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

**Case Reference** : **LON/00AW/OLR/2016/0503**

**Property** : **33 Swan Court, Chelsea Manor Street,  
London Sw3 5RX**

**Applicant** : **Cadogan Holdings Limited**

**Representative** : **Ms Ellodie Gibbons Counsel**

**Respondent** : **Orphic M Limited**

**Representative** : **Mr Carl Fain Counsel**

**Type of Application** : **Section 48 Leasehold Reform, Housing  
and Urban Development Act 1993 –  
determination of terms of acquisition  
in dispute**

**Tribunal Members** : **Judge John Hewitt  
Ms Marina Krisko BSc (EstMan) FRICS**

**Date and venue of  
Hearing** : **2 August 2016  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **2 September 2016**

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**DECISION**

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### **Decisions of the tribunal**

1. The tribunal determines that the premium payable by the respondent to the applicant on the grant of the new lease is £1,015,271 made up as shown on the Tribunal Valuation appended to this decision.
2. The reasons for our decisions are set out below.

### **Procedural background**

3. The subject property (flat 33) is a second floor flat in a substantial purpose built development known as Swan Court which comprises a number of flats and maisonettes laid out over ground to eighth floors.
4. By a lease dated 10 February 1971 flat 33 was demised for a term 49 years (less three days) from 29 September 1969. On 20 April 2009 Philippa de Pass CVO was registered at Land Registry as the proprietor of the lease.
5. By a notice of claim dated 14 October 2015 and given pursuant to section 42 of the Act, Ms de Pass CVO sought to exercise the right to claim a new lease of flat 33. Ms de Pass CVO proposed a premium of £598,500 for the grant of the new lease.
6. By deeds of assignment dated 19 October 2015 Ms de Pass CVO assigned to the respondent the remainder of the term created by the lease and the benefit of the notice of claim dated 14 October 2015.
7. By a counter-notice dated 1 December 2015 given pursuant to section 45 of the Act by the applicant, as reversioner, to the respondent, the applicant admitted that on the relevant date Ms de Pass CVO had the right to acquire a new lease of flat 33 and has validly assigned that right to the respondent. The counter-notice stated that the premium proposed in the notice of claim was not acceptable and counter-proposed a premium of £1,285,900. The counter-notice made further counter-proposals and a draft of the new lease contended for was annexed to the counter-notice. We need not trouble with those other matters because they are all now agreed we are concerned solely with the premium payable.
8. Evidently the parties were unable to agree all of the terms of acquisition and by an application form dated 23 March 2016 the applicant sought a determination by the tribunal of the terms of acquisition in dispute.
9. Directions were duly given and the application came on hearing before us on 2 August 2016

### **The hearing**

10. At the hearing the applicant was represented by Ms Ellodie Gibbons of counsel who called Ms Frances Joyce FRICS of Jones Lang LaSalle to give expert valuation evidence.

The respondent was represented by Mr Carl Fain of counsel who called Mr Jeremy Rohan Dharmasena MRICS of Knight Frank to give expert valuation evidence.

11. We were informed that by the time of the hearing the only term of acquisition in dispute was the premium to be paid by the respondent to the applicant.

Ms Joyce's valuation was at £1,041,800.

Mr Dharmasena submitted a revised valuation shortly after the hearing to correct some errors that had emerged during the course of the hearing and his revised valuation was at £948,984.

### **Valuation matters agreed**

12. The parties were able to agree a number of the components of the valuation exercise including:

Valuation date:	14 October 2015;
Unexpired term of lease:	2.95 years;
Capitalised value of the ground rent:	£15.00;
Extended lease value relative to FHVP:	97.00%;
Deferment rate – existing term:	2.25%;
Deferment rate – extended term:	5.00%;
End allowance:	5.00%
Gross internal area (GIA):	67.73 sq m (729 sq ft); and
Existing lease value to be calculated by assessing a net rent (agreed at 2.175%) capitalised at 2.175%.	

### **Valuation matters not agreed**

13. The matters not agreed and for the tribunal to determine were:

Existing lease value: Should capitalisation rate be single or dual rate, with or without tax;

Any discount for assured tenancy risk which shall be assessed somewhere between nil and 2.50%; and

Share of freehold value:

### **The evidence and our findings**

14. It was not in dispute that Swan Court is a prestige development of some 144 apartments in prime central London. It is set out on four sides around a central courtyard and lies between Chelsea Manor Street and Flood Street on the west/east axis and is just south of the rear of Kings Road and just north of the rear of Flood Walk. The location and the development are well illustrated in the two expert reports before us. Both valuers helpfully included a Stacks Diagram in their reports.

### **Share of freehold value**

15. On the morning of 3 August 2016 we had the benefit of an internal inspection of flat 33 and external inspections of other flats which had been referred to as comparables.

We noted that flat 33 was part centrally heated and the bathroom and kitchen were rather dated and in need of modernisation. The kitchen and bedrooms faced a slightly south of westerly direction and overlooked the inner courtyard. The reception room faces a more or less easterly aspect, but is overshadowed by a wing of Swan Court. The views from that room overlook the roof of a nearby low rise development.

There was an issue as to what adjustment should be made for floor level and/or aspect and our general visit to and around the development enabled us to form a view on the rival submissions made to us.

16. Ms Joyce relied upon recent open market sales of five two-bedroom flats within Swan Court, namely flats 37, 66, 69, 108, and 113. A number of adjustments were made to each of them. Ms Joyce' preferred comparable was flat 108 because it was unmodernised and thus did not require an adjustment for condition. Ms Joyce arrived at an average value £psf of £1,575 and this was close to value £psf of flat 108 which came out at £1,588.
17. Mr Dharmasena relied upon the same five comparables but in addition he wished to rely upon the sale of flat 14 which took place on 8 December 2015, which was quite close to the valuation date. Mr Dharmasena also made a number of adjustments to his comparables and he arrived at an average £psf of £1,475.
18. Both valuers had adopted slightly different approaches or methodologies to adjustment which, for the most part, were nuanced. For example, Ms Joyce adjusted for time taking the completion date and adopting the Savills 2015 graph for mid-term leases whereas Mr Dharmasena took the exchange date as reported in LON RES which he considered resulted in a more accurate snapshot of the market and he adopted the Savills 2002 graph because the 2015 graph was not available to the market at valuation date. But, at the end of the day there is little material difference between the two valuers.

Ms Joyce adjusted for floor level adopting an approach starting at 100% at ground level and adding 2% per floor going up, whereas Mr Dharmasena started with 100% at the second floor because that is floor on which flat 33 is located and then adding (or subtracting) 2% per floor as appropriate. Both experts agreed that 2% per floor was an appropriate adjustment.

Ms Joyce did not adjust further for aspect because, in effect there were eight possibilities N, S, E and W refined as to overlooking the inner courtyard or overlooking outwards. Even then further refinement may be required because of possible obstructions at the lower levels. In

contrast Mr Dharmasena adjusted for aspect and his adjustments ranged between +2.5% and -5.0%.

It was partly to do with aspect that Ms Joyce rejected flat 14 as a helpful comparable because, in her view, its aspect was very poor, overlooking the bin stores at quite close quarters.

There were also differences in the approach to adjustments for condition. Ms Joyce took a broad view and took into account the information in the selling agents' sales particulars, additional photographs where available and selling agents' views where available. Ms Joyce said that the adjustments she had made were in line with adjustments made by her in previous settled lease extension claims in Swan Court. Ms Joyce' adjustments ranged at nil for 108 Swan Court which did not require an adjustment to between £100 and £150 psf where Ms Joyce considered an adjustment was required.

Mr Dharmasena adopted a broadly similar approach and adopted three levels of adjustments:

Good:	-2.5%
Modernised:	-5%
Excellent:	-10%

Mr Dharmasena considered that his approach was perhaps conservative. He relied upon some research set out in appendix 7 of his report which sets out data on prices achieved on a re-sale following a refurbishment.

Because the way that Mr Dharmasena's spreadsheet was set up it was not possible to readily ascertain in £psf the adjustments he made for condition.

19. Taken overall the value £psf arrived at by both valuers was tolerably close and well within that valuation margin. Whilst the two experts had some differences in the approach to adjustments it is difficult to say that one was wrong on all of them whilst the other was right. There was a fair mix. In broad terms we preferred Ms Joyce approach on adjustments for time and for aspect whereas we preferred Mr Dharmasena's approach to adjustments for floor level. Both had a fairly subjective approach to adjustments for condition and it appears to us that that both were working with varied third party information the accuracy of which was not certain.
20. We have decided to reject flat 14 as a helpful comparable. It is a one-bedroom flat whereas all the other comparables were two-bedroom flats, albeit of different sizes but generally considerably larger than flat 14. On our inspection we noted that the aspect of flat 14 was most unattractive and was not like for like.

21. We also reject the concept of adjustment for aspect. To do so would introduce too many variables, most of them subjective. We find that the market does not work that way and prospective purchasers will make their choices on a bundle of variables in respect of properties on the market at the time they are looking. Whilst aspect might be important to some it will be less relevant, if relevant at all, to others.
22. We have decided that the transactions concerning flats 37 and 113 are not helpful because they are both mid-term leases, being 50.15 and 48.97 years unexpired respectively and thus introduce relativity complications. There were rival submissions as to what graph or graphs should be adopted, one of which was not available as at the valuation date and there was a difference of view as to whether it reflected a reliable guide of market sentiment at the valuation date.
23. We are left with three comparables. We have taken the respective values £psf calculated by the after adjusting for time and lease length but before any other adjustments and we have made adjustments (with rounding) which we consider to be appropriate having regard to the rival evidence presented to us.

Ms Joyce had adopted a weighting to the comparables but we decided not to do because each of them had benefits and dis-benefits of location, level and outlook all of which had a tendency to cancel each other out.

Our table is as follows:

	<b>Applicant</b>	<b>Respondent</b>
<b>Flat 66</b>		
Value psf	£1772	£1773
Tribunal adjustments:		
Floor level -4%	£ 71	£ 71
Condition £150	<u>£ 150</u>	<u>£ 150</u>
	<b>£1551</b>	<b>£1552</b>
<b>Flat 69</b>		
Value psf	£1817	£1814
Tribunal adjustments:		
Floor level -4%	£ 73	£ 73
Condition £150	<u>£ 150</u>	<u>£ 150</u>
	<b>£1594</b>	<b>£ 1591</b>
<b>Flat 108</b>		
Value psf	£1704	£1706
Tribunal adjustments:		

Floor level -8%	<u>£ 136</u> <b>£1567</b>	<u>£ 136</u> <b>£1569</b>
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It may be noted that both valuers agreed that no condition adjustment was required in respect of flat 108.

Mr Dharmasena had made a -10% adjustment for condition in respect of both flats 66 and 69. In contrast Ms Joyce made an adjustment of £150 in respect of flat 66 and £125 in respect of flat 69. Ms Joyce was of the opinion that flat 66 had the edge over flat 69 in terms of the quality of modernisation, but, of course, that is a subjective view.

We have taken an average of those six values in the table above to arrive at a value of £1,570 psf. With a floor area of 729 sq ft for flat 33 that produces a value of £1,144,530 for the FHVP. The extended lease value at 97% thus amounts to £1,110,194.

#### **Assured Tenancy Risk**

24. It was common ground that the respondent and current lessee was a company and thus it could not acquire assured tenancy rights upon the expiry of the term, pursuant to the provisions of schedule 10 to the Local Government and Housing Act 1989.

In these circumstances the applicant argued that no adjustment should be made to reflect the risk that assured tenancy rights might arise.

The respondent argued that it was not out of the question that as at the valuation date there was a risk that such rights might arise. It was accepted that the risk was a small one and Mr Dharmasena contended for a 2.5% adjustment.

25. The alienation provision in the lease is qualified as follows:

“8.

(i) ...

(ii) *Not to assign transfer underlet or part with possession of the Flat as a whole without the previous consent in writing of the Lessor such consent not to be unreasonably withheld and to be subject to compliance by the Tenant with the provisions of paragraphs (9) and (10) of this Schedule*

...”

26. Ms Gibbons for the applicant submitted that there have been many cases in which it was held that it is reasonable for a landlord to withhold consent where the assignee would acquire some statutory benefit which the assignor was not entitled to or did not want. The

example cited was *Lee v Carter* [1949] 1 KB 85. Ms Gibbons submitted the line of authorities was about as clear as it could be. The body of case law was such that it would be reasonable for the landlord to refuse consent. Ms Gibbons argued that there was a limited reasonable but that is was small and not significant enough to be quantifiable, it being negligible

Ms Gibbons also submitted that the End Allowance of 5% was sufficient to include for such a risk as there might be.

27. Mr Fain for the respondent argued that the End Allowance of 5% was to reflect a quite different factor. He also submitted that this was not a case where there was no risk at all. There was some risk because the issue is a matter of fact and degree in each case. Mr Fain took us through *Lee v Carter* and drew our attention to a number of passages. Mr Fain also drew our attention to paragraph 11.151 of *Woodfall: Landlord and Tenant* where the authors cited *Lee v Carter* and subsequent authorities, including *Bookman v Nathan* [1955] 1 WLR 815 and *Deverall v Wyndham* [1989] 1 EGLR 57 in support of the proposition that the mere fact an assignee (or sub-tenant) will or might acquire protection under the Rent Acts will not by itself be sufficient to justify a refusal of consent.
28. It was unfortunate that neither of the two valuers were able to explain to us clearly what they had in mind when they had agreed the end allowance of 5%.
29. In *Trustees of the Sloane Stanley Estate v Carey-Morgan & anor* [2011] UKUT 415 (LC) (known as Vale Court) it was said:

*“137. The second possible element is the lack of control that the owner of an interest giving the right to future possession has compared with the owner of an interest in possession. He is reliant on the covenants in the lease and can do nothing with the property until the lease falls in. We can see that considerations of this sort might affect the comparative value and thus call for some additional allowance. This could be in the form of an end allowance or as an adjustment to the yield.*

*142. ... We accept the appropriateness of a 5% adjustment to reflect the owner’s lack of control during the period of the reversion*

*... and we make a 5% end allowance for lack of control...*

*143. Accordingly, for future guidance we conclude that the deferment rate for reversions of less than 5 years should be the net rental yield that the evidence shows to be appropriate for the property in question; and that in addition there should be an end allowance, which in absence of evidence establishing some other percentage, should be 5%.”*



It appears to us that the end allowance under discussion in *Vale Court* is to reflect the lack of control which the landlord has during the remainder of the (short) term rather than to reflect the consequences that might happen after the term has ended. One of those consequences is the possibility that the then lessee might be able to obtain statutory rights.

30. On balance we prefer the submissions made on behalf of the respondent. We find that when agreeing the End Allowance of 5% the respective valuers did not have in mind the assured tenancy risk and that this is a separate risk – a risk that can only rise after the contractual term has ended.
31. Whilst we acknowledge the strength of the authorities relied upon by the applicant we cannot say that there is no risk at or that the risk is unquantifiable. We find that there is a risk but it is a modest risk and doing the best we can with the imperfect materials before us we quantify the risk at 1.5%.

#### **Capitalisation rate – existing lease value**

32. The two valuers had agreed that the net annual rental value will be 2.175% of its share of the freehold value. Evidently that was based on Savills Prime Central London Residential Gross Yield of 2.9% as at the valuation date, less 25% to reflect management costs. (2.9% x 75% = 2.175%)
33. The applicant contends for (dual) capitalisation rate of 2.175% as above incorporating a sinking fund of 2.25% and tax of 30%. Ms Joyce submitted this was conventional valuation practice when valuing a wasting asset. In support of her opinion Ms Joyce relied upon the decision in *Vale Court* and extracts from *Modern Methods of Valuation* 11<sup>th</sup> edition by Eric Shapiro, David Mackmin and Gary Sams, particularly p 111.
34. In her oral evidence Ms Joyce expressed the opinion that the most likely purchaser of a flat such as flat 33 with 2.95 years unexpired on the lease would be an investor who would be looking to recover a rental income and also recover a return of the capital invested. We did not agree with that opinion. Whilst Ms Joyce said her view was the conventional view she recognised that it was not universal and that it is tax that makes all the difference and tax rates can vary with off-shore companies paying little or no tax.
35. Mr Dharmasena argued that in *Vale Court* there was a passing reference to another Sloane Stanley decision – Carlyle House in which the landlord's valuer had adopted the dual rate because that was the method he used to value regulated and assured tenancies. Mr Dharmasena said that was not the appropriate way in which to value an existing leasehold interest because capitalisation rates are mainly concerned with calculating rental income and not a liability or payment out. He said that what is being assessed is the expenditure by a tenant

rather than income to him. In support of his argument Mr Dharmasena also relied upon extracts from *Modern Methods of Valuation* 11<sup>th</sup> edition but pp 169-180 in Chapter 12 which set out a number of criticisms about the dual rate method of valuing leasehold interests.

36. Mr Dharmasena also argued that the use of dual rates was now historic and are no longer used at Knight Frank. The market has moved on and more sophisticated models and programmes are now deployed. What is to be valued is the value to the tenant. The tenant will pay a sum of money in return for the right of being able to use or occupy the property for the period of 2.95 years. This was an opinion we agreed with. Mr Dharmasena explained that valuing rental income is a different approach. Mr Dharmasena also argued that the yields now used already allow for tax and the uncertainty of different tax regimes and levels. Mr Dharmasena acknowledged that this was not an argument he has deployed on previous occasions.
37. Mr Dharmasena disagreed with Ms Joyce that the only purchaser of a short lease would be an investor purchaser. Mr Dharmasena said he had experience of some private buyers purchasing very short leases in prime central London, including Swan Court. Whilst an investor purchaser would be looking to get a return on his investment an owner occupier would be looking to get a benefit; the right to reside in the flat, and would balance the capital sum to be paid against the rent otherwise payable and that if the proposed rack rent tenancy was not the full 2.95 years the risk of it being terminated part way through that period.
38. In final submissions Mr Fain said that whilst in *Vale Court* both valuers adopted a dual rate there was not a finding that that was the correct or only approach and he said it was a practice that was not now used. He also observed that both valuers were of the view that a sinking fund and a tax liability of 30% was an objective view that does not reflect reality. Mr Fain urged us to adopt a single rate.
39. In her final submissions Ms Ellodie urged us to accept Ms Joyce' evidence and conclude that the most likely purchaser was an investor and that we should adopt the convention and apply a dual rate with tax at 30%.
40. Having considered the rival evidence and submissions of the parties we prefer those advanced on behalf of the respondent. We find that the prospective purchaser might just as well be a private purchaser as an investor. Mr Dharmasena's evidence on this point struck a chord with the experience of the members of the tribunal. In *Vale Court* the valuers had agreed that the hypothetical purchaser would be an investor looking for a return of capital at the end of the term. We concluded that a property in Swan Court would be attractive to a purchaser of a short term interest without requiring a return of capital and a single rate properly reflects this.

41. Further, we prefer Mr Dharmasena's evidence that the market has moved on and away from dual rates. We are reinforced in that conclusion by extracts from p 112 of *Modern Methods of Valuation* which read:

*"The use of the single rate is considered in Chapter 12. Dual rate is by no means uniformly accepted and there is a growing usage of single rate where capital is deemed to be repaid..."*

*In some colleges and universities dual rate is almost off the curriculum...*

*The theory is set out below and the reader is left to consider whether dual rate is defunct after consulting the issues raised in Chapter 12 and elsewhere."*

42. We have therefore adopted a single rate in our valuation which is appended to this decision.

Judge John Hewitt  
2 September 2016

TRIBUNAL VALUATION  
Flat 33, Swan Court, Chelsea Manor Street, London, SW3.

Agreed matters

Valuation date	14 <sup>th</sup> October 2015
Remaining term	2.95 years
Ground rent	£5 p.a.
Extended lease value relative to FHVP	97%
Deferment rate – existing term	2.25%
Deferment rate – extended term	5%
End allowance	5%
Gross interest area	729 sq. ft.
Existing lease value capitalised at	2.175%

Tribunal Determinations

Rate per square foot	£1570
FHVP value	£1,144,530
Extended lease value	£1,110,194
Discount for Assured Tenancy risk	1.5%
Existing lease capitalisation	Single rate

Term

2.95 years £5 p.a. agreed at £ 15

Reversion

FHVP	£1,144,530
Less end allowance 5%	<u>£ 57,226</u>
	£1,087,304

Less Assured Tenancy risk 1.5%	<u>£ 16,310</u>
	£1,070,994

PV 2.95 years @ 2.25%	0.9365	£1,002,986
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Less FH in possession	£1,144,530	
PV 92.95 years @ 5%	0.0107	<u>£ 12,247</u>

Diminution in Landlord's interest		£ 990,754
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Marriage Value

Landlord's interest	£ 12,247	
Extended lease	<u>£1,110,194</u>	£1,122,441

Less

Landlord's current interest	£1,002,986	
(Tenant's interest FHVP	£1,144,530	
2.175%	£ 24,893 p.a.)	

YP 2.95 years 2.175%	<u>£ 70,422</u>	<u>£1,073,408</u>
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£ 49,033

50%

£ 24,517

Premium

£1,015,271