2886

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00ML/OLR/2013/0038, 0040, 0137, 0138, 0165, 0262-0268, 0275-0279, 2014 0026- 0028**
Property	:	**Flats 16, 17, 18, 24, 25, 27, 34, 39, 44, 55, 57, 58, 60, 62, 78, 87, 88, 89, 98, 102, 103, 104, 111,112, 117, 120, 122, and 125 Ashdown, Eaton Road, Brighton BN3 3AR**
Applicant	:	**Pauline de Yong and others**
Representative	:	**Nathaniel Duckworth counsel instructed by Rexton Law LLP**
Respondent	:	**Remstar Properties Limited**
Representative	:	**Kevin Pain counsel**
Type of Application	:	**Determination of premium or other terms of acquisition remaining in dispute section 48 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	:	**Judge Tildesley OBE** **Mr R Wilkey FRICS** **Mr N Maloney FRICS**
Date and venue of Hearing	:	**1 and 2 May 2014** **Lewes Combined Court Centre, 182 High Street, Lewes BN7 1YB**
Date of Decision	:	**5 June 2014**

DECISION

Decisions of the tribunal

(1) The Tribunal determines a capitalisation rate of 6 per cent for calculating the value of future ground rents, and a deferment rate of 5 for calculating the value of the landlord's interest once the new extended leases are granted.

(2) The Tribunal directs the parties to agree the premiums payable for the extended leases of the subject properties on the terms decided by the Tribunal, and lodge a copy of the agreed valuations with the Tribunal within 14 days of release of this decision.

The Application

1. The Applicants seek a determination of the premiums payable for new leases in respect of the said properties in accordance with section 48 of the 1993 Act.

2. The Applications in respect of flats 57, 78, 87, 104 and 125 have bee n settled and no longer form part of this determination.

3. The parties had reached a good measure of agreement in respect of the valuation elements involved in determining a premium, which meant that the Tribunal was only required to decide upon two issues, namely:

    - The capitalisation rate for determining the value of the right to receive ground rent under the leases.

    - The deferment rate for determining the value of the landlord's interest once the new lease is granted.

4. The Applicants contended for a capitalisation rate of 6 per cent, and a deferment rate of 5.5 per cent. The Respondent, on the other hand, argued for a capitalisation rate of 5 per cent, and a deferment rate of 5 per cent.

Background

5. The properties comprised purpose built flats providing a range of accommodation from one bedroom to three bedrooms. The properties formed part of a larger development known as Ashdown which was built in the 1970s with a reinforced concrete framed structure clad predominantly with brick. The main roof was of a flat design covered with asphalt or similar material. The windows were contained within aluminium framed sliding casements. The residential accommodation was arranged over ground and seven upper floors, although the south

wing was only built with six upper floors. The basement provides individual parking spaces in a secure garage.

6. The development was situated immediately adjoining the south side of Sussex County Cricket Club and in easy walking distance of the shops, railway station and the sea front of Hove.

7. Although the dates of the leases varied for the properties, their terms were the same with all leases expiring on 29 September 2094. The Applicants' notices for extended leases were served on different dates with the result that the unexpired terms on the leases range from 81.02 years to 82.28 years.

The Proceedings

8. In 2007 Ashdown Hove Limited in its capacity as nominee purchaser served a notice seeking to exercise the right to acquire the freehold under part 1 of the 1993 Act. On 7 June 2010 the Tribunal determined the price payable by the nominee purchaser for the acquisition of the freehold in the sum of £1,732,109. The Tribunal applied a deferment rate of 6 per cent. The parties had agreed upon a capitalisation rate of 6 per cent. The decision was released on 28 June 2010 under the case number CHI/00ML/OCE/2008/0025 and is referred to in this decision as *Ashdown Part 1*.

9. Following the handing down of the Tribunal's decision in *Ashdown Part 1* the participating tenants lost their funding for the non-participating flats, which in turn jeopardised the ability of the nominee purchaser to complete the enfranchisement. The nominee purchaser struck a bargain with the Respondent whereby the premium payable for the collective enfranchisement was proportionately reduced in consideration of the grant by the nominee purchaser to the Respondent of a 999 year head-lease of the non-participating flats. Thus the Respondent bought back the right to receive the premiums for the new leases of the non-participating flats when claims were made.

10. On various dates the Applicants served notices on the Respondent in accordance with section 42 of the 1993 Act seeking to exercise their right to acquire a new lease. On various dates the Respondent served counter notices on the Applicants pursuant to section 45 of the 1993 Act. The Respondent admitted the Applicants' rights to acquire new leases but did not accept the terms of acquisition.

11. Having failed to agree the terms of acquisition, the Applicants issued applications to the Tribunal. On 21 February 2014 the Tribunal directed that the applications be heard together. The Tribunal further directed that the parties should exchange valuers' reports by 7 March 2014, and that the valuers should meet by 28 March 2014 with a view to

identifying the matters that remained in dispute and those that were agreed. The Applicants were required to prepare bundles for the Tribunal and exchange skeleton arguments. The Applicants served the bundles late which caused significant inconvenience to the Tribunal and the Respondent. The Tribunal considered whether it was appropriate to apply sanctions for the non-compliance of directions but decided against sanctions because the Respondent was unable to demonstrate that it had been prejudiced by the Applicants' breach. Despite their lateness, the bundles were well put together, and the Tribunal complimented both parties at the end of the hearing for the clear and erudite manner in which they presented their cases.

12. The Tribunal heard the applications on the 1 and 2 May 2014. The Tribunal received expert testimony from Andrew Pridell FRICS for the Applicants and from Anthony E Ford MRICS for the Respondent.

13. Mr Pridell was a fellow of the Royal Institution of Chartered Surveyors having qualified as an associate in 1969 and elected to fellowship in 1982. In 1972 he joined the partnership of Clifford Dann and Partners of which he later became Senior Partner. Clifford Dann and Partners was an independent firm of Chartered Surveyors which had a residential property outlet covering principally central and East Sussex. In 2004 he resigned from Clifford and Dann to establish Andrew Pridell Associates Limited which specialised in providing advice and valuations for lease extensions and collective enfranchisements. The company has completed in excess of 4,500 cases. Mr Pridell has appeared at numerous Tribunals as an expert witness and advocate. He regularly lectured on the subject of leasehold reform valuation and was a founder member of the Association of Leasehold Enfranchisement Practitioners.

14. Mr Pridell confirmed that he was aware of the requirements of Part 35 of Civil Procedure Rules dealing with expert evidence, and the Protocol for the Instruction of Experts to give evidence in civil claims. Mr Pridell also confirmed that his valuation was carried out in accordance with the RICS Valuation Standards (Red Book). Mr Pridell gave evidence for the nominee purchaser in *Ashdown Part 1*.

15. Mr Ford was a member of the Royal Institution of Chartered Surveyors, having qualified as a surveyor in 1988. Since qualifying Mr Ford has specialised in residential valuation in London and the south east, particularly in matters relating to leasehold reform. From 1989 to 1996 Mr Ford was employed by Chesterton International where he dealt with enfranchisement and lease extensions on behalf of the Church Commissioners, the Philimore Kensington Estate and the Day Estate, amongst others. In 1996 Mr Ford became a partner in Cluttons' Central London Residential Consultancy team acting on behalf of a range of freeholders from private individuals to large public companies. Prior to qualifying as a surveyor Mr Ford was employed by Whiteheads Estate

Agency at Hove whose office was very close to the Ashdown Development. During his time there Mr Ford was involved in the sale of a number of flats in Ashdown.

16. Mr Ford stated that his report had been prepared in accordance with the Practice Statement and Guidance Notes prepared by the Royal Institution of Chartered Surveyors for surveyors acting as expert witnesses, Mr Ford testified that he understood that his overriding duty was to the Tribunal in preparing his report and give oral evidence. Mr Ford did not act for the Respondent in *Ashdown Part 1*. Mr Gray FRICS was the previous valuer for the Respondent.

Capitalisation Rate

17. The capitalisation rate is the rate of return an investor would expect to receive from his investment in the right to receive ground rent income.

18. The Lands Tribunal in *Nicholson v Goff* [2007] 1 EGLR 83 identified five factors as relevant to a determination of the appropriate capitalisation rate, namely:

- The length of the lease term
- The security of recovery
- The size of the ground rent
- The provision for the review of ground rent.
- The nature of any provision for review.

19. Under the terms of the lease the ground rent for the subject properties was reviewed every 20 years to 0.25 per cent of the long lease value of each flat. The next review was in September 2014. The rents to be applied from September 2014 on the basis of current values were agreed between the parties. The average anticipated uplift in ground rents represented compound growth of 8.34 per cent over 18 years.

20. The parties agreed that this rent review clause with the prospect for guaranteed income growth would be attractive to an investor and have an impact on the capitalisation rate. The parties further agreed that the impact would be a reduction of the "starting rate" for the "plain vanilla" type of rent review clause by one per cent.

21. The dispute between the parties was the "starting rate" which the Applicants said was 7 per cent, whilst the Respondent contended for 6 per cent.

22. The Applicants argued that 7 per cent was the capitalisation rate for a lease with a standard rent review clause for a property in the Brighton area. The Applicants relied on the expert knowledge of Mr Pridell and

on three Tribunal cases[1] in Brighton where a capitalisation rate of 7 per cent had been determined. Further the Applicants pointed out that Mr Gray who had acted for the Respondent at the counter notice stage had accepted a starting rate of 7 per cent. Mr Gray also told the Tribunal in *7 Sudleley Street* CHI/00ML/OCE/2008/0023 that he had consistently used 7 per cent which was common rate used in the locality. Mr Ford in cross-examination accepted that he was unaware of something other than a capitalisation rate of 7 per cent in the Brighton area.

23. The Applicants pointed out that the parties had agreed a rate of 6 per cent in *Ashdown Part 1*. The 6 per cent rate had been derived from a starting rate of 7 per cent with a deduction of one per cent to reflect the attractive terms of the rent review clause in the leases for the Ashdown flats. The Applicants were of the view that the agreement in *Ashdown Part 1* constituted compelling evidence of the starting rate because it related to the actual property with the same rent review clause.

24. The Respondent's contention of a 6 per cent capitalisation rate as the starting rate was derived from Mr Ford's opinion of the increased attractiveness of ground rent income as a secure form of investment, and his analysis of recent sales of freehold reversions.

25. Mr Ford expressed the view that the demand for the income potential from freehold reversions had increased significantly in recent years, particularly as financial returns from other investments had reduced significantly in view of the historic low Bank base lending rate. Mr Ford also believed that the demand for such investments had been further fuelled by the movement of large financial institutions into the market. These institutions had come to recognise that ground rent income was a secure form of investment. According to Mr Ford, many of these institutions were purchasing freehold and long leasehold interests from developers once blocks had been completed. Mr Ford, however, said that evidence of these transactions was hard to find because they generally took place off market.

26. Mr Ford supplied an analysis of 12 freehold sales subject to ground rent income which had been sold by auction between May 2012 and December 2013. This period covered the effective dates of valuation for the subject properties. Mr Ford's analysis included only properties with leases of unexpired terms in excess of 100 years to ensure that the sale prices were not distorted by the value of the reversion.

27. The leases for 10 of the properties had a clause reserving a ground rent which doubled every 25 years of the term. Of the remaining two, one

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[1] *93/95 Bear Road* CHI/00/ML/OCE/2006/0086; *16 Brighton Road* CHI/24UL/OCE/2009/0029 and *7 Sudleley Street* CHI/00ML/OCE/2008/0023. It turned out that *16 Brighton Road* related to a property in Aldershot. Applicant's counsel asserted that there was another case in Brighton and had made a mistake in supplying a copy of *16 Brighton Road*.

had a clause where the rent doubled every 20 years. The final one reserved a ground rent which doubled every 15 years. Mr Ford considered that the ground rent review clauses in these leases were typical of the "plain vanilla" review clauses.

28. Mr Ford calculated the initial yield for the 10 properties where the rent doubled every 25 years, which produced a range of 4.14 to 7.86 per cent with an average of 5.77 per cent. The other two comparables had initial yields of 3.97 and 5.4 per cent respectively.

29. Mr Ford also calculated the compound growth rates for the fixed ground rent review clauses and concluded that an investor acquiring the reversion with such a clause ran the real risk of the value of his investment being eroded by inflation. According to Mr Ford, this was in stark contrast with the potential for income growth in respect of the subject leases which currently gave a rate of 6.74 per cent above the rate of inflation. In Mr Ford's opinion, an investor purchasing the reversions for the subject properties would be prepared to accept an initial yield below the average yield of 5.77 per cent for the 10 properties.

30. The Respondent contended that the average yield of 5.77 per cent indicated that the starting rate for the "plain vanilla" rent review clauses should be 6 per cent which with the agreed one per cent reduction to reflect the favourable terms of the clause for the subject properties produced a capitalisation rate of 5 per cent.

31. The Applicants argued that the Respondent's reliance on the sales analysis was flawed for the following reasons:

- The average yield of 5.77 per cent was based on the analysis of just 10 sales. In the Applicant's view, a far wider sample would be required in order to draw meaningful conclusions.

- The analysis may have been tainted by considerations beyond ground rent. Mr Ford supplied no further details of the sales, and did not know what other income streams were attached to them. According to the Applicants, the purchasers of these properties may have been looking to secure other sources of income, such as income from sales of basements/roof spaces, premiums for consent to alterations or change of use, insurance commissions, and management fees.

- The results from the analysis were meaningless. The analysis produced a wide spread of yields from 4.14 to 7.86 per cent with no bunching around a particular figure. In short the Applicants argued that the analysis could equally support their contention of a 7 per cent starting rate.

32. The Respondent countered by saying unlike the deferment rate there was no *Sportelli* starting point for capitalisation rate. In the Respondent's view the purported rate of 7 per cent had been adopted routinely in the Brighton area and had no evidential basis which could be tested. Further the Tribunal decisions cited by the Applicants involved the state of the market in 2006 and 2007 which had no relevance to the valuation dates for the subject applications. The Respondent argued that its starting rate of 6 per cent should be preferred because it was derived from actual transactions.

Consideration

33. The Tribunal is not convinced by the Respondent's argument that the adopted rate of 7 per cent was without evidential basis. Mr Pridell gave expert testimony of 7 per cent being the standard rate in the Brighton area for leases with long unexpired terms at modest ground rents. Mr Pridell's evidence was supported by the Tribunal decisions cited by the Applicants including *Ashdown Part 1.* Also Mr Ford, the Respondent's expert, acknowledged the existence of an adopted rate of 7 per cent. The question, therefore, for the Tribunal is the weight to be attached to Mr Pridell's expert testimony

34. The Tribunal considers Mr Ford's sales analysis unsuitable for drawing reliable conclusions about the starting rate for leases with standard ground rent review clauses. In this respect the Tribunal agreed with the Applicants' criticisms regarding sample size, the wide range of yields and the absence of an indicative yield characterised by a bunching of results. The Tribunal would also question the relevance of the sampled properties, the locations of which were predominantly in Greater London. None of the properties were situated in West and East Sussex or Kent.

35. The Tribunal held concerns about the coherence of the Respondent's argument. Their stated position was that they agreed the one per cent deduction for the favourable rent review terms, and the sole issue in dispute was the starting rate for a lease with a standard review clause. On the other hand, the Respondent appeared at times to use the 5.77 per cent average as a benchmark for suggesting a significantly lower capitalisation rate for the subject properties. The Tribunal considers the latter suggestion a departure from their stated position. In effect the Respondent was asking the Tribunal to determine a capitalisation rate which disregarded the agreed one per cent deduction. If that was the Respondent's position it would have been advisable to have adduced some evidence of yields for leases with review clauses similar to those for the subject properties. The Tribunal considers this confusion with the Respondent's position weakened its argument for a 5 per cent capitalisation rate.

36. The Tribunal acknowledges that the Respondent had some success in denting Mr Pridell's depiction of the improving British economy which was on the optimistic side at the time of the agreed valuation dates for the subject properties. The Tribunal, however, does not consider the Respondent's challenge sufficient to undermine the substance of Mr Pridell's expert opinion.

37. The Tribunal concludes that Mr Pridell's expert testimony of a starting rate of 7 per cent for leases with standard rent review clauses was the best evidence. Mr Ford accepted the use of the 7 per cent rate for properties in the Brighton area. The existence of such a rate was substantiated by the Tribunal decisions relied upon by the Applicants. The Respondent's counter argument was confused and unreliable.

38. For the reasons given above the Tribunal **determines a capitalisation rate of 6 per cent,** which is arrived at by deducting the agreed one per cent from a starting rate of 7 per cent.

Deferment Rate

39. The Applicants argued for a deferment rate of 5.5 per cent, with 0.5 per cent to be added to the risk premium to reflect the reduced growth prospects for the subject properties. The Respondent, on the other hand, said that there should be no departure from the generic rate of 5 per cent as stipulated in *Earl Cadogan and another v Sportelli and another* [2007] EWCA Civ 1042.

40. Mr Pridell's evidence in support of the Applicants' proposition for a deferment rate of 5.5 per cent adopted the same framework as was used in *Zuckerman v Trustees of the Calthorpe Estates* [2009] UK UT 235 LC. Essentially Mr Pridell used the format of the *Zuckerman Graph* which enabled comparison of the percentage increase in the value of the subject flats with the value of flats in Prime Central London as measured by the Knight Frank Central Index. In the period from 1974 to 2013 the value of the subject properties rose on average by 1,518 per cent which contrasted with an average increase of 6,667 per cent for Prime Central London flats. In Mr Pridell's opinion, the comparison demonstrated without doubt that the capital growth prospects for the subject properties were significantly lower than those for flats in Prime Central London, which in turn supported an increase in the risk premium by 0.5 per cent.

41. The sales evidence adduced by Mr Pridell spanned a period of 40 years and included 19 years of sales for the subject properties (1974 and again from 1995-2013). According to the Applicants, this data was much stronger than that presented in *Zuckerman,* where the Upper Tribunal approved an addition of 0.5 per cent to the risk premium based upon 30 years worth of data which included just 4 years of sales for the subject properties.

42. The Applicants also pointed out that Mr Pridell's data in this case was better than the evidence presented in *Ashdown part 1* in which the parties agreed upon a deferment rate of 6 per cent. In this case Mr Pridell's data covered a longer period by 5 years, and contained 20 more sales of the subject properties. The data also showed how the subject properties fared during the economic downturn.

43. The Respondent argued the burden was on the Applicants to justify a departure from the 5 per cent generic rate as advanced in *Sportelli*. The Respondent further contended that the Applicants had approached the risk to capital growth from the wrong perspective. According to the Respondent, the correct question to ask was whether the subject properties would achieve real capital growth of 2 per cent over the long term not whether the subject properties had markedly lower capital growth than for flats in Prime Central London.

44. Mr Ford relied on two separate data sets to demonstrate that the real growth rate in the values of the subject properties was higher than two per cent.

45. First Mr Ford drew up a schedule showing the original premiums paid for each underlease for subject properties between May 1974 and December 1977 against the freehold/long leasehold values which had been agreed for each property with effective dates between June 2012 and September 2013[2]. This analysis showed uplifts in the values of the subject properties from 1182 per cent to 1528 per cent with an average uplift of 1368 per cent, which translated into a compound growth rate of 7.1 per cent for capital appreciation. When the figure of 7.1 per cent was set against the growth in the Retail Price Index (RPI) for the same period, the percentage figure for real growth in the value of the subject flats was 2.59 per cent[3].

46. Second Mr Ford relied on the percentage uplift in rental values for the subject properties from the date of the last review in September 1994 to September 2012 as a proxy for measuring the increase in the values of the said properties[4]. The average uplift during this period was 324 per cent which represented compound growth of 8.34 per cent. The

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[2] See Appendix 12 to Mr Ford's witness statement dated 22 April 2014. The parties' valuers agreed the freehold/long leasehold values in order to assess the impact on the ground rent on the next review in September 2014.

[3] On the day of the hearing the Tribunal admitted Mr Ford's evidence of comparing compound growth with RPI. The Tribunal decided the comparison was relevant to the dispute, and that the Applicants were not prejudiced by the late admission. The new evidence essentially comprised changes in the RPI during the relevant period. The Applicants were given leave to object to the accuracy of the figures within 7 days from the end of the hearing. The Applicants did not object. See page 526A of the bundle for the calculation.

[4] The increase in rental values was set out in Appendix 1 to the Agreed Statement of Facts. The uplift in rental values operated as a reliable proxy for property values because under the terms of the lease the review of the rent was directly linked to value of the long leasehold.

corresponding increase in RPI during the same period was 2.93 per cent which resulted in a figure of 5.41 per cent for the real growth in the values of the subject properties from September 1994 to September 2012.[5]

47. Mr Ford used the HM Land Registry House Price Index from 1995 to August 2012 to plot the growth in property values for Kensington and Chelsea (location of the properties considered in *Sportelli*), Warwickshire (the county for the location of Kelton Court which was considered in *Zuckerman*), and Brighton and Hove (the city in which the subject properties are situated).

48. Over this period of 18 years property values rose by 455 per cent in Kensington and Chelsea, 322 per cent in Brighton and Hove and 152 per cent in Warwickshire. Thus the value of properties in Kensington from 1995 to 2012 grew 41 per cent more than properties in Brighton, and 200 per cent more than properties in Warwickshire. According to Mr Ford, if the *Zuckerman* addition applied to Brighton and Hove it would be a ratio of 41:200 of 0.5[6] which would mean at the highest a 0.1 per cent increase in the generic deferment rate of 5 per cent.

49. Mr Ford pointed out that during this 18 year period, the rate of growth in Brighton and Hove was higher than that for Kensington & Chelsea in 1995, and between 2001 and 2007.

50. The Applicants argued that Mr Ford's evidence was inadequate to undermine Mr Pridell's expert opinion in favour of a 5.5 per deferment rate. The Applicants stated that the Upper Tribunal in *City & Country Properties Limited v Yeats* [2012] UKUT 227 LC had criticised evidence of changes in the HM Land Registry House Price Index because it covered too short a period to enable any useful comparisons to be made about comparative growth rates. Also the Tribunal in *Ashdown Part 1* had rejected Mr Gray's evidence for the Respondent. Mr Gray had also relied on changes in the HM Land Registry House Price Index for his expert opinion on the deferment rate.

51. The Applicants also contended that the Respondent was wrong with its focus on whether the subject properties would achieve real growth of 2 per cent. According to the Applicants, the Upper Tribunal in *Zuckerman* was clear that the real issue concerned the comparison between prospects for growth in Prime Central London on the one hand, and the subject properties on the other. Thus if the hypothetical investor would be less confident about a long term rate of 2 per cent being achieved in the subject properties than in Prime Central London

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[5] See Appendices 9 and 10 to Mr Ford's witness statement dated 22 April 2014 and page 526 A of the bundle

[6] 41= Kensington/Chelsea/Brighton & Hove 200 = Kensington/Chelsea/Brighton & Hove/Warwickshire; 0.5 increase in deferment rate in Zuckerman to reflect poor capital growth prospects.

he would reduce his bid. The Applicants also stated there was nothing new with the Respondent's argument on the 2 per cent long term growth for the subject properties. Mr Gray had run the same argument in *Ashdown Part 1*.

Consideration

52. The Tribunal's starting point is the Court of Appeal decision in *Sportelli*. The Court of Appeal confirmed the Lands Tribunal decision that the generic deferment rate for flats should be five per cent, which comprised

Risk free rate	2.25%, minus
Real growth rate	2.00%, plus
Risk premium	4.5%, plus
Increased management risks for flats	0.25%

53. The facts of *Sportelli* were concerned with residential properties in Prime Central London. Lord Justice Carnwath pointed out in the course of his judgment in the appeal at paragraph 102 that although 5 per cent was the starting point, different considerations may apply to properties outside Prime Central London:

> "The issues within the PCL were fully examined in a fully contested dispute between directly interested parties. The same cannot be said in respect of other areas. The judgment that the same deferment rate should apply outside the PCL area was made, and could only be made, on the evidence then available. That must leave the way open to the possibility of further evidence being called by other parties in other cases directly concerned with different areas. The deferment rate adopted by the tribunal will no doubt be the starting point; and their conclusions on the methodology, including the limitations of market evidence, are likely to remain valid. However, it is possible to envisage other evidence being called, for example, on issues relevant to the risk premium for residential property in different areas. That will be a matter for those advising future parties, and for the tribunals, to consider as such issues arise."

54. The Applicants have relied almost exclusively on the Upper Tribunal decision in *Zuckerman* in their case for a departure from the generic rate of 5 per cent. The Applicants have adopted the methodology deployed in *Zuckerman* for their evidence in support of a departure. They have also relied on *Zuckerman* for their legal proposition that the Tribunal should be concerned with the relative real capital growth rates between the subject properties and those in Prime Central London.

55. The Tribunal starts with the Applicants' legal proposition on relative growth rates. In this respect, the Applicants rely on the Upper Tribunal's pronouncement at paragraph 53 of the *Zuckerman* decision:

> "As I have said, the 5% deferment rate determined in *Sportelli* for flats in PCL is the starting point for calculating the appropriate rate for Kelton Court. Since, as I have found, an investor considering long term growth prospects at Kelton Court would not be confident that the PCL growth rate would be achieved (or, put another way, would be less confident that the real growth rate of 2% would be achieved in the West Midlands than in PCL), he would reduce his bid for Kelton Court accordingly. The appropriate way to assess that reduction, in my view, is by further increasing the risk premium by 0.5% to 5.25%".

56. The Tribunal places a different construction on the wording of paragraph 53 than that of the Applicants. In the Tribunal's view the phrase in parenthesis: *or put another way, would be less confident that the real growth rate of 2% would be achieved in the West Midlands than in PCL* not only clarified the meaning of the preceding reference to PCL growth rate but also defined the salient issue, namely, would an investor be confident that the subject properties would achieve a real growth rate of 2 per cent in the long term?

57. The Tribunal gains support for its interpretation of the salient issue from the later Upper Tribunal decision in *Yeats* which said at paragraph 61:

> "It is appropriate for us finally to note that all of the evidence and argument upon whether an adjustment should be made to the deferment rate in respect of growth was directed towards the question of whether there could be found a long term difference in growth rates between Horsham and PCL. It was this comparison that was concentrated upon. No evidence was called nor was any argument advanced upon the question of whether, ignoring wholly growth rates in PCL, the statistical information showed that the real growth rate in respect of flats in Horsham had (over any particular period) been at 2 per cent or had exceeded or fallen short of 2 per cent, which was the real growth rate assumed to be present in *Sportelli*".

58. Thus the Tribunal agrees with the Respondent's contention that it should be examining from the perspective of a knowledgeable and prudent hypothetical purchaser the question of the risk of the subject properties not achieving a real capital growth rate of 2 per cent over the long term.

59. Although Mr Pridell for the Applicants adduced sales evidence of the subject properties, he did not analyse the rate of capital growth for them. His evidence concentrated solely on the comparison of the relative capital growth rates of the subject properties with flats in Prime Central London. In contrast, Mr Ford for the Respondent using two different data sets demonstrated that the average real capital growth for the subject properties was 2.59 per cent for the period 1974/1977 to 2012/2013, and 5.41 per cent for the period September 1994 to September 2012.

60. The Tribunal notes that the Applicants did not challenge the accuracy and the reliability of Mr Ford's analysis of the real capital growth rate for the subject properties. The Applicants' objections to the analysis were that it addressed the wrong question, and that it raised nothing new from the previous Tribunal decision in *Ashdown Part 1*.

61. The Tribunal has already expressed its disagreement with the Applicants' legal proposition on the salient question. The Tribunal considers the Applicants' reliance on the rejection of Mr Gray's evidence in *Ashdown Part 1* misguided. The principal reason for the *Ashdown Part 1* Tribunal disregarding Mr Gray's evidence was that it found his credibility as an expert witness had been undermined by his failure to disclose that he had given a different analysis of the effects of the *Sportelli* decision in another recent application to the Tribunal[7]. The finding on Mr Gray's credibility was not relevant to the evidence before this Tribunal.

62. The Tribunal finds Mr Ford's analysis of the real capital growth for the subject properties compelling. The analysis covered periods of 18 and 39 years respectively which were sufficient to enable conclusions to be drawn on long term trends. Moreover the analysis was sound and the Applicants did not challenge its reliability and accuracy.

63. In view of its findings on Mr Ford's analysis of the real capital growth, the Tribunal considers the evidence on relative growth rates between the subject properties and Prime Central London of marginal significance. The Tribunal, however, is not convinced with the Applicants' criticism of Mr Ford's use of 18 years data from the HM Land Registry House Prices Index to plot comparative growth trends in house prices in Brighton and Hove, in Kensington and Chelsea and in Warwickshire. The Applicants argued that the Upper Tribunal in *Yeats* had rejected similar evidence from another expert witness, a Mr Sharp, and that effectively no weight should be attached to Mr Ford's use of 18 years data.

64. The Tribunal notes that the Upper Tribunal in *Yeats* was not wholly dismissive of Mr Sharp's evidence observing at paragraph 59 that

> "However, it may be noted that over the period from January 1995 to December 2005 the increase in both indices was effectively the same (100 became 277 in West Sussex and 276.2 in Westminster)".

65. Further the Upper Tribunal in *Yeats* said at paragraph 56 that information covering more than 15 years but less than 50 years may be sufficient to indicate a trend depending on the length of time and the particular circumstances.

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[7] See paragraphs 37 and 38 of the *Ashdown Part 1* decision.

66. The Tribunal gives some weight to Mr Ford's use of the House Prices Index. First Mr Ford gave a plausible rationale for his use of the data, namely, the data was collected on a uniform basis in all regions and his choice of one data set overcame the criticism in *Yeats* of using a range of data sets measuring different things. Second his finding that house prices in Brighton and Hove outperformed those for Kensington and Chelsea in 8 years of the 18 year period challenged Mr Pridell's opinion of the predominance of growth rates in Prime Central London. Finally, Mr Ford's conclusion that the rate of growth for houses in Brighton and Hove was consistently and significantly higher than those in Warwickshire exposed the incompleteness of Mr Pridell's use of the *Zuckerman* graph.

67. The Tribunal is satisfied that a prudent and knowledgeable hypothetical purchaser of the freehold reversion would place predominant weight on the evidence of real growth rates for the subject properties of 2.59 per cent over 39 years and 5.41 per cent in the last 18 years in deciding whether an adjustment was needed to the deferment rate. As part of his consideration the hypothetical purchaser would have some regard to the fact that in eight of the last 18 years the rate of growth in house prices in Brighton and Hove had outperformed the rate of growth in Kensington and Chelsea. **Having weighed up the evidence the Tribunal finds that the hypothetical purchaser would make no adjustment to the generic deferment rate for flats. The Tribunal, therefore, decides on a deferment rate of 5 per cent.**

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking