UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – maisonette – premium – freehold reversion – whether reduction in value appropriate to reflect risk of tenancy continuing under Local Government and Housing Act 1989, Schedule 10 – if so, whether adjustment to be made at end of original term or extended term – held deduction appropriate at end of original term – appeal dismissed

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

BY

MIDLAND FREEHOLDS LIMITED

Re: 68 Mallaby Close
Shirley
Solihull
West Midlands
B90 2PW

Determination based on written representations

The following cases are referred to in this decision:

Clarise Properties Ltd's Appeal [2012] 1 EGLR 83
West Hampstead Management Co Ltd v Pearl Property Ltd [2002] 1EGLR 115

DECISION

Introduction

1. This is an appeal by Midland Freeholds Limited against a decision by the First-tier Tribunal (Property Chamber) (the F-tT), determining the premium payable for an extended lease of a maisonette known as 68 Mallaby Close, Shirley, Solihull, West Midlands B90 2PW (the appeal property) under section 56 and Schedule 13 to the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act).

2. The F-tT's decision was dated 30 October 2013. It determined the premium payable at £11,130. It also determined the appellant's legal costs at £375 plus VAT and disbursements (if applicable) and valuation fees at £375 plus VAT and disbursements (if applicable). On 13 January 2014 an application was made to this Tribunal for permission to appeal against the F-tT's decision insofar as it related to the premium payable. The basis of the application was that the F-tT had been wrong, in assessing the value of the freehold reversion, to make a deduction (referred to as a "*Clarise* deduction" after the decision of this Tribunal in *Clarise Properties Ltd's* appeal [2012] 1 EGLR 83) – to reflect the risk that vacant possession might not be obtained on the lease expiry because of the provisions of Schedule 10 to the Local Government and Housing Act 1989 (the 1989 Act). If such a deduction was justified, the appellant submitted that it should have been made at the end of the extended lease and not at the end of the original term as decided by the F-tT.

3. On 11 March 2014 the Deputy President granted permission to appeal by way of re-hearing because, although the sum in issue was very small, the question whether a *Clarise* deduction was appropriate in principle in determining the premium payable for a lease extension under the 1993 Act was an issue of general significance.

4. By letter dated 25 March 2014, the Tribunal was informed that the respondent lessee, Mr Neil Jeffries, would take no part in the appeal. On 28 April 2014 the Deputy President further ordered that the appeal be determined on written representations only, and as a review rather than a re-hearing.

5. I have received written submissions in support of the appeal from Mr M A Fell, a director of the appellant company.

Facts

6. In its decision the F-tT found that the appeal property is a first floor purpose-built maisonette comprising hallway, staircase to first floor, living room, kitchen, two bedrooms and bathroom together with a garage. The property is double-glazed.

7. The appeal property is held under a lease for a term of 99 years from 25 March 1974 at a yearly ground rent of £35 payable from 22 October 1975 to 24 March 2007, £52 from 25 March 2007 until 24 March 2040 and £70 thereafter.

The F-tT hearing

8. At the F-tT hearing on 1 October 2013 Mr Jeffries was represented by Mr Anthony Brunt FRICS. Mr Fell provided written submissions on behalf of the appellant. Mr Fell did not attend the hearing because of a medical appointment, but he informed the F-tT that he was happy for the hearing to proceed on the basis of his written submission.

9. In addition to the *Clarise* deduction, two other issues were before the F-tT: the value of tenants' improvements (if any) and the existing lease value. The F-tT's conclusions on these issues were not contested and I say no more about them.

The F-tT's decision

10. The F-tT referred to the *Clarise* deduction in paras 13 to 18 of its decision in these terms:

> "Mr Brunt submits for a "*Clarise* deduction". Mr Fell makes no comment. A *Clarise* deduction arises out of the *Clarise* decision where the Upper Tribunal in an enfranchisement case determined under the Leasehold Reform Act 1967 ("the 1967 Act") that 20% be deducted from the standing house value when calculating the value of the ultimate reversion to reflect the risk of an assured tenancy arising under Schedule 10 to the Local Government Act 1989 ("the 1989 Act") at the end of the 50 year notional lease extension contemplated by the 1967 Act which would deprive the freeholder of vacant possession.
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> 14. Mr Brunt submits that the freeholder cannot be sure of gaining possession at the end of the hypothetical 50 year lease after the expiry of the original term. Security of tenure is granted to the tenant, not by virtue of the 1967 Act, the 1993 Act or any other leasehold reform legislation but by virtue of Schedule 10 to the Local Government and Housing Act 1989.
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> 15. Mr Brunt submits that Schedule 10 applies equally to leases and flats as it does to houses. The deduction is applied at the end of the term date of the original lease and not 50 years later, or at the end of the extended lease.
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> 16. Mr Brunt accordingly submits for a *Clarise* deduction and values it at £5,000.
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> 17. The Tribunal accepts that the rationale for the deduction expounded in the *Clarise* decision should apply equally to new leases under the 1993 Act as it does to enfranchisements under the 1967 Act. The Tribunal determines that the discount for deduction needs to be decided on its own particular facts. The most significant factor is the length of the unexpired term; the

shorter the term the greater the deduction. The Tribunal determines that any discount should be deducted at the end of the original term of the lease and not at the expiry of the extended lease.

18. The Tribunal determines a *Clarise* deduction of £5,200."

Appellant's submissions

11. Mr Fell made the following points. *Clarise* was concerned with the valuation of a house under the Leasehold Reform Act 1967, not a maisonette under the 1993 Act with which this case is concerned. There have been no subsequent decisions in which the Lands Chamber has applied *Clarise* to 1993 Act cases. No reasons were given to support the F-tT's decision on this important point. Moreover, the F-tT's *Clarise* deduction, £5,200, was greater than the figure of £5,000 suggested by the tenant's own valuer.

12. The F-tT held that the deduction to reflect the Schedule 10 rights should be made in the same way as in *Clarise*. But whereas in *Clarise* the Lands Chamber had valued on the basis that the tenant would have the right to remain in possession at the end of the 50 year lease extension, in the current case the F-tT made the consequential deduction at the original term date.

Discussion

13. Mr Fell's principal argument is that *Clarise* does not provide a precedent for this appeal because it was decided under the 1967 Act, whereas the present appeal concerns an enfranchisement under the 1993 Act.

14. The distinction drawn by Mr Fell is strictly accurate; the subject matter in *Clarise* was a house, not a maisonette such as the appeal property. In consequence the right to enfranchise in each case arose under different legislation. As Mr Brunt pointed out to the F-tT, however, the right to security of tenure is derived from Schedule 10 to the 1989 Act, not from the relevant enfranchisement legislation.

15. It is apparently true, as Mr Fell suggests, that the Lands Chamber has not, since *Clarise* was published on 17 January 2012, issued a decision incorporating a deduction to reflect the possibility of an assured tenancy arising at the end of the lease. However, the right to such a tenancy existed before *Clarise*. The learned editors of Hague on Leasehold Enfranchisement, Fifth Edition, point out (27-06) that there has been one reported case relating to collective enfranchisement under the 1993 Act where the Lands Tribunal had to consider a claim that the value of the freeholder's interest was diminished by virtue of the fact that the tenants of flats may have had rights under Part 1 of the Landlord and Tenant Act 1954 or Schedule 10 to the 1989 Act. In that case (*West Hampstead Management Co. Ltd v Pearl Property Ltd* [2002] 1 EGLR 115) the Tribunal (P R Francis FRICS)

discounted the value of the landlord's interest by 10 per cent. That part of the decision was not the subject of the subsequent appeal to the Court of Appeal [2002] 3 EGLR 55.

16. In the light of the Tribunal's decision in *West Hampstead,* and in the absence of any attempt by the appellant to explain why the provisions of Schedule 10 do not apply to premises enfranchised under the 1993 Act, I consider that the F-tT was entitled to hold that they do so apply.

17. I turn to Mr Fell's suggestion that if any *Clarise* deduction – in fact I suggest it might more accurately be termed a *West Hampstead* deduction – should be made, it should be at the end of the 50 year lease extension and not at the end of the original term. I do not think that suggestion is justified. In *Clarise* the Tribunal did indeed apply the deduction at the end of the second reversion. But that was because the valuation was prepared under the provisions of the 1967 Act. The Tribunal therefore had to assume that, following the end of the existing lease, the freeholder would be entitled to a modern ground rent only, and the full value of the house would not be enjoyed until the expiry of the 50 year lease extension. The risk of an assured tenancy, therefore, would not arise until the latter date.

18. In the case of a 1993 Act enfranchisement, on the other hand, the price payable is to be calculated on the assumption that the vendor is selling a freehold subject to any existing leases. There is no assumption of a 50 year extended lease at a modern ground rent. It follows that the date when the freeholder is entitled to the value of the flat or flats, and thus the date when the assured tenancy might be created, is the termination date of the original lease, as the F-tT correctly decided.

19. Mr Fell's third point is that the F-tT deducted £5,200 to reflect risk, which was £200 more than the figure suggested by Mr Brunt for the tenant. It is clear from its valuation in para 23 of the decision that the F-tT calculated the appropriate deduction by applying 4% to a figure of £130,000. The latter had been agreed by the parties as representing the value of the extended lease "subject to argument on improvements." In para 12 the F-tT found that no deduction for improvements was justified and there is no appeal against that finding. In those circumstances I do not consider that the F-tT's deduction of £5,200 can be faulted.

20. The appeal is dismissed. I confirm that the premium payable for an extended lease of 68 Mallaby Close is £11,130, plus legal costs and valuation fees as determined by the F-tT.

Dated: 7 July 2014

N J Rose FRICS