

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LEASEHOLD ENFRANCHISEMENT – DEVELOPMENT POTENTIAL – property purchased at auction four months before valuation date – enfranchisement premium determined at less than a third of auction price – sufficiency of FTT’s reasons – whether FTT bound to adopt auction price as market value – s.24, Leasehold Reform, Housing and Urban Development Act 1993 – appeal dismissed*

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL  
(PROPERTY CHAMBER)

BETWEEN:

PROPERTIES AY&U LIMITED

Appellant

-and-

BARHAM HOUSE FREEHOLD LIMITED

Respondent

Re: 39-40 Molyneux Street,  
London W1

Martin Rodger QC, Deputy Chamber President and Mark Higgin FRICS

Heard on 15 June 2022

*Paul Clarke*, instructed by Jury O’Shea LLP for the appellant  
*Sam Madge-Wyld*, instructed by Comptons Solicitors LLP for the respondent

The following cases are referred to in this decision:

*Allen v Leicester City Council* [2013] UKUT 16 (LC)

*Brickfield Properties Limited v Ullah* [2022] UKUT 25 (LC)

*Flannery v The Halifax Estate Agents Limited* [2000] 1 WLR 377

*Ridgeland Properties Ltd v Bristol City Council* [2009] UKUT 102 (LC)

*Trustees of Sloan Stanley Estate v Mundy* [2018] 1 WLR 4751

*Wellcome Trust Limited v Rominees* [1999] 3 EGLR 299

## **Introduction**

1. By a decision issued on 10 December 2021 the First-tier Tribunal (Property Chamber) (the FTT) decided that under section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 the premium payable by the respondent, Barham House Freehold Ltd, to the appellant, Properties AY&U Ltd for the freehold of Barham House, 39-40 Molyneux Street, London W1H 5JA should be £30,000. It arrived at that conclusion after hearing the evidence of expert witnesses for both parties. For the respondent Mr James Hayes MRICS had given evidence that the open market value of the freehold interest was £20,000, which should be increased to £30,000 if the FTT was satisfied that there was some development value associated with the possibility of adding additional flats to the building. For the appellant, Mr Jatinder Dhanoa MRICS gave evidence that the premium payable on enfranchisement should be in excess of £1.2 million based on the development potential of creating a three-bedroom flat in the basement of the building and adding a two-storey rooftop development within a year of the valuation date.
2. With the permission of this Tribunal the appellant now appeals against the FTT's decision. It no longer suggests that the price payable under section 24 of the 1993 Act should be in excess of £1.2 million but argues instead that having dismissed the evidence of Mr Dhanoa the FTT was wrong not then to value the freehold at £91,000, which was the price paid by the appellant for the property at auction only four months before the valuation date.

## **The facts**

3. Barham House is a four-storey purpose-built block of eight flats which was constructed in 1938. It is located in the Molyneux Street conservation area to the east of Edgware Road in the London Borough of Westminster and sits in the middle of a terrace of 18<sup>th</sup> century houses which are all listed buildings. Barham House itself is not listed but it is mentioned in the conservation area policy as a building of merit. The terraced houses on either side are three-storey but Barham House is a four-storey building and rises above them.
4. Each of the terraced houses has a very small open lightwell at the front of the building from which light is admitted into a basement. The pavement at the front of Barham House abuts the face of the building and there is no lightwell and no basement, or at least no basement to which access is available.
5. It is possible that Barham House was constructed on the foundations of two buildings which previously stood on the site and formed part of the terrace. If so, a void may exist beneath the ground floor of the current building where there was previously a basement. The terrace is shown in conservation area policy documents as having originally been continuous but the existence of a basement level below the modern building is a matter of speculation.
6. There are two flats on each of the four floors of Barham House and all eight flats are let on long leases. On the ground floor a narrow communal hallway leads to a staircase to the upper floors and a door gives access to a small yard at the rear of the building. One of the ground floor flats has been extended at the rear into the yard.

7. The freehold interest in the building was offered for sale at auction on 13 February 2020. The auction particulars described the lot as a freehold ground rent investment and suggested a guide price of £15,000 plus. The Tribunal was told that the vendor was a company in the Grainger Group, one of the UK's largest residential property companies.
8. At the conclusion of the auction the appellant was the successful bidder at a price of £91,000.
9. Almost immediately after the auction the respondent gave notice under section 13 of the 1993 Act on behalf of leaseholders of flats in the building that it intended to exercise the right to acquire the freehold. The notice was later said to be defective and a second notice was served on 10 June 2020. Both notices offered a premium of £18,000 for the freehold.
10. The sale to the appellant was completed on 8 April 2020.
11. On 11 May 2020 the appellant received pre-application planning advice from Westminster City Council. It had requested advice on the prospect of obtaining planning consent to excavate a single-storey basement to create a three-bedroom flat with associated light wells at the front and rear of the building, and to erect either a single-storey or a double-storey roof extension to provide either two three-bedroom flats or four one-bedroom flats.
12. In its advice the local planning authority recorded that only written advice had been sought and that no site visit had been made. It also referred to the fact that only limited information had been supplied with the pre-application enquiry and that floor plans which it had requested had not been provided. Barham House was described as making a positive contribution to the conservation area and the authority considered that the proposed roof extension would make it highly conspicuous and incongruous and would be detrimental to the character and appearance of the conservation area and harmful to the setting of the surrounding listed buildings. In short, there was no chance of planning permission being obtained for the proposed roof-top extension.
13. The basement excavation project faced fewer policy objections and the authority took the view that it would not harm the character or appearance of the conservation area. The acceptability of the proposed unit was nevertheless difficult to assess; one relevant consideration was whether it could receive enough natural light to form acceptable living accommodation. In principle, however a single basement level was likely to be considered acceptable subject to compliance with design standards.

### **The FTT's decision**

14. The parties were unable to agree the purchase price for the freehold and that issue was referred to the FTT. Before the hearing the parties agreed that the value of the rental income and reversion was £19,000. The only matters remaining in issue were the development value of the building and the value of appurtenant property. The appurtenant property, which the respondent is entitled to acquire along with the freehold of the building itself, comprises the narrow concrete apron separating the building from the pavement on the Molyneux Street frontage and the small rear yard used for the storage of bins and bicycles.

15. The FTT recorded legal submissions by Mr Madge-Wyld from which it derived the following statements of principle:
  - (1) Where the subject property has been sold shortly before or after the valuation date, the sum paid is the value of the freehold subject to any necessary adjustment (statutory or otherwise).
  - (2) Where there is evidence of a comparable sale in the open market, a residual valuation should not be used (referring to decisions of this Tribunal in *Allen v Leicester County Council* [2013] UKUT 16 (LC) and *Ridgeland Properties Ltd v Bristol City Council* [2009] UKUT 102 (LC)).
16. The FTT then recorded the evidence of Mr Hayes who considered that there was no development value associated with the property and that the maximum amount that the market would pay for hope value was £10,000. It was clear from the pre-application advice that no rooftop development would be allowed; there was uncertainty about what structure was below ground level and whether any previous basement void had been filled in; it was not clear whether habitable accommodation could be created in the basement nor whether development in the yard area would be feasible.
17. The FTT then gave an account of Mr Dhanao's evidence. He had carried out a residual valuation and spoke to a value of £1.23 million. Mr Dhanao confirmed that he did not think it was necessary to refer to the auction sale price, two months before the valuation date. He had not mentioned it in his report because he did not consider it was a material factor. He thought the guide price at auction of £15,000 "might be wrong" and that the market at the time of the auction in February 2020 might have been "nervous" due to the covid pandemic. He explained his residual valuation and confirmed that it was based on certain assumptions, namely, that rooftop development would be permitted in the future, that there was a basement which had been filled in and could be excavated, that the building would remain structurally sound after the excavation, and that the cost of the excavation would not be excessive.
18. Mr Madge-Wyld invited the FTT to conclude that the appellant had overpaid for the property and that the market would not have paid £91,000 at the valuation date. A purchaser would pay no more than £10,000 for the possibility that there may be development value sometime in the future.
19. The FTT's conclusions were comprised in four relatively short paragraphs. As part of the appeal concerns the sufficiency of its reasoning, we will set that part of the decision out in full:
  - "36. The tribunal has not referred in detail to the component parts of Mr Dhanao's residual valuation because it had determined that such an approach is not a reliable basis upon which to assess the premium. It is a method of last resort.
  37. Moreover, the tribunal is not convinced that Mr Dhanao's method of valuing the proposed flats in the basement and on the roof of the block results in values

which could realistically be achieved in the open market. His approach to the valuation was not underpinned by any evidence nor had he considered the price paid by his client to be a relevant factor or indeed why his client had paid such a sum.

38. No evidence has been produced to support the likelihood of the proposed development either obtaining planning permission or being economically viable. Little consideration was given to the practicalities of undertaking the basement development where, as here, the ground floor flats are demised and the remaining area is a common part. The tribunal accepts that there is very little prospect of any rooftop development in view of the local authority's guidance.

39. The tribunal finds that a purchaser would consider this a very speculative development opportunity adding no more than the £10,000 offered by the applicants. The value of the rear yard at £1,000 was not contested."

As a result, the FTT determined that the premium payable on collective enfranchisement was £30,000. It is apparent that that figure represented the agreed sum of £19,000 for the value of the reversion to the leases, plus £10,000 hope value and £1,000 for the value of the appurtenances.

## **The appeal**

20. At the hearing of the appeal the appellant was represented by Mr Paul Clarke, who had not appeared before the FTT and had not settled the ground of appeal. The respondent continued to be represented by Mr Madge-Wyld.

### *The scope of the appeal*

21. There was some discussion between Mr Clarke and the Tribunal about the scope of the appeal. The application for permission to appeal was supported by draft grounds of appeal running to 12 paragraphs. These drew attention to the FTT's acceptance that in principle and subject to any necessary adjustments the price achieved on a sale of the subject property shortly before the valuation date indicated its value. Reference was then made to the auction price of £91,000. The draft grounds of appeal went on:

"The tribunal was wrong to assess the premium at just £30,000 in these circumstances. At a minimum, the premium should have been £91,000, no reason having been put forward for adjusting the real value downwards."

22. The draft grounds complained that the decision was almost entirely lacking in any reasoning and that such reasoning as there was, was wrong. The remaining paragraphs of the draft grounds explained why the FTT had been wrong to reject Mr Dhaneo's residual valuation and to overlook the evidence which, it was maintained, demonstrated that the value of the property was not less than £91,000.
23. The Tribunal granted permission to appeal on the single limited ground that the FTT did not explain why it did not regard the recent auction purchase price as a reliable indicator of

market value. Permission was specifically refused in relation to the arguments concerning Mr Dhanoa's residual valuation because the FTT had explained why it regarded it as unrealistic.

24. Despite the terms in which permission was granted Mr Clarke suggested that the appeal ought not to be limited to a challenge to the sufficiency of the FTT's reasons. He maintained that the reasons were inadequate and that the appeal ought to be allowed on that basis but he nevertheless submitted that the appeal should extend also to the general proposition that the FTT's valuation was "wrong". He pointed out that, in granting permission to appeal, the Tribunal had not referred to the whole of the discussion in the grounds of appeal and it should be taken to have given permission for any argument that had not specifically been refused.
25. We do not think there is any doubt about the scope of the Tribunal's permission to appeal. The only ground of challenge referred to is the FTT's omission to explain why it did not regard the recent auction purchased price as a reliable indicator of market value. A statement that "permission is granted on that ground" does not seem to us to be capable of a more expansive interpretation.

*The Tribunal's practice in valuation appeals from the FTT*

26. When the Tribunal gave permission to appeal it directed that the appeal would be a review of the decision of the FTT "with a view to a rehearing". As the Tribunal's Practice Directions explain, at paragraphs 8.2 and 8.4, appeals from the FTT usually take the form of a review of the decision at which the Tribunal considers oral or written argument but does not hear evidence. To avoid the cost and delay of sending a successful appeal back to the FTT for further consideration the Tribunal may direct that an appeal will be dealt with by a review "with a view to a re-hearing". Where this direction has been given the Tribunal will hear argument on the appeal and, if it decides to allow the appeal, will proceed (usually at the same hearing) to re-hear all or part of the evidence and make a new decision.
27. There was also some discussion at the start of the appeal on the practice of the Tribunal on hearing appeals from the FTT in valuation cases. The practice of the Tribunal's statutory predecessor, the Lands Tribunal, when it heard appeals from decisions of leasehold valuation tribunals was always to conduct a re-hearing; the consequences of that former practice were explained by the Lands Tribunal in *Wellcome Trust Limited v Rominees* [1999] 3 EGLR 299. The practice of conducting all appeals from the FTT and its predecessor tribunals as rehearings has not been followed by this Tribunal since its establishment in 2010. Unless a specific direction has been given, all appeals from the FTT will involve a review of the decision. No evidence will be heard unless, exceptionally, the Tribunal has directed that the appeal is to be conducted by way of rehearing or, after conducting a review, it has set aside the decision and is proceeding to remake it rather than remitting the claim to the FTT for redetermination.
28. The only difference between valuation cases and other FTT appeals (or those from leasehold valuation and residential property tribunals in Wales) is that where the issue is a valuation issue the Tribunal will be marginally more inclined to direct a rehearing so that it can make

more effective use of its special expertise in valuation (as it is required to do by rule 2(2)(d) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010).

*The sufficiency of the FTT's reasoning*

29. Despite this being the only ground on which permission to appeal had been obtained, Mr Clarke made limited submissions in support of the proposition that the FTT's reasoning had been inadequate.
30. We were referred to the decision of the Court of Appeal in *Flannery v The Halifax Estate Agents Limited* [2000] 1 WLR 377 which discussed the duty of a judge to explain why they have reached their decision. In that case after a hearing lasting eight days, at least four of which consisted of expert evidence, the trial judge had dealt with the profound disagreement between the experts in only a few lines, saying no more than that he preferred the evidence of the defendant's expert to that of the plaintiff's. The Court of Appeal set aside the decision, describing it as "entirely opaque". In its discussion of the requirement to give reasons the Court explained, at 382A:

"The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed, there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where, as here, there is disputed expert evidence; but it is not necessarily limited to such cases."

31. We have no doubt that the FTT gave a sufficient explanation of its reasons for preferring the views of the respondent's expert to those of the appellant's. Mr Dhanao's residual valuation was "not a reliable basis upon which to assess the premium". That was a matter of valuation judgment which not only was not challenged by Mr Clarke but was positively supported by him. The FTT was right to say that the valuation was unsupported by evidence about the likelihood of planning permission being obtained; that depended on design issues which Mr Dhaneao had assumed would be satisfactorily resolved. It was also right that he had given little consideration to the practicalities of undertaking the development. It correctly recorded that the pre-application advice showed that there was very little prospect of any rooftop development. Summarising all of those conclusions the FTT was entitled to say simply that any purchaser would consider this to be "a very speculative development opportunity" and to value it on that basis at the figure suggested by Mr Hayes.
32. There is, superficially at least, more substance in the suggestion that the FTT should have discussed the significance of the price paid for the subject property at auction only four months before the valuation date. But on closer consideration the reason for that omission is quite clear. The FTT recorded that Mr Dhanao himself did not consider the auction price



to be a relevant factor and had given no evidence about why his client had paid so high a sum. The appellant can therefore have been left in no doubt, reading the FTT's decision, why it had not found that the premium should be at least £91,000. The appellant can be taken to have read the evidence presented on its behalf and would have appreciated that it had been no part of its own case that that auction figure was an appropriate premium for the respondents to pay. It would have understood that its own expert witness did not regard the auction price to be a relevant consideration, and that he did not even refer to it in support of an alternative valuation if his more ambitious development value was rejected.

33. The only evidence concerning the auction price given on behalf of the respondent by its expert, Mr Hayes, focussed on explaining why it was an unrealistic and excessive price which did not reflect the sum that could reasonably be expected to be paid on another occasion in the open market. The FTT's conclusion that a purchaser would consider that the very speculative development opportunity added no more than £10,000, as Mr Hayes had proposed, would be understood by an informed reader of the decision as an acceptance of Mr Hayes' view and the reasons he had given for it.

34. We therefore dismiss the suggestion that the FTT's decision was inadequately reasoned.

*Was the FTT's valuation "wrong"?*

35. Although he did not have permission to appeal on this ground, we nevertheless heard Mr Clarke's submissions that, having dismissed Mr Dhanao's residual valuation, the FTT ought not to have accepted Mr Hayes' valuation. Mr Clarke described Mr Hayes' evidence as "a hypothetical attempt to get into the mind of the purchaser" and submitted that the FTT ought to have rejected that attempt and given much greater weight to the evidence of the behaviour of real purchasers in the market whose competitive bidding had established a market value of £91,000 only four months before the valuation date.

36. Mr Clarke suggested that the FTT had correctly identified that the purchase price of £91,000 should be the starting point of its determination of the premium, "subject to any necessary adjustment (statutory or otherwise)". He referred to the observations of Lewison LJ in *Trustees of Sloan Stanley Estate v Mundy* [2018] 1 WLR 4751, at [42], which had been referred to by the FTT:

"Sometimes markets behave irrationally. The Tulip mania of the mid-seventeenth century, the South Sea Bubble of the early eighteenth century, the railway mania of the mid-nineteenth century and the dot-com bubble of the late twentieth century are well-known examples. Even in the absence of these extreme examples, markets are often influenced by what John Maynard Keynes called "animal spirits". In my judgment there is no legal justification in a case like this for ignoring real market transactions."

37. Mr Clarke also referred to the decision of the Tribunal (Mr A J Trott FRICS) in *Allen v Leicester City Council* [2013] UKUT 16 (LC) in which it had rejected the use of a residual valuation and favoured a recent auction price as a reliable guide to value in a compulsory purchase case. At [45] the Tribunal said this:

“An auction is a recognised method of disposal to achieve open market value. Bids are made openly. It differs from an informal or formal tender where prospective purchasers make their offers in confidence and where there is scope for misjudging the market and offering considerably more than the other bidders.”

38. Mr Clarke submitted that the FTT should have been guided by these statements of principle and, that whatever the inadequacies of the appellant’s own evidence, it was wrong not to have arrived at a valuation based on the open market value established by the very recent auction price.
39. Mr Clarke’s submissions came close to the proposition that, as a matter of law, the FTT was not entitled to arrive at a valuation lower than the auction price. We reject that submission. The determination of the open market value of a property on a particular valuation date is a matter of valuation judgment. The question is a question of fact, not one of law. Statements by judges identifying valuation principles do not lay down rules of law. That was one of the grounds on which, in the *Mundy* case, Lewison LJ dismissed an appeal against the Tribunal’s refusal to adopt the so called “Parthenia model” for converting values derived from sales of leases into a value to be ascribed to the freehold. At [27] he made the important point (because an appeal to the Court of Appeal lies on a point of law only) that: “Whether to accept or reject the Parthenia model (unless perverse) was a question of fact for the UT.”
40. In *Allen v Leicester City Council* the Tribunal was not laying down any different rule about a price demonstrated by an auction sale. As the Tribunal has recently said, in *Brickfield Properties Limited v Ullah* [2022] UKUT 25 (LC), at [33], referring to *Allen*:

“The Tribunal was not suggesting that an auction sale must prevail in all circumstances, in the face of all competing evidence.”

41. The FTT could, of course, have arrived at a figure based on the auction price despite the fact that neither of the experts appearing before it considered that that was a reliable guide to value. But in the face of a consensus that the auction price was either irrationally high or irrationally low, and in any event did not represent open market value, in our judgment the FTT cannot be criticised for failing to give it greater weight. It had heard evidence that the auction vendor had attributed a guide price of £15,000 to the property. It had heard no evidence from the appellants of their own reasons for paying £91,000. It was entitled to assume (as we were informed was the case) that there had been competitive bidding up to that level, but it was entitled to accept the evidence of Mr Hayes that the participants in the auction had taken “an expensive punt” and that it was very unlikely that a purchaser on a later occasion would take the same optimistic view.
42. In *Mundy*, Lewison LJ qualified his observation that valuation issues were issues of fact which could not be the subject of an appeal to the Court of Appeal on a point of law “unless perverse”. Appeals to this Tribunal on valuation issues are not restricted to appeals on points of law, but nevertheless, where a first-tier tribunal has heard the evidence of two experts and accepted the view of one of them, it will rarely be possible for this Tribunal to say that it was not entitled to do so unless the view which it accepted proceeded on the basis of some

identifiable error of approach. We can find no such error in the decision of the FTT, or in the evidence of Mr Hayes which it accepted. Both acknowledged the significance of the auction price and Mr Hayes explained why he considered it would not be repeated. Where an appeal is being conducted as a review, in the absence of some flaw sufficiently significant to vitiate the FTT's valuation it is not for this Tribunal to substitute a different valuation of its own. There is no such flaw in this case and we therefore dismiss the appeal.

Martin Rodger QC,  
Deputy Chamber President

Mark Higgin FRICS

18 August 2022

### **Right of appeal**

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.