UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRA/154/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – flats – premiums for extended leases – capitalisation rate – discount for onerous ground rent terms – Leasehold Reform, Housing and Urban Development Act 1993, Schedule 13 Part I – appeal dismissed

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

BETWEEN **C A TROTT (PLANT HIRE) LIMITED** **Appellant**

and

(1) BRIAN HUMBLE **Respondents**
(2) PATRICIA MARY HUMBLE
(3) BASIL DEREK WESTLEY
(4) CHRISTINE MURIEL TURNER WESTLEY
(5) PETER JOHN GLIBBERY
(6) MARGARET DALLY GLIBBERY

re: 16, 21-22 and 27 The Waterside, Low Road, Hellesdon, Norwich NR6 5QN

Before: The President and P R Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS

on 25 September 2012

Wayne Clarke, instructed by Hewitsons LLP, solicitors of Cambridge, for the appellant
Nathaniel Duckworth, instructed by Kennedys, solicitors of London, for the respondents

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The following cases are referred to in this decision:
Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39
Nicholson v Goff [2007] EG 256

The following cases were also referred to in argument:
Lucie M v Worcestershire CC and Evans [2002] EWHC 1292 (Admin)
London Borough of Havering v Macdonald [2012] UKUT 154 (LC)
Tanfern v Cameron MacDonald [2000] 1 WLR 1311

DECISION

Introduction

1. This is an appeal, heard by way of review, from a decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel (the LVT) dated 14 September 2011 which determined the premiums to be paid for extended leases on three flats at The Waterside, Low Road, Hellesdon, Norfolk as follows:

16 The Waterside (Mr & Mrs Humble)	£22,700
21-22 The Waterside (Mr & Mrs Westley)	£22,650
27 The Waterside (Mr & Mrs Glibbery)	£11,500

2. The appellant, C A Trott (Plant Hire) Ltd, which is the freehold owner of the flats and was the respondent before the LVT, applied to it on 5 October 2011 for permission to appeal on the grounds that in considering, inter alia, the loss of ground rent to the landlord upon the grant of the extended leases as provided for by Schedule 13 to the 1993 Act , and the effect that the onerous ground rent review provisions had on value:

> (1) There was a substantial procedural defect in that the tribunal failed to adhere to the principles of natural justice. In arriving at its decision it had relied upon evidence of a case of which it was aware (a property at St Michael at Pleas, Norwich), but which was not before it in respect of this application. No copy of that earlier decision was provided to the experts, and no opportunity was given for them to consider it (by way, for instance, of a short adjournment). Further, the LVT chose to ignore verbal evidence given by Mr Saffell (the respondent freeholder's expert) relating to a property at Tanners Court on the grounds that it had not been referred to in his written evidence.
>
> (2) The tribunal adopted an approach to valuation which took account of an irrelevant consideration. The application of a further 30% discount (to the 10% already agreed and applied by the valuers in connection with restrictions on use of the grounds) to the development value of the site upon which the Waterside properties are located to reflect onerous ground rent review provisions (set out in the Fourth Schedule of the leases) was not justified on the evidence before it and, in any event, involved an element of double counting as the onerous nature of the rent review provisions was already reflected in the capitalisation rate.

The application was refused (see paragraph 15 below).

The facts

3. The Waterside is a 1990s cul-de-sac development of 24 flats (two of which are converted from a late 19th century house) off Low Road in Hellesdon, a suburb of Norwich, about 4 miles north-west of the city centre. Flat 16 is a three bedroom, two bathroom first floor flat with garage and two parking spaces, flat 21-22 is also first floor and has four bedrooms, two bathrooms and two garages and flat 27 is a first floor two bedroom, one bathroom unit with two parking spaces.

4. All of the flats are held on leases having terms of 99 years from 1 January 1994, there being 82.88 years remaining as at the agreed valuation date of 16 September 2010 – the date that the initial notices claiming lease extensions under the 1993 Act were served upon the freehold landlord. The leases, apart from some variations not relevant to this appeal, are generally in common form and, by clause 1(b) and the Fourth Schedule there is provision for the ground rent to be reviewed every 25 years – the first such review therefore being due on 1 January 2019.

5. The method for calculating the premium is defined at paragraph 2 to Schedule 13 of the 1993 Act:

> "The premium payable by the tenant in respect of the grant of a new lease shall be the aggregate of
>
> (a) the diminution in value of the landlord's interest in the tenant's flat as determined in accordance with paragraph 3,
>
> (b) the landlord's share of the marriage value as determined in accordance with paragraph 4, and
>
> (c) any amount of compensation payable to the landlord under paragraph 5."

It is agreed that it is only (a) that is in issue in this appeal, and that in reaching its determination the LVT needed to consider the effect the loss of rent would have on value.

6. The relevant clauses relating to ground rents (which were set initially at £200, £200 and £100 pa respectively for the three flats) provide:

> "1. … TO HOLD the said premises hereby demised unto the lessee for the term specified in Paragraph 5 of the Particulars YIELDING AND PAYING therefore during the said term:-
>
> (a) for the first twenty five years of the term calculated from the date specified in Paragraph 5 of the Particulars the initial rent specified in paragraph 6 of the Particulars

(b) for each successive period of twenty five years from each relevant Review Date the open market ground rental value of the Flat at such Review Date determined in accordance with the provisions in that behalf contained in the Fourth Schedule hereto"

"THE FOURTH SCHEDULE before referred to

(Rent Review)

THE RENT payable hereunder shall be reviewed on each successive Review Date and shall be determined in the manner following that is to say whichever shall be the highest of the rent reserved in clause 1(a) of this Lease the rent payable immediately prior to the relevant Review Date or the open market ground rental value of the Flat at the relevant Review Date PROVIDED and IT IS HEREBY AGREED as follows:-

(a) the expression "Review Date" shall mean each successive twenty fifth anniversary of the commencement date of the Term specified in Paragraph 5 of the Particulars as appropriate

(b) the expression "open market ground rental value" shall mean a sum calculated at the relevant Review Date and determined in manner hereinafter provided as being the Service Charge Share multiplied by the open market ground rental value of the Property

(c) In calculating the open market ground rental value of the Property at each of the Review Dates the following assumptions shall be made:-

(i) that the lease has an unexpired term of 99 years

(ii) that the Property is cleared of buildings and is available for immediate development

(iii) that equal services are available at the Review Date as at the commencement of the Lease Term

(iv) that vacant possession is available

(v) that no premium is taken

(vi) that all the covenants conditions and provisions contained in this Lease other than those with regard to the length of the Term and the amount of the rent shall apply

(d) the ground rent hereunder shall never equal such a sum as would in appropriate circumstances create an inhibition on the premium capable of being charged on an assignment of the Flat in the same manner as set out in the Rent Act 1977 Section 127 and Schedule 18 Part II as amended by Section 78 of the Housing Act 1980 or any amending or similar legislation provided that where the said Sections would otherwise operate to create such an inhibition in the reviewed rent shall be set at such a sum which shall be one pound per annum below the sum which would so create the said inhibition

(e) …"

The parties' valuers were agreed that that the rent review provisions of the leases provided for a modern ground rent not dissimilar to s.15(2) of the Leasehold Reform Act 1967, and that at the next review in 2019 the rents were likely to be very high. The method for calculating the ground rent that would be applicable from 2019 was agreed to be, essentially, the "standing house" approach.

The LVT's decision

7. Before the LVT the parties were represented by surveyors, the tenants by Mr Andrew Pridell FRICS of Andrew Pridell Associates Ltd of Hove, and the landlords by Mr Nicholas Frederick Saffell FRICS of Brown & Co, Norwich. Mr Pridell and Mr Saffell exchanged expert reports and valuations in advance of the LVT hearing. In his report, addressing the value of the existing leasehold interests, Mr Pridell said that relatively few flats at The Waterside had been sold following the initial sales, despite numerous attempts by lessees to sell. The marketability of the flats had proved to have been seriously harmed by the ground rent provisions in the leases and also that, despite the fact that the lessees funded the upkeep of the grounds, there was, with the exception of one flat, no right to use them. Having expressed his opinion on the value of the subject properties disregarding these disadvantages (at £220,000, £218,000 and £123,250 respectively), he said:

> "However, with the uncertainty created by the ground rent provisions, I take the view that a discount is applicable, which, in today's poor sales climate, I feel is in the order of 10%. Furthermore, the lack of grounds rights, coupled with the responsibility to maintain them further harms the value of the flats which I assess at a further 10%."

Mr Pridell therefore adopted leasehold values that were 20% less than those that he thought would have applied in the absence of these disadvantages.

8. The LVT recorded (at paragraph 20) that Mr Pridell was keen to stress a number of points, including the fact that since 2007 it had become public knowledge that the flats are tainted by "these heinous ground rent provisions". Having set out the other matters that he had been keen to stress, the LVT went on:

> "21. When questioned Mr Pridell said that he had been involved with the site since 2008 and in his opinion Norwich prices had remained about the same since 2007, when the last Waterside property was sold. That was before the ground rent problems became public knowledge. While the larger flats might be expected, in that location, to fetch £250,000 a 10% reduction was justified because of the problematic aspects of the leases, which were unique in his experience. In fact his 10% reduction might be light, and perhaps 20-25% would be more appropriate."

9. Mr Saffell for his part took values for the leasehold interests that were rather higher than Mr Pridell's undiscounted values (at £250,000, £250,000 and £140,000 respectively). The LVT's decision records him as having said that he did not think that there was much of a diminution in value due to the ground rent provisions. It then said:

"26. The tribunal put to him that in a previous tribunal case concerning the St Michael at Pleas estate in central Norwich (in which Mr Saffell had appeared as a witness) there had been evidence that even at a price of £177,000 and a ground rent of just over £1,000 one simply could not sell a flat in Norwich. He responded that one of his client's flats had sold at Tanner's Court in July 2010 with a ground rent in place of £1,150. This was not in his written evidence and Mr Pridell understandably objected to this being sprung on everyone without the opportunity of investigating it further. The tribunal ignored it. Mr Saffell also referred to the sale of a flat at St Michael at Pleas itself which was going through. It had not however reached exchange of contracts, he did not know the asking and offer prices, and so this evidence was rather limited and unhelpful."

10. Under the heading "Findings" the LVT said:

"31. Having:

a. Read and considered the two valuers' written reports and listened to their oral evidence and answers to questions put to them at the hearing, and

b. Specifically drawn to their attention and invited comment upon the evidence given at an earlier hearing in Norwich (St Michael at Pleas) at which Mr Saffell had appeared as a witness,

the tribunal makes the following findings, upon which the calculations in the four attached schedules have been made.

32. *Values of long unimproved leasehold interests* - The valuation evidence is poor, with the ongoing ground rent problem on this site and the state of the market generally ensuring that no recent, good quality comparable evidence is available. Both valuers have had to work from the past sales of flats on this estate, of which there have been none since 2007. To these Mr Pridell has made some adjustments, on the extent of which he was having second thoughts, whereas Mr Saffell made none.

33. The tribunal prefers the evidence of Mr Pridell, who has spent a number of years wrestling with the problem of this estate and checking the market with local agents, but with some adjustments…"

11. The LVT said that it adopted values on "normal" lease terms of £230,000, £225,000 and £130,000, and it went on to make two downwards adjustments. It applied a discount of 10% to reflect the lack of a right to use the gardens while having to pay for their upkeep, thus producing figures of £207,000, £202,500 and £117,000. Secondly, it said, a further allowance must be made for the likely effect on the market of the current ground rent terms, and in relation to this it said:

"36…the tribunal bears in mind the evidence of which it was already aware at the St Michael at Pleas hearing, and on which it invited both valuers to comment, that there really was no market in Norwich for flats with ground rents in the order of £1,000 and above. A purchaser would require a very strong incentive to take a flat with this type of complex rent review provision and then buy his way out through the acquisition of an extended lease.

37. The tribunal is disappointed that in his written and oral evidence Mr Saffell omitted to share either with it or with Mr Pridell, who is not a local valuer, his knowledge (possibly gained from the hearing of the St Michael at Pleas case) of the difficulty of selling flats with high ground rents and difficult rent review clauses in Norwich. He did so only in answer to questions from the tribunal. Accordingly, doing the best it can and using its knowledge and experience, the tribunal discounts the above figures by a further 30%."

12. The tribunal's adjusted valuations, therefore, became:

Flat 16	£144,900
Flat 21-22	£141,750
Flat 27	£ 81,900

13. Acknowledging that the ground rent review figures are to be determined by applying each flat's service charge percentage to development value of the whole Waterside estate, the tribunal then noted that whilst neither it nor the valuers had inspected the whole development, Mr Pridell was likely to know it best due to his being local, and having been involved with it and the leases over the years. Whilst the tribunal had not been addressed specifically upon the estate's overall development value, both valuers had produced a figure, so it adopted Mr Pridell's gross value of £3,383,000 and then deducted firstly the 30% for the onerous ground rent provisions and secondly the 10% agreed discounts relating to restricted use of the grounds to give an adjusted development value of £2,131,920. That methodology produced an overall discount for the two amounting to some 37%.

14. The tribunal continued:

"40. From this, the tribunal, to avoid over discounting, allows Mr Safell's 30% site value percentage rather than Mr Pridell's 25%, yielding a figure of £639,387. From this the agreed ground rent percentage of 5% produces a total annual ground rent for the whole estate of £31,969. At the service charge percentages of 7.4% and 3.7% respectively, the ground rents as at the first review in 2019 are therefore assessed at:

a.	Flat 16	£2.366
b.	Flat 21/22	£2,366
c.	Flat 27	£1,183

41 *Capitalisation Rate* – Taking into account its general experience, continuing low interest rates, and the evidence before it the tribunal considers that the uncertainty of valuation of a site such as this, with the present adverse aspects to the leases, requires a capitalisation rate of 7% as contended of by Mr Pridell."

15. Allowing a deferment rate of 5.75% (which was not subject to appeal before us), the premium was then determined at the figures set out in paragraph 1 above.

Refusal of permission to appeal

16. In its refusal of the application for leave to appeal dated 12 October 2011, the tribunal said, in connection with the alleged procedural defect:

> "4. The tribunal has dealt in paragraph 26 of its decision with the evidence which Mr Saffell sought to adduce concerning a sale at Tanner's Court (which was not in his report and appeared to come from his client). While the evidence of St Michael at Pleas was evidence adverse to his client's case of which Mr Saffell was aware, that of the Tanner's Court sale, which was potentially adverse to the Applicants, was one of which Mr Pridell was not aware and which, had Mr Saffell considered it significant, would or should have been in his report or, at the very latest, been raised in the course of the experts' joint discussions."

17. In connection with the discount, it said:

> "6. Paragraph 14(i) [of the application] is rejected. The "transactional" evidence, or difficulty of achieving any transactions, included both St Michael at Pleas and – more importantly – The Waterside estate itself. There had been no sales at all since the defects in the leases had come to light….
>
> 7. Paragraph 14(ii) is also rejected. Although in his report Mr Pridell suggested that a 10% discount should be applied, he later in oral evidence, thought that this might be light and perhaps 20–25% would be more appropriate…
>
> 8. In paragraph 15(i) of the Grounds the Respondent [appellant here], in arguing that a capitalisation rate of 7% was sufficient to cater for the uncertainties of the lease, wholly ignores the evidence of Mr Saffell that the remedy he would always urge upon a purchaser was to seek a lease extension and that in the case of the Waterside that could cost £60,000 plus perhaps a further £10,000 in legal and tribunal costs…
>
> 9. In paragraph 15(ii) of the Grounds the Respondent seeks to rely upon the sale of one flat at Tanner's Court with a ground rent of £1,150 (see paragraph 8 of the Grounds), wholly ignoring the fact that on Mr Saffell's valuations the ground rents could rise to over £4,000 per annum and in the tribunal's decision to nearly £2,400."

18. The subsequent application to this Tribunal dated 20 October 2011 was granted by the President on 20 November 2011 where he said:

> "There is a realistic prospect of success on each of the two issues raised.
>
> The applicant asks that the appeal should be by way of a re-hearing, but I do not think that there is sufficient justification for the Upper Tribunal to determine the valuation issues in the event that either of the grounds of appeal is made out. In particular, while it may be that the decision on the 30% discount may affect other applications for lease extensions at The Waterside, this is a matter of local rather than general significance. The appeal,

limited to the two grounds advanced in the application, will accordingly be dealt with by way of review."

The parties' contentions – Procedural Error

19. The appellant said that the LVT had committed a procedural error in introducing, of its own volition, evidence from an earlier case with which it had been involved and, contrary to natural justice, neither provided a copy of the decision nor gave the experts the opportunity to properly consider the implications of it. This was particularly unfair as it then relied upon it in making its findings and in support of its conclusions. The unfairness was, it was submitted, further compounded by its refusal to consider Mr Saffell's rebuttal evidence relating to the Tanner's Court sale. Regarding the LVT's reference to the St Michael at Pleas property, it was submitted that the LVT was wrong in saying that Mr Saffell had appeared as a witness at that hearing (as it admitted in its reasons for refusal of permission to appeal) and it also incorrectly stated that there had been evidence that "even at a price of £177,000 and a ground rent of just over £1,000pa one simply could not sell a flat in Norwich". Thus it wrongly concluded that the evidence showed there to be no market in Norwich for selling flats with ground rents of that order and above. The LVT also undermined Mr Saffell's credibility by saying that it was disappointed that he had not, prior to being asked by the tribunal, shared his knowledge of the Tanner's Court property with it or Mr Pridell.

20. It was submitted that a tribunal should reach its decision on the evidence before and if intending to consider other evidence in exercising its knowledge and expertise, it must give the parties the opportunity to consider that evidence and at the very least a copy of the St Michael at Pleas decision should have been provided to the parties. If it had done so, it would have been possible to establish that Mr Saffell had not been a witness in that case, and that there was no reference in the determination to the price or to evidence that properties in Norwich with high ground rents were difficult or impossible to sell. The three procedures, in terms of fairness, that a tribunal must follow were set out in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 where it said, at paragraph 23:

> "23. It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision."

21. In *Lucie M v Worcestershire CC and Evans* [2002] EWHC 1292 (Admin) Lawrence Collins J set out a number of principles of general application (albeit in connection with a Special Educational Needs Tribunal) and at (5) he said:

> "Fifthly, the lay members of a Tribunal specifically appointed for their [educational] expertise may use that expertise in deciding issues before the Tribunal, but they may not use it to raise or decide other issues which the parties may not have had an opportunity to

consider as the Tribunal must obey the rules of natural justice and members should not give evidence to themselves which the parties have had no opportunity to challenge."

It was submitted that this principal, which although related to another tribunal, was equally applicable here and had been followed by Her Honour Judge Walden-Smith sitting in the Upper Tribunal (Lands Chamber) in *London Borough of Havering v Macdonald* [2012] UKUT 154 (LC) at 31.

22. For the respondents, Mr Duckworth submitted that the proper approach to the procedural error issue was for the Tribunal not to ask itself whether it would have done the same as the LVT in respect of the St Michael at Pleas and Tanners Court evidence, but to consider whether the LVT's decisions exceeded the generous ambit within which reasonable disagreement was possible (see *Tanfern v Cameron MacDonald* [2000] 1 WLR 1311). This ground of appeal seems to suggest a serious procedural irregularity, and by analogy with the authorities under the CPR, this is an onerous ground of appeal that requires the appellant to show that the irregularity rendered the decision unjust, and that it had a serious impact upon the outcome of the proceedings (see White Book notes at 52.11.4).

23. The appellant's arguments relating to the St Michael at Pleas case, it was argued, simply do not stand up, and proceed on a false premise. Whilst it is alleged that the LVT acted unfairly because it had regard to, and relied upon, a decision which had not previously been supplied to the parties for consideration, what it actually said was (at para 26): "…in a previous tribunal case concerning St Michael at Pleas estate in central Norwich…there had been evidence that even at a price of £177,000 and a ground rent of just over £1,000 one simply could not sell a flat in Norwich." (Emphasis added).

24. Thus it was not referring to the decision (which only made fleeting reference to the evidence that had been before it), but to the evidence upon which it had based its conclusions. Therefore, even if the LVT had made a copy of the decision available to Mr Saffell, he would have been little the wiser. What the LVT (which included two of the same members as in this appeal) in fact did was to explain to Mr Saffell the substance of the evidence they had received from the two experienced valuers that had been before them, to the effect that flats with high ground rents in Norwich did not sell, and asked him to comment on it. That was eminently fair and, having regard to the limitations of the decision itself, was the only means of dealing with the issue. The evidence the LVT referred to was clearly germane to its consideration of the subject properties which were within 3.5 miles of St Michael at Pleas.

25. Mr Pridell, it was pointed out, gave evidence in this case before the LVT stating that once the prospective increase to very onerous ground rents became public knowledge, no sales of properties in The Waterside had been possible, and that evidence, which was unchallenged, was clearly in parallel to that which had been adduced in the St Michael at Pleas case.

26. Mr Duckworth also pointed out that Mr Saffell engaged with the LVT in respect of their questions regarding the St Michael at Pleas case, but at no time did he say anything to the effect

that he was not a witness, nor did he suggest he was unfamiliar with that decision. He also did not ask for a copy of it, did not seek an adjournment so as to refresh his memory, and did nothing to communicate to the LVT that he was embarrassed, ambushed or otherwise prejudiced by reference to that case. In the circumstances, it was reasonable to assume that either he was conversant with the case (he was secretary of the St Michael at Pleas residents' company, had attended a pre-trial review in respect of it and was a partner of Mr Hodge, who had appeared) or chose not, for reasons known only to himself, to point out his unfamiliarity. His alleged difficulty with the St Michael at Pleas case was only revealed after the LVT decision in this case was published and it therefore appears to the respondents that this is an *ex post facto* ground of appeal. The appellant's suggestion that it was not for Mr Saffell to have asked the LVT for a copy of the decision or for an adjournment was, Mr Duckworth submitted, a startling proposition. If the LVT was labouring under the misapprehension that he was familiar with the case, and he was not, then it was for Mr Saffell to disabuse them of that misapprehension at the time, not after the decision had been issued. If Mr Saffell was not inconvenienced or prejudiced by the LVT's reference to St Michael at Pleas, then the LVT's decision cannot be overturned on that basis.

27. As to Tanner's Court, Mr Duckworth said that the LVT's refusal to admit this late evidence was plainly right. Not only had Mr Pridell quite reasonably objected, but also it appeared that the little information that Mr Saffell did have had come from his client and not through his own professional knowledge. It only seemed to become relevant once the St Michael at Pleas issue had been aired, and in any event, as the LVT rightly pointed out, the ground rent at Tanners Court was very significantly less than they would become at The Waterside, and thus the relevance of that evidence was questionable.

Conclusions - Procedural Error

28. The appellant's case is that there are two respects in which the procedure followed by the LVT was unfair. The first unfairness, it is said, lay in the tribunal's raising with Mr Saffell without warning evidence that was said to have been given at the St Michael at Pleas hearing. It is suggested that that was unfair because the tribunal did not enable Mr Saffell to see the decision in the case and the reports of the experts before having to respond. Those documents, it is said, ought to have been supplied to him, and the tribunal ought to have adjourned in order to enable him to obtain proper details and consider the implications of what the documents contained.

29. It is true that the LVT was in error in thinking that Mr Saffell had been a witness at the St Michael at Pleas hearing. However, it appears that the tribunal's questions included the assertion that he had been a witness in the case and it appears also that he did not demur from this. His failure to correct the tribunal's misapprehension is, we think, only explicable on the basis that he was so familiar with the case and what was said in the course of the hearing that the error about his role was of no significance. In refusing permission to appeal the LVT pointed out that Mr Saffell was both the secretary of the residents' company that was a party to the case and the partner of Mr Hodge, who gave valuation evidence. Of course, those facts are not by themselves sufficient to show that Mr Saffell must have been aware of the evidence to

which the LVT referred, but there has been no witness statement from him saying that he was not aware or, apparently, any instructions to that effect given to counsel for the appellant. Clearly, unless he was unaware of the evidence, or insufficiently aware of it, there was no unfairness in raising it with him without notice. The respondent's statement of case made the same points about Mr Saffell's involvement with the residents' company and his partnership with Mr Hodge, and it added that conspicuous by its absence was any assertion that Mr Saffell had been entirely unaware of the St Michael at Pleas case at the time of the hearing. Mr Clarke said that, since the appeal was being conducted by way of review, it would have been inappropriate to have sought to file evidence. That is not the case. It is for the appellant to show that the decision of the LVT was wrong, and if evidence was needed for this purpose, as it was, permission could have been sought to adduce it.

30. It is also significant that, when the matter of the St Michael at Pleas evidence was raised with him, Mr Saffell did not ask for any document to be produced or seek an adjournment to enable him to deal with it. As the professional representative of the appellant he must have realised that it was open to him to make such a request. Instead he sought to answer the question by referring to the sale of a flat at Tanner's Court and a sale that was "going through" of a flat at St Michael at Pleas. There is nothing to suggest that he was not content to deal with the matter in this way.

31. It is the refusal of the LVT to allow Mr Saffell to rely on the Tanner's Court transaction that is said to constitute the second unfairness. At first sight it does appear surprising that, having asked the question about the difficulty of selling flats with high ground rents, the tribunal should then have shut out the response that the witness wished to give. The answer was clearly relevant to the question asked. It is to be noted, however, that the decision went on to express the tribunal's disappointment that "in his written and oral evidence Mr Saffell omitted to share either with it or with Mr Pridell, who is not a local valuer, his knowledge (possibly gained from the hearing of the St Michael at Pleas case) of the difficulty of selling flats with high ground rents and difficult rent review clauses in Norwich". Its view, clearly, was that if Mr Saffell had considered that the transaction was relevant to the issue of the allowance made by Mr Pridell for this factor, he should have raised it earlier. In our judgment the LVT was entitled to take this view. Although the point put to Mr Saffell was the general one about selling flats in Norwich rather than one related to the particular flats at The Waterside it does not appear that he sought to suggest that there was any material difference in this respect. In the circumstances the exclusion of the evidence was, in our view, within the tribunal's discretion and was not unfair.

32. In any event there is nothing to suggest that the evidence might have been sufficient to persuade the tribunal to a different conclusion. The respondents point out that the ground rents that were the subject of the valuations at The Waterside ~~were~~ would become much higher than that at Tanner's Court. That, clearly, is a potentially significant distinction. Of greater importance in our view is that the mere fact that a sale had been made would provide no support for the appellant's case unless the sale price was not significantly less than the sale price that would have been achieved in the absence of the ground rent difficulty. The allowance that Mr Pridell and the LVT made was the adjustment that they considered to be necessary to reach the market value of the flats – the prices at which sales in the market would have been achieved in the absence of the ground rent problem. There is nothing to indicate that Mr Saffell would have

been able to show that the Tanner's Court sale was at a price that made no allowance for this factor. It is impossible to conclude, therefore, that the appellant was substantially prejudiced by the exclusion of the evidence.

33. We would add that the conclusion that we have reached should not be seen as diluting the principles set out in *Arrowdell*. LVTs should continue to bear these in mind and apply them. In the circumstances of the present case, however, it cannot be concluded that the appellant has been substantially prejudiced by the LVT's reliance on the evidence in the St Michael at Pleas case, its raising this with Mr Saffell without notice or the exclusion of the evidence about Tanner's Court that Mr Saffell wished to rely on.

The parties' contentions – Discount

34. Mr Clarke said that the LVT's approach to the calculation of the modern ground rent at the 2019 review accorded with that agreed and adopted by the expert valuers. However, in respect of the two discounts, whilst Mr Pridell had advocated 10% for the difficulties regarding use of the land, and a further 10% relating to the potentially onerous ground rent (subsequently increased to 20-25% in oral evidence but not supported by a revised valuation), Mr Saffell had made no such additional adjustments, considering that any such disabilities were adequately reflected in the chosen capitalisation rate. Mr Clarke confirmed however that in this appeal there was no dispute relating to the first discount, and it was therefore only the second one that was in issue before us.

35. The discount for the onerous ground rent provisions chosen by the LVT at 30% (off the leasehold values already reduced by 10%) was, it was submitted, not justified on the evidence. The only "transactional" evidence was St Michael at Pleas and as had been argued in respect of the first issue, it was inappropriate for the LVT to have relied upon it in the circumstances. However, if the LVT had accepted the Tanners Court evidence which Mr Saffell tried to introduce, that showed a property in Norwich with a ground rent in excess of £1,000 had, in fact, sold. Thus the 30% discount that was determined was inappropriate and excessive. In any event, it was submitted, such a discount was double counting in that any disabilities within the lease were already reflected in the chosen 7% capitalisation rate. The LVT clearly recognised this as, at paragraph 41 of the decision it said "…with the present adverse aspects to the leases, requires a capitalisation rate of 7% as contended of by Mr Pridell." Mr Clarke said that any effect on value should be recognised either in the capitalisation rate, or a discount from the unencumbered leasehold value, but not both.

36. Mr Clarke said that that what the LVT said in its reasons for refusal of permission to appeal revealed further defective reasoning in its decision over the discount. The LVT suggests that the landlord's contention that any uncertainties over the rent review provisions of the leases are reflected in the capitalisation rate failed to have regard to the fact that Mr Saffell's evidence was that the cost to a lessee of buying itself out of the problem by obtaining a lease extension would be substantial. It clearly took that into account when determining a 30% discount, but failed to appreciate that such an approach, even if that would happen in the real world, would be

contrary to the provisions of Schedule 13 to the 1993 Act – where a "no-Act world" has to be assumed. To take account of the costs of leasehold extension assumes a world where the Act applies, and should not therefore be taken into account.

37. On this latter point, Mr Duckworth submitted that this was a late addition to the appellant's arguments and it was strange that exception was being taken to the question of the cost of extracting oneself from the onerous rent review provisions having been taken into account by the LVT as it was Mr Saffell's evidence and opinion that was being referred to. Whilst the LVT plainly did listen to Mr Saffell's evidence under this head, it did not specifically follow that route, preferring instead to apply a discount to the unencumbered long leasehold values. In any event, Mr Duckworth pointed out, in a no-Act world the landlord has an absolute right to refuse an application for a lease extension, and therefore the extraction costs might be very much higher than the figures suggested by Mr Saffell.

38. Mr Duckworth submitted that the suggestion that the St Michael at Pleas "evidence" was the only basis upon which the conclusions for a discount could be made was wrong. Mr Pridell had given unchallenged evidence to the LVT that since the ground rent provisions had become public knowledge in 2007, no one had been able to sell their flats in The Waterside itself. Further, neither valuer had been able to find a comparable with broadly equivalent rent review provisions. It was plainly evident that a lease which contains provisions as onerous as these will be very much less attractive than one which reserves a peppercorn or nominal rent. The rent review provisions must be properly reflected in the long-lease values, and it was submitted that the LVT would not need a wealth of comparable evidence to reach that obvious conclusion.

39. As to the alleged double counting, the appellant's case was, it was submitted, entirely predicated upon the assumption that that absent the rent review provisions the LVT would not have applied a 7% capitalisation rate. That was an uncertain premise. Mr Pridell had contended for 7% on grounds that did not include the rent review problems. In its decision the LVT did refer to the rent review provisions but only to one of the three factors which were said to support the 7% figure. There is nothing unusual or non-standard about the adoption of that percentage which until recently was almost an industry standard rate. There was every likelihood that even if the LVT had chosen not to reflect the rent review provisions at all in the capitalisation rate, it would have nonetheless determined a 7% rate. The appellants, it was argued, have certainly not proved the contrary.

40. Furthermore, there are intellectually defensible reasons why the rent review provisions might be reflected in both the capitalisation rate and in the determined long-lease value without any element of double counting coming in to play. Indeed, it was held by the Lands Tribunal in *Nicholson v Goff* [2007] EG 256 that the nature of the rent review provisions in the lease is a matter which falls to be reflected in the capitalisation rate. Consideration of the capitalisation rate reflects the position from the landlord's point of view, whereas in valuing the leasehold interest it is considering the lessee's position, Mr Duckworth said.

41. In conclusion he said that stepping back from the extraordinary arguments that had been promulgated by the appellant it is incontrovertible that these leases contain very onerous, complicated and uncertain rent review provisions. To adopt what is effectively a standard capitalisation rate without making any other discount fails to take into account the considerable difficulties that they cause to the prospects of a sale at market value.

Conclusions - Discount

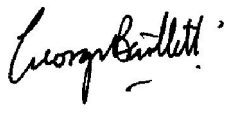
42. The appellants argument on double discounting does not, in our view, stand up to close scrutiny. The LVT clearly said in paragraph 41 of its decision (see paragraph 14 above) that it accepted Mr Pridell's suggested capitalisation rate of 7%. Mr Pridell suggested that rate as well as the two discounts that he was proposing. Therefore Mr Pridell's professional opinion was that the 7% was the appropriate figure to be applied to ground rent derived from the already discounted leasehold value. It was acknowledged at the hearing of this appeal that the wording of paragraph 41 of the LVT's decision was potentially ambiguous.

43. The point was also made about the respective positions and perspectives of the landlord and tenant, and we agree with the respondents' submissions in this regard and with their submissions relating to the costs to a tenant of extricating itself from the onerous rent review provisions where, it appears, the appellants were arguing against themselves.

44. In any event, in the light of our conclusions on the first issue we are satisfied that the LVT's decision was a reasonable one to have come to in the light of the evidence it had before it and its consideration of the St Michael at Pleas evidence. We therefore determine that the LVT was not, in our judgment, wrong to have applied a 30% discount to reflect the onerous rent review provisions of the lease.

45. This determines the issues in this appeal which is dismissed.

DATED 29 October 2012



George Bartlett QC (President)

Paul Francis FRICS