UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – deferment rate - use of Upper Tribunal decisions as evidence of facts found – evidence required to justify departure from Sportelli deferment rate outside prime central London – whether reliance on Zuckerman permissible – risk of long term growth rate not being achieved – risk of deterioration of low value property of conventional design – management issues in maisonettes – appeal allowed in part

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE MIDLAND RENT ASSESSMENT PANEL

BY

SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED — **Appellant**

Re: 7 Grange Crescent
Halesowen
West Midlands
B63 3ED

Before: Martin Rodger QC, Deputy President and A J Trott FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
11 February 2014

Mr Oliver Radley-Gardner of Counsel, instructed by W H Matthews & Co, for the appellant

The following cases are referred to in this decision:

Earl Cadogan and Cadogan Estates Limited v Sportelli and others [2007] 1 EGLR 153 (LT); [2008] 1 WLR 2142 (CA)

Hildron Finance Limited v Greenhill Hampstead Limited (2007) LRA/120/2006

Daejan Investments Limited v The Holt (Freehold) Limited (2008) LRA/133/2006

Lippe Cik v Chavda (2008) LRA/111/2007

Culley v Daejan Properties Ltd [2009] UKUT 168 (LC)

Earl Cadogan v Erkman [2009] 1 EGLR 87

Mansal Securities Limited's Appeal [2009] 2 EGLR 87

Zuckerman v Trustees of the Calthorpe Estate [2009] UKUT 235

Daejan Investments Ltd v Benson [2013] 1 WLR 854

Voyvoda v Grosvenor West End Properties [2013] UKUT 0334 (LC)

Clarise Properties Ltd [2012] UKUT 4 (LC)

31 Cadogan Square v Cadogan [2010] UKUT 321 (LC)

Arrowdell Limited v Coniston Court (North) Hove Limited [2007] RVR 39

Land Securities v Westminster City Council [1993] 1 WLR 286

Lethaby and Regis' Appeal [2010] UKUT 86 (LC)

DECISION

Introduction

1. This is an appeal against a decision of the Midland Leasehold Valuation Tribunal ("the LVT") given on 20 November 2012 by which it determined the premium payable for a new lease of 7 Grange Crescent, Halesowen, West Midlands, B63 3ED under section 48 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). The LVT decided that the price payable should be £10,407, the figure contended for by the valuer instructed on behalf of the leaseholder; it rejected the figure of £15,990 advanced on behalf of the landlord.

2. The parties agreed that the freehold vacant possession value of 7 Grange Crescent was £96,600 and only two valuation issues had to be considered by the LVT, namely the deferment rate and the value of the existing leasehold interest. This appeal is concerned only with the deferment rate and proceeded before us as a review with a view to a re-hearing.

3. The evidence presented to the LVT on behalf of the tenant by Mr A W Brunt FRICS of Anthony Brunt & Co on the issue of the deferment rate supported a rate of 5.75% which rested, Mr Brunt explained, "on the Upper Tribunal appeal in what is now known as the *Zuckerman* case", as well as on his own experience of agreeing deferment rates of 5.75% and 6% on maisonettes and flats respectively with other chartered surveyors in the Midlands.

4. In his evidence on behalf of the landlord, Mr G T Holden FRICS of Parsons Son & Basley LLP relied on the decision of the Lands Tribunal in *Earl Cadogan and Cadogan Estates Limited v Sportelli and others* [2007] 1 EGLR 153 in support of a deferment rate of 4.75%.

5. The LVT dealt with the issue of the deferment rate at paragraph 17 of its decision, as follows:

> "The Tribunal considers that the starting point for the calculation of the deferment rate is *Sportelli*, subject in this case to the modifications in *Zuckerman*. Although no new evidence was introduced in this case, it is now generally accepted that in the Midlands area a higher deferment rate should be adopted. Following the *Sportelli* decision, *Zuckerman* increased the deferment rate by 0.5% to reflect poorer growth outside PCL [prime central London] and a further 0.25% to reflect obsolescence and deterioration which the Tribunal consider appropriate to this matter. The deferment rate adopted by the Tribunal is, therefore, 5.75%."

6. In refusing permission to appeal the LVT noted that the decision in *Zuckerman* was concerned principally with the West Midlands "of which Halesowen is very much part" and had

been widely adopted by the Midland Leasehold Valuation Tribunal since the decision was handed down. The LVT went on:

> "It is both unreasonable and unnecessary to expect that, in every case of this nature before the Midlands Tribunal, the same level of evidence should have to be provided as in *Zuckerman* in order to justify adopting the principles of that case. That would be as absurd as expecting the full evidential burden of *Sportelli* to be provided in every case in Prime Central London before the principles of that case could be adopted.
>
> The Tribunal is entitled, where appropriate, to take inference and guidance from established principles and cases – as it has in this instance from *Zuckerman*."

7. In granting permission to appeal on 22 July 2013, the Tribunal said that:

> "It is appropriate for the Tribunal to consider the status which [first-tier tribunals] may afford to the Tribunal's decision in *Zuckerman* in modest lease extension cases where relatively limited evidence is presented to establish the premium payable."

8. After receiving a copy of the appellant's statement of case in the appeal the leaseholder, who had been the applicant before the LVT, instructed Mr Brunt to inform the Tribunal that she would take no part in the appeal which has therefore proceeded unopposed.

The issue

9. The issue in this appeal is whether the LVT was entitled simply to adopt the deferment rate used by the Tribunal in *Zuckerman*, and to treat the facts established in that case and the conclusions drawn from them as applicable to the valuation of 7 Grange Crescent without the need for those facts to be independently established by evidence presented to it. Was the LVT, in effect, entitled to follow *Zuckerman* as providing guidance on deferment rates in the West Midlands, or was it required in the absence of convincing evidence to adhere to the deferment rates identified by the Lands Tribunal in *Sportelli*?

The Facts

10. 7 Grange Crescent is a conventional maisonette on the ground floor of a two-storey pitched-roof building designed as four self-contained maisonettes, two on the ground floor and two on the upper floor, each having its own separate entrance. The Tribunal has been provided with photographs of the appeal property and others in Grange Crescent, a cul-de-sac largely comprising buildings of similar design.

11. The appeal property was described by the LVT, which carried out an inspection, as comprising a side entrance hall, lounge, kitchen, two bedrooms and bathroom. It includes a large

front garden, with a smaller area to the rear and a garage, which is one of a pair located at the rear of the property.

12. The appeal property was the subject of a lease granted on 24 October 1962. We infer from the content of that lease, and from the appearance of the property, that it was newly-built at that time. The lease is for a term of 99 years from 25 March 1961 and was granted in consideration of a premium of £2,690 and at a ground rent of £15 per annum. It was agreed that 48.29 years of the term remained when on 9 December 2011 the leaseholder exercised her right under section 42 of the 1993 Act to claim a new lease of the property for a term equal to the unexpired term plus an additional 90 years at a peppercorn rent. The claim to a new lease was admitted by the appellant, who proposed a premium of £14,846 rather than the £10,431 suggested in the leaseholder's notice of claim.

13. The terms of the lease identify the demised premises by reference to a colour plan and a general description that they comprise "the lower maisonette of the building now or hereafter to be constructed upon the piece of land… and the garage and coal store appurtenant thereto."

14. The lease includes a covenant by the leaseholder at clause 2(4) as follows:

> "To repair and keep in good and substantial repair and if necessary to rebuild the demised premises including the joists or other support for the maisonette over the demised premises…"

15. The leaseholder also covenanted to redecorate the interior and exterior of the demised premises (clause 2(5)), to permit the landlord to enter to view the state and condition of the demised premises (Clause 2(9)), and to carry out any remedial work of which the landlord might give notice within three months provided that if such work had not commenced within one month it was to be lawful for the landlord to enter the demised premises, carry out the necessary repairs and recover the cost as rent in arrear.

16. The landlord's covenants were limited and, so far as relevant, comprised only a covenant to keep the demised premises insured (clause 3(2)) and (at clause 3(4)), the following:

> "That (if so required by the Tenant) the Landlord will enforce the covenants similar to those contained in clause 2 hereof entered into or to be entered into by the Transferees or Tenants of the other maisonettes in the said building on the Tenant indemnifying the Landlord against all costs and expenses in respect of such enforcement and providing such security in respect of costs and expenses as the Landlord may reasonably require."

17. The lease contains no provision for a service charge. The landlord was entitled to recoup its expenditure on insurance as an additional rent payable by the leaseholder on demand. Also recoverable as rent pursuant to clause 2(7) was a contribution by the tenant equal to a reasonable proportion of the cost of repairing, amongst other things, roads and paths, gutters, pipes and

drains used in common by the occupier of the demised premises and the occupier of any adjoining or neighbouring premises.

The proceedings before the LVT

18. The evidence presented on behalf of the leaseholder by Mr Brunt, so far as it concerned the deferment rate, was brief and to the point. In paragraphs 11 and 12 of his written report he informed the LVT:

> "11. My view on deferment rate rests, in part, on the Upper Tribunal appeal in what is now known as the *Zuckerman* case (both parties were represented), but in addition to *Zuckerman* I would inform the Tribunal that in all negotiations post that appeal I have been agreeing 5.75% and 6% deferment rates on maisonettes and on flats respectively with other chartered surveyors in the Midlands.
>
> 12. As the Upper Tribunal is a superior court of record I would believe that we should follow their determination on the deferment rate point in that fully contested case unless there is some other case of greater importance (of which I know not)."

19. Mr Holden's evidence on behalf of the appellant was carefully recorded by the LVT. His starting point was the Lands Tribunal's decision in *Sportelli* which gave guidance that a deferment rate of 4.75% should be applied when valuing houses, with 5% being adopted for flats. He submitted that the decision in *Zuckerman* was a justified departure from *Sportelli* only because compelling evidence had been provided to the Tribunal. It was, Mr Holden said, for the leaseholder as applicant to provide compelling evidence justifying a departure from *Sportelli* and this had not been attempted.

20. Mr Holden explained to the LVT that he could find no evidence that there was any greater risk of deterioration and obsolescence with the subject property than with the generality of properties and submitted that it should therefore be assumed that factors relating to deterioration and obsolescence were fully reflected in the vacant possession value of the property agreed between the valuers. He explained that as far as concerned the risk that a real growth rate of 2% might not be achieved, he considered the statistical evidence relied on by the Tribunal in *Zuckerman* to be unreliable. Land Registry data (which he considered more reliable) demonstrated that between December 1995 and 2005 there was no significant difference in growth rates between prime central London ("PCL") and Dudley. In the six years since 2005 there had been a marked divergence between the two but this, in Mr Holden's view, was explained by special global and European factors affecting residential values in PCL and had occurred over too short a period to enable them to be reflected in a judgment about long term growth. Finally Mr Holden did not feel that any allowance should be made for the risk of management problems because the subject property was a maisonette in respect of which the landlord's covenants were no different from those which would be found in the lease of a house.

21. Having recited the evidence of both the valuers the LVT based its determination of the deferment rate on a direct application of two of the adjustments to the generic *Sportelli* rate for flats which the Tribunal had decided were appropriate in *Zuckerman*. It adopted an additional 0.5% to reflect "poorer growth outside PCL" and a further 0.25% to reflect "obsolescence and deterioration which the Tribunal consider appropriate to this matter." Its overall conclusion was that the deferment rate should be 5.75%, which indicated that its starting point was the 5% deferment rate for flats taken from *Sportelli*.

Sportelli

22. In *Sportelli*, under the heading "general effect of conclusions" the Lands Tribunal gave explicit guidance about the status of its decision that a deferment rate of 4.75% was applicable in the determination of the price payable for houses while 5% was the appropriate deferment rate for flats. The rate for houses comprised three elements: a risk-free rate of 2.25% from which a rate of real growth of 2% is deducted and a risk premium of 4.5% is added; in the case of flats a further 0.25% was added to the risk premium to reflect the inherent problems of managing leasehold flats. After drawing attention (at paragraph 114) to its function as a specialist tribunal of promoting consistent practice in the application of the law in decisions made within its jurisdictions, the Tribunal went on (at paragraph 117):

> "The function of the tribunal is thus to make decisions on points of law and on what may be called principles of practice to which regard should be had by the first-tier tribunals and by practitioners dealing with claims in any of the tribunal's original or appellate jurisdictions. Such principles of practice are not, in our view, confined to valuation methodology… but may extend to matters of quantification if the considerations underlying the quantification are of general application."

23. The Tribunal intended its decision in *Sportelli* to be treated as "a guideline in other enfranchisement cases" as it said at paragraph 120. Its reasons were practical and its justification was carefully considered, as is apparent from paragraph 121:

> "It is obviously undesirable and, indeed, it would be impossible, for the sort of financial and valuation evidence that we have heard to be called and considered in every enfranchisement case. It is, in our judgment, unnecessary that it should be, because LVTs and this tribunal are entitled to rely upon their own expertise, guided by this decision. The prospect of varying conclusions on the deferment rate in different cases reached on evidence that was less comprehensive than that before us can therefore be avoided by LVTs adopting the practice of following the guidance of this decision unless compelling evidence to the contrary is adduced. This is justified because, as we have explained above, the deferment rate is unlikely to vary according to factors particular to the individual case. Some factors, including, in particular, the prospect of long-term growth, will not vary from case to case, while other factors, such as location and obsolescence, will already be reflected in the vacant possession value."

24. The Tribunal's belief that the appropriate deferment rate was unlikely to vary according to factors particular to individual cases was emphasised by its suggestion that statutory prescription could well be appropriate and could usefully give greater certainty to the market than a guideline decision of the Tribunal was capable of doing. Despite that observation the Tribunal clearly contemplated the possibility of exceptional cases. At paragraph 123 it concluded its remarks on the general effect of its decision as follows:

> "The application of the deferment rate of 5% for flats and 4.75% for houses that we have found to be generally applicable will need to be considered in relation to the facts of each individual case. Before applying a rate that is different from this, however, a valuer or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate."

25. When the Tribunal's decision in *Sportelli* was considered by the Court of Appeal ([2008] 1 WLR 2142) Carnwath LJ devoted a significant portion of his judgment, with which the other two members of the Court agreed, to the precedent effect of the Lands Tribunal's decision on an issue of fact such as the appropriate deferment rate in an enfranchisement valuation. The Tribunal's approach had been criticised by counsel for one of the parties as involving a fundamental misconception of its role and of the status of its decisions. That criticism was rejected. Two factors influenced the Court of Appeal's approval of the concept of the Tribunal giving guidance on issues of fact. The first, mentioned at paragraph 97, was the specialist nature of an appellate tribunal and its now clearly recognised role in providing guidance on factual as well as legal matters. The second, identified in paragraph 98, was the public interest in avoiding wasted expenditure and the risk of inconsistent results, in successive leasehold valuation tribunal appeals on an issue such as that of deferment rates. The breadth and quality of the evidence in *Sportelli* was particularly noted at paragraph 63 and again at 98 where it was said:

> "The Lands Tribunal could hardly have done more to ensure that the issues were fully ventilated and exhaustively examined… I have already referred to the steps taken by the tribunal to bring together the present group of cases. Furthermore it is difficult to envisage a better qualified panel of experts for the purpose than those called in this case, or of specialist counsel on both sides of the argument."

26. Concluding his consideration of the Lands Tribunal's approach Carnwath LJ drew attention to the then prospective changes in its jurisdiction, at paragraph 99:

> "I agree with the tribunal that an important part of its role is to promote consistent practice in land valuation matters. It was entirely appropriate for the tribunal to offer guidance as they have done in this case, and, unless and until the legislature intervenes, to expect leasehold valuation tribunals to follow generally that lead. Mr Munro invited us to go further, and to consider the status of Lands Tribunal decisions respectively on issues of law, valuation and fact. However, I bear in mind that under the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the Lands Tribunal is likely in the near future to be subsumed in that of the new Upper Tribunal, which will be a "superior court of record" under the Act. It will be principally for the new tribunal to lay down guidelines as to the precedent effect of its decisions for different purposes."

27. The Court of Appeal then went on to qualify its general approval of the Lands Tribunal's approach so far as it related to future decisions outside the PCL area. After drawing attention at paragraph 100 to the fact that the evidence in *Sportelli* was directed principally to the market within the PCL area, Carnwath LJ said this at paragraph 102:

> "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 judgment 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 different areas. The deferment rate adopted by the Tribunal 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 would be a matter for those advising future parties, and for the tribunals, to consider as such issues arise."

Subsequent authorities – Greater London

28. On a number of occasions since the Court of Appeal's decision the Tribunal has been invited to depart from the generic deferment rates identified in *Sportelli* when valuing properties outside PCL. On each such occasion the need for evidence to justify a different rate has been emphasised. In *Culley v Daejan Properties Ltd* [2009] UKUT 168 (LC) the Tribunal (George Bartlett QC, President and P R Francis FRICS) provided the following guidance (at paragraph 35):

> "Thus evidence of valuers as to whether a higher risk premium should be taken because of the features of the property under consideration, including its location, is of undoubted relevance, and if a tribunal is satisfied on the evidence before it that such features justify the application of a higher deferment rate then, of course, it ought to apply such higher rate. In determining whether a higher rate is appropriate it will need to bear in mind the considerations that led the Tribunal in *Sportelli* to adopt the approach that it did, and the primary question will always be whether there are particular features that are not fully reflected in the vacant possession value and thus should be reflected in a higher risk premium. Moreover – and this is a matter that may not, or may not sufficiently, emerge from the Tribunal's post-*Sportelli* decisions – what matters is the view that the market, properly informed on relevant factual matters, would take on such features (the prospective movement of house prices in the area, for instance, or the potential obsolescence of the property) in considering an investment in the reversion. On this the expert opinion of the valuer is likely to be important."

29. In *Hildron Finance Limited v Greenhill Hampstead Limited* (2007) LRA/120/2006 a block of flats in north London was the subject of a collective enfranchisement claim under the 1993 Act. The Lands Tribunal (His Honour Judge Reid QC and Mr N J Rose FRICS) decided that Hampstead was not within PCL and, at paragraph 34, considered whether "the evidence has

demonstrated that a departure from the deferment rate adopted in *Sportelli* is justified." It concluded that the evidence, which was largely based on the personal opinion of the leaseholder's valuer, was unsustainable in the light of the Court of Appeal's approval of the approach taken in *Sportelli*. The Lands Tribunal also rejected the suggestion that the 1930s block of flats under consideration (which it described "as generally of solid construction" but with a timber framed mansard roof covering the top floor accommodation) was at greater risk of obsolescence than was accommodated in the *Sportelli* generic deferment rate. At paragraph 35 the Lands Tribunal said:

> "We do not think that age on its own can be the appropriate test; the question is whether obsolescence and condition are not fully reflected in the vacant possession value and the risk premium. To the extent that the flats are, as Mr Maunder-Taylor suggested, deficient in design, layout, services, facilities, fittings and finishes, these factors would presumably be reflected in their present vacant possession value. In our judgment the only factor mentioned by Mr Maunder Taylor which might have a greater effect on the value at the end of the lease than it does now is the mainly timber construction of the top floors. We have borne this consideration in mind, but we have concluded that a purchaser would not feel it to be sufficiently significant to justify an increase in the deferment rate to be applied."

30. Evidence had also been presented on behalf of the landlord in *Hildron* in an attempt to demonstrate that the long term growth rate of flats in north London was comparable to that in PCL. At paragraph 39 of its decision the Lands Tribunal commented on the fact that the evidence covered a period of only 13 years, saying this:

> "We do not consider that such a short period – which coincided with a general upward movement in values – is adequate for the purpose for which it was intended. In order to provide a reliable indication of the long term movement in residential values so as to justify a departure from the *Sportelli* starting point, we consider that a period in the region of 50 years should be looked at, and that a series of statistics with different starting dates should be considered in order to ensure that an unrepresentative period is not relied on."

The Lands Tribunal concluded in *Hildron* that none of the evidence in the appeal persuaded it that the deferment rate should be different from the 5% applied to the flats in *Sportelli*.

31. *Daejan Investments Limited v The Holt (Freehold) Limited* (2008) LRA/133/2006 was a claim for collective enfranchisement of a block of flats at Maldon, Surrey known as The Holt under the 1993 Act in which the LVT had concluded (before *Sportelli*) that a deferment rate of 7.5% was appropriate. The Lands Tribunal (His Honour Judge Huskinson and Mr A J Trott FRICS) re-heard the application. Evidence was adduced on behalf of the respondent of a comparative analysis of the growth in house prices in different London boroughs using published house price indices for the period March 1992 to September 2007. This was said to show different rates of growth in house prices of between 3.22 times in Bexley to 4.95 times in Wandsworth, with the PCL boroughs tending to come at the top of the list and low value boroughs at the bottom (paragraph 52).

32. At paragraph 78 of its decision the Lands Tribunal posed for itself the question whether "upon the evidence before this Tribunal, a departure from the 5% deferment rate determined in *Sportelli* is justified." The elements of the generic rate in dispute in that case were the real rate of growth and the risk premium. As regards the real rate of growth, the Lands Tribunal drew the conclusion from the evidence it had received concerning the change in the value of flats in The Holt compared with the value of older residential property in London generally from 1977 to 2006 that The Holt had out-performed the general market by 20%. Of that evidence it was said at paragraph 79:

> "The analysis was conducted over a 29 year period which covered both strong and weak markets. Whilst it is less than a period in the region of 50 years that this Tribunal thought in *Hildron* would be required to provide a reliable indication of a long term movement in residential values it is considerably longer than the period used in the other analyses put before us and had the benefit of relating specifically to data about the appeal property itself. We find this analysis useful and we give weight to it."

33. The Lands Tribunal was critical of other data from published sources which had been relied on by the respondent's expert because none of it related specifically to flats. The evidence for the appellant had been confined to a comparison between the respective growth rates of the London Boroughs of Merton and Camden (in which the appeal property in *Hildron* was located). The Lands Tribunal placed no weight on that comparison because both boroughs contain a variety of residential areas and no separate data by postal district was available for Hampstead to allow a more refined analysis. The period of comparison (15 years) was also too short to enable a reliable comparison of long term growth rates to be undertaken. The Tribunal therefore concluded (at paragraph 82) that:

> "The evidence before us does not establish that the long term growth rate of The Holt is likely to be materially different from that determined in *Sportelli* and we therefore adopt the rate of 2% as the real rate of growth applicable in this appeal."

34. As far as the remaining contentious elements of the deferment rate assessment, deterioration and obsolescence, were concerned the Lands Tribunal reminded itself at paragraph 83 that physical deterioration and obsolescence were reflected in the generic deferment rate (through the risk premium element) to the extent that the risk related to them is common to all residential property viewed in the long term. It was also necessary to give consideration to whether the generic rate needed to be adjusted in any case for specific factors. It was argued on behalf of the respondent that The Holt (a three-storey block built in about 1930 of brick and concrete construction under a partly pitched and partly flat roof) was particularly susceptible to obsolescence. The Lands Tribunal rejected this approach. Despite the Lands Tribunal describing The Holt as "tired and shabby" and "not built to modern standards" it was not a building "especially prone to the risk of deterioration and obsolescence" and its condition, design and construction were already accounted for in the vacant possession price.

35. It was also suggested on behalf of the respondent that investors in the hypothetical reversion would have a longer-term outlook than purchasers who bought the individual flats for their own occupation or as a buy-to-let opportunity and that the prices paid by owner-occupiers or buy-to-let

purchasers should not be used to value the reversionary interest of a purchaser of the reversion. The Tribunal rejected that submission. In *Sportelli*, at paragraph 76, the Lands Tribunal had declined to accept that in the hypothetical market it was contemplating there would be any significant number of investors looking to hold these long-term assets throughout their lives. Rather, the attraction of the investment would be its relative security, the prospect of growth and the opportunity for both long-term retention and early sale. For those reasons the Lands Tribunal in *The Holt* concluded that the price paid for the flats by owner-occupiers was fairly representative of the reversionary vacant possession value since the investor will not necessarily have a materially different time horizon for holding his investment.

36. In *Lippe Cik v Chavda* (2008) LRA/111/2007 the premises subject to collective enfranchisement were two blocks of 1930s flats in Hounslow. The LVT had adopted a deferment rate of 6.5% and identified the location of the property as one factor justifying a departure from the *Sportelli* rate of 5%. On appeal to the Lands Tribunal the only expert evidence was adduced by the appellant landlord who argued that a higher deferment rate than the generic *Sportelli* rate was not justified. In paragraph 31 of its decision the Lands Tribunal (George Bartlett QC, President and Mr P R Francis FRICS) said that the mere fact of a different location from PCL did not self-evidently affect the deferment rate. The evidence before it did not show that growth rates were lower in Hounslow or that volatility was greater for flats than in the PCL area and there was therefore no justification for taking a higher deferment rate. At paragraph 32 the Lands Tribunal listed the specific locational factors which had been relied on as justifying a different deferment rate but reiterated that:

> "In the light of *Sportelli* the correct approach when considering matters of this sort is to ask whether or not they are fully reflected in the vacant possession value. If the evidence shows that they are not fully reflected – if they would be of greater concern to the purchaser of the reversion than to the purchaser of the freehold with vacant possession – an adjustment to the risk premium might be justified."

The Tribunal concluded that none of the factors relied on justified the making of such an adjustment.

37. These early efforts to justify a departure from the *Sportelli* generic deferment rates for property outside PCL but nonetheless still in Greater London were notably unsuccessful. Other attempts met with a similar fate (see, for example *Culley v Daejan Properties Ltd* [2009] UKUT 168 (LC), an outer London case). In *Earl Cadogan v Erkman* [2009] 1 EGLR 87 the Lands Tribunal (George Bartlett QC, President and Mr A J Trott FRICS) held that the public interest in avoiding wasted expenditure, and the risk of inconsistent results, meant that a first-tier tribunal ought in general, in the exercise of its power to control its own procedure, to exclude evidence designed to show that the guidance given in *Sportelli* was wrong. Although we do not read the decision as limiting the scope for a party to adduce sufficient evidence to show that a departure from the guidance was appropriate in a particular case (as is clear from *Culley* at paragraph 2) any root and branch challenge is ruled out. As the Court of Appeal stated in *Sportelli* at paragraph 102 the Lands Tribunal's conclusions on the methodology to be adopted are likely to remain valid, including outside PCL.

Subsequent authorities – West Midlands

38. The first of three attempts to justify a departure from the generic *Sportelli* rate for property in the West Midlands was made in *Mansal Securities Limited's Appeal* [2009] 2 EGLR 87. 22 conjoined appeals were determined in each of which the LVT had adopted a deferment rate of 5.5% in valuing the freehold interest in family houses in different parts of the West Midlands conurbation for the purpose of their enfranchisement under the Leasehold Reform Act 1967. In all but four of the appeals the price determined by the LVT was less than £5,000, and in none did it exceed £16,000; the freeholders contended for increases of up to a few thousand pounds in each case. It is perhaps unsurprising, given the geographical spread of the cases and the relatively low sums in issue, that none of the leaseholders was willing to incur the expense of responding to the appeals and no expert evidence was presented to the Tribunal other than on behalf of the freeholders. The Tribunal (Mr N J Rose FRICS) was told that a significant number of other cases awaited the outcome of the appeals.

39. Part of the evidence relied on by the LVTs in justifying an increase in the *Sportelli* deferment rate had consisted of average house price figures compiled by the Nationwide Building Society; the Tribunal was satisfied that these strongly suggested that over a period of 55 years house price growth was significantly slower in the West Midlands than in the inner London area (paragraphs 32 and 33). The Tribunal nonetheless concluded that that evidence was not sufficient on its own to justify an increase in the generic deferment rate. There was insufficient information on how the statistical material had been compiled, how its ingredients had been weighted and of what they consisted to enable a conclusion to be reached on its reliability as a basis for determining a long term growth rate for the West Midlands. *Mansal* did, however, indicate an openness by the Tribunal to a departure from the *Sportelli* rates if the necessary evidence was presented to it.

40. In *Zuckerman v Trustees of the Calthorpe Estate* [2009] UKUT 235 the Tribunal (Mr N J Rose FRICS) returned to the deferment rate issue with the assistance of proper evidence and experienced legal representation on both sides of the argument. The appeal concerned the price payable for lease extensions under the 1993 Act for 11 flats at Kelton Court, Edgbaston, Birmingham, but was of wider immediate concern as outstanding appeals in cases involving a further 20 flats in the Edgbaston area had been stayed to await the Tribunal's decision. The LVT had adopted a deferment rate of 5%, in line with the guidance given in *Sportelli*, but it was argued on behalf of the appellant leaseholders that different growth rates and different rates of deterioration and obsolescence between West Midland and PCL property justified a different deferment rate. On the basis of the evidence presented to it the Tribunal largely agreed.

41. Kelton Court is located in the Edgbaston conservation area and comprises 36 two-bedroom flats located in 6 three-storey blocks erected in the 1970s. At the relevant time the long leases on which the flats were let had 64 years unexpired terms and permitted the landlord to recover the full costs of repairing and insuring the blocks through a service charge.

42. The evidence presented to the Tribunal by the leaseholders' valuation expert proposed two adjustments to the 4½% risk premium identified as part of the deferment rate for PCL property in *Sportelli*. The factors justifying a different risk premium for Birmingham were said to be first, functional obsolescence and a greater risk of physical deterioration the extent of which might become so great that the flats would become no longer worth repairing, and, secondly, the long term prospects for capital growth.

43. As to obsolescence and deterioration it was pointed out in evidence that the properties considered in *Sportelli* had significantly higher market values than those in Kelton Court, but the difference in the cost of maintaining buildings in the two areas was relatively small. It was therefore to be expected that it would remain cost effective to rebuild, repair or refurbish high value PCL properties for very much longer than flats such as those at Kelton Court. The respondent's expert did not agree and warned against confusing repair and obsolescence. The landlord was responsible for external and structural repairs, at the leaseholders' expense, so when the leases expired the building should be handed back in repair. Obsolescence was more to do with function than condition or state of repair and was reflected in the vacant possession value of the property, as were the quality of the building and its design. Some of the most valuable houses in the West Midlands were close to Kelton Court, which was within a conservation area and therefore subject to greater restraints on redevelopment.

44. The evidence presented to the Tribunal concerning capital growth comprised information on sale prices in Kelton Court as well as research into the data published by, among others, the Nationwide Building Society, HBOS, the Land Registry and the Valuation Office Agency. The evidence was somewhat limited in terms of time, and did not achieve the fifty year perspective referred to by the Tribunal in *Hildron*, nonetheless it was relied on by the appellants as demonstrating a significant difference in property prices and in the rate of growth in the value of properties between PCL and the West Midlands and the UK as a whole and Kelton Court in particular. The trend demonstrated by this material showed growth at Kelton Court was a little below that of both the West Midlands and the UK national average. The leaseholders' expert considered that to reflect investors' concern as to whether the growth rate in capital values would be as high in Birmingham as in PCL, between 0.5% and 1.0% should be added to the generic *Sportelli* deferment rate for flats.

45. The landlord's expert did not accept this analysis, and disputed the reliability of the statistical material on which it was based, pointing out how a relatively small difference in the period for which data had been compiled could lead to a radically different result. The landlord's expert concluded that the expectations of future growth were reflected in current capital values, and disagreed with the view that property values in the West Midlands had grown at a slower rate than in PCL. Between 1983 and 2007, the average real growth rate was 6.43% per annum for London and 5.88% per annum for the West Midlands. Between 1986 and 2007 the figures were 5.49% and 6.16% respectively. For both areas, over these periods, the average level of real growth was significantly greater than 2%.

46. In reaching its own conclusion the Tribunal took the 5% determined in *Sportelli* for flats in PCL as its starting point. It then considered whether an adjustment was appropriate to reflect a greater risk in Edgbaston than in PCL that flats would become obsolete over the term of the existing leases, or that the extent of deterioration would be so great that the flats would no longer be worth repairing. In *Sportelli* the Tribunal had considered that it would only exceptionally be the case that such factors were not fully reflected in the vacant possession value and the risk premium, but in *Zuckerman* the Tribunal found sufficient evidence to justify such an exception. The evidence showed that the values of the properties considered in *Sportelli* were of a different order of magnitude from those of the flats in Kelton Court. At paragraph 46 the Tribunal reached these conclusions:

> "I do not consider that the fact that there has been extensive redevelopment in Birmingham proves that the previously existing buildings had become obsolete. Nor does the fact that most of the *Sportelli* properties are in a conservation area mean that they cannot become obsolete. Nevertheless … the difference between the value of flats in Kelton Court and those considered in *Sportelli* is striking. Although building costs were somewhat higher in London than in Edgbaston, I accept … that it is likely to remain economically viable to repair high value properties in PCL for considerably longer than it will for similar sized flats in Kelton Court. As a result, whilst the individual flats might be leased on full repairing terms, there is a greater risk of deterioration at Kelton Court than in PCL properties, but this is not reflected in the respective vacant possession values. I find that a purchaser of the freehold reversion to Kelton Court would have required an increase of 0.25% in the risk premium to 4.75% to compensate for this difference."

47. Turning to the prospect of future growth the Tribunal in *Zuckerman* first commended the experts for their efforts in presenting all the available statistics illustrating residential property movements in the West Midlands and PCL over the past 50 years, before acknowledging that despite these efforts the statistical information that the Tribunal indicated in *Hildron* would be required was simply not available. In particular, and contrary to the Tribunal's understanding in *Mansal*, separate regional statistics for the West Midlands were not available earlier than 1973. Nonetheless, as the Tribunal noted at paragraph 50, despite their deficiencies, the patterns of price movements shown in the Nationwide Regional Index – West Midlands for all residential properties from the fourth quarter of 1973 and the corresponding Halifax Regional Index from the first quarter of 1983 were similar. The trend of increase illustrated by both indices – and also by the history of price increases in Kelton Court – was significantly slower than that shown by the Knight Frank Index for Kensington and Chelsea (part of PCL) since 1976. It was accepted by the landlord's expert that information to that effect would have been provided to an investor, seeking to compare the likely growth rates of residential properties in the West Midlands and PCL.

48. The Tribunal made its own assessment of the material and the view the market would take of it at paragraph 51:

> "In my judgment, in spite of its undoubted limitations, the available statistical information demonstrates that the difference between past rates of long-term price increases in PCL and in the West Midlands has been not slight but considerable. I accept … that this information would persuade an investor that he could reasonably anticipate significantly slower long-term growth from residential properties in the West Midlands generally than in PCL and I

find that there was no reason to suppose that the position would be significantly different in the case of Kelton Court itself."

49. As a result the Tribunal concluded at paragraph 53 that an investor considering long term growth prospects would not be confident that the real growth rate of 2% per annum which had been assumed in calculating the deferment rate for PCL in *Sportelli* would be achieved at Kelton Court, "or, put another way, would be less confident that the real growth rate of 2% would be achieved in the West Midlands than in PCL". That lack of confidence would cause the investor to reduce his bid for Kelton Court and the appropriate way to assess that reduction, was by further increasing the risk premium by 0.5% to 5.25%.

50. The Tribunal concluded its assessment of the deferment rate issue by increasing the 0.25% allowance for management included in the *Sportelli* generic rate for flats by a further 0.25% to reflect the greater risks to landlords of being unable to recover the cost of major works through service charges which had arisen as a result of the Service Charge (Consultation Requirements) (England) Regulations 2003. That aspect of the Tribunal's decision in *Zuckerman* has been overtaken by the authoritative re-assessment of the effect of the 2003 Regulations undertaken by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. As a result, the 0.25% supplement made by the Tribunal in *Zuckerman* is no longer appropriate, as was recognised by the Tribunal (Sir Jeremy Sullivan, Senior President and Mr N J Rose FRICS) in *Voyvoda v Grosvenor West End Properties* [2013] UKUT 0334 (LC). Leaving that supplement out of consideration the aggregate risk premium of 5.25% considered appropriate in *Zuckerman* would have resulted in a deferment rate for the flats at Kelton Court of 5.75%.

51. The last of the three decisions of the Tribunal in which a departure from the generic *Sportelli* rates was considered for property in the West Midlands is *Clarise Properties Ltd* [2012] UKUT 4 (LC). The appeal concerned the price payable under section 9(1) of the Leasehold Reform Act 1967 for the freehold interest in a modest two bedroom 1930s semi-detached house in Northfield, Birmingham let on a full repairing lease. The LVT had adopted a two stage valuation approach and had declined to make an addition to reflect the value of the landlord's reversion after the expiry of the 50 year statutory lease extension. The Tribunal (George Bartlett QC, President and Mr N J Rose FRICS) decided that the LVT had been wrong and that it should have adopted the three stage approach proposed by the freeholder. The appeal proceeded as a re-hearing and the Tribunal considered the appropriate deferment rate in carrying out its own valuation.

52. The LVT had said that it would apply the "clear guidance on yield rates for the valuation of the reversion in the West Midlands" given in *Mansal* and *Zuckerman* (paragraph 13). The expert valuer who gave evidence on behalf of the freeholder, Mr Evans, explained to the Tribunal that *Zuckerman* was accepted in the West Midlands as providing guidance on deferment rates; he did not dissent from it and he produced evidence of the same indices as had been relied on in *Zuckerman* (paragraphs 24 and 25). In its decision the Tribunal expressed no disapproval of the description of *Zuckerman* as providing "guidance". It reached its own conclusions at paragraph 37, as follows:

"37. The starting point for determining the deferment rate to be applied in this case is the generic rate of 4¾% for houses in Prime Central London (PCL) determined in *Sportelli* …. We accept Mr Evans's evidence that the prospects of capital growth were lower in the West Midlands than in PCL and that it is appropriate to increase the *Sportelli* rate by 0.5% to reflect this difference in line with the decision in *Zuckerman*. In that case, however, the Tribunal made a further addition of 0.25% because it was "likely to remain economically viable to repair high value properties in PCL for considerably longer than it will for similar sized flats in Kelton Court." The open market value of each of the Kelton Court flats was agreed to be £158,025, which is similar to the agreed value of the appeal property. The respective floor areas of the relevant properties are not available, but in both cases the accommodation includes two bedrooms. Mr Evans did not suggest that there was any reason why the risk of deterioration of the appeal property was less than at Kelton Court and, to be consistent with the decision in *Zuckerman*, we find that the *Sportelli* rate should be increased by a total of ¾% to 5.5%."

53. The Tribunal therefore applied a deferment rate of 5.5% when valuing the semi-detached house which was the subject of the *Clarise* appeal.

Evidence

54. The case for the tenant presented to the LVT has been summarised in paragraph 18 above. Mr Brunt argued for a deferment rate of 5.75% but supported that figure by reference only to the decision in *Zuckerman* and his own experience of agreeing that rate with other chartered surveyors in the Midlands. No additional evidence was presented to us.

55. In his written evidence Mr Holden, for the freeholder, took as his starting point the 4.75% determined in *Sportelli* as the appropriate deferment rate for houses. He saw no justification for believing that the risk of deterioration and obsolescence were not fully reflected in the freehold vacant possession value of the subject property. He had not seen the statistical information referred to in *Zuckerman* and regarded house price statistics as highly unreliable, but such evidence as he had seen did not justify the conclusion that the rate of growth differed significantly between PCL and the West Midlands (although a divergence was apparent from 2005 onwards, but this was due to exceptional global factors). Nor was there any reason to regard the maisonettes in Grange Crescent as being at any greater risk of deterioration than was already accounted for in the freehold vacant possession value, and there were a number of important distinctions between the appeal property and the flats at Kelton Court. No adjustment to the generic rates was therefore justified in this case. The addition of 0.25% to the risk premium to reflect management problems with flats was not appropriate in this case, because the landlord's obligations were no different from those which would be found in the lease of a house; in particular the obligation to repair the building fell on the leaseholders and there was no service charge to administer.

56. In his oral evidence Mr Holden confirmed that, although he had not seen the statistics relied on in *Zuckerman* (which included material specific to Kelton Court) he was familiar with the

published house price indices referred to in that decision. Mr Holden had undertaken research of his own, using Land Registry data for the Dudley Metropolitan District which includes Halesowen and while he did not disagree with the Tribunal's conclusion in *Zuckerman* that the rate of growth in the West Midlands as a whole was slower than in PCL he considered that Halesowen was one of the better parts of the West Midlands and was not typical of that trend. He produced a graph comparing growth rates for Dudley with those for Kensington and Chelsea from 1995 to 2010. These did not appear to us to bear out Mr Holden's thesis, but rather (although over a much shorter and therefore much less reliable period) to be consistent with the judgment of the Tribunal at paragraph 51 of *Zuckerman* that "the difference between past rates of long-term price increases in PCL and in the West Midlands has been not slight but considerable".

57. Mr Holden also produced figures showing the nominal rate of growth (from the first grant of leases in 1961-2 to recent sales in 2011-13) exhibited by the sales of six properties in Grange Crescent and Grange Road, each of which was similar to the appeal property (although one had been extended). Mr Holden later did some further work on these figures at the request of the Tribunal in which he sought to derive an average figure for long term real (rather than nominal) growth for Grange Crescent. His revised figures for 24 sales in Grange Crescent and Grange Road from 1999 to 2013 showed an average annual growth rate since 1962, adjusted by reference to RPI, of 1.53%. We are grateful to Mr Holden for his assistance in producing these figures which seem to us to be consistent with the Tribunal's conclusion in *Zuckerman.*

Submissions

58. In his written and oral submissions Mr Radley-Gardner did not dispute that there are cases where a departure from the *Sportelli* generic deferment rate was appropriate. Nonetheless, any such departure had to be justified on a case-by case basis and on factual evidence which related to the subject premises in dispute. It required "compelling evidence" (*Sportelli* paragraph 121) or "exceptional circumstances" to justify the adoption of a different rate, even in a case involving premises outside PCL. Although the Court of Appeal had contemplated in paragraph 102 of its decision in *Sportelli* that for areas outside PCL the way was open to the possibility of further evidence being called by other parties in other cases leading to a different deferment rate, it had emphasised that the generic rate identified by the Lands Tribunal should be the starting point and had not suggested that the evidence required to support a departure from that rate should be of less than the compelling quality which the Lands Tribunal had indicated would be required.

59. Mr Radley-Gardner accepted that, as "a superior court of record" (see section 3(5), Tribunals Courts and Enforcement Act 2007) the Upper Tribunal is capable of creating binding precedents for the first-tier tribunal and for itself. The issue raised by the appeal, he suggested, concerned the extent to which a decision in one case can be used to determine a question of fact arising in another case. In his submission the fact finding role of the first-tier tribunal could not be delegated to a different tribunal.

60. Mr Radley-Gardner referred us to the decision of the Lands Tribunal (George Bartlett QC, President and Mr N J Rose FRICS) in *Arrowdell Limited v Coniston Court (North) Hove Limited* [2007] RVR 39 at paragraphs 23 and 37 and to *Land Securities v Westminster City Council* [1993]

1 WLR 286 in support of his submission that decisions of other courts and tribunals on issues of fact were either inadmissible or of no probative value because they were based on evidence (written and oral) which the later tribunal has not read, seen or heard, and because the decisions themselves are statements of opinion.

61. Guidance cases such as *Sportelli* were an exception to that principle, but the Lands Tribunal had only felt itself in a position to give guidance of general application because of the range and quality of the evidence it had been able to consider and because it was satisfied that the three elements of the deferment rate - the risk free rate, the long term real rate of growth, and the risk premium - were all likely to be stable over time, while other relevant factors which distinguished properties of different quality or type or in different locations were likely to be reflected in their freehold vacant possession value.

62. *Zuckerman* was simply an example of a case in which sufficient evidence had been adduced to justify a departure from the *Sportelli* rate, and could not itself be regarded as providing any guidance capable of being applied in other cases. Evidence on deferment rates was difficult or impossible to obtain and the appellant had not seen the *Zuckerman* evidence. There were factual distinctions between the flats at Kelton Court and the appeal property in this case which meant that the adjustment for the risk of deterioration made in *Zuckerman* could not simply be transferred to properties in Grange Crescent. For example, Kelton Court had had a flat roof and more extensive common parts and so was more likely to be at risk of deterioration over time than the traditional maisonettes of Halesowen. The statistical evidence concerning growth rates relied on by the Tribunal in *Zuckerman* had related in part to Kelton Court itself, and so could not be regarded as of general application to all property in the West Midlands.

63. Mr Radley-Gardner had the same difficulty in the case of *Clarise* as in *Zuckerman* in understanding the basis on which the Tribunal had felt able to make adjustments to the generic rate to reflect the risk of deterioration where such risks would ordinarily be factored into the freehold vacant possession value of the property. *Sportelli* clearly stated that further adjustments could only be justified on specific facts where it could positively be shown that the vacant possession value did not reflect the risk of obsolescence. Both *Zuckerman* and *Clarise* appeared to treat the issue as being at large, at least in all non-PCL cases.

64. A similar problem was said to arise in relation to the adjustment to the long term real rate of growth to reflect the risk of a slower rate of growth outside PCL. Neither *Zuckerman* nor *Clarise* had considered the basis on which the *Sportelli* real growth rate had been computed. The real growth rate (and the adjustment for risk) in *Sportelli* had been based upon average national growth figures, and were not based on PCL rates alone. That was apparent from the paragraphs 21 and 86 of the Lands Tribunal's decision. It was inherent in the use of national average figures that market in some localities would operate above, and some below, the average rate adopted in *Sportelli*. The mere fact that a property was located outside PCL could not therefore be a sufficient reason for adjusting the risk of future growth component in the *Sportelli* deferment rate. To justify a departure from the average it would have to be shown that there was some market feature taking the location out of the range on which that average was based since, inevitably, there would be areas of the country where higher and lower rates were experienced. In some areas of above average growth the adoption of an average would favour tenants, while in areas of lower growth landlords would benefit, but neither was entitled to complain about the use of a national average

(we were referred generally to *R (on the Application of the Wellcome Trust Ltd) v Upper Tribunal* [2013] EWHC 2803 (Admin) in this context, although we found nothing in it of assistance).

65. Mr Radley-Gardner also submitted that evidence relied on to justify the conclusion that a lower than-average rate of growth was exhibited by the market in a particular locality must satisfy the high standard required by the Lands Tribunal in *Hildron* (not cited in *Clarise*) and must demonstrate a long-term settled trend. In this case the onus of producing such evidence was on the tenant, as the party seeking a departure from the *Sportelli* starting point.

66. The Tribunal in *Clarise* had been wrong in principle (at paragraph 37) to treat *Zuckerman* as automatically applying. It was also wrong in principle to treat *Zuckerman* as a West Midlands' case and *Sportelli* as a PCL case. The correct approach was to recognise that *Sportelli* set a nationwide default deferment rate.

Discussion

67. The appellant's contentions in this case go to the scope of the Tribunal's function, as a specialist appellate tribunal, in promoting consistent practice in the land valuation matters over which it has jurisdiction. As the Lands Tribunal made clear in *Sportelli* at paragraph 117 that function is not confined to the promotion of consistency in valuation methodology but may extend to matters of quantification, if the considerations underlying the quantification are of general application. Carnwath LJ explained in his judgment in *Sportelli* that the exotic notion of the decision of one tribunal setting a factual precedent for other tribunals, which is clearly recognised in the jurisprudence of both the Tribunal and the Immigration Appeal Tribunal, serves an important public interest in avoiding wasted expenditure and the risk of inconsistent results.

68. The promotion of consistent practice, and through it the achievement of consistent and predictable outcomes, is of obvious importance in disputes concerning property of relatively modest value. The evidence of Mr Holden in this case confirms that, whether or not they are expressed as providing guidance to first-tier tribunals, valuation decisions of this Tribunal are widely treated as doing so on issues of fact as well as on matters of law or valuation principle. Consistency of approach on the part of tribunals, including consistency in relation to common issues of fact, is an important foundation of the amicable and economical resolution of valuation disputes. The assumption that different tribunals will reach similar conclusions on comparable issues ensures that many enfranchisement claims are resolved by agreement without the need to refer them to a tribunal at all, and of those which are the subject of formal proceedings, enables a much greater number to be compromised without the need for a contested hearing than will be fought to a conclusion before a tribunal. The role of this Tribunal in promoting and facilitating consistent outcomes by providing guidance which parties can assume will be followed is therefore one of its most important functions.

69. In *Land Securities v Westminster City Council*, on which Mr Radley-Gardner relied, Hoffmann J decided that an arbitration award determining the market rent of a property represented no more than the opinion of the arbitrator, and was not direct evidence of the rent at

which comparable properties were actually let in the open market; evidence of the arbitrator's opinion was not admissible on two grounds, first because it was hearsay, being the assertion of a person not called as a witness which was relied on to prove the value of a comparable property, and secondly because its admission would require a collateral inquiry as to whether the arbitrator had come to the right decision. The first limb of the reasoning in *Land Securities* has been overtaken by the Civil Evidence Act 1995, which renders hearsay statements admissible in civil proceedings, subject to certain procedural safeguards. As *Sportelli* illustrates, in the Lands Tribunal the second limb was not regarded as a sufficient ground of objection to rule out reliance on its decisions as material capable of establishing facts which were not otherwise the subject of proof.

70. The Tribunal's decision in *31 Cadogan Square v Cadogan* [2010] UKUT 321 (LC) at paragraphs 74 to 79 further illustrates and explains the approach which has been taken to the admissibility of material recorded in decisions of the Tribunal, and the decisions themselves, as evidence in subsequent cases. A Grade 2 listed building comprising six flats was the subject of a collective enfranchisement, and one of the issues in dispute concerned the likelihood that planning permission would be granted to enable the building to be converted into a single house. The tenants' nominee purchaser relied on previous decisions of LVTs and of the Lands Tribunal on that issue, and on evidence given by witnesses in such previous cases and recorded in the decisions (for example on the attitude of planning officers to developments of the type proposed). Counsel for the freeholder objected to the admission of such material in evidence in principle, and argued in the alternative that no weight could be placed on it.

71. Reliance was placed by the appellant on two decisions of the Lands Tribunal including *Arrowdell* at 45 in which it had ruled, at paragraph 36, that LVT decisions on questions of fact and opinion (including relativity) were not inadmissible, but that the mere percentage figure adopted in a particular case was of no evidential value. Its reasons were similar to the second of those accepted by Hoffmann J in *Land Securities.* In order to determine how much weight should be attached to the figure adopted in a particular decision, it would be necessary to investigate what evidence the LVT had had before it and how it had treated it. It was inherently undesirable that LVT hearings should resolve themselves into re-hearings of earlier determinations, and for that reason the Lands Tribunal considered "the decisions themselves can constitute no useful evidence in subsequent proceedings."

72. The Lands Tribunal (His Honour Judge Huskinson and Mr A J Trott FRICS) preferred the submissions on behalf of the nominee purchasers which were founded on the provisions of the Civil Evidence Act 1995 and on *Sportelli.* The Tribunal considered that there was nothing in the Court of Appeal's analysis of the extent to which the Lands Tribunal decision on deferment rates should have a precedent effect to indicate that in subsequent cases LVTs or the Tribunal should ignore previous decisions of the Lands Tribunal except in respect of law or procedure. Material referred to in earlier decisions of which notice had been given in good time was rendered admissible by the Civil Evidence Act, and the Tribunal could give it such weight as it decided was appropriate. Previous Lands Tribunal decisions may be relevant upon matters of fact or opinion evidence, as well as on law or procedure. Factual or opinion evidence given to the Tribunal in an earlier case and recorded in its decision and conclusions by the Tribunal on issues of fact (such as whether a particular development would be permitted by a local planning

authority) was admissible as evidence. A subsequent Tribunal was entitled to take into consideration and give weight to a finding of a previous Tribunal on an issue of fact, but must do so in the light of the other evidence called in the particular case.

73. We are satisfied that the relevant jurisprudence of the Tribunal, supported by the Court of Appeal in *Sportelli,* demonstrates that the value of decisions of the Tribunal on questions of fact is not as limited as Mr Radley-Gardner has submitted. We reiterate what was said by the Lands Tribunal in *Arrowdell* concerning decisions of first-tier tribunals, namely, that "the decisions themselves can constitute no useful evidence in subsequent proceedings", but the same does not apply to decisions of this Tribunal. On an appeal which proceeds as a re-hearing the Tribunal's decision will usually record and discuss the evidence which the Tribunal has heard in some detail, and will make clear any limitations or gaps which it finds in that material (as it did in *Mansal*). Another tribunal, whether at this level or in the first-tier, which is asked in a subsequent case to consider and adopt the Tribunal's conclusions of fact as its own, will therefore be in a position to assess those conclusions in the light of the evidence it has heard for itself in its own case and decide whether it is persuaded by the totality of the material before it.

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 in 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.

75. In coming to their own conclusion first-tier tribunals should bear well in mind any limitations in the scope or quality of the evidence they receive. We do not consider that first-tier tribunals in the West Midlands, or elsewhere outside PCL, should be inhibited by the need to find "compelling evidence" justifying a departure from *Sportelli* rates which continue to act as their starting point. Mr Radley-Gardner's submission that only compelling evidence could support any adjustment to the generic guideline rates gives insufficient weight to the decision of the Court of Appeal in *Sportelli,* and in particular to the qualification of the Lands Tribunal's decision which Carnwath LJ explained was necessary in relation to future decisions outside the PCL area. In *Sportelli* the evidential focus was very much on PCL, as one would expect given the location of the subject properties; the interest in the wider market was the Lands Tribunal's own, and not that of the participants, and the limits of the evidence given by the valuers was noted in paragraphs 80 and 88 of its decision (as Carnwath LJ subsequently emphasised). In paragraph 102 of the Court of Appeal's decision (which we have quoted at paragraph 27 above) it drew a clear distinction between the significance of the Tribunal's guidance within and beyond PCL and left open the possibility of "further evidence" being called in cases directly concerned with other areas.

Although the Court of Appeal did not doubt that the Tribunal's PCL rates would form the starting point for other regions it did not suggest that the "further evidence" which might be called in other cases would have to be especially cogent or compelling to justify a departure from those rates. The whole thrust of paragraph 102 of its decision is to the opposite effect.

76. Nonetheless, the further evidence required to justify a departure from the *Sportelli* starting point must provide what the Lands Tribunal in *The Holt* described as "a reliable indication of a long term movement in residential values". Evidence relating specifically to data about the appeal property itself is also likely to be necessary, such as was available in *Zuckerman* and again in this appeal in the form of Mr Holden's analysis of real growth since 1962 in the sales of properties in Grange Crescent and Grange Road. Particular care should be taken in drawing firm conclusions from statistical material where the basis on which it has been compiled and its application to the subject property are uncertain. It will be recalled that in *Mansal* the Tribunal was not prepared to draw definite conclusions from statistical material because there was insufficient information on how the material had been compiled, how its ingredients had been weighted and of what they consisted to enable a conclusion to be reached on its reliability as a basis for determining a long term growth rate for the West Midlands.

77. The evidence presented to the Tribunal in *Zuckerman* was sufficiently clear, and covered a sufficient period (the 35 years from 1973 to 2008) to persuade it that the difference between past rates of long-term growth in PCL and in the West Midlands was not slight, but was considerable, and would cause an investor to reduce his bid for Kelton Court to a degree which required a 0.5% increase in the risk premium. The evidence and representation on both sides in *Zuckerman* were of a much higher calibre than might ordinarily be expected in relatively modest cases, and the Tribunal had the benefit of its own previous consideration of the issues in *Mansal.* The Tribunal's conclusion on comparative growth rates, derived from published statistics (the Nationwide and Halifax Regional Indices for the West Midlands and the Knight Frank Index for Kensington and Chelsea), was one which the LVT was entitled to take into account as part of the evidence before it in this case. It was entitled to do so notwithstanding the fact that the indices themselves were not put in evidence by Mr Brunt, the tenant's valuer, or the fact that Mr Holden said that he had not seen all of the statistical information relied on in *Zuckerman*. As he confirmed to us in his oral evidence, Mr Holden was familiar with the three indices referred to in paragraph 50 of *Zuckerman.* He did not disagree with the conclusion drawn from them by the Tribunal as regards the West Midlands as a whole, although he regarded Halesowen as an exception to the general West Midlands market and focussed his own statistical assessment on a much smaller area (Dudley). Mr Holden was not disadvantaged in giving his own evidence, or in commenting on Mr Brunt's, by the limited material placed before the LVT and there was therefore no unfairness in its reliance on the evidence and conclusions in *Zuckerman.*

78. In *Clarise* the Tribunal clearly treated its decision in *Zuckerman* as providing evidence in its own right relevant to the deferment rate appropriate to modest flats and houses in the West Midlands. That had been the approach taken by the freeholder's expert (at paragraph 24) who relied on the same statistical material on regional house prices and on the conclusion reached in *Zuckerman* that an investor considering long term growth prospects would not be as confident as he would in PCL that the growth rate assumed in *Sportelli* would be achieved in the West

Midlands. In paragraph 37 of its decision the Tribunal accepted both the statistical evidence and the need to adjust the *Sportelli* growth rate "in line with the decision in *Zuckerman*".

79. We are unable to accept Mr Radley-Gardner's criticism of the Tribunal's treatment (in *Clarise*) of *Zuckerman* as a West Midlands' case and *Sportelli* as a PCL case. Although the Lands Tribunal sought in *Sportelli* to set a nationwide default deferment rate, and had regard to national house price statistics, the Tribunal itself emphasised the limits of that evidence and the Court of Appeal specifically envisaged different outcomes for different areas because of the limitations of the evidence which had been presented to the Lands Tribunal. It would be inconsistent with the clear indication given by the Court of Appeal for us to accept Mr Radley-Gardner's invitation and exclude the possibility of different regional outcomes on the grounds that the rates in *Sportelli* were national average rates which ought to be applied throughout England and Wales in all but the most extreme cases.

80. We also find ourselves unable to accept Mr Radley-Gardner's broad criticism of the Tribunal's approach to obsolescence and deterioration in *Zuckerman* and *Clarise*. The Tribunal's justification for an additional 0.25% allowance in *Zuckerman* was based on the striking difference between the value of the flats in Kelton Court and those in PCL considered in *Sportelli*, which led to the conclusion (at paragraph 46) that "it is likely to remain economically viable to repair high value properties in PCL for considerably longer than it will for similar sized flats in Kelton Court". Looked at from the perspective of a long term investor (who, it will be remembered, is to be assumed to have no prospect of reaching a deal with the tenant for the early release of marriage value by the sale of the freehold, and for whom the attraction of the investment would include its long term security and prospects of growth) the risk that the property might deteriorate over an extended period would be of greater concern than to the purchaser who is buying to occupy in the short term or medium term in the market in which vacant possession values are established. It is the difference between the perspective of purchasers in those different markets which seems to us to have justified the conclusion in *Zuckerman* that the greater risk of deterioration in a modest West Midlands property, as compared to much more valuable PCL properties, was not fully reflected in their respective vacant possession values and so required a compensating adjustment in the risk premium.

81. In *Clarise* the Tribunal also made the same 0.25% adjustment to reflect the greater risk of deterioration as it had in *Zuckerman.* That adjustment was not apparently based on any specific evidence concerning the anticipated cost of repairs to the subject property in *Clarice.* The evidence to support the adjustment was derived from a comparison of the size and value of the appeal property with the flats at Kelton Court considered in *Zuckerman.* Having satisfied itself that the properties were similar the Tribunal then took *Zuckerman* as the evidential starting point on the attitude which a purchaser would take to the risk of deterioration and placed the onus of proving that a similar adjustment was inappropriate on the landlord. That is clear from the Tribunal's statement in paragraph 37 of the decision that *"*Mr Evans did not suggest that there was any reason why the risk of deterioration of the appeal property was less than at Kelton Court and to be consistent with the decision in *Zuckerman*, we find that the *Sportelli* rate should be increased by a total of ¾% to 5.5%."

82. Nonetheless we do agree with Mr Radley-Gardner that any such allowance must be based on the characteristics of the particular property which is under consideration. The passages we have cited above from *Sportelli*, *Hildron* and *The Holt* emphasise that it will only be in exceptional cases that the risk of deterioration will not be reflected in the vacant possession value of a property. Something more than age or a current poor condition is required to justify any additional allowance.

83. In *Clarise* the Tribunal took the generic rate of 4¾% "for houses in Prime Central London" as its starting point, as the Court of Appeal in *Sportelli* had indicated it should, but it took the adjustments made in *Zuckerman* as sufficiently established by that decision to require that it adopt a consistent approach. We do not accept Mr Radley-Gardner's submission that such an approach was wrong in principle; on the contrary, it was consistent with *Sportelli* itself and with *31 Cadogan Square* and gave appropriate weight to the conclusions of the Tribunal in *Mansal* and *Zuckerman.*

Conclusion

84. The LVT applied a deferment rate of 5.75% which it arrived at by taking the *Sportelli* rate as its starting point "subject in this case to the modification in *Zuckerman";* thus, it added the same 0.5% increase to reflect poorer long term growth compared to PCL and a further 0.25% "to reflect obsolescence and deterioration which the Tribunal considers appropriate to this matter". The appeal property is let without a service charge and the LVT did not mention the further 0.25% added by the Tribunal in *Zuckerman* to reflect the risks thought to have been created by the Service Charges (Consultation Requirements) (England) Regulations 2003. The deferment rate of 5.75% which the LVT adopted indicates that the *Sportelli* rate which it had started from was the 5% appropriate to flats.

85. This appeal has been dealt with by the Tribunal as a review with a view to a re-hearing, and although it was convenient for us to hear the evidence presented by Mr Holden before coming to any conclusion on the LVT's decision, our first task is to review the decision of the LVT and to consider whether any part of the challenge to it has been made out.

86. For the reasons we have already given we are satisfied that the LVT was entitled to rely on the Tribunal's decision in *Zuckerman* as a sufficient basis for the additional 0.5% which it added to reflect poorer long term growth in the West Midlands. The figures produced by Mr Holden in relation to Grange Crescent and Grange Road seemed to us to provide local confirmation of a lower long term real growth rate than the 2% adopted in *Sportelli.*

87. The LVT inspected and described the appeal property and recorded the evidence of Mr Holden that he considered the risk of deterioration and obsolescence was fully reflected in the agreed vacant possession value. It expressed its own conclusion that the allowance of 0.25% was "appropriate to this matter". Mr Radley-Gardner submitted that the LVT had simply adopted the 0.25% allowance in *Zuckerman* and had not had regard to the Tribunal's warning in *Culley* (at paragraph 35) that "the primary question will always be whether there are particular features that

are not fully reflected in the vacant possession value and thus should be reflected in a higher risk premium".

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.

89. We have therefore considered that question afresh for ourselves. Unlike in *Clarise* the evidence of Mr Holden satisfies us that although the appeal property is of modest size and value, there is no additional feature which would strike a prospective investor as liable to create a greater risk of deterioration over the remainder of the term than we can assume is already accounted for in its freehold vacant possession value. We therefore do not find any further adjustment to the risk premium on account of deterioration to be made out in this case.

90. It was also argued by Mr Holden that the LVT should have taken the generic deferment rate appropriate to houses (4.75%) rather than the rate for flats (5%) as its starting point, because of the particular characteristics of the appeal property and the terms on which it was let. Those terms placed a minimal management burden on the landlord, made each tenant responsible for the repair of the structure and exterior of his own property and required that if necessary the tenant should rebuild the property. The LVT did not deal specifically with this issue in paragraph 17 of its decision. It ought to have done, as the issue had been prominently raised in the evidence before it. We have therefore considered the issue for ourselves.

91. We have had regard to the minimal management which would be required in connection with the appeal property. We have also taken into account the Lands Tribunal's explanation in paragraphs 92 to 96 of *Sportelli* that it considered that even where flats are efficiently managed service charge and repair problems inevitably occur and that the potential for management problems to arise is inherent in all leases (of flats). The Lands Tribunal contemplated that there may be cases where a greater allowance was justified where exceptional difficulties were in prospect, but said nothing of circumstances in which such an allowance would be inappropriate altogether. The unusual terms on which the appeal property is let in this case are not different from those considered by the Tribunal (Mr N J Rose FRICS) in *Lethaby and Regis' Appeal* [2010] UKUT 86 (LC). The Tribunal concluded that the risk of deterioration of a terraced house in Hackney divided into three flats justified the same 0.25% increase in the risk premium as other flats although full responsibility for effecting repairs fell on the leaseholders . We are therefore

satisfied that the starting point for flats of 5% should be adopted on the particular facts of this case. The allowance of 0.5% found by the LVT should also be added to produce an aggregate deferment rate of 5.5%.

92. We therefore allow the appeal to the extent that the appropriate deferment rate is 5.5% rather than the 5.75% found by the LVT. The price payable for the extended lease is therefore £10,800 calculated as shown in the appendix to this decision.

Dated 23April 2014

Martin Rodger QC
Deputy President

A J Trott FRICS

APPENDIX

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION

1. Diminution in the value of freeholder's interest

Term

Capitalised ground rent		£220		
Reversion				
Value after lease extension	£96,600			
PV £1 in 48.29 years at 5.5%	0.0754			
		£7,284		
Freeholder's present interest (diminution)			£7,504	

2. Marriage value

Value after lease extension	£96,600			
Value of existing leasehold	£82,500			
Freeholder's present interest	£7,504			
Marriage value		£6,596		
50% to freeholder			£3,298	
				£10,802
Price, say				**£10,800**