b>% difference</b>
North	1.52
Yorkshire/Humberside	1.07
North West	0.49
Outer Metropolitan area	0.49

10. Dr Lethaby also suggested that the risk premium should differ according to location. He said

“it does not appear to make sense to suggest that a property such as ours in the notorious London Borough of Hackney opposite a large and renowned Council Estate with a high crime rate and constantly changing population has the same level of long

term risk as an investment in a property in the Prime Central London area. However I concede that I am providing no further evidence to support this assertion in this appeal.”

11. After the appeal had been allocated to me for decision, I caused a letter to be written to Dr Lethaby, drawing his attention to my decision in *Zuckerman and Others v Trustees of the Calthorpe Estates* dated 18 November 2009 (LRA/97/2008, unreported). Dr Lethaby responded by suggesting that, in the light of that decision, the appropriate deferment rate was 6.0%. This was based on three adjustments to the Tribunal’s calculations in *Sportelli*, as follows. Firstly, the risk premium should be increased from 4.5% to 4.75% to reflect the much lower value of the flats in the appeal property than those considered in *Sportelli*. He said that the adjusted 2006 purchase price of his flat (No.2) was £279 per sq ft as at September/October 2007, compared with values between £740 and £1,100 per sq ft in *Sportelli*. It was therefore likely to remain economically viable to repair the PCL properties for considerably longer than the appeal property.

12. Secondly, for the reasons given in his initial submission, Dr Lethaby submitted that an investor considering long term growth prospects in Hackney would not be confident that the *Sportelli* real growth rate would be achieved. If, therefore, the Tribunal considered it appropriate to reflect this factor by adjusting the risk premium rather than the real growth rate, the former should be increased by a further 0.5% to 5.25%. Finally, Dr Lethaby suggested that investors would increase the *Sportelli* 0.25% adjustment for flats to 0.5%, reflecting a fuller appreciation of the risk implications resulting from the Service Charges (Consultation Requirements) (England) (Regulations) 2003.

## Conclusions

13. I deal firstly with two arguments advanced by Dr Lethaby, questioning the relevance of *Sportelli* to this appeal. Firstly, he suggested that *Sportelli* was irrelevant because it had not been published at the valuation date. There is nothing in that point; *Sportelli* itself was concerned with valuations that pre-dated the decision.

14. Secondly, Dr Lethaby pointed to the fact that in *Sportelli*, several witnesses had considered that there should be a different deferment rate for properties outside and within PCL. That is true but, having heard all the evidence, the Tribunal concluded that no such difference was justified. The weight to be given to the Tribunal’s observations in respect of properties outside PCL was subsequently considered by the Court of Appeal. In paragraph 102 of the judgment Carnwath LJ said:

“the deferment rate adopted by the Tribunal [for PCL properties] will no doubt be the starting point; and their 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 relevant to the risk premium for residential property in different areas. That will be a matter for those advising future parties, and for the tribunals, to consider as such issues arise.”

15. This Tribunal is bound to follow judgments of the Court of Appeal. The question, therefore, is whether there is sufficient evidence in this case to justify a departure from the *Sportelli* 5% deferment rate for flats.

16. In paragraph 72 of its decision in *Sportelli*, the Tribunal expressed the view that any investor concern that a real growth rate of 2% might not be achieved should be reflected in the risk premium. Dr Lethaby did not suggest that this was the wrong approach. Moreover, he has produced no persuasive evidence to suggest that the value of the appeal property is likely to grow more slowly than if it were situated in PCL. The statistics he relied on sought to compare growth rates for properties in London generally with those elsewhere in the UK. Dr Lethaby accepted that he did not have data to enable comparison to be made between PCL and east London. That concession, which was inevitable, is fatal to his case on relative growth rates.

17. I turn to the suggestion that the *Sportelli* allowance for flats should be increased from 0.25% to 0.5%. The risk to landlords resulting from a failure to comply with the 2003 regulations is that their ability to recover substantial expenditure which they have incurred in providing services, repairs, improvements, insurance, or management services will be restricted to £250 for each tenant. The risk is likely to be greatest in those cases where expensive building work has been undertaken to the structure and/or common parts of a block of flats.

18. The freeholder's responsibility for repairs to the appeal property is minimal. The building is divided into two flats. In respect of each unit, the demise includes

“all the floors and ceilings of the flat and the joists and beams supporting the floors and all the external and internal walls which bound or form part of the flat above such level.”

The lease of flat 2 includes:

“the roof, roof void and beams and timbers supporting the said roof.”

The lease of flat 1 includes:

“the foundations of the property lying beneath the demised premises”.

Each tenant covenants to keep the demised premises in good and substantial repair and condition. The tenant of flat 1 covenants to contribute one-third of the cost incurred by the tenant of flat 2 in repairing and maintaining the roof. The tenant of flat 2 covenants to contribute two-thirds of the cost incurred by the tenant of flat 1 in repairing and maintaining the foundations. The risk to the freeholder is therefore very much less than in *Zuckerman*, where the landlord's responsibilities included the maintenance of the structure and the common areas of the flats and a separate block of garages, private roads and amenity areas. Against that background, I consider that the *Sportelli* allowance of 0.25% is entirely adequate to reflect the greater problems of managing the appeal property than if it were occupied as a single house.

19. Dr Lethaby also suggested that the risk premium should be adjusted to reflect the added risk of deterioration compared with properties in PCL. In *Zuckerman*, I found that such a risk

was present in a block containing flats worth £198.50 per sq ft in September/October 2007, when compared with the *Sportelli* flats, valued at £740/£1,100 per sq ft between December 2003 and July 2005. The corresponding value for the appeal property in autumn 2007 was £279. Although I consider that the circumstances of the current appeal are on the borderline, I think that an investor would conclude that, in this case, there was a greater risk than in *Sportelli* of eventual deterioration in the state of the property towards the end of the lease term, which would in practice have to be remedied by the freeholder notwithstanding the lessees' contractual repairing obligations. In my judgment this increased risk would be reflected by an increase of 0.25% in the risk premium.

20. Accordingly, I conclude that the *Sportelli* deferment rate for flats should be increased from 5.0% to 5.25% to reflect the circumstances of the appeal property. The appeal is allowed to that extent. The price payable for the freehold interest in the appeal property is £10,850, calculated as follows:

**Term (not appealed)**

Ground rents to Sep 2012		£150	
YP 6.14 years @ 7.0%		<u>4.85</u>	£727
Ground rents to Sep 2037		£300	
YP 25 years @ 7%	11.65		
Deferred 6.14 years @ 7%	<u>0.66</u>	<u>7.69</u>	£2,307
Ground rents to Sep 2062		£400	
YP 25 years @ 7%	11.65		
Deferred 31.14 years @ 7%	<u>0.12</u>	<u>1.40</u>	£560
Ground rents for 24 years		£800	
YP 24 years @ 7%	11.47		
Deferred 56.14 years @ 7%	<u>0.02</u>	<u>0.23</u>	<u>£ 184</u>
			£3,778

**Reversion:**

Combined vacant possession value of flats:		£415,000	
Present Value 80.14 years @ 5.25%		<u>0.017</u>	£7,055

**Diminution in Value**

Term	£3,778
Reversion	<u>£7,055</u>
	£10,833
<b>Say</b>	<b>£10,850</b>

Dated: 24 March 2010

N J Rose FRICS