



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : BIR/44UE/OLR/2021/0013

Property : 14 The Whitehouse, High Street, Henley in Arden, Warks.,
B95 5GA

Applicant : Peter Ronald Smith as Executor to the Estate of
Michael John Smith deceased

Representative : Mr M.D. Cannon FRICS of Lawrence & Wightman

Respondent : Abacona Investments Limited

Representative : Mr A.P. Herbert FRICS of Pennycuick Collins Ltd.

Type of Application : Application to determine the premium and terms in respect of
a lease renewal pursuant to section 48 of the Leasehold
Reform Housing & Urban Development Act 1993.

Tribunal Members : Mr I.D. Humphries B.Sc.(Est.Man.) FRICS
Mr D. Satchwell FRICS
Judge D. Barlow

**Date and Venue of
Hearing** : 17 June 2021 by on line Hearing

Date of Decision : **20 October 2021**

DECISION

Decision

- 1 The Tribunal makes the following determinations in respect of the disputed terms:
 - (1) the Tribunal determines the Premium at £49,000 (Forty Nine Thousand Pounds).
 - (2) the Tribunal determines that the terms of the acquisition should not include the 'disputed clauses' set out in this decision.

Introduction

- 2 This is an application to determine the premium and terms of a new lease pursuant to section 48 of the Leasehold Reform Housing and Urban Development Act 1993 ('the Act').
- 3 The Applicant, the Executor to a deceased's estate, served Notice under section 42 of the Act on 3 August 2020. The Respondent's counter-notice was served 9 October 2020. On 1 April 2021 the Applicant applied to the First-tier Tribunal (Property Chamber) to determine the premium and terms under section 48. On 8 April 2021 the Tribunal issued Directions. The case was heard by on-line Hearing on 17 June 2021 and the Tribunal re-convened on 30 July 2021 to inspect the exteriors of properties referred to as comparable by the parties. Due to the number and complexity of issues raised by the parties the Tribunal re-convened again on 7th October 2021 and having considered the evidence finds as follows.

The Law

- 4 The property is held by lease granted 25 March 1973 for a term of 99 years expiring 24 March 2072 so that at the date of the tenant's application, 3 August 2020, there were 51.64 years unexpired. The ground rent was reserved at £45.00 pa for the first 25 years but unusually there was provision for review to open market rent after 25 years which was determined by independent expert at £530 pa in 1998, with provision for two further reviews on 25 March 2023 and 2048, again to open market value.
- 5 The exact wording of the rent review clause is significant as it affects the value of the term income and is defined in the Eighth Schedule of the Lease, para.1 as :

' ... the current market ground rental value at the beginning of each such period that is the rental to be obtained for the site of the Demised Premises disregarding the building and structure thereof and on the assumption that the Development were to be redeveloped in the same manner as it shall then stand.'
- 6 There is also a clause setting the minimum increase at 150% over the previous rent.
- 7 The Applicant served Notice requesting a new lease on statutory terms, i.e. the unexpired term extended by 90 years, the ground rent reduced to a peppercorn and otherwise the same terms as existing. The premium offered was £30,900 plus legal costs and valuation fees.
- 8 The Respondent replied within two months quoting a counter-offer of £100,000 and proposing alterations to the terms of the lease.
- 9 Under the Act, if the premium and terms cannot be agreed they can be referred to the First-tier Tribunal (Property Chamber) where they can be assessed in accordance with a formula in Schedule 13. This sets out the basis of calculation and requires the premium to be based on the landlord's loss of ground rent for the term together with a sum to compensate for the landlord's deferred right to possession of the flat and a share of any marriage value arising from the grant of a new extended lease. The share is defined at 50% in the Commonhold and

Leasehold Reform Act 2002. It also allows the landlord to claim any diminution in the value of land retained in its estate due to grant of the lease extension if such loss can be justified, generally known as paragraph 5 compensation, although no such claim has been made in this case.

- 10 In addition, the tenant is required to pay the landlord's reasonable legal costs and valuation fees incurred in the transaction under section 60 of the Act although they are not part of this application.

Facts Found

- 11 The Tribunal has been unable to inspect the interior of the Flat due to Covid 19 regulations but inspected the exterior and exteriors of all comparables referred to by the parties. The Tribunal therefore relies on the descriptions of accommodation provided by the parties' surveyors and agreed facts.
- 12 The property is located in Henley in Arden, an attractive town about 9 miles south east of Solihull in Warwickshire. It has a population of less than 4,000 and appears generally affluent. The town is centred on a long High Street running north–south with a high number of period buildings to either side. There are shops, bars and cafes in the centre with many buildings further along the road converted to flats and there have been several new flat developments built in recent years behind the frontages.
- 13 The subject property is to the south of the central area on the eastern side of the High Street. It comprises the upper two floors of a three storey Georgian building No. 171-171A High Street that has a shop on the ground floor. The building is part of a 1970s development forming part of Nos.167-179 High Street comprising residential conversions over shops along the High Street with new houses and maisonettes to the rear, built around lawns with driveways and garages for the houses.
- 14 No.14 The Whitehouse is a duplex flat accessed from an external staircase to the rear of the building. It has a hall, living room and kitchen on the first floor with stairs to a landing, two bedrooms, bathroom and boxroom on the second floor. There are no garages or designated parking spaces included within the demise. There is street parking directly outside the building although it is time limited.

Issues

- 15 The parties' surveyors have agreed the following inputs to the valuation:
 - 1 Unexpired term: 51.64 years
 - 2 Present ground rent: £530 pa
 - 3 Gross internal floor area Flat 14: 766 sq.ft.
 - 4 Existing lease value with Act rights: £175,000
 - 5 Existing lease value without Act rights: £160,055
 - 6 Relativity per Savills enfranchisable graph: 78.96%
 - 7 Notional Freehold differential: 1%
- 16 The disputed inputs are:
 - 8 Assumed rental value on review
 - 9 Capitalisation rate
 - 10 Deferment rate
 - 11 Extended lease value
 - 12 The Respondent's proposed changes to the terms of the lease

Submissions

17 The Tribunal would like to say at the outset that they were impressed by the presentation of evidence by both parties' surveyors. Both are highly experienced Chartered Surveyors in this specialist field and have clearly undertaken considerable research before arriving at their conclusions. The fact that Mr Cannon's valuation is £43,096 and Mr Herbert's £86,434 is no reflection on their professional opinion and merely serves to demonstrate how small differences in valuation input can have a disproportionate effect on the outcome.

18 The Tribunal has considered each input and finds as follows:

8 Assumed Rental Value on Review

Applicant

19 The March 2023 rent review is 2.64 years away from the valuation date and has a potentially major impact on the value of the term.

20 Mr Cannon refers to *Jarrett and Burford Estates & Property Co Ltd (LRA/12/1994)*, a case under the Leasehold Reform Act 1967, where the Member found a difference between 'nominal' and 'full' ground rents and that there was no market in 'full' ground rents which only existed in the artificial world of the 1967 Act. Referring to historic price data, Mr Cannon submits that the original ground rent of £45 pa can have only represented around 0.30-0.36% of the market value of the flat in 1976 and was therefore a 'nominal' ground rent at the time. The lease was dated 1976 but the term ran from 1973.

21 Ignoring the 1998 review rent of £530 pa, he applies the increase in Retail Price Index since 1973 to calculate the 2020 equivalent of the original £45 pa at £575.85 pa by the valuation date, which was the sum required to reinstate the parties to the same position they would have been in, allowing for inflation over the intervening period.

22 As a check, he applies his 0.30-0.36% assessment of ground rent to market value ratio to his 'extended' lease value of £220,000 (rounded), and estimates that on this basis the ground rent would have been between £660-£792 pa at the valuation date in 2020.

23 Referring to high ground rents, he says at para. 6.4.9, 'Clearly, no developer would set a ground rent on a new build leasehold flat at a level so high that it would make the flat unsaleable; ...' and furthermore, 'the Council of Mortgage Lenders suggest that a ground rent higher than 0.1% of a flat's market value makes it unacceptable as security'.

24 He refers to the Lands Tribunal decision for another flat in the development, Flat 13 The Whitehouse (LRA/23/2000), where the Member P.H. Clarke FRICS who also determined the *Jarrett* case, adopted the minimum increase of 50% when estimating the value of future rent reviews planned for 2023 and 2048.

25 Mr Cannon notes that the minimum increase to £795 reserved by the lease would make the ground rent higher than two of the comparables, a flat in The Elms where the rent is £185-197.50 pa (0.1% of market value) and Apartment 1, George House where the rent is £200 pa (0.075% of market value). In his opinion, the ground rent of the subject property ought to be nearer £200 pa but in view of the minimum uplift reserved by the lease he accepts it has to be reviewed to a minimum of £795 pa. Adopting the same principle, he forecasts the 2048 rent review rent to be £1,092.50.

Respondent

26 Mr Herbert describes the review mechanism in the lease. He emphasises that rent reviews are to be based on the market rental value of the property as built, and any comparison with a

percentage of the initial sale price or any other new build development in the area would be irrelevant.

27 To this end he estimates the rental value on a residual basis by assessing the sale value of a new flat on the site, deducting the estimated cost of construction, deducting 30% of the build cost for developer's profit and leaves a residual sum for the value of the site of £70,640. Applying a capitalisation rate of 4.75% (for which see para.43 below) produces an annual equivalent rental value of £3,000 pa as the Modern Ground Rent in 2023.

28 Applying the 50% minimum to the next review would result in £4,500 pa ground rent in 2048.

29 Mr Herbert comments that a developer would be looking to recover the site cost in any sale but accepts that 'too high a ground rent would be prejudicial to sales'.

Tribunal

30 Both approaches make valid points but Mr Cannon's approach fails to relate the ground rent to the terms of the rent review clause in the lease.

31 However, while Mr Herbert's approach attempts to follow the procedure in the lease, the information provided to assess the residual value is light on content and the Tribunal is not persuaded there is sufficient evidence to justify the figure submitted.

32 Mr Herbert advises that he relies on 'advice provided by my Building Consultancy Department who referenced the BCIS House Reinstatement Tables (*RICS Building Cost Information Service*)' and that he understood their estimate would 'replicate the front elevational detail with pitched roof, in accordance with the likely requirements of planning' and they had 'adjusted the figures to reflect the additional kitchens and bathrooms to replicate the whole of the current building in arriving at their rebuild figure per sq.ft.'

33 However, no-one was put forward from the Building Consultancy Department to comment on their figures and at the Hearing, Mr Herbert was unable to advise which of the 43 columns listed as 'Residential Facilities' in the 2019 BCIS Building Price Book had been used to arrive at £200/sq.ft., which was the figure in his residual valuation.

34 There was no explanation regarding the claimed adjustments for additional kitchens and bathrooms.

35 Furthermore, while the BCIS guide provides estimates for construction costs based on tender prices provided by contractors nationally with regional adjustment, it makes no allowance for external works, contingencies, Architects or Structural Engineers' fees.

36 The Tribunal are therefore unable to place great reliance on Mr Herbert's estimated construction costs.

37 A full residual valuation would set out as many inputs as possible making allowance for estate agent's and legal fees on sale, interest payable on bank loans, a discounted cash flow projection over the time taken to build the project and all the itemised build costs. In this case, Mr Herbert provides an abbreviated residual valuation but the only costs allowed for are the construction costs and developer's profit at 30% of build cost. This though is entirely arbitrary and the Tribunal note that even assuming Mr Herbert's projected 'new build' sale price of a flat on the site were correct at £275,000, if the estimated construction costs were increased by say 10% to £220/sq.ft. and developer's profit were 30% of the sale value of the flat, the resulting land value would be just £10,413. Applying Mr Herbert's capitalisation rate of 4.25% would produce a ground rental value of £442 p.a.

- 38 The Tribunal appreciates the difficulties in providing a residual valuation due to the number of variable inputs, but in this instance considers the evidence provided insufficient to justify the valuation contended.
- 39 In the circumstances, the Tribunal relies on the minimum increase in the lease of 50% which is £795 on review in 2023 and £1,192 in 2048.

9 Capitalisation Rate

Applicant

- 40 Mr Cannon submits that ground rents increasing every 25 years should be capitalised at 6%. He cites an enfranchisement case in Oxford where he recently agreed 91 flats with a total rental income of £15,425 (average £169 pa each) with fixed 25 year increases capitalised at between 6% and 6.5%, and individual lease extensions where he had agreed rates from 6% to 6.5% for ground rents of around £200 pa.

Respondent

- 41 Mr Herbert cites the leading case of *Nicholson & Bunbury v Wilks* (LRA/29/2006) where the key determinants were held to be:

the length of lease;
security of recovery;
size of ground rent;
provision for rent review and
if any, the type of review provision.

- 42 The subject case has a dynamic review regime where the rent is fixed linked he says 'to the value of the property generally as the site value directly correlates to a percentage of the property value', rather than fixed pre-determined rates. Interest rates he submits, are at historic lows and he considers what rates of return are available in the investment market to provide risk averse, long term income which he suggests are around 0.5% - 1.0%.
- 43 Mr Herbert submits that typical 99 year leases with 33 yearly reviews to fixed ground rents are traditionally valued at 6%, but in this case, where the lease offers growth prospects based on site value, the rate should be reduced to 4.75%.

Tribunal

- 44 The Tribunal notes that both Surveyors are valuing traditional ground rents with 3 or 4 reviews to fixed rents during the lease at 6% or slightly higher in some cases.
- 45 The Tribunal agrees that the possibility of an increase over and above the fixed 50% at review ought to add value by depressing the yield, but as has seen from para.37 above, this is not a straightforward exercise and has been unsuccessful in this case based on Mr Herbert's Submission for the 2023 review.
- 46 Furthermore, although there is a prospect of increase, the rent is still fixed for 25 years which is a long period for any investment and in the Tribunal's opinion it would not be particularly attractive to investors. Certainly not as attractive as say Assured Shorthold tenancies where there is potential for annual increase and investors typically look for 5% return. No evidence has been provided by the parties to support this but this is the Tribunal's general experience from its role as an expert Tribunal. For these reasons we do not accept Mr Herbert's proposal of 4.75% return for 25 year increases which we find too optimistic and unsupported.

47 If 5% were acceptable for annual flexible increases and 6% for 25 year fixed increases, the rate for a 25 year flexible increase underwritten by a minimum 50% increase must fall somewhere between, and in the Tribunal's expert opinion we find 5.75% appropriate.

10 Deferment Rate

Applicant

48 Mr Cannon assesses his rate based on *Earl Cadogan v Sportelli* (LRA/50/2005) at 5% for flats.

49 He adds 0.5% to reflect the lower rate of growth in West Midlands' property prices compared to prime central London following *Zuckerman v Trustees of the Calthorpe Estates* [2009] UKUT 235 (LC).

50 He makes no addition for 'obsolescence' which was one of the further additions in *Zuckerman* as there is no evidence to suggest that The Whitehouse has any structural or maintenance issues to warrant further increase.

51 Accordingly Mr Cannon for the Applicant submits for a deferment rate of 5.5%

Respondent

52 Mr Herbert refers to the same *Sportelli* decision which he analyses to its component parts:

	Risk free rate	2.25%
+	Risk Premium	4.50%
-	Real Growth Rate	2.00%
+	Addition for Flats	<u>0.50%</u>
	Deferment Rate	5.00%

53 The Risk Free Rate in that case was based on the average of index linked yields on a five year rolling period over the decade prior to the hearing. Mr Herbert points out that five year, index linked Treasury bonds hit a peak of 4.3% in 2008 but have slipped since 2012 and are now close to zero.

54 By analogy, in *Wells v Wells* (1999) 1 AC 345, a personal injury award under the 1996 Damages Act, the court determined a rate similar to the Risk Free Rate at 2.5%. However, when the exercise was reviewed by the Lord Chancellor in 2017 it was reduced to minus 0.75%. The Civil Liability Act 2018 changed the position to a 'low risk' rather than 'no risk' position which is not a true risk free rate, but the new rate was adjusted in 2019 to minus 0.25% with provision for five yearly review.

55 He therefore considers the present starting point to be unrealistic and proposes a reduction in the Risk Free Rate to 1.5%, which would result in a new deferment rate of 4.25%.

Tribunal

56 This Tribunal has not been provided with sufficient information on Treasury bond rates to justify altering the *Sportelli* rate. Even if historic data were provided, there is no guarantee that rates would remain at present levels in the future and from its own general but no specific knowledge, there has been growing press speculation in recent months that interest rates could rise, partly to offset the immediate effects of looming inflation and partly because it cannot remain at historic lows indefinitely.

- 57 In the absence of full and detailed specific evidence, the Tribunal is not persuaded to alter the rate set by the Lands Tribunal in *Sportelli* and does not find the threshold of exceptional circumstances in para.123 of *Sportelli* to have been crossed.
- 58 Furthermore, no evidence has been provided to counter the extensive evidence provided in *Zuckerman* to challenge the additional 0.5% to reflect lower growth rates in the West Midlands compared to prime central London.
- 59 We therefore find the deferment rate to be the *Sportelli* rate of 5% plus 0.5% for the *Zuckerman* addition, and the appropriate deferment rate in this valuation to be 5.5%.

11 Extended Lease Value

- 60 Mr Cannon contends for £219,437 after deducting for Act rights.
Mr Herbert contends for £250,000.

Applicant

- 61 There have been no sales of directly comparable flats with extended leases in The Whitehouse so Mr Cannon assessed his figure on relativity tables as is common market practice where there are no comparables, cross checked against sales of other flats in the area.
- 62 Adopting the relativity approach, Mr Cannon's £219,437 is derived from the agreed short lease value (i.e. existing lease) of £175,000. He applies the Savills Enfranchisable Relativity graph at the unexpired term of 51.64 years which is 78.96%, to produce an equivalent freehold vacant possession value for the flat of £221,631. The parties have agreed the freehold vacant possession value to be 1% more than the extended lease value and reducing it by 1% produces an extended lease value of £219,437, which is the figure used in his calculation.

$$\begin{aligned} \text{i.e. } \quad & \text{£175,000} / 0.7896 = \quad \text{£221,631} \\ & \text{£221,631} / 101 \times 100 = \quad \text{£219,437} \end{aligned}$$

The flats used as cross checks are:

- 63 *No.8 The Whitehouse*
A 1970s maisonette within the scheme sold for £205,000 on 7 February 2020 on a statutory extended lease. The flat had two bedrooms and a garage, double glazing, central heating and refitted bathroom with floor area of 710 sq.ft. which compares with 786 sq.ft. for the subject flat.
- 64 *5 Henley Park Court*
A 1990s flat in a development at the southern end of the High Street sold for £205,000 on 15 November 2019. It had two bedrooms and two parking spaces. The lease was 999 years and the flat had been 'luxuriously refitted'. 559 sq.ft.
- 65 *7 Henley Park Court*
Another flat in the scheme with similar accommodation sold for £192,500 with 999 year lease on 23 August 2019. 667 sq.ft.
- 66 *1 George House, High Street*
A one bedroom flat in a converted black and white building in the centre of the High Street with two parking spaces. It sold with a 150 year lease for £265,000 in December 2017 and is now advertised for sale at £260,000 but remains unsold. 709 sq.ft.

67 *The Elms, 14 High Street*

A Victorian building converted to 10 flats fitted to 'luxurious' standards with on site parking. The development was completed in late 2020 and the majority of flats had been sold but the sale prices have yet to be recorded by Land Registry. The leases were for 250 years. The asking prices ranged from £192,500 to £425,000.

Mr Cannon was aware the lease of Flat 7 had sold for £197,500 subject to ground rent of £197.50 pa and Flat 1 for £185,000 at ground rent of £185 pa.

Respondent

68 Mr Herbert has carried out a similar exercise but prefers to rely on market evidence of the sales of other flats in Henley rather than relativity tables. However, he confirms that in the absence of market evidence, he would have relied on the Savills Relativity graphs with a No Act World adjustment which are the same graphs used by Mr Cannon.

69 The market evidence relied on is from several sources. It is stressed that there are two markets in Henley; one for older buildings and character conversions such as the subject property which Mr Herbert regards as highly desirable, and one for modern developments regarded as less desirable.

70 *No.15 The Whitehouse* – character conversion

The sale of this flat in the same part of the development offers the only piece of short lease sales evidence in the block. It is smaller than No.14 having only a single bedroom but has the advantage of a courtyard garden and garage. It sold on 7 November 2020 for £150,000 with its original short lease but had been marketed at £225,000 in 2019 on the basis that the lease were already extended, for which Mr Herbert's firm had quoted a premium of £65,000. The copy 2019 details from Peter Clarke show 'sold subject to contract' but it did not complete at the time.

71 *The Elms, 14 High Street* – character conversion

The same scheme referred to by Mr Cannon.

Flat 1 sold for £185,000 in October 2020 and Flat 7 for £197,500 in the same month. They were both smaller than the subject flat having only one bedroom and 441 sq.ft. of accommodation.

72 *George House, High Street* – character conversion

None of the flats had been inspected but the following information had been obtained:

No.5 George House	September 2017	£245,000	source: Land Registry
No.1 George House	December 2017	£265,000	source: Land Registry
No.2 George House	December 2017	£185,000	source: Land Registry
No.4 George House	October 2018	£335,000	source: Land Registry
No.3 George House	October 2019	£289,000	source: Land Registry
No.1 George House	June 2021	£260,000	source: Agent asking price

73 *Maisonettes at The Whitehouse* – modern development

Two storey maisonettes built to the rear of The Whitehouse. The following leases had been sold and extended:

6 The Whitehouse	March 2017	£190,000	source: Land Registry
7 The Whitehouse	April 2017	£200,000	source: Land Registry
8 The Whitehouse	February 2020	£205,000	source: Land Registry

74 *The Croft* – modern development

Two bedroom flats on long leases.

27 The Croft	April 2020	£228,000	source: Land Registry
32 The Croft	September 2020	£250,000	source: Land Registry

75 In summary, Mr Herbert considers the sales of flats in 'character buildings' to be more relevant evidence than sales of modern flats. He has also spoken to the Manager of Peter Clarke estate agents' Henley office who advised that 'he is of the opinion that the likely achievable price for number 14 with the benefit of an extended lease and brought back up to date in terms of condition would be a maximum of £250,000'. He also points out that the sales evidence above is for extended or otherwise long leases with the benefit of Act rights.

Considering all points, Mr Herbert submits for an extended lease value of £250,000.

Tribunal

76 In assessing the figure the Tribunal inspected the exteriors of all the properties referred to by the parties and extensive documentary evidence supplied of which the information above is only a summary. The Tribunal took account of the oral evidence provided at the hearing and are grateful to the parties for their input.

77 In principle, the Tribunal agrees that comparable sales evidence is to be preferred to values obtained from relativity tables, especially where the evidence produced to compile the tables will not necessarily be local, but in this case there is clearly nothing directly comparable to 14 The Whitehouse having sold on the open market by extended lease and the Savills graphs are relevant.

78 The Tribunal agrees with Mr Herbert that if general comparables are to be used, then sales of flats in character buildings provide better evidence than sales in modern blocks.

79 However, the most striking piece of evidence provided is in fact heresay provided by Mr Herbert who advises that the Manager of Peter Clarke's office considered the value of the subject flat to be a maximum of £250,000 extended 'brought back up to date in terms of condition'. Flat 14 had been converted in 1973 and ignoring any tenant improvements in accordance with Schedule 13.3(2)(c) of the Act but assuming it to be in the condition required by the terms of the lease, the fixtures and fittings including the kitchen and bathroom suites would now be 47 years old and dated. It is highly likely that they would need refurbishment to bring the flat to current standards and the cost of doing so would have to be deducted from the agent's figure of £250,000.

80 On Mr Herbert's evidence, £250,000 sets the ceiling for a refurbished version of this flat and although he applies this in his valuation, there must be some allowance for the cost of refurbishment.

81 Furthermore, when considering the comparables, there is ample evidence of sales of long leases above £200,000 but according to the information provided, none have ground rents close to the £530 currently paid or minimum increase to £795 in just over two years' time, which must have an adverse effect on the value of the extended lease, other things being equal.

82 Taking these factors into account, the Tribunal finds the extended lease value to be £230,000 at the valuation date assuming it had been maintained in accordance with the terms of the lease.

83 The Tribunal accepts the parties' submissions in this case that the freehold vacant possession value, although a fiction, would be a notional 1% greater than the extended lease value, i.e. £232,300 for the purposes of premium calculation.

The Tribunal's Valuation

84 Applying the inputs determined by the Tribunal:

Diminution in value of the landlord's interest per Sch.13 para.3(1)

Term

Ground Rent to 24.3.23	£ 530	
Years Purchase 2.64 years 5.75%	<u>2.38644</u>	£ 1,264

Ground Rent 25.3.23 to 24.3.48	£ 795	
Years Purchase 25 years 5.75%	13.0927	
Present Value 2.64 years 5.75%	<u>0.86277</u>	£ 8,980

Ground Rent 25.3.48 to 24.3.72	£ 1,192	
Years Purchase 24 years 5.75%	12.8456	
Present Value 27.64 years 5.75%	<u>0.21325</u>	£ 3,265

Reversion

Value of Freehold vacant possession	£232,300	
Present Value £1 51.64 years 5.5%	<u>0.06298</u>	£14,630

Less Value of Landlord's interest after extension

Freehold Vacant possession value	£232,300	
Present Value £1 141.64 years 5.5%	<u>0.000508</u>	
		<u>£ 118</u>
Landlord's present interest		£28,021

Landlord's Share of Marriage Value

per Sch.13 para.4(2)

i value of Tenant's interest after extension	£230,000	
ii value of Landlord's interest after extension	<u>£ 118</u>	
		£230,118

Less

i value of Tenant's interest before extension	£ 160,055	
ii value of Landlord's interest before extension	<u>£ 28,021</u>	
		<u>£188,076</u>

Marriage Value

Landlord's share 50%

	£ 42,042	
		<u>£21,021</u>
		£49,042

Premium

rounded to

£49,000

The Respondents proposed modifications to the terms of the new lease

85 The terms of the lease extension are agreed save for the following three clauses, proposed by the Respondent at clause 2.1 of the draft Deed of Surrender and Regrant (“the disputed clauses”):

(b) To add a new clause 14 to the Fourth Schedule of the Lease as follows:

“The Tenant will reimburse the Landlord in respect of costs reasonably incurred including all legal fees, agents fees and costs in making any application to any judicial body in:

- a.(agreed)
- b.(agreed)
- c. the costs of preparation for and application to the Property Chamber of the First Tier Tribunal or other similar body required for the confirmation of the service charge to be paid in any particular year;
- d. preparation for and application to any appropriate judicial body to amend the terms of this Lease for the better management of the development.”

(c) To add a new clause 15 to the Fourth Schedule of the Lease as follows:

“if the rental contribution to expense referred to in clause 1(2) shall be in arrears or unpaid the lessor shall be entitled to be paid interest at 4% above HSBC bank plc base rate or 10% whichever shall be the higher from the date such rent or service charge became due to the date of payment thereof.”

The Law

86 Section 57(1) of the 1993 Act provides that:

“Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1)), the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate to take account:

- (a) ...
- (b) ...
- (c) ... ”

87 Section 57(2) provides:

“Where during the continuance of the new lease the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance—

(a) the new lease may require payments to be made by the tenant (whether as rent or otherwise) in consideration of those matters or in respect of the cost thereof to the landlord; and

(b) (if the terms of the existing lease do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount) the terms of the new lease shall make, as from the term date of the existing lease, such provision as may be just—

(i) for the making by the tenant of payments related to the cost from time to time to the landlord, and

(ii) for the tenant’s liability to make those payments to be enforceable by [re-entry or otherwise (subject to section 85 of the Tribunals, Courts and

Enforcement Act 2007)] in like manner as if it were a liability for payment of rent.”

88 Further, pursuant to section 57(6):

“Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as—

- (a) it is necessary to do so in order to remedy a defect in the existing lease; or
- (b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.”

89 Guidance from case law:

Gordon v Church Commissioners for England (LRA/110/2006), His Honour Judge Huskinson:

“39. The 1993 Act provides in section 57(1) that, subject to certain matters, the new lease to be granted to a tenant under section 56 “shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date”, subject to certain potential departures from these existing terms as provided for in section 57. Thus the starting point is firmly based in the terms of the existing lease.

41. In contrast to the approach where subparagraphs (a) to (c) of section 57(1) apply, the words in section 57(6) contemplate the parties having open on the table before them the terms of the existing lease and identifying one or more of those terms as being a term which, by reason of the matters in paragraphs (a) or (b), should either be excluded from the new lease or should be modified in the new lease. In my judgment there is no power under section 57(6) for a party to require that there is added into the new lease a new provision which is not to be found in the old lease. There is nothing illogical or unfair in this because, apart from the grant of the new lease, the parties would have continued to be bound by the terms of the old lease for the next X years where X may be a substantial period (over 50 years in the present case). It is one thing to exclude or modify a term or terms of the existing lease where a good reason (ie within paragraph (a) or (b) of section 57(6)) can be shown. It is another thing to permit a party to seek a rewriting of the lease by the introduction of new provisions.”

Rossman v The Crown Estate Commissioners [2015] UKUT 288:

“Section 57(6) of the 1993 Act provided the opportunity to ensure that defects in the existing lease were remedied when a new lease was granted, *Howard de Walden Estates Ltd v Aggio* [2008] UKHL 44, [2009] 1 A.C. 39, [2008] 6 WLUK 612 followed. However, the general presumption in s.57(1) was that a new lease would be in the same terms as the existing lease. It was implicit in s.57(6) that it was for the party seeking change to show the need for the exclusion or modification of the disputed term; there was no burden on the other party to show the contrary. The task of the First-tier Tribunal under s.57(6)(a) was to establish whether there was a proper basis for regarding the disputed term as defective. The party seeking change also had to show that the exclusion or modification argued for would cure, and not merely ameliorate, the defect.”

“Hague comments (at paragraph 32-10(a)) that “[the] word “defect” is not defined, but given the use of the word “necessary” a strict or narrow interpretation seems the proper one”, and therefore that “the use of [section 57(6)(a)] to attempt to modernise the terms generally in the face of opposition from the other party would not be permissible.”

Park v Morgan [2019] UKUT 20 (LC)

“49. Section 57(6)(a) permits a modification of the terms of the existing lease only where it is "necessary to do so in order to remedy a defect". The leading authority on the scope of the FTT's power to correct defects is the Lands Tribunal's decision in *Gordon v Church Commissioners for England* (2007) LRA/110/2006. As the FTT in this case reminded itself, it is not sufficient that the proposed variation may be convenient or consistent with current practice. It must be necessary to correct a defect, which, as the Lands Tribunal explained in *Gordon*, means:

"... a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party."

50. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 Lord Hoffmann, with whom the other members of the House of Lords agreed, emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". Any tribunal which is asked to find that a lease contains a defect capable of being remedied under section 57(6) should therefore proceed with caution.”

90

General principles drawn from Case Law:

- A general presumption in s.57(1) that the new lease will be in the same terms as the existing lease.
- Section 57(6) does not confer a general power for a party to require that a new provision can be added to the new lease, which is not to be found in the old lease.
- It is implicit in s.57(6) that it is for the party seeking change to show the need for the exclusion or modification of the disputed term; there is no burden on the other party to show the contrary.
- A lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the standpoint of both a reasonable landlord and a reasonable tenant.
- “Defect” is not defined, but use of the word “necessary” connotes a strict or narrow interpretation and that “the use of [section 57(6)(a)] to attempt to modernise the terms generally in the face of opposition from the other party would not be permissible.”
- A defect is a shortcoming below an objectively measured satisfactory standard and one which neither party can have intended to be included in the Lease as originally granted.
- The distinction between convenience and necessity is important. “The crucial question is not whether it is necessary to remedy the defect in the existing lease, but whether, given that there is a defect which must be remedied, it is necessary to make the exclusion or modification to achieve that.”
- A tribunal asked to find that a lease contains a defect capable of being remedied under section 57(6) should proceed with caution.

91 Respondent

The disputed clauses do not appear in the old lease. The Respondents reasons for proposing the new clauses are:

- (i) to bring the lease in line with four other renewal leases completed within the same block.
- (ii) The absence of an interest clause means that the other leaseholders are, in effect, financing late payment of service charge.

92 Applicant

The Applicant objects to the inclusion of the disputed clauses for the following reasons:

- (i) It may be convenient for the landlord to include the new clauses, but it is not essential and the case has not therefore been made out for the proposed changes.
- (ii) The inclusion of a charging clause for litigation costs is a disadvantage to the tenant who is not obliged to agree onerous new terms.
- (iii) The principles of the relevant parts of the 1993 Act have not been made out.

93 Tribunal

The relevant tenant covenants are set out in the Fourth Schedule of the old lease:

Clause (1) is a tenant covenant to pay the rent and additional rent (i.e. the service charge) as provided in the lease. There is no Clause 1(2). It is assumed the proposed additional clause 15 should reference Clause (1).

Clause (12) provides in terms, for the tenant to pay all costs charges and expenses (including legal and surveyors costs) incurred by the landlord in or in contemplation of any consent application by the tenant and of any steps in proceedings or service of notices under s146 or 147 of the LPA 1925 (including reasonable costs charges and expenses of inspection and preparation of schedules of dilapidations) whether or not any right of re-entry or forfeiture is waived or avoided.

There is no general charging clause for legal and administrative costs incurred in connection with proceedings before a court on lease variation applications, or tribunal proceedings, as proposed by the new clause 14 (c) and (d).

94 There is no interest charging clause on late payments, as proposed by the new clause 15.

95 The new lease includes an existing obligation on the part of the landlord for provision of services, including repairs, maintenance and insurance. However, the lease also includes a tenant covenant to pay a variable charge for such services. The provisions of s57(2) are therefore not engaged.

96 The Respondent has not provided any submissions linking the proposed new clauses to the requirements of s57(6) of the Act. It does not suggest that the modifications are required to remedy a defect in the old lease (s57(6)(a)); or that it would be unreasonable in the circumstances to include without modification, any term of the old lease which in view of changes occurring since the date of commencement of the old lease has affected the suitability of the provisions of the old lease (s57(6)(b)). In short, the Respondent is seeking to improve its position by including the disputed clauses, because they have been accepted by other tenants of the block on their respective renewals.

97 The lease includes adequate tenant covenants for payment of rent and service charge, which the landlord can enforce in the usual way. It also provides for the tenant to

pay the landlord's legal and other costs in connection with any litigation arising from breach of the tenant's covenants. The absence of a general charging clause for litigation costs incurred in connection with either tribunal proceedings or variation applications to the court, or for interest on late payments, does not render the lease defective. It would undoubtedly be convenient, indeed, advantageous to the landlord for the disputed clauses to be included in the lease, but that is not the test.

98 For the above reasons and in the absence of any evidence or argument that the disputed clauses either address a defect in the lease, or are modifications to existing clauses that are required, because it would be unreasonable not to include the modifications, due to changes occurring since the grant of the lease, the Tribunal determines that the terms of the acquisition should not include the 'disputed clauses'.

I.D. Humphries B.Sc.(Est.Man.) FRICS
Chairman

Date: 20 October 2021

Appeal to the Upper Tribunal

Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal and the result sought by the party making the application.