UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – flat – capitalisation rate – deferment rate – relativity – whether adjustments to be made to freehold value and marriage value calculation to reflect allegedly onerous rent and lease terms – appeal dismissed

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

BETWEEN:

(1) JONATHAN HOWARD ROBERTS **Appellants**
(2) JANET ANN THAIN

AND

MARIA MERCEDES FERNANDEZ **Respondent**

Re: 70 Andace Park Gardens
133-149 Widmore Road
Bromley
BR1 3DH

Before His Honour Judge Behrens and N J Rose FRICS

Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
on
27 February 2015

Mr Jonathan Roberts on behalf of the appellants.
Mr Peter Morgan FRICS, MCIArb on behalf of the respondent

The following cases are referred to in this decision:

Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39
Sinclair Gardens Investments (Kensington) Ltd's Appeal [2014] UKUT 0079 (LC)
Millard Investments v Cadogan Estates (LON/LVT/1756/04)
Cadogan v Sportelli [2007] 1 EGLR 153 (LT)
Daejan Investments Ltd v Benson [2013] UKSC 14
Voyvoda v Grosvenor West End Properties [2014] L & TR 10
Kosta v Carnwath and Others [2015] RVR 61
Zuckerman v Trustees of the Calthorpe Estate [2009] UKUT 235

DECISION

Introduction

1. This is an appeal by the joint freeholders, Mr Jonathan Roberts and his wife, Ms Janet Thain, from a decision of the First-tier Tribunal (Property Chamber) (the F-tT), whereby the F-tT determined the premium payable by the respondent lessee, Ms Maria Fernandez, for an extended lease of a flat known as 70 Andace Park Gardens, 133-149 Widmore Road, Bromley BR1 3DH (No. 70) in the sum of £10,052.

2. The Deputy President granted permission to appeal on 5 March 2014. In doing so he stated that the proposed appeal was arguable and had a realistic prospect of success. Moreover, the existence of a number of inconsistent decisions of the F-tT relating to property in the same building and in its immediate vicinity, let on similar terms, was likely to promote uncertainty in future applications for lease extensions. In those circumstances it was appropriate for the Tribunal to entertain the proposed appeal. The Deputy President added that the appeal would be determined as a review with a view to a re-hearing.

3. Mr Roberts, a non-practising barrister, appeared as advocate on behalf of the appellants. Ms Fernandez was represented by Mr Peter Morgan FRICS, MCIArb, appearing as both advocate and expert witness. Mr Morgan also produced a witness statement prepared by Ms Fernandez. The contents of that statement were accepted by the appellants.

4. It was agreed that the Tribunal would not be assisted by a site inspection. The agreed valuation date is 8 April 2013.

Facts

5. The basic facts were not in issue and are as follows. Andace Park Gardens comprises two purpose-built blocks of more than 80 flats, built in about 1985. The blocks are four storeys high and are built around a petrol filling station which fronts Widmore Road, the A222 road from Bromley to Sidcup and to the A20 and M20. Widmore Road is a busy main road. It is a bus route and Bromley town centre is about 0.75 miles to the west. All flats have either a garage or a parking space. No. 70 has one bedroom.

6. The lease of No. 70 was granted for 99 years from 25 March 1986. The unexpired term at the valuation date was 71.964 years. The initial ground rent was £200 per annum, subject to review every 25 years in line with the Index of Retail Prices (the RPI). The rent was increased in 2011 to £358.68 per annum.

7. An unusual feature of the lease is that, on every occasion when it is assigned, the freeholder receives 1% of the sale price.

Issues

8. The following issues are not agreed:

	F-tT	Appellants	Respondent
Relativity	93.7%	88-90%	93.7%
Onerous lease supplement	Not dealt with	£5,000	None required
Adjustment to marriage value	Not dealt with	Required to compensate for high rent	Not agreed
Deferment rate	5.75%	5.25%	5.75%
Capitalisation rate	5.5%	5% or better	7%

Relativity

The Argument before the F-tT

9. In his written argument dated 17 November 2013 Mr Roberts produced three graphs for 2013 prepared by Beckett and Kay. He said that graph A suggested a relativity slightly below 90% for a lease with 72 years unexpired in Prime Central London (PCL). Graph B, based on published research, showed around 90%. This figure related to the whole country, but Bromley was much closer to PCL than, say, Halesowen, which would also have been included in the graph. Graph C, which only covered mortgage dependent properties, showed a relativity of around 82%. Andace Park Gardens, being at the bottom end of the property ladder in Bromley, was heavily mortgage dependent.

10. Mr Roberts said that since Autumn 2007, and more particularly since the collapse of Lehman Brothers in 2008, lenders had shown an increased aversion to short leases. Many mainstream lenders would not lend at all on leases of less than 70 years. The fact that leases in Andace Park Gardens now had just over 71 year unexpired had led to depressed prices.

11. Mr Roberts referred to the LVT decision on 21 Andace Park Gardens (No.21) dated 6 October 2011. In that case the LVT had accepted his suggested relativity of 90% for an unexpired term of 74.389 years, finding that sales of flats in the block were very much mortgage dependent. Mr Roberts invited the F-tT to adopt a relativity of 85% (not 88% as stated in the decision).

12. Mr Morgan's report to the F-tT was dated 29 October 2013. He said that, if open market evidence were available, it would provide a better guide to relativity than graphs prepared by practitioners. He produced (as Appendix PM5) details of flat sales in The Laurels, Kingsway Court and The Oasis in Bromley, and two adjacent blocks in Beckenham which, he said, showed that there was very little difference between the prices paid for extended leases and leases with more than 70 years unexpired. He also referred to two sales in Andace Park Gardens itself; No.55, sold in December 2012 without a lease extension for £164,000 and No.37, sold in June 2013 with an extended lease and free of ground rent for £162,500.

13. In the light of this evidence Mr Morgan contended that, in the real world, provided the unexpired term was at least 70 years, purchasers took no account of the lease length when making their offers. As an alternative approach which he described as "rational", Mr Morgan said that he had calculated that a purchaser would need to put aside £4,770 to accumulate at an average interest rate of 5% over 72 years, to replace the capital spent on purchasing No. 70 for his valuation figure of £160,000. Since £4,770 represented just under 3% of £160,000 this suggested a relativity of 97%.

14. Mr Morgan said that the Beckett and Kay graph merely represented one man's idea of relativity and it simply did not reflect the market. There were seven other graphs in common use and they suggested relativities ranging from 92% to 94.72% for a 72 year lease. The average was 93.76% which, together with his arithmetical calculation of 97% and real market evidence showing no difference at all, fully justified his suggested relativity of 93.76%.

The decision of the F-tT

15. In paragraph 22 of its decision the F-tT stated that it was not bound by earlier tribunal decisions. It preferred Mr Morgan's approach, but it reduced his figure marginally from 93.76% to 93.7% because one of the graphs he had used – that produced by LEASE – used tribunal decisions and was therefore "not appropriate".

The Argument in the Upper Tribunal

16. Mr Roberts repeated his previous arguments, but he increased his suggested relativity from 85% to 88%. Mr Morgan's case was largely unchanged.

Discussion

17. With one exception the F-tT did not state in terms its conclusions on the individual matters raised by Mr Roberts in support of his suggested relativity. The exception is that the F-tT said that it did not consider itself bound by previous tribunal decisions – a reference presumably to the LVT's determination of a relativity of 90% for the 74.389 years unexpired at No. 21. The F-tT was right to reach that conclusion (see *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 at para 38).

18. It is clear that the F-tT did not place any weight on the Beckett and Kay graph C, which suggested a relativity of 82% for mortgage dependent properties. In answer to a question from this Tribunal Mr Roberts said that he was not able to provide any information as to the data which had been used in the preparation of the graph. In those circumstances it is not surprising that the F-tT did not attach any weight to the Beckett and Kay figures. As the Tribunal (Martin Rodger QC, Deputy President and A J Trott FRICS) observed in *Re*: *Sinclair Gardens Investments (Kensington) Ltd's appeal* [2014] UKUT 0079 (LC) at para 76:

> "Particular care should be taken in drawing conclusions from statistical material where the basis on which it has been compiled and its application to the subject property are uncertain."

19. 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 v Carnwath and Others* [2015] RVR 61 at para 39).

20. We would add that the F-tT's task would no doubt have been simpler if it had been provided with reliable market evidence. Mr Morgan did produce various sale prices achieved for long and short leases, but the supporting information was limited to the property's address, sale date, price paid and lease length. No information was given to indicate, for example, the condition of the flat, the extent of any tenant's improvements, on which floor in the building it was located or whether there was a lift. Without such information it is not possible to draw any meaningful conclusions from the sale prices. What is certain, however, is that a long lease is more valuable than a short lease in an otherwise identical property, contrary to the reverse position suggested by the sales in The Oasis, The Laurels and Kingsway Court, referred to by Mr Morgan.

Onerous Lease Supplement and Adjustment to Marriage Value

The Argument before the F-tT

21. In his argument before the F-tT (trial bundle p51) Mr Roberts referred to other LVT decisions (and in particular *Millard Investments v Cadogan Estates* (LON/LVT/1756/04)), which had concluded that a ground rent of no more than 1% of the freehold value was palatable to a purchaser and noted that the ground rent payable for No. 70 was well in excess of that proportion. He added that in a decision concerning flats in The Oasis the LVT had concluded that the combination of a number of onerous lease features merited an addition of £7,000 to the reversionary value when calculating marriage value. Those features were: (i) the lessee's liability to pay a premium of 1% plus VAT on any sale; (ii) the lessee's liability to pay nearly £500 per annum towards the leisure centre rent (with annual RPI reviews) and running costs; (iii) the requirement for a licence to assign or sub-let; and (iv) the liability to pay a fairly high ground rent, reviewable every 21 years in accordance with RPI increases from the previous review date. Mr Roberts considered that in the case concerning The Oasis the LVT had misunderstood the review intervals for the leisure facility rent, and he suggested an addition of £5,000 to the reversionary value of No.70 to reflect the fact that it had one bedroom less than the flat in The Oasis.

22. Mr Roberts added:

> "logically the proportion of the capitalised rent which represents the 'onerous' element of the ground rent unpalatable to a purchaser, should be discounted when assessing the marriage value, which in simple terms should be an equal division of the enhanced value of the extended lease less the sum of the value to the freeholder of the loss of the reversion and the capitalised value of a 'normal rent".

23. In para 21 of his report (trial bundle p101) Mr Morgan reproduced the following quotation from the recent RICS paper "Leasehold Reform: Graphs of Relativity":

> "Where there is a high ground rent … this has the effect of depressing the value of the existing lease interest and thus the relativity. This is known as an onerous ground rent. The level of rent which

has no effect on value is generally accepted to be in the range 0.05% to 0.25% of the freehold vacant possession value. The assumption made in the graphs of relativity is that the ground rent is nominal, so an adjustment will need to be made when valuing an existing lease with an onerous ground rent. The usual method is to capitalise the onerous element of the rent until reversion and to deduct this sum from the unaffected existing lease value."

24. Mr Morgan said that the ground rent of £359 per annum had been reviewed two years earlier. If the F-tT accepted his freehold valuation of £155,000, the ground rent represented 0.2316% of that value, which was within the range mentioned in the research paper. It was therefore not necessary to treat it as an onerous ground rent.

25. Mr Morgan submitted (trial bundle p101) that the swimming pool and gymnasium were an asset to the block. On his analysis the cost to each tenant was no more than the annual membership of a club and the leisure facility was a most attractive feature of flats in the block. Moreover, a LVT decision had concluded that sale price of flats in the block had not been reduced as a result of the liability to pay the 1% premium and nothing had changed since then.

The F-tT decision

26. The F-tT decision did not mention Mr Roberts's submissions on the onerous lease supplement or the adjustment to marriage value. It is clear from the calculation accompanying the decision, however, that the F-tT did not make either of the adjustments suggested by the appellants.

The Argument in the UT

27. Mr Roberts complained that the F-tT did not deal with his arguments on these issues. He referred again to the LVT decision in *Millard* as suggesting that the ground rent payable was onerous.

28. Mr Morgan repeated the quotation from the RICS research paper. He observed that, since the ground rent represented 0.21% of the freehold value as determined by the F-tT, it was not onerous. He reiterated that nothing had changed since an earlier LVT had decided that market values of flats in the block had not been affected by the 1% premium required on assignment or sub-letting.

Discussion

29. Mr Roberts's arguments rested on the proposition that the element of the ground rent which exceeded 1% of the freehold value, together with certain other lease features, would be considered onerous in the market. The only support for that proposition, before the F-tT and on re-hearing before us, consisted of certain LVT decisions and the assertions of an advocate with a financial interest in the outcome of the

case. Moreover, insofar as those decisions suggested the ground rent was onerous, they were inconsistent with the RICS research paper.

30. It is clear from *Arrowdell* that LVT decisions do not constitute useful evidence in subsequent proceedings. The RICS research paper, on the other hand, is valid evidence of the opinion held by the experienced practitioners who compiled the document. There was thus no evidence before the F-tT, or before this Tribunal on re-hearing, to support either of the adjustments put forward by Mr Roberts, which we reject.

Deferment Rate

The Argument before the F-tT

31. Mr Roberts submitted that the starting point when determining the deferment rate was the 5% for flats in PCL determined in *Cadogan v Sportelli* [2007] 1 EGLR 153 (LT) (*Sportelli*). There was no justification for making an addition for obsolescence. Land values in Bromley were high, and it was likely that future owners of flats in Andace Park Gardens would wish to maintain their properties in good order so as to protect their investments. In that sense the situation was no different from that in PCL. Alternatively, if an element for obsolescence were introduced the allowance should be less than 0.5% in a case concerning a property in a good area of Bromley.

32. Mr Morgan's starting point was the LVT's decision on 21 Andace Park Gardens (No. 21) dated 6 October 2011, which determined a deferment rate of 5.75%. He quoted paras 68 to 73 of that decision, as follows:

> "Firstly, where on expert evidence there is an increased risk of obsolescence not reflected in the current market value of the subject flat, an increase in deferment yield may be appropriate (see *Zuckerman*, para 46). The main factor is the relative value of the subject flat against those considered in *Sportelli*.
>
> In the present case the Tribunal notices that there is a vast difference between the value of flats in Cadogan Square and those in Andace Park Gardens. The Tribunal therefore finds that it will be less economically viable in the future to maintain the subject property. It therefore finds that a 0.25% addition to the *Sportelli* rate is required on that account.
>
> Secondly, where on expert evidence the prospect of future long term growth is considerably less than for a property within the Prime Central London area, a further adjustment to the deferment rate may be justified.
>
> The Tribunal does not consider that Mr Morgan's evidence is sufficiently detailed on the issue to enable the Tribunal to make any such finding. In *Zuckerman* considerable statistical material was adduced which is not the case here. The Tribunal therefore rejects any adjustment on account of this.
>
> Thirdly in *Zuckerman* the Upper Tribunal found that the provisions of the Service Charges (Consultation Requirements) (England) Regulations 2003 are 'potentially extremely serious' for landlords. It held that this requires a 0.5% addition to the *Sportelli* rate. In that connection, the

Tribunal rejects the submission of Mr Roberts that the risk of consultation or other failures can be removed by the appointment of a managing agent who can be sued in the event of such difficulty. This is because bringing an action against an insured professional is fraught with delay, possible failure and the risk of a large adverse costs order.

For the above reason, the Tribunal finds that the correct deferment rate is 5.75%."

33. Mr Morgan said that nothing had changed since the previous LVT decision and he submitted that the same reasoning was applicable to the current case. Values in Andace Park Gardens had hardly changed in the past 2.5 years, whereas prices in PCL had continued to grow. The situation on repairs and management was therefore unchanged.

34. Mr Morgan added that there was evidence showing a vast difference in growth rates between flats in PCL and flats in Bromley, sufficient to justify an addition of 0.25% to the deferment rate as in *Zuckerman*. He produced information from the Land Registry which showed that, between January 1995 and April 2013, the average house price had increased by 593% in Kensington and Chelsea and only 328% in Bromley. He also produced details of certain properties which he had personally valued in Central London and the suburbs. A comparison between his respective valuation figures and the premiums paid on the grant of the leases, some as far back as the 1970s, showed that growth in values had been greater in PCL than in the suburbs over a very long period.

The decision of the F-tT

35. The F-tT determined a deferment rate of 5.75%. Its reasons were as follows:-

"30. *Sportelli* fixed a deferment rate and *Zuckerman* subsequently identified factors that could lead to a higher deferment rate. The Tribunal has applied the principles laid out in *Zuckerman* and has come to the following conclusions.

31. Firstly, where there is expert evidence of an increased risk of obsolescence not reflected in the market value of the Flat, there could be an adjustment. The case of *Sportelli* dealt with high value properties in Cadogan Square that had been standing for a considerable period of time. The Block was built 30 years ago and is of a very different type to the properties in Cadogan Square. This is a type of property that will be demolished and rebuilt in the fullness of time, as it will not be economically viable to continue to maintain it. The Tribunal considers that an addition of .25% to the *Sportelli* rate would be appropriate.

32. Secondly, there is the question of expert evidence of future long term growth. Mr Roberts (sic) has provided a schedule showing the comparable growth rates in Kensington and Chelsea that highlights the difference between the two areas. Mr Roberts (sic) has produced a schedule of sales in the Block since 2007 and this demonstrates that there has been little or no movement in the prices achieved. The Tribunal considers that an increase of .25% to the *Sportelli* rate would be appropriate to reflect the lack of substantial long term growth.

33. The last point considered was whether the provisions of the Service Charges (Consultation Requirements) Regulations 2003 would have an adverse effect on the landlord's ability to recover

costs. It was found to be 'potentially extremely serious for landlords' and that an adjustment of .5% was appropriate.

34. The Regulations were imposed to protect tenants from unscrupulous landlords but the effect has been that tenants are readier to seek to avoid payment as a result of some technical breach of the regulations. This has been recognised by the Upper Tribunal and there are some safeguards for the landlord as a result of the case of *Daejan v Benson* where the landlord has acted reasonably. In the light of this recent decision, the Tribunal considers that an addition of .25% to the *Sportelli* rate was appropriate. Accordingly the Tribunal finds that a deferment rate of 5.75% would be appropriate."

The arguments in the UT

36. Mr Roberts's case was that there was insufficient evidence before the F-tT to justify a departure from the *Sportelli* starting point on the grounds of long term growth. Moreover, there was no expert evidence before the F-tT to justify a further 0.25% in respect of obsolescence. Even if there had been such evidence, the full repairing and insuring nature of the lease was a factor to be weighed in the balance. Moreover where, as here, there was a fairly high service charge, the market value of the flats already reflected the position.

37. Mr Roberts also disagreed with the addition of 0.25% to the starting point to reflect management difficulties. There was no evidence of such difficulties which would deter an investor.

38. In answer to the Tribunal Mr Roberts said that, although he felt that there was no justification for any of the F-tT's adjustments to the *Sportelli* rate, he had put forward a rate of 5.25% before the F-tT and he wished to adhere to that figure.

39. With one exception Mr Morgan did not add anything to the evidence he had given below. The exception was the unchallenged witness statement of Ms Fernandez, in which she described various management problems relating to her flat, the building generally and the swimming pool.

Discussion

40. We start with obsolescence/deterioration. A similar issue arose before the Lands Chamber in *Re Sinclair Gardens Investments Ltd's appeal* [2014] UKUT 0079, which concerned the premium payable for an extended lease of a maisonette in Halesowen. In its decision dated 23 April 2014 the Tribunal (Martin Rodger QC, Deputy President and A J Trott FRICS) said this (references to "the Tribunal" are to the Lands Tribunal or Lands Chamber):

"74. An acceptance that decisions of the Tribunal on issues of fact in one case may be relied on as evidence in another case does not imply that all decisions are of equal weight, and there is no general obligation on a first-tier tribunal to reach the same decision as the Tribunal on an issue of fact. Each case must be decided on the evidence adduced to it, which may include evidence derived from other decisions of the Tribunal. The 'guideline' decision in *Sportelli* stands apart from that general rule for the two reasons identified by the Lands Tribunal: because its subject matter, the

deferment rate for PCL property, is unlikely to vary over time or according to factors peculiar to individual cases, and because of the breadth and quality of the evidence considered by the Tribunal which could not easily be reassembled in another enfranchisement case. For those reasons the practice has been adopted in PCL cases of applying the generic *Sportelli* deferment rate unless compelling evidence to the contrary is adduced. No similar practice was mandated by the Tribunal in *Zuckerman* in relation to deferment rates in the West Midlands, and it remains for first-tier tribunals to come to their own conclusion on that issue …

88. The LVT did not identify anything about the appeal property in particular which would cause an investor to perceive a greater risk of deterioration and obsolescence than was already accommodated in the 4.75% risk premium applied by the Lands Tribunal in *Sportelli* or reflected in the freehold vacant possession value. It appears to have based its decision to make the addition on *Zuckerman*, but it is a misreading of *Zuckerman* to assume that the same 0.25% allowance is appropriate to all property outside PCL or all properties in the West Midlands. On the contrary, whether such an allowance is justified must be considered in each case by reference to the characteristics of the property in question. Despite its reference to the 0.25% addition being 'appropriate to this matter' we are not satisfied that there was evidence before the LVT which justified that conclusion or, if there was, that it was a conclusion which was sufficiently explained in the LVT's decision. The maisonettes in Grange Crescent are typical of thousands of similar age and conventional design. In the end we have been satisfied that the LVT did not sufficiently relate the 0.25% allowance to the risk of deterioration in the appeal property itself to justify its conclusion."

41. We respectfully agree with those observations. Against that background we do not consider that the F-tT's justification for adding 0.25% to the *Sportelli* rate for the risk of deterioration or obsolescence was well-founded. Firstly, if *Zuckerman* – which concerned a property in the West Midlands – was insufficient on its own to justify departing from the *Sportelli* rate without sufficient evidence when considering a property in Halesowen, that principle applies with even greater force to No. 70, situated as it is in Greater London. Moreover, the F-tT's comment that No.70 was of a type of property that would be demolished and rebuilt in the fullness of time, as it would not be economically viable to continue to maintain it, is problematic. Properties are rebuilt, not when it is no longer economically viable to maintain them, but when their existing use value in whatever condition they happen to be is less than their site value for redevelopment (always provided, in the case of a block of flats for example, that vacant possession of the whole can be obtained). In our judgment, the question whether or not a property is likely eventually to be developed and rebuilt is quite different from the question which must be answered when deciding whether a departure from *Sportelli* is justified, namely whether the risk of future deterioration or obsolescence is greater than that reflected in the risk premium determined in *Sportelli* or in the current freehold value with vacant possession. In the present case there was no evidence before the F-tT – apart from *Zuckerman* - to suggest that the answer to that question was no. There was therefore no justification for a departure from *Sportelli* on the grounds of obsolescence or deterioration. Nor did Mr Morgan produce any evidence before us to support such a departure.

42. On long-term growth, the F-tT was persuaded that the evidence produced by Mr Morgan was sufficient to justify an addition to the *Sportelli* rate. We do not agree. The Land Registry statistics covered a period of only seventeen years, which is insufficient to provide a reliable picture of long-term price movements. As for the evidence based on his valuations of certain flats in PCL and the suburbs, Mr Morgan fairly accepted that the sample of properties he had produced was too small to be reliable. In those circumstances we consider that there was not enough evidence before the F-tT or this Tribunal to justify increasing the *Sportelli* rate to reflect future growth.

43. The F-tT's third adjustment to the *Sportelli* rate was based on the additional management risk arising from the new service charge regulations. In *Zuckerman* the Lands Tribunal added 0.5% to reflect the problem as it was then perceived. The F-tT recognised that, as a result of the Supreme Court decision in *Daejan Investments Ltd v Benson* [2013] UKSC14, the risk to landlords had been reduced, but it still made an addition of 0.25% (compared with 0.5% in *Zuckerman*) presumably to reflect the remaining additional risk. In *Voyvoda v Grosvenor West End Properties* [2014] L & TR10 at 73, however, the Tribunal (Sir Jeremy Sullivan, Senior President and N J Rose FRICS) held that, although an element of management risk remained after the Supreme Court decision in *Daejan*, that risk was adequately covered by the uplift of 0.25% for flats (as compared with houses) in *Sportelli*. We respectfully follow that decision and find that the F-tT was wrong to make an adjustment for this factor.

44. We would add that, although it is clear from Ms Fernandez's statement that there have been certain deficiencies in the management of Andace Park Gardens, in our view they have been the result of inadequate management in the past. None of them would be expected to recur if the property were competently managed by the new freeholder. There is therefore no justification for increasing the *Sportelli* allowance of 0.25% for flats to reflect the particular circumstances of No.70.

45. We have found that the F-tT was wrong to make the three adjustments of 0.25% each to the *Sportelli* deferment rate that it did. The appellants indicated, however, that they would be prepared to accept a total reduction of 0.5% from the 5.75% determined by the F-tT. Accordingly, we find that the appropriate deferment rate is 5.25%.

Capitalisation Rate

The argument before the F-tT

46. In Mr Roberts's original written argument (trial bundle p51) he took as his starting point the capitalisation rate of 5.5% determined by the LVT in The Oasis case (PJ/CON/OOAF/OLR/2008/0828). In the case of both The Oasis and Andace Park Gardens, he said, the ground rent investments were highly desirable because of (i) the lessee's liability to pay a premium of 1% plus VAT on any sale; (ii) the lessee's liability to pay a contribution of nearly £300 per annum (rising on an annual RPI basis) towards the leisure centre rent, with an effective indemnity against running repair costs; (iii) the lessee's liability to pay a fairly high ground rent, annually in advance, reviewable every 25 years in accordance with RPI increases from the previous review date; (iv) the requirement for a licence for any assignment or underletting by the lessee; (v) the ability to place insurance and management, if thought fit; and (vi) a level of rent in excess of the minimum prescribed by section 167(1) of the Commonhold and Leasehold Reform Act 2002.

47. Mr Roberts said that the LVT had misunderstood the nature of the rent review mechanism in the Oasis lease. It had assumed that the rent for the leisure centre would be reviewed every 21 years, not annually as was in fact the case. He submitted that an investor would accept a yield of 5% or better for the bundle of rights that made up the Andace Park Gardens investment.

48. In his report (trial bundle p96) Mr Morgan referred to the LVT decision dated 6 October 2011 in respect of No. 21. The LVT had found that the liability to pay the 1% premium on assignment would be an unusually attractive feature. It would normally have expected a capitalisation rate of 7%, but reduced it

to 6% on account of the possibility of receiving premiums. Mr Morgan submitted (p97) that this approach was wrong. In particular he argued that the liability to pay the 1% premium remained after the lease extension. In those circumstances there was no basis for compensating the landlord for its loss. Accordingly, the reduction from 7% to 6% was not justified and 7% was the proper capitalisation rate.

The decision of the F-tT

49. The F-tT's decision on the capitalisation rate was as follows:

> "25. The Tribunal does not place the same importance on the unusual provisions in the lease as Mr Roberts. The amenity lease is by way of a commercial lease and does not come under the jurisdiction of the Tribunal. As a commercial lease the annual increase in the rent by applying the RPI is to be expected. This is outside the jurisdiction of the Tribunal and no adjustment will be made. The Tribunal does not find it uncommon to find leases with ground rents that double at regular intervals and are to be found in the market. There is no market evidence before the Tribunal to show that Mr Roberts' suggestion that the rent provisions in the lease would affect the capitalisation rate.
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> 26. The Tribunal considers that the point under Section 167(1) of the 2002 Act is too remote to affect the level of yield and the requirement for licence to assign the lease and to control management and insurance are normal and would not attract any further investment. The only issue that would be attractive to an investor would be the right to collect 1% premium on any sale.
>
> 27. Taking all these matters into account the Tribunal considers that the figure proposed by Mr Morgan is too generous and the figure proposed by Mr Roberts is unrealistic. The Tribunal adopts a capitalisation rate of 5.5%."

The argument in the UT

50. Mr Roberts reiterated his argument that the six factors to which he had referred made the freehold investment particularly attractive. He added that the F-tT's dismissal of the leisure centre lease as a commercial lease was plainly wrong. Enjoyment of the leisure facilities by the tenant and the obligation to provide them on the part of the landlord were inextricably linked to the lease structure of the individual flats in the development and could not be ignored.

51. Mr Morgan repeated his case made before the F-tT. He added that he had agreed 7% on hundreds of lease extension cases where the ground rent review interval was more than 20 years.

Discussion

52. We consider firstly the F-tT's conclusion that Mr Morgan's suggested capitalisation rate of 7% (wrongly recorded by the F-tT as 6%) was "too generous" because the right to collect a 1% premium on

alienation would be attractive to an investor. We agree that this lease provision is an attractive feature of the freehold reversion. However, we also agree with Mr Morgan that it is irrelevant to the calculation of the premium. As Mr Morgan pointed out, the right to receive the premium will continue notwithstanding the lease extension. The landlord cannot in our view retain the right to the premium and be compensated for its loss.

53. We agree that the F-tT was right to ignore the amenity lease, although our reasoning differs from that of the F-tT.

54. The landlord under the lease of No. 70 is the tenant under the amenity lease. Under the terms of the amenity lease the tenant is obliged to pay the rent (currently in excess of £20,000 per annum) and (in the Third Schedule) has a number of other obligations, including obligations of repair, and reimbursing its landlord a fair proportion of certain defined expenses.

55. The lease of No. 70 contains a number of references to the amenity lease. The most relevant obligations are as follows:

(i) an obligation by the landlord (7th Schedule paragraph 9) to pay the rent and perform the covenants under the amenity lease.

(ii) an obligation by the tenant (6th Schedule paragraph 29) to contribute an appropriate part of the costs and expenses of the landlord in carrying out its obligations under the 7th Schedule.

56. Thus, the £285.46 payable by the tenant is reimbursing the landlord for the appropriate part of its own obligations to pay the rent and observe the covenants in the amenity lease. It follows that the moneys paid in respect of the amenity lease do not provide the landlord with any profit or income. They therefore do not enhance the value of the freehold reversion.

57. In his oral submissions Mr Roberts sought to avoid this argument by asserting (without evidence) that the landlord and the tenant under the amenity leases are one and the same person. Even if that is true it does not affect the position. The investor that we are considering would not acquire the freehold reversion of the amenity lease and thus he would have to pay the rent under the amenity lease.

58. We have concluded that, of the six factors put forward by Mr Roberts as justifying a lowering of the capitalisation rate, two are misconceived. The only evidence before the F-tT and this Tribunal to suggest that the remaining four factors would have affected the yield required by an investor consisted of an LVT decision relating to The Oasis. That decision is of no evidential value (*Arrowdell*). In those circumstances we find that the appropriate capitalisation rate is 7% which Mr Morgan said, and we accept, he has agreed in hundreds of cases where ground rent reviews are at intervals of 20 years or more.

Result

59. We attach (Appendix 1) our valuation, which follows that prepared by the F-tT, except that the deferment rate is reduced from 5.75% to 5.25% and the capitalisation rate is increased from 5.5% to 7%.

Our valuation is in the sum of £10,008, which is only £44 (or 0.44%) below the figure determined by the F-tT. In view of the very small difference between the two valuations we do not consider it appropriate to substitute our own figure for that of the F-tT. Accordingly, whilst we have concluded that the deferment rate and capitalisation rate decided by the F-tT were wrong, the appeal is dismissed. We confirm that the premium payable for the extended lease of 70 Andace Park Gardens is £10,052.

Dated: 23 March 2015

His Honour Judge Behrens

N J Rose FRICS

Appendix 1

70 ANDACE PARK GARDENS, 133-149 WIDMORE ROAD
BROMLEY BR1 3DH
VALUATION BY UPPER TRIBUNAL (LANDS CHAMBER)

Matters Agreed

Valuation date:	8 April 2013
Current ground rent	£358.68 per annum
Remaining term	71.964 years (72 years)

Matters determined

Existing unimproved leasehold value	£159,000
Extended unimproved leasehold value	£169,690
Relativity	93.7%
Capitalisation rate	7.0%

Deferment Rate	5.25%

Term

Ground rent £358.68 per annum	
72 years @ 7% x 14.176	£ 5,084

Reversion

£169,690 in 72 years @ 5.25% x 0.025	£ 4,242

Landlord's interest

	£ 9,326

Marriage Value

Extended leasehold value	£169,690
Less existing leasehold value	£159,000
Less landlord's interest	£ 9,326
	£ 1,364
50%	£ 682
Premium Payable	**£ 10,008**