FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/OLR/2021/0781 V:CVP**
Property	:	**Flat 5, 7 Clipstone Street, London W1W 6BD**
Applicant	:	**Stephen Jack Peter**
Representative	:	**Ian Davidson MRICS**
Respondent	:	**Katarzyna Karolina Teofilak**
Representative	:	**Piers Harrison (counsel)**
Type of Application	:	**93 Act New Lease of Flat**
Tribunal member(s)	:	**Judge Sheftel** **Mrs Sarah Redmond MRICS**
Date of Decision	:	**28 April 2022**

DECISION

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Background

1. This is an application made pursuant to Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act") for a determination of the premium to be paid and the terms for a new lease.

2. The application relates to Flat 5, 7 Clipstone Street, London W1W 6BD (the "Property"). 7 Clipstone Street is a modern 5-storey development on the corner of Clipstone Street and Great Titchfield Street in the Fitzrovia

area of London. The building comprises a restaurant on the ground and basement floors and nine flats above. The subject property is a one-bedroom flat situated on the third floor and benefits from a lift that serves the property. Heating and hot water are provided by combination boiler and double-glazed aluminium framed windows have been fitted throughout.

3. The Applicant served a Section 42 Notice of Claim 18 January 2021, proposing a premium for a lease extension of £110,000. The Respondent served a Counter-Notice dated 18 March 2021, proposing a premium of £215,000.

4. As at the date of the hearing, there remained several issues in dispute. With regard to the premium payable, the parties had not agreed either the freehold value with vacant possession or relativity. Further, proposed modifications to the terms of the lease were not agreed.

5. The hearing of this application took place on 22 March 2022. The Respondent, landlord, was represented by Piers Harrison (counsel) and expert evidence was provided by Mr Andreas Christou MA MRICS. The Applicant, tenant, appeared in person in relation to the issues relating to the proposed variations to the lease. However, in respect of the valuation matters, he was represented by Mr Ian Davidson MRICS, who also provided expert evidence. Mr Davidson's original report did not contain the standard expert's declaration. However, at the request of the tribunal Mr Davidson provided a signed declaration following the conclusion of the hearing.

6. The parties had provided a bundle in advance of the hearing. However, at the start of the hearing Mr Peter sought permission to adduce additional evidence in the form of photographs of the common parts, which showed the common parts in a poor state of repair. The Respondent did not oppose the admission of such evidence provided the tribunal also admitted evidence of a section 20 notice that had been served for proposed internal works. In the circumstances, we considered that it was consistent with the overriding objective that all of the late evidence could be admitted.

Valuation

7. The following matters have been agreed between the parties:

(1) Valuation date: 18 January 2021

(2) Unexpired Term: 34.2 years (the term date of the lease was 25 December 1974)

(3) Floor area of the flat: 399 sq ft

(4) Ground rent: £150 per annum rising to £200 per annum from 6 April 2027

(5) Deferment Rate: 5%

(6) Capitalisation Rate: 6%

(7) 1% differential between the unimproved extended lease value and the unimproved freehold vacant possession.

It was also not disputed that the ground rent is £150 per annum rising to £200 per annum from 6 April 2027. At the hearing, the parties agreed that the capitalised value of ground rent should be £2,747.

8. Turning to the matters in dispute:

(1) Mr Davidson suggested a freehold value with vacant possession ("FHVP") of £450,000 and a relativity of 69%. This produced an existing lease value of £310,500 and a premium of £111,503.

(2) In contrast, in Mr Christou's view, the FHVP should be £585,800. For relativity, Mr Christou adopted a figure of 56.25%. This produced an existing lease value of £329,513 and a premium of £181,118.

9. There was no suggestion from either valuer that the proposed modification of lease terms would impact upon the valuation figures.

The Applicant's evidence

10. Mr Davidson made reference to two comparables:

(1) flat 1, 100 Cleveland St, W1T a long leasehold flat 1 bedroom of approximately 462 sq ft that sold on 7 January 2022 for a rate of £1,071 per sq ft; and

(2) 19 Rosetti House, W1W, that sold for £1006 per sq. ft on or around 19 November 2021.

Unfortunately, no further details particulars were provided in relation to either property which would have allowed the tribunal to assess their suitability as comparators (beyond a basic LONRES website print out for the former property, giving only the information set out above).

11. Mr Davidson also noted that there had been a sale of flat 3 in the subject building in August 2018 for a rate of £1,552 per sq. However, he considered that this should not be relied on as a comparable given how long prior to the relevant date the sale had taken place and, in particular, due to the fact that it pre-dated the pandemic. The impact of the pandemic on the market was a key feature of Mr Davidson's analysis. His evidence was that he had spoken to several local estate agents who confirmed his opinion that there had been a significant drop in the market in prime central London as a result of the pandemic. Under cross examination as to whether he had also consulted indexes to confirm the assertions as to the effects of the pandemic on the local market, Mr Davidson sought to minimise the value of indexes and considered that local agents who had experience and familiarity of the particular local area provided a better and more reliable guide to what had been happening. In this regard, he stressed that valuation was subjective – an art not a science – and involves determining what someone would actually pay.

12. On relativity, Mr Davidson submitted that, consistent with the *Zucconi* guidance, actual sales evidence was the best evidence and that this was preferable to the graphs – although it did not appears to be disputed that insofar as the graphs were applicable, it was appropriate to take the average of the two Savills (2016) and Gerald Eve (2016) graphs, being 56.34% & 56.16%.

13. Mr Davidson relied heavily on the fact that there had been an agreed sale for the subject property in January 2021. The tribunal was informed that a sale had originally been agreed at £390,000 which was then reduced to £370,000 – albeit that sale ultimately fell through. The Applicant asserted that the prospective buyer pulled out due to the covenant in the lease requiring consent for subletting.

14. Ultimately, Mr Davidson's analysis led to a relativity of 69%. This figure was reached on the basis of the two graphs and the figure of 82% being

the relativity of the aborted sale compared to Mr Davidson's freehold value of £450,000. The figures from the graphs of 56.16% + 56.34% plus the 82% produce an average of 64.83%. However, Mr Davidson adjusted this to 69% on the basis that it was "closer to the actual sale evidence".

15. Although Mr Davidson appeared to acknowledge the necessity for a deduction for a no-Act world in principle (as an alternative he was prepared to deduct 10% in respect of 1993 Act rights), he also suggested that a buyer would not necessarily know about Act rights or the Upper Tribunal's decision in *Sloane Stanley v Mundy* [2016] UKUT 223 (LC). Indeed, he referred to the fact that the prospective buyer in the aborted sale had been from Israel and would not necessarily have known of the benefits of the 1993 Act. For this reason, he considered that the investment method of valuation was permissible and in support of this he referred to similar one-bedroom rentals of which he had been advised, again by local estate agents.

The Respondent's evidence

16. On the issue of FHVP, Mr Christou made reference to sales of six one-bedroom properties as comparables. He also provided sales particulars for the properties. Further, Mr Christou used Land Registration indexation for flats and maisonettes in the City of Westminster for the month of the valuation date to provide an adjusted price for each comparable:

    (i) Flat 62, 49 Hallam St W1W, which provided an adjusted price of £535,068 (£1,555 per sq ft);
    (ii) 11 Culbourne House, 4 Hanson St W1W, which provided an adjusted price of £440,220 (£1,397 per sq ft);
    (iii) Flat 22, Furnival Mansion, Wells St W1T, which provided an adjusted price of £543,901 (£1,311 per sq ft);
    (iv) Flat 23, Furnival Mansion, Wells St W1T, which provided an adjusted price of £557,341 (£1,400 per sq ft);
    (v) Flat 45, Goodwood Court, 54-57 Devonshire Street, London W1, which sold in April 2020 for £850,000 and provided an adjusted value of £1,452 per sq ft;

(vi) Flat 3, Capital House, 7 Clipstone Street, which provided an adjusted price of £634,111 (£1,458 per sq ft).

17. The final property (the sale of a different flat in the same building) was also referred to by Mr Davidson – although as set out above, Mr Davidson had discounted this as a comparable given how much time had passed since the date of sale. Mr Christou acknowledged that it was a historic sale although nevertheless considered that it provided a useful check.

18. Taking an average of the adjusted prices, Mr Christou arrived at a figure of £1,429 per sq ft. This provided an extended lease valuation of £580,000, and, applying a 1% uplift, a freehold value with vacant possession of £585,000.

19. On cross-examination, Mr Christou was challenged that the comparables that he had chosen were superior to the subject property: in particular on the basis that the subject property is situated above a restaurant and also having regard to the condition of the common parts – noting the photographs that Mr Peter had produced at the start of the hearing. Mr Christou appeared to accept that the first property was of a better standard than the subject property, although still took the view that it was a useful check. In relation to comparables (ii)-(iv), he considered that the condition of the common parts at 7 Clipstone Street and the fact that the flat was above a restaurant could be balanced against the fact that flat had the benefit of a lift – unlike comparables (ii)-(iv), which were walk-up properties. He also noted that a section 20 notice had been served in respect of carrying out internal works.

20. On the issue of relativity, Mr Christou considered that the aborted sale was not a transaction, nor was there any other market evidence which could assist in determining relativity. As a consequence, he arrived at the figure of 56.25%, being the average of the two Savills (2016) and Gerald Eve (2016) graphs in accordance with the Upper Tribunal decision in *Deritend Investments (Birkdale) Limited v Treskonova* [2020] UKUT 0164 (LC).

Discussion

21. Beginning with the evidence of comparable sales, we consider that comparables (ii), (iii) and (iv) provided by Mr Christou as listed above

are helpful for the purposes of calculating the FHVP. We discount flat 3, 7 Clipstone Street given the historic nature of the sale. We also consider Flat 62, 49 Hallam St and Flat 45, Goodwood Court to be less useful as comparables on the basis that they both they both have caretaker element as well as appearing to be in clearly superior condition having regard to the evidence provided.

22. Unfortunately, as set out above, we do not have sufficient material to be able to determine whether the two properties referred to by Mr Davidson are useful comparators.

23. We accept that 11 Culbourne House and Flats 22 and 23 Furnival Mansions might have better common parts than the subject building and that those flats are not situated above a restaurant. However, we agree with Mr Christou's analysis that this can be balanced out against the fact that the subject property has a lift.

24. On the issue of adjustments for time, while we note Mr Davidson's submissions that indexes must be treated with a degree of caution, they nevertheless provide an objective benchmark and do not accept any suggestion that they should be discounted entirely in favour of the views of local estate agents. Mr Davidson's submission that there was a significant drop in the market as a result of the pandemic might be correct but was not substantiated. One way of doing might have been to use the Land Registry index as a cross check but no such analysis was provided. On the other hand, insofar as this affects the present case, the issue does not have a huge bearing on the outcome: the comparables provided by both valuers were (with the exception of flat 3 in the building) based on sales during the pandemic and therefore the adjustments for time were in fact relatively modest as shown by Mr Christou's evidence.

25. The three comparables (11 Culbourne House and Flats 22 and 23 Furnival Mansions) applying the rates as adjusted to FHVP produce an average of £1,383 per sq ft and a freehold value with vacant possession of £551,817.

26. On relativity, while we agree with the Applicant with regard to the using actual transactional evidence where it exists, we do not consider that the

aborted sale falls into that category given that no transaction in fact took place as the buyer decided not to proceed at that price (or at all).

27. Accordingly, in the absence of transactional evidence, it falls that relativity can be determined by reference to the graphs. As the Upper Tribunal stated in *Deritend Investments (Birkdale) Ltd v Treskonova* [2020] UKUT 0164 (LC) at para.39:

> "The two PCL graphs are still rightly regarded as the most reliable and recent graphs of relativity. They provide objective evidence of relativity, based on a very large data set, and have been revised in light of close scrutiny by the Tribunal in *Mundy* . They should be considered as a starting point where no, or insufficient, transactional evidence has been submitted by the parties. They are not ideal, particularly for property outside PCL, but for the time being they provide the only treatment of relativity which can be regarded as reliable. Their use is always preferable to the use of an average of the RICS 2009 graphs."

28. In the circumstances, we agree with Mr Christou's figure of 56.25% for relativity being the average of the Savills 2016 (56.34%) and Gerald Eve 2016 (56.16%) graphs.

29. However, even if we were to accept the aborted sale as transactional evidence, we do not agree that it leads to the result contended for by Mr Davidson. In particular, we agree with the Respondent that there must be a deduction for 1993 Act rights. We note Mr Davidson's submission that buyers might not be aware of the benefits of the 1993 Act. However, we do not consider that this argument is sustainable. As Mr Harrison pointed out, the Upper Tribunal in *Cadogan v Cadogan Square Properties Limited* [2011] UKUT 154 (LC) confirmed at para.43 that "*in McHale v Earl Cadogan [2010] EWCA Civ 1471 the Court of Appeal decided that the rights under the 1993 Act should not be taken into account when valuing the existing leases for the purposes of marriage value*".

30. Moreover, as the Upper Tribunal noted in *Contractreal v Smith* [2017] UKUT 178 (LC)at para.31:

> "Sales of leases without the benefit of the Act are, to all intents and purposes, hypothetical so there can be no direct comparison between sale prices with and without Act rights. But it has long been recognised by the Tribunal that having Act rights is a valuable benefit; see, for instance, *Nailrile Limited v Earl Cadogan [2009] RVR 95* at paragraphs 216 to 217 and, more recently, The Trustees of the Sloane Stanley Estate v Mundy [2016] UKUT 0223 (LC) at paragraph 121. The amount of that benefit increases as the unexpired term reduces. It is beyond doubt that Act rights confer a benefit which is reflected in the value of leases in the actual market and which falls to be disregarded when calculating the premium payable for a new lease under the 1993 Act. This

applies throughout England and Wales without exception; the West Midlands is no different to any other region in this respect and the FTT gave no persuasive reason why it should be."

31. Finally, as to Mr Davidson's analysis based on the investment method, while it is accepted that in some circumstances this might be appropriate, we do not consider that this provides much assistance in the present case. In particular, we agree with the Respondent's submission that, on the facts of the present case, it merely introduces other variables which are themselves open to argument and dispute and on which the tribunal has not received detailed evidence. For example, not only did the Respondent contest the appropriate deduction for management charges, but it was pointed out that no allowance had been made for matters such as service charges, insurance and voids. The Respondent also challenged what should be the proper capitalisation rate and ultimately submitted that the method was only ever suitable for very short leases. For all these reasons, we consider that the Applicant's conclusions based on this alternative calculation, do not undermine the tribunal's determination of valuation as set out above.

32. An appendix showing the tribunal's calculations is attached. Based on our determination as to FHVP (£551,817) and relativity (56.25%) we determine the premium payable to be **£170,699**.

Proposed modifications to the lease

33. Prior to the hearing, both sides had sought various proposed modifications to the lease. The Applicant had proposed the following two changes:

(1) In relation to clause 2(xiv), preventing alterations:

At the end of sub-clause 2(xiv) to add the words "*always provided that the Lessee shall be entitled to make non-structural internal alterations without the prior consent of the Lessor*"

(2) In relation to clause 2(xx), which bars alienation without consent, which is not to be unreasonably withheld:

At the end of that sub-clause to add the words "*always provided that the Lessee shall be entitled to sublet the flat for a period of not more than three years by an Assured Shorthold Tenancy Agreement or similar tenancy in force at the relevant time without the Landlord's consent*".

34. The Respondent proposed the following change to clause 2(xxi) (in relation to registration with the landlord of assignments and disposals:

> The words *"A fee of £10"* should be deleted and replaced with the words *"a reasonable fee of not less than £60 plus VAT"*.

35. The Applicant's stated position in relation to this proposal was that he would agree the words "*a reasonable fee of not more than £60 plus VAT*". However, at the hearing the Applicant appeared to seek to resile from this suggesting that his primary position was that no amendment should be made.

The law

36. The tribunal's powers to make alterations to the terms of the existing lease are constrained by statute. Section 57(1) of the 1993 Act provides that:

"(1) 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) of the omission from the new lease of property included in the existing lease but not comprised in the flat

(b) of alterations made to the property demised since the grant of the existing lease; or

(c) in a case where the existing lease derives (in accordance with section 7(6) as it applies in accordance with section 39(3)) from more than one separate leases, of their combined effect and of the differences (if any) in their terms.

37. 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."

38. In essence, and so far as is relevant to the present case, the tribunal has jurisdiction to modify terms of the existing lease only where either (i) it is necessary to do so in order to remedy a defect in the existing lease, or

(ii) where in the circumstances it would be unreasonable 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.

Discussion and decision

39. Dealing first with the Applicant's proposed amendments, in relation to the alterations clause (2(xiv)), Mr Peter asserted that a prospective buyer had been put off a sale as a result of this clause. He also contended that another lessee had been permitted to make non-structural alterations. He submitted that non-structural alterations could improve the flat – and was now a common practice - and therefore would benefit not only the lessee but the freeholder as well.

40. Similarly, with regard to the alienation clause (2(xx)), Mr Peter asserted that a proposed sale fell through as a result of this clause. He also noted that assured shorthold tenancies had been created since the grant of the lease and submitted that the ability to grant short-term sublettings would be beneficial.

41. Mr Peter appeared to accept that neither clause was defective per se, but that section 57(6)(b) of the 1993 Act was nevertheless engaged – i.e. changes since the date of the commencement of the existing lease. In this regard, he relied on the advent of assured shorthold tenancies as a relevant change in relation to clause 2(xx) and the fact that lessees making internal alterations to flats had become more commonplace in relation to clause 2(xiv).

42. Both proposed amendments were opposed by the Respondent. Mr Harrison submitted that section 57(6) of the 1993 Act was not engaged: it could not be said that the existing clauses were defective and it was not the case that there had been changes that meant it would be unreasonable to include the clauses without modification. In his submission, the fact that a change might be desirable is not enough. Specifically, in relation to clause 2(xx), Mr Harrison stressed that the existing covenant does not prevent subletting, just that it must be with consent, not to be unreasonably withheld. It was submitted that this was a valuable safeguard for the landlord. He also noted that there could be further changes to the assured shorthold tenancy regime in the future.

43. Similarly, as to the alterations clause, he stressed that the clause does not mean that changes cannot ever be made, just that the lessee must obtain permission.

44. In the tribunal's determination, we find in favour of the landlord in relation to both covenants. We agree that it cannot be said that either clause is defective as presently drafted. With regard to clause 2(xiv), while we note Mr Peter's submission, we do not find that there have been any changes since the grant of the lease that would make it unreasonable to retain the existing clause without modification. Similarly, as regards clause 2(xx), even if the advent of assured shorthold tenancies amounts to a 'change' for the purposes of section 57(6)(b), we do not accept that it would be unreasonable to retain the existing clause without modification. In particular, we note that the clause as presently drafted does allow for subletting. Although the landlord's consent is required, the lease expressly provides that such consent is not to be unreasonably withheld.

45. Turning to the landlord's proposed amendment to clause 2(xxi), Mr Peter raised two grounds of objection. First, although his stated position had been to agree to a change to the clause provided that it allowed for a maximum of £60, he stated at the hearing that his principal position was that there should be no change at all. In the alternative, he stressed that the most important issue to him was certainty, and that the landlord's proposal, which set a minimum charge, the precise amount of which would be qualified only by the inclusion of the word 'reasonable' did not achieve that.

46. Mr Harrison submitted that the 'change' since the grant of the lease for the purposes of section 57(6)(b) was the change in the value of money, and that it would be inappropriate to maintain a sum of £10. Further, he noted that the Applicant's stated position had been that he had agreed to a change and therefore implicitly accepted that in principle this must be correct. On the question of certainty, he stressed that the inclusion of the word 'reasonable' was a clear check on what the landlord could charge and that the courts and tribunals frequently had to interpret the meaning of such word.

47. In our view, we do not accept that we are bound to conclude that there must be some change made to the clause. We note in this regard Mr Peter's submission at the hearing that his primary position was that there should be no change, notwithstanding the alternative offer that had been made previously and we do not accept that there has been a concession as a matter of principle that the clause should be changed. Ultimately, we do not conclude that the fact there has been inflation since the date of the lease means that it would be *unreasonable* to include the existing cause without modification having regard to the test set out in section57(6) of the 1993 Act. The original lease itself was granted for a term of over 80 years and the parties were prepared to have a flat fee for the entirety of that time notwithstanding the possibility of inflation.

48. **In the circumstances, the tribunal determines that the terms of acquisition should not include any of the proposed amendments**. As noted above, the tribunal was informed that the other terms of acquisition have been agreed.

Conclusion

49. For the reasons set out above,

    (1) we determine the premium payable to be £170,699.

    (2) the terms of acquisition should not include any of the proposed amendments.

Name: Judge Sheftel **Date:** 28 April 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix

5 Capital House, 7 Clipstone Street, London W1W 6BD

Facts and matters agreed and determined:

Third floor 2 room flat of 399 sq. ft.	
Valuation date:	18/01/2021
Capitalisation Rate:	6%
Marriage value:	50%
Deferment rate:	5%
Uplift to freehold value	1%
FHVP value psf	£1,383
FHVP	£551,817
Lease term:	25/12/1974 to 2/4/2055
Unexpired Term:	34.2 years
Ground Rent per annum, rising:	£150 for 6.21 years; £200 for 15 years, £250 for 12.99 years
Capitalised value of Ground Rent:	£2,747
Relativity with 34.2 years remaining:	56.25%
Value of existing lease:	£310,397

Calculation of premium:

Diminution in value of Landlord's interest:

Existing interest:			
Value of Ground Rent:		2,747	
Reversion to Freehold	551,817		
Deferred 34.2 years at 5%	0.1885	104,018	
		106,765	
Proposed interest:			
Reversion to Freehold	551,817		
Deferred 124.2 years @ 5%	0.0023	1,269	
Total diminution in landlord's interest:			105,496

Calculation of Marriage Value:

Proposed interests:			
Landlord	1,269		
Lessee	546,299	547,568	
Less Existing interests:			
Landlord:	106,765		
Lessee:	310,397	417,162	
Total Marriage Value:		130,406	
Attributable to Landlord @ 50%			65,203

Total Premium payable: **£170,699**