

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – premium – valuation of maisonette – new lease – relativity – whether sale of comparable flats viable basis for calculating FHVP value and relativity of subject property – whether sale of existing lease too historic – use of graphs – held transactions not reliable and use of enfranchiseable graph preferred – appeal allowed in part – premium determined at £18,524

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

BETWEEN:

JUDITH REISS

Appellant

and

IRONHAWK LIMITED

Respondent

Re: 76 Hampden Lane, London. N17 OAS

Determination on Written Representations

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The following cases are referred to in this decision:

The Trustees of the Sloane Stanley Estate v Mundy [2016] UKUT 223 (LC)

Mallory v Orchidbase Limited [2016] UKUT 468 (LC)

Windward Properties Limited v Government of St Vincent and The Grenadines [1996] 1 WLR 279

Aberdeen City Council v Stewart Milne Group [2011] UKSC 56

Mundy v The Trustees of the Sloane Estate [2018] EWCA Civ 35

DECISION

Introduction

1. This appeal concerns the premium to be paid by a tenant on a grant of a new lease under section 56 and Schedule 13 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”). The First-tier Tribunal (Property Chamber) (“FTT”) determined that it should be £36,400. The parties disagree about the relativity to be applied to the agreed freehold vacant possession (“FHVP”) value of a ground floor maisonette at 76 Hampden Lane, London N17 OAS to obtain the value of the existing lease with an unexpired term of 75.23 years at the valuation date of 29 September 2016. “Relativity” simply means the relationship between the value of a short lease and the FHVP value of the same property; it is a valuation tool which can be used to derive the value of a short lease where the FHVP value has been agreed or determined.
2. The leasehold interest in the appeal property was purchased by the appellant, Ms Judith Reiss, for £120,000 on 19 December 2013. Although the parties’ experts have agreed the FHVP value of the appeal property at the valuation date (£252,525), they have not agreed the FHVP value at the date it was acquired by the appellant.
3. The appellant’s expert, Mr Bruce Maunder Taylor, FRICS, a partner with Maunder Taylor, Chartered Surveyors, considers that evidence of transactions is of no assistance in obtaining the relativity. He relies instead upon the graph of relativity produced by Nesbitt & Co which he says shows the “without Act rights” relativity of an unexpired lease of 75.23 years to be 93.5% of the agreed FHVP value. This gives a value for the existing lease of £236,111 at the valuation date and a premium of £10,231.
4. The respondent landlord’s expert, Mr Ghulam Yasin, BSc, MRICS, of Myleasehold Chartered Valuation Surveyors, relies on transactional evidence, namely the acquisition by the appellant of the existing lease of the appeal property in December 2013 and the sale of two flats opposite the appeal property in Hampden Lane which he analyses to produce an average FHVP value for the appeal property of £177,566 as at December 2013. He makes two agreed adjustments to the leasehold sale price of £120,000 (for condition and for the benefit of the Act) to give a revised leasehold value of £131,600. This gives a relativity of 74.13% which he adjusts to the valuation date (by which time the lease had 2.81 years less to run) by an agreed allowance of 0.65% per annum. This gives an adjusted relativity of 72.30%.
5. Mr Yasin undertakes an alternative valuation using indexation (relativity 71.99%) and a check valuation by analysing two other comparables in the N17 postcode area (relativity 76.56%). He concludes that it is appropriate to average the first two of his valuation methods which gives a relativity of 72.15% and an unexpired leasehold value, without Act rights, of £182,200 at the valuation date and a premium of £37,150.
6. Before the FTT the landlord argued for a relativity of 70.23% and the tenant for a figure of 93.5%. The FTT preferred Mr Yasin’s approach although it agreed with Mr Maunder Taylor that adjustments

to the comparables should be made as percentages rather than spot figures. It determined the without Act rights relativity at 72.77% being the average of relativities derived from the comparable sales evidence (Hampden Lane) and the indexation of the leasehold sale price of the appeal property.

7. The Deputy President of the Tribunal gave the following reasons for granting permission to appeal on 17 January 2018:

“1. The FTT was presented with the divergent views of two well qualified expert witnesses which it carefully considered before arriving at its own conclusion. It is clear that the FTT found the valuation problematic, because of the limited evidence available to it, but making allowances for the material available its conclusion nevertheless suffers from the difficulty that the relativity it arrived at, based on that limited evidence, ought to have struck the FTT as obviously too low. The graphs relied on by the appellant showed relativities of between 86.3% and 96.64% at 75 years unexpired. The FTT’s figure of 72.77%, net of the benefit of the Act, could not be reconciled with those graphs and suggested that the heavily adjusted transactional evidence available to it was insufficient to provide material from which to derive a credible relativity of the order which could be justified in such a case. Nor could the FTT’s conclusion easily be reconciled with the relativity of 76.2% determined by the Tribunal in *Orchidbase*, to which the FTT referred, which concerned much shorter leases yet produced a significantly higher relativity.

2. It is therefore arguable that, had the FTT stood back and considered its own relativity figure against the totality of the evidence, it would have appreciated that its figure was so inconsistent as to be unsustainable. There is therefore a realistic prospect of a successful appeal in this case.”

8. The appeal is by way of the written representations procedure. For the appellant, Mr Maunder Taylor produced a concise statement of case dated 13 February 2018, an expert report dated 10 April 2018 and closing submissions dated 12 June 2018. For the respondent Piers Harrison of counsel produced a statement of case dated 2 March 2018 and written submissions dated 25 June 2018. Mr Yasin produced an expert report dated 13 April 2018. The experts produced a statement of agreed facts concerning valuation comparables dated 6 April 2018, a statement of agreed facts and disputed issues dated 12 April 2018 and a further statement of agreed facts and disputed issues (effectively a Scott Schedule) dated 6 June 2018.

Facts

9. Hampden Lane is a residential street located approximately 1km south of White Hart Lane station and approximately 0.6km north of Bruce Grove station, both of which provide access to London Overground Services. The nearest shops are in the High Road a few minutes walk to the west.

10. 76 Hampden Lane is a purpose-built ground floor maisonette in a two-storey semi-detached 1950s property with access from a side alleyway. The accommodation comprises a reception room, bedroom, kitchen and bathroom. There are small rear and front gardens (15.7m² and 11m² respectively). The gross internal area is 42.0m². The maisonette has gas central heating. There is no car parking space on site but on-street parking is available to resident permit holders only.

11. The subject property was marketed for sale by private treaty (not by auction) in 2013 at a price of £129,995 and as needing refurbishment. The appellant purchased the property for £120,000 on 19 December 2013 and proceeded to refurbish and improve it. The works were extensive and were listed, but not costed, in an email from the appellant to Mr Maunder Taylor dated 24 April 2017.

12. The experts have helpfully agreed the following facts:

- (i) The existing lease is for a term of 129 years from 25 December 1962 at a ground rent of £10 pa without review.
- (ii) The valuation date is 29 September 2016 when the lease had 75.23 years unexpired.
- (iii) The capitalised value of the ground rent is £142.
- (iv) The value of the extended lease of the property, unimproved but in repair, is £250,000.
- (v) The extended lease value is 99% of the FHVP value.
- (vi) The deferment rate is 5%.
- (vii) An upward adjustment of £15,000 is to be made to reflect the lack of repair of the subject property at the date of its sale in December 2013.
- (viii) Relativity depreciates by 1.83% between the sale date of the subject flat (78.04 years unexpired) and the valuation date (75.23 years unexpired), a difference of 2.81 years. This represents a rate of 0.65% pa.
- (ix) The value of Act rights is 2.5%.
- (x) No compensation is payable to the landlord under paragraph 5 of Schedule 13 to the 1993 Act.

Statutory Provisions

13. Section 56 of the 1993 Act provides that where a qualifying tenant of a flat has a right to acquire a new lease and gives notice of his claim in accordance with section 42 (which in this case was given by the appellant on 29 September 2016) a new lease extending the existing lease by 90 years shall be granted and accepted in substitution of the existing lease upon payment of the premium payable under Schedule 13.

14. Under paragraph 2 of Schedule 13 the premium payable for the new lease shall be the aggregate of the diminution of the landlord's interest, the landlord's share (50%) of the marriage value and any amount of compensation payable to the landlord under paragraph 5 (which in this appeal is agreed to be nil). In calculating the value of the landlord's interest and his share of the marriage value any increase

in the value of the flat which is attributable to an improvement carried out by the tenant at his own expense is to be disregarded.

The case for the appellant

15. Mr Maunder Taylor did not consider the transactional evidence to be helpful. He thought the sale of the appeal property to the appellant in December 2013 failed to satisfy the guidance given by the Tribunal in *The Trustees of the Sloane Stanley Estate v Mundy* [2016] UKUT 223 (LC) at paragraph 169:

“... the more difficult cases in the future are likely to be those where there was no reliable market transaction concerning the existing lease with rights under the 1993 Act, at or near the valuation date. In such a case, valuers will need to consider adopting more than one approach. One possible method is to use the most reliable graph for determining the relative value of an existing lease without rights under the 1993 Act. Another method is to use a graph to determine the relative value of an existing lease with rights under the 1993 Act and then to make a deduction from that value to reflect the absence of those rights on the statutory hypothesis. When those methods throw up different figures, it will then be for the good sense of the experienced valuer to determine what figure best reflects the strengths and weaknesses of the two methods which have been used.”

Mr Maunder Taylor said that the sale that took place 2.81 years before the valuation date was not “at or near the valuation date”. He said that between the date of sale of the subject property and the valuation date there were major influences affecting the local and national residential markets, e.g. the introduction in April 2016 of a 3% stamp duty surcharge on buy to let (second home) purchases, the phased withdrawal of tax relief for buy to let investors, the Brexit referendum vote and the nearby development of Tottenham Hotspur’s White Hart Lane stadium. He noted that three of the agreed comparables had been resold during the relevant period for amounts that showed unusually large price increases (although Mr Maunder Taylor did not identify any specific factors which might explain these price movements). In *Mundy* the Tribunal said at paragraph 166 that “What matters is how the market performed at [the valuation date].” Mr Maunder Taylor said that market conditions were substantially different at that date to the date when the appellant acquired the subject property in December 2013.

16. Mr Maunder Taylor did not think the Land Registry House Price Index for the London Borough of Haringey was fit for purpose in this part of Tottenham which he said was an area of modest value compared to high value areas in the borough such as Highgate. His analysis of the three agreed comparables near the subject property showed that where re-sales had taken place price performance was not in line with the Land Registry index. Mr Maunder Taylor said the unreliability of the index was also illustrated by the difference in the sale prices of 23 and 29 Hampden Lane in May 2013 and September 2014 respectively. Mr Maunder Taylor thought there should be no more than a 3% price differential to reflect the difference in the unexpired leasehold term of the two flats (85 years and 990 years). The difference in their prices was 38.2% despite prices having risen by only 27.4% between their sale dates according to the Land Registry index.

17. In *Mundy* the Tribunal said a market transaction of the existing lease would be a useful starting point for determining its value without Act rights provided the sale was “a true reflection of market value for that interest”. Mr Maunder Taylor did not think the sale of the existing lease of the subject

property in December 2013 satisfied that test. Neither expert saw the property before it was repaired and modernised and the agreed estimate of £15,000 for repairs was not based upon a specification or contract price. Speaking from experience Mr Maunder Taylor said that probate sales were often concluded quickly so as to obtain an early trouble-free sale in order to wind up the estate rather than market the property fully to obtain the best price. Auction sales did not always allow enough time for potential buyers to act prudently and it could not be assumed that a price obtained at auction was equivalent to market value. Mr Maunder Taylor therefore turned to graphs of relativity and, in particular, the without Act rights graph produced by Nesbitt & Co.

18. Mr Maunder Taylor noted that both experts had provided a valuation to the FTT that was based on the Nesbitt & Co graph and he submitted this was de facto evidence that the experts took this to be the most reliable graph since neither of them produced a valuation based on any other graph. In his evidence to the FTT Mr Maunder Taylor said that for north London's suburban properties generally he and his "colleague valuers", whether acting for landlords or tenants, had commonly adopted the Nesbitt & Co graph over many years and for many agreed transactions "numbering in the hundreds".

19. The author of the Nesbitt & Co graph, Mr Laurence Nesbitt, gave evidence to the Tribunal about the graph in *Mallory v Orchidbase Limited* [2016] UKUT 468 (LC). Mr Maunder Taylor noted that Mr Nesbitt was recorded as saying the use of graphs was only appropriate in the absence of market evidence, since there were shortcomings in the graphs especially (in the case of his own graph) where the unexpired term of the lease was less than 55 years and where "the relativity ranged considerably in the various blocks" (paragraph 35). Mr Maunder Taylor said the natural inference of Mr Nesbitt's remarks was that at longer lease lengths, such as the 75.23 years in the present appeal, there was not a considerable range of relativity between blocks and that the Nesbitt graph was reliable.

20. Mr Maunder Taylor rejected Mr Yasin's comment that "if graphs were ever accurate, they are now certainly out of date" because Mr Nesbitt had explained in *Orchidbase* that he amended his graph to take account of fresh sales evidence where this was adopted by the FTT. Mr Yasin said that he accepted and used these "defunct graphs as a tool for reaching a compromise in his day to day work" if there was no transactional evidence. Mr Maunder Taylor queried how Mr Yasin could say the graphs were defunct when he continued to use them in certain circumstances. Mr Nesbitt said in *Orchidbase* that it would be wrong to ignore transactional evidence from the same block as the appeal property but Mr Yasin's two principal comparables were not in the same block and were different types of flats that required too many adjustments for them to be reliable.

21. In *Mundy* the Tribunal said that another method of determining the relativity was to use an enfranchiseable graph to determine the value of a lease with Act rights and then to make a reduction from that value to reflect the absence of those rights on the statutory hypothesis. But such graphs only existed for prime central London properties and neither expert in this appeal had relied on them.

22. Mr Maunder Taylor said the Tribunal in *Mundy* had indicated it was for the good sense of the experienced valuer to determine which was the best method of valuation to use. In this case Mr Yasin's reliance upon comparables produced an anomalously low relativity that was completely at variance with that produced by any of the recognised graphs of relativity and which was not supported by evidence of

any settlement or determination. A single sale of the subject property well before the valuation date and where it was in an acknowledged but unseen state of disrepair was not a reliable basis to calculate relativity, especially when the property was being wrongly compared with very different types of flats.

23. Mr Maunder Taylor concluded that “standing back and using good sense” the valuation based on the relativity in the Nesbitt & Co graph (93.5%) was the best method to use because the transactional evidence was unreliable. This produced a premium payable of £10,231.

The case for the respondent

24. Mr Harrison submitted that Mr Maunder Taylor was attacking a straw man by arguing that the respondent’s reliance on the sale of the subject property failed the *Mundy* requirement to consider evidence “at or around the valuation date”. It was never the respondent’s case that the sale of the subject property met that requirement. Mr Yasin had sought to establish the appropriate relativity by considering evidence of the FHVP value of the subject property at the date of the sale of the existing lease in December 2013 and then to apply that relativity to the agreed FHVP value of the subject property as at the date of valuation. Mr Maunder Taylor’s review of the major influences affecting the local and national market between 2013 and 2016 was not to the point because none of his analysis was directed to how, if at all, such influences would affect relativity rather than their equal effect on the market value of short and long leases. The relativity obtained from the sale of the subject property 2.81 years before the valuation date was more reliable than that derived from the historic Nesbitt & Co graph.

25. Mr Maunder Taylor had also tried to develop an argument that the sale of a short lease in the subject property in 2013 was not a true reflection of its market value. But no specific case had been made out by Mr Maunder Taylor who made generalisations about residential properties sold at auction not meeting the RICS definition of market value. That was irrelevant because the leasehold sale in 2013 was not by auction. It was not suggested that the property had not been properly marketed; the FTT said Mr Yasin, having spoken to the selling agent, had no reason to doubt the sale was not a standard open market transaction (para. 34) and that the appellant did not suggest there was anything unusual about the purchase (para.44).

26. Mr Harrison said the sale of the subject property was prima facie evidence of its open market value. In *Windward Properties Limited v Government of St Vincent and The Grenadines* [1996] 1 WLR 279 Sir Michael Hardie Boys said at 285H:

“... In the absence of acceptable evidence to the contrary, a tribunal or court is entitled to infer that the transaction was entered into at arm’s length in the normal course of the market. The transaction then becomes evidence of value, to be weighed along with such other evidence as there may be.”

Mr Maunder Taylor had not produced any evidence to show that the sale of the subject property in December 2013 had not been an arm’s length transaction. In *Aberdeen City Council v Stewart Milne Group* [2011] UKSC 56 Lord Hope said at paragraph 16:

“... A sale at arm’s length is usually taken to be the best evidence of the value of the subjects in the open market.”

27. Mr Harrison submitted that Mr Yasin had not accepted that the Nesbitt & Co graph was the most reliable for this area of north London. Mr Yasin had dismissed it as “defunct” and as “a tool for those who wished to use it. This does not mean it is the correct approach”. Mr Yasin said that “adopting the Nesbitt graph flies in the face of the evidence.” The Nesbitt & Co graph suffered from the same defects as those graphs criticised by the Tribunal in *Mundy* which were based, at least to some extent, on Leasehold Valuation Tribunal decisions. It had not been updated since 2008 and could not be said to reflect current, as opposed to historic, relativity. Mr Yasin said that in *Orchidbase* Mr Nesbitt had agreed his graph was flawed and over-stated relativity.

28. Mr Yasin’s primary method of calculating relativity was to compare the leasehold sale price of the subject property in 2013, adjusted for its lack of repair, with its FHVP value at that time. He estimated the FHVP value by reference to two comparables at 23 and 29 Hampden Lane which were in the same block immediately opposite the subject property.

29. The comparable flats were on the first (No.23) and second (No.29) floors of a purpose-built three-storey brick block constructed by Croudace in 1999. The flats had double-glazing, gas central heating, fitted kitchens and secure private car parking spaces. There was no lift. No.23 was sold leasehold for £162,000 in May 2013 with an unexpired term of 85.33 years and No.29 was sold with a share of the freehold for £223,850 on 19 September 2014.

30. Mr Yasin adjusted the sale prices to make them comparable to the subject property at 76 Hampden Lane. He did so by making percentage adjustments rather than adopting spot figures as he did before the FTT. He deducted 7.5% for the comparative modernity of Nos.23 and 29; 2.5% for a private car parking space; and 2.5% for their larger size (by about 15%). He added 7.5% to reflect the subject property having private garden space rather than communal gardens. The net adjustment was therefore minus 5%.

31. This gave adjusted values of £153,900 for No.23 and £212,858 for No.29. No.29 needed no adjustment for tenure since it was sold with a share of the freehold. But since No.23 was sold leasehold with an unexpired term of 85 years it needed to be adjusted upwards onto the equivalent FHVP value. Mr Yasin used the Savills 2002 enfranchiseable graph to calculate the uplift. This showed a lease of 85.3 years unexpired to have a with Act rights relativity of approximately 94%. Mr Yasin increased the leasehold value of No.23 by 6% to give an adjusted FHVP value of £163,134. Finally, Mr Yasin indexed the FHVP values to the date of sale of the subject property in December 2013 using the Land Registry House Price Index for the London Borough of Haringey. This gave fully adjusted FHVP values for Nos.23 and 29 of £175,500 and £179,632 respectively. Mr Yasin took the average of the two at £177,566.

32. Mr Yasin made two adjustments to the sale price of the existing leasehold of the subject property (£120,000). Firstly, he increased it by the agreed figure of £15,000 to reflect its poor state of repair.

Secondly, he deducted the agreed sum of 2.5% in respect of the benefit of rights under the Act, such benefits having to be disregarded under the statutory hypothesis. This gave an adjusted leasehold value of £131,625.

33. The relativity of the existing lease at December 2013 was therefore 74.13%¹. To adjust the relativity from the date of sale to the valuation date Mr Yasin deducted the agreed amount of 0.65% pa to account for the lease being 2.81 years shorter by September 2016. This gave a total deduction of 1.83% or a fully adjusted relativity of 72.30%.

34. Mr Yasin's second method of calculating relativity was to index the leasehold sale price to the valuation date and then compare it to the agreed FHVP value at that time. He indexed the leasehold sale price of £135,000 (adjusted for repairs) to give £190,000 at the valuation date. He reduced this figure by 1.83% to reflect the shorter lease and 2.5% for the benefit of rights under the Act. This gave £181,800 and a relativity of 71.99% compared with the agreed FHVP value of £252,525.

35. Mr Yasin supported his second valuation approach by indexing the average FHVP value of 23 and 29 Hampden Lane to give £263,500 at the valuation date. He compared this to the agreed FHVP value of the subject property (£252,525). The difference was "approximately 4%" which he compared with his net adjustment of 5% (see paragraph 30 above). He said this showed the Land Registry Index was a reliable valuation tool.

36. Mr Yasin adopted the average relativity obtained from his two valuation methods, i.e. 72.15%, which produced a premium payable of £37,150.

37. As a cross-check Mr Yasin compared the value of a short lease (75.69 years) of a one-bedroom first floor flat in a mid-terrace converted Victorian house at 30 Strode Road N17 sold for £160,000 in May 2013 with the FHVP value of a one bedroom first floor flat in a semi-detached converted Victorian house at 124 Broadwater Road N17 sold for £212,000 in June 2014. The flats were about 1km apart and within the same postcode and local authority areas. He adjusted the sale prices to the sale date of the subject property (December 2013). The only adjustments required were for the disrepair of 124 Broadwater Road and the fact that, unlike 30 Strode Road, it had the benefit of a garden. The adjusted and indexed values, allowing 2.5% for the benefit of Act rights, were £152,922 (30 Strode Road) and £198,967 (124 Broadwater Road). This gave a without Act rights relativity of 76.86% for a lease with an unexpired term (75.69 years) that was almost exactly the same as that of the subject property (75.23 years). This result was considerably closer to Mr Yasin's adopted relativity of 72.15% than to the equivalent figure shown by the Nesbitt & Co graph of 93.84%.

38. Mr Yasin said that where short lease evidence was available in secondary locations, it was almost always the case that the relativity indicated by the graphs was high compared to that obtained from the evidence. Mr Yasin said Mr Maunder Taylor's approach "short-changes the freeholder". He described this approach as an anomaly and said it comprised two stages. At stage one the purchaser buys the

¹ £131,625/£177,566 x 100

existing lease at a relativity below that indicated by the traditional graphs. At stage two the passage of time (in this case 2.81 years) means the prime evidence of the sale of the existing lease is ignored as being unreliable and the traditional graphs are used instead. These show a much higher relativity than did the original leasehold sale price, even though the unexpired term of the lease is 2.81 years shorter by then. This reduces the marriage value and therefore the premium to be paid for the lease extension. Mr Yasin said such a result was “counter-intuitive and against the spirit of the Act...”. The Nesbitt & Co graph gave a without Act rights relativity of 93.62% for an unexpired term of 75.23 years. Applying this relativity to the agreed FHVP value at the valuation date of £252,525 gave an existing leasehold value of £236,400. Adjusting this to the date of purchase of the existing lease in 2013 using the Lands Registry Index gave a figure of £167,992. Mr Yasin said that according to the Nesbitt & Co graph the subject property would be worth approximately £50,000 more in December 2013 without rights than it sold for at that time with Act rights – and when the lease was 2.81 years longer. The FTT accepted at paragraph 58 that this anomaly meant the Nesbitt & Co graph was unreliable.

39. Mr Yasin rejected Mr Maunder Taylor’s reference to comparables which formed part of high density social housing schemes because he considered them to be unreliable. He said, “it is accepted market wisdom that ex-local authority accommodation is discounted” and supported his view by reference to an article written by Jennifer Young Thomson of Kinleigh Folkard & Hayward in January 2015 in which she said, “First time buyers can therefore sometimes save around 40% by buying ex-local authority properties.” Mr Yasin analysed the sales contained in the statement of agreed facts concerning valuation comparables that excluded ex-local authority flats on housing estates and said these corroborated his original analysis of the sales of 23 and 29 Hampden Lane.

Discussion

40. In *Orchidbase* the Tribunal, His Honour Judge David Hodge QC and Mr Peter McCrea FRICS, said at paragraph 42:

“We endorse and reiterate the Tribunal’s preference for market evidence over the use of relativity graphs, as long as it can be shown that the market evidence is reasonably comparable and does not require artificially extensive manipulation in order to apply it to the subject valuation.”

In *Mundy v The Trustees of the Sloane Estate* [2018] EWCA Civ 35 Lewison LJ made a similar point at paragraph 29:

“These [valuation] adjustments are essentially a matter of valuation judgment. The fewer the differences there are between the comparable and the subject of the valuation, the greater the weight that can be given to the comparable.”

41. In *Orchidbase* the market evidence was very comparable, being the sale of two flats in the subject blocks which had very similar unexpired lease terms to the appeal properties, one of which was sold in the same month as the valuation date and the other two months before. In the present appeal the two comparables relied upon by Mr Yasin in his primary valuation, 23 and 29 Hampden Lane, although located directly opposite the subject property, are dissimilar in several important respects, i.e. they (i) are in a new (1999) purpose built block of flats; (ii) have a private car parking space; (iii) are some 15%

larger; (iv) do not have private outside space; (v) have different unexpired lease terms; (vi) require (in one case) adjustment onto a without Act rights basis using Savills' 2002 enfranchiseable graph; (vii) were sold 24 months and 40 months before the valuation date and 10 months after and 7 months before the date of purchase of the subject premises and therefore require price indexation. Mr Yasin uses these comparables to estimate the FHVP value of the subject premises at the date of the leasehold sale in December 2013. That is then compared with the leasehold sale price of the subject property adjusted for its unseen state of disrepair, the benefit of Act rights and for the shorter unexpired term at the valuation date.

42. Mr Yasin denies this large number of adjustments makes the use of his primary comparables unreliable. He notes that in *Mundy* there were seven adjustments and that these had a greater net effect than the "far more modest 5% in this appeal." But the fact that the net effect may be small is irrelevant to the reliability of Mr Yasin's approach.

43. The quality of the comparables relied upon by Mr Yasin is far removed from that of the comparables adopted in *Orchidbase* which were flats in the same blocks, sold close to the valuation date and with almost identical unexpired terms. In my opinion there are too many adjustments required to Mr Yasin's primary comparables to make them useful as the basis for calculating the FHVP value of the subject property at December 2013. This method of calculating the relativity also assumes no change in relativity over the next 2.81 years, which is not a proposition that the landlord accepted. Mr Harrison submitted that the market evidence showed the graphs of relativity to be out of date which meant "that relativity may have changed over time [and geographically]."

44. To the extent that Mr Maunder Taylor could be said to have been attacking a straw man it was only in so far as Mr Yasin's primary method of valuation was concerned; his evidence about changing market conditions was relevant to Mr Yasin's second approach which was to index the adjusted leasehold sale price to the valuation date and compare it with the agreed FHVP value. In his written representations Mr Harrison accepts that it was never the respondent's case that the sale of the subject flat took place "at or around the valuation date", per *Mundy* at paragraph 168.

45. In *Orchidbase* the landlord's valuer, Mr Nesbitt, relied upon the indexation of the historic sale price of one of the appeal properties to support his main case based on transactional evidence. The sale took place 2.85 years before the valuation date, almost exactly the same period as that between the date of sale of the subject property (19 December 2013) and the valuation date (29 September 2016). The Tribunal in *Orchidbase* preferred the use of the comparables to the indexation of the historic sale price.

46. There is a dispute between the experts as to whether the sale price of £120,000 for the existing lease was properly reflective of its market value. I do not think Mr Maunder Taylor's evidence shows that it was not an arm's length transaction. I note the price paid was a discount of 7.5% from the asking price of £129,995 and that it was marketed through an established local estate agent. The parties acknowledged that the maisonette needed repair and neither expert saw the property in its unrepaired and unimproved state which makes the agreed allowance for repairs of £15,000 somewhat speculative.

47. The use of the Land Registry House Price Index for the local authority area in which the property to be indexed is situated has been adopted by the Upper Tribunal in the past. I recognise that local variations in capital growth may occur where the Borough contains residential properties of widely differing size, type, quality and value, but nevertheless it is usually considered a permissible approach provided the relevant transaction was reasonably near the valuation date. Mr Harrison accepts this is not so in this case. In considering *Mundy* he stated:

“... the Tribunal was emphasising that what is important is how the market performed at the date of valuation. The Tribunal commended the use of a market transaction of the subject property close to the valuation date because it would reflect market relativity at or near the valuation date and would therefore be a useful starting point for determining the value of the lease without rights under the 1993 Act.”

There are no transactions of the subject property close to the valuation date and, in my opinion, the indexation of the sale price of the existing leasehold interest nearly three years before the valuation date is not a suitable starting point for ascertaining the appropriate relativity. Where there is no reliable transaction evidence valuers will need to consider adopting more than one approach. One possible method is to use the most reliable without Act rights graph; another is to use an enfranchiseable (with Act rights) graph and make an informed deduction for the benefit of the Act (see *Mundy* paragraph 169).

48. Mr Maunder Taylor says the Nesbitt & Co graph is the most reliable. Although he says it has been updated he adduced no evidence of any revised version from that contained in the 2009 RICS Research Report “Leasehold Reform: Graphs of Relativity”. The Nesbitt & Co graph is one of five without Act rights graphs said to cover Greater London and England. Of those five graphs the Nesbitt & Co graph gives the lowest relativity for the 75-year unexpired term (93.5%). The graph suffers from the criticisms made of the prime central London graphs in Appendix C of *Mundy*, in particular its reliance on settlements and LVT decisions where Mr Nesbitt appeared. There was no transactional database. Mr Nesbitt recognised his graph had shortcomings in *Orchidbase*.

49. I do not accept Mr Maunder Taylor’s claim that Mr Yasin agreed that the Nesbitt & Co graph was the most reliable to use in this location. Mr Yasin used it to demonstrate what he considered to be a valuation anomaly caused by what he saw as the discrepancy between transactional evidence (his two comparables at 23 and 25 Hampden Lane) and the Nesbitt & Co graph (see paragraph 38 above). While he described the graphs as “defunct” Mr Yasin said that he accepted and used them as a tool for reaching a compromise in his day to day work where there was no transactional evidence.

50. The alternative to using transaction evidence or without Act rights graphs is to use a with Act rights graph and adjust for the benefit of the Act. The experts have agreed that the benefit of those rights was 2.5% at the valuation date. The only with Act rights graph in common use is that produced by Savills. The original 2002 version is the one which appears in the RICS Research Report but this was updated in June 2016 when the Savills’ 2015 enfranchiseable graph of relativity was launched. This updated version is referred to in *Mundy* at paragraph 170 which states that “the authority of the Savills’ 2002 graph has been to some extent eroded by the emerging Savills’ 2015 enfranchiseable graph.” Mr Maunder Taylor does not rely upon the Savills’ 2002 enfranchiseable graph which he says is suitable for prime central London properties but not for the age, character and location of the subject property. Mr Yasin, however, uses it when adjusting the unexpired lease term of 23 Hampden Lane (85 years) to

give its FHVP value. He does so by increasing the leasehold value by 6%. The with Act rights relativity for an 85-year unexpired term is given in Savills' 2002 graph as 93.9% i.e. approximately 6% less than the FHVP value. (The updated Savills' 2015 enfranchiseable graph gives the relativity for 85 years as 91.7%).

51. Mr Yasin's use of the Savills' 2002 enfranchiseable graph is limited to leases with unexpired terms of 80 years "as there is no marriage value payable and the calculation of the premium is a straightforward exercise and the subsequent negotiations between Landlords and Lessees are less contentious." But the Savills' graph shows no sudden change at 80 years unexpired term and the with Act rights relativity of a lease with 78 years to run is given in the 2002 graph as 91.7% and in the 2015 graph as 89.1%. In circumstances where, as Mr Yasin says, "there is no non-prime central London graph which gives an indication of relativity above 80 years un-expired term" (or, so far as I am aware, for unexpired terms less than this) it is reasonable to use the Savills' enfranchiseable graph where (i) this is broadly supported by the relativity derived from relevant market transactions and (ii) the experts have agreed the adjustment for the benefit of the Act.

52. I am surprised that neither expert considered the relativity between Mr Yasin's two primary comparables, namely the relativity of 23 Hampden Lane (85 years unexpired) and 29 Hampden Lane (share of the freehold). These two flats are in the same block (albeit on different floors in a building without a lift, a factor not considered – at least not in terms – by either expert) and share all relevant characteristics at the date of sale. The only adjustment required is for time.

53. Adjusting both sales to the date of the leasehold purchase of the subject property in December 2013 gives revised values of £174,288 (No.23) and £189,034 (No.29). The with Act rights relativity is therefore 92.2% which is mid-way between the relativities produced by the two Savills' enfranchiseable graphs. Had he undertaken this exercise it would have been obvious to Mr Yasin that this result, in which the relativity of his comparables closely matched the result from using the Savills' enfranchiseable graph, casts doubt on his conclusion that the with Act rights relativity of the subject lease with 78 years unexpired was 76.03%². This seems to me to be an elephant in the room of Mr Yasin's analysis and one which requires an explanation. The anomaly of the respondent's position was pointed out by the Deputy President in granting permission to appeal. He noted that in *Orchidbase* the relativity was determined at 76.2% for an unexpired term of 57.68 years, i.e. a relativity which was 4% greater than Mr Yasin's figure in this appeal for a lease that was some 17.5 years shorter. Mr Harrison says it would be wrong to assert that if the relativity derived from a market transaction is so far below that arrived at in other cases it must be wrong:

“[That] assumes that the conclusion in the other case was correct in an absolute way and that relativity does not vary from location to location... a tribunal decision on relativity in another case is only a decision on the evidence that was presented in that case and relates only to the relativity in that vicinity.”

² (£135,000/£177,566) x 100 = 76.03%. This is before the deduction of 2.5% from the leasehold value to reflect the benefit of the Act.

While I accept that a decision can only be as good as the evidence on which it is based, Mr Yasin's result not only conflicts with *Orchidbase* – a case outside London in Hemel Hempstead where the transaction evidence was strong and adopted in preference to the use of graphs – it is out of line with the tone of relativity determined by the Tribunal in every other appeal. Once it is realised that the actual with Act rights relativity of Mr Yasin's preferred comparables is 21% higher than his calculated relativity for the subject lease with 78 years to run, i.e. only 7 years less than 23 Hampden Lane, and that the actual relativity is supported by the Savills' 2002 and 2015 enfranchiseable graphs, Mr Yasin's figure is seen to be unsustainable.

54. In my opinion the most reliable method of valuation in this appeal is to use the Savills' enfranchiseable graphs. This gives a relativity for an unexpired term of 75.23 years of between 90.87% (2002 graph) and 89.1% (2015 graph). I prefer the 2015 graph because it was prepared much closer to the valuation date and had been published by that time. I consider that the with Act rights relativity of the subject lease at the valuation date was 89.1%. Deducting the agreed allowance of 2.5%³ for the benefit of the Act gives a without Act rights relativity of 86.9%.

Determination

55. Adopting a without Act rights relativity of 86.9% the premium payable for the new lease is determined at £18,524 as shown in Appendix 1 attached hereto. I therefore allow the appeal in part.

Dated 27 September 2018

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)

³ 89.1% x 0.975 = 86.9%. It is not 89.1% - 2.5% = 86.6%

APPENDIX 1
CALCULATION OF PREMIUM FOR A NEW LEASE

1. Diminution in value of freeholder's interest

	£	£	£
(i) Loss of term rent (agreed)		142	
(ii) Loss of reversionary value (agreed)	6,430		
Less future freehold reversionary value	<u>80</u>		
		<u>6,350</u>	
			6,492

2. Marriage value

(i) Value of future interests			
(a) Freehold	80		
(b) Extended leasehold	<u>250,000</u>		
		250,080	
(ii) Less value of present interests			
(a) Freehold	6,572		
(b) Existing leasehold (at 86.9% relativity)	<u>219,444</u>		
		<u>226,016</u>	
Marriage value		24,064	
Landlord's share @ 50%			<u>12,032</u>
Total compensation:			£18,524