



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

Case Reference : **BIR/00FY/OAF/2021/0011**

Property : **136 Mansfield Road Nottingham
NG1 3HL**

Applicant : **Mr Amarveer Singh Mann**

Representative : **G R Bates BA FRICS of Adcocks**

Respondent : **LUCEMI LLP**

Representative : **James Hewetson of Matthews &
Goodman LLP**

Type of Application : **Application under Section 21(1)(a)
and Section 21(2)(a) of the Leasehold
Reform Act 1967**

Tribunal Members : **Nicholas Wint FRICS
Judge D Barlow
Wyn Jones BSc Dip Surv FRICS MCI Arb
MEWI**

Date of Decision : **19 November 2021**

DECISION

DECISION

1. The Tribunal determines that, taking account of the evidence adduced and the Tribunal's own general knowledge and experience, the price payable by the Applicant for the acquisition of the freehold interest in the property known as **136 Mansfield Road Nottingham NG1 3HL** (the 'Property') in accordance with section 9(1)(a) of the Leasehold Reform Act 1967 (as amended) is **£7,400 (Seven Thousand & Four Hundred Pounds)** calculated as set out in the Appendix below.
2. In accordance with section 21(2)(a) of the Act the provisions to be included in the conveyance under section 10 of the Act are as set out in the Applicant's TP1, modified to take account of the matters set out in paragraphs 40, 41 and 42 below.

REASONS FOR THE DECISION

Introduction

3. This is an application received by the Tribunal dated 4 May 2021, under section 21(1)(a) of the Leasehold Reform Act 1967 (the 'Act') for a determination of the price payable for the Property under section 9(1A) of the Act and also an application under section 21(2)(a) of the Act for a determination of the provisions which ought to be contained in the conveyance.
4. The Applicant served a Notice of Claim to acquire the freehold of the house and premises on the Respondent dated 4 December 2020. The Landlord's Reply to the Tenant's notice was served by the Respondents Solicitors dated 29 January 2021 admitting the claim.
5. Directions were issued by the Tribunal on 6 May 2021.
6. Due to the Covid 19 public health emergency the Tribunal has not been able to inspect the Property. The parties have also confirmed they are content to proceed without a hearing and by way of documents only.
7. In accordance with the Tribunals Directions the Applicant and Respondent have prepared and submitted their valuations. Mr G R Bates for the leaseholder submits a valuation of **£4,128** and Mr Hewitson for the freeholder a valuation of **£10,000**.

The Law

8. The relevant law in relation to the application is set out in section 8, 9, 14 and 15 of the Leasehold Reform Act 1967 as amended by the Commonhold and Leasehold Reform Act 2002.
9. Under section 8 (Obligation to enfranchise) where a tenant of a house has a right to acquire the freehold, and gives to the landlord written notice of his desire to have the freehold, then the landlord shall be bound to make to the tenant, and the tenant to accept, (at the price and on the conditions so provided) a grant of the house and premises for an estate in fee simple absolute, subject to the tenancy and to tenant's incumbrances, but otherwise free of incumbrances.
10. Section 9 of the Act (Purchase price and costs of enfranchisement, and tenant's right to withdraw) provides:
 - (1) the price payable for a house and premises on a conveyance under section 8 shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions:
 - (a) that the vendor was selling for an estate in fee simple, subject to the tenancy but on the assumption that this Part of this Act conferred no right to acquire the freehold, and if the tenancy has not been extended under this Part of this Act, on the assumption that (subject to the landlord's rights under section 17) it was to be so extended;
 - (b) on the assumption that the vendor was selling subject, in respect of rent charges to the same annual charge as the conveyance to the tenant is to be subject to, but the purchaser would otherwise be effectively exonerated until the termination of the tenancy from any liability or charge in respect of tenant's incumbrances; and
 - (c) that (subject to paragraphs (a) and (b) above) the vendor was selling with and subject to the rights and burdens with and subject to which the conveyance to the tenant is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to section 10.

15. Section 14 of the Act (Obligation to grant extended lease) provides that where a tenant of a house has under this Part of this Act a right to an extended lease, and gives to the landlord written notice of his desire to have it, then except as provided by this Part of this Act the landlord shall be bound to grant to the tenant, and the tenant to accept, in substitution for the existing tenancy a new tenancy of the house and premises for a term expiring fifty years after the term date of the existing tenancy.
16. Under section 15 (Terms of tenancy to be granted on extension) the new tenancy to be granted under section 14 above shall be a tenancy on the same terms as the existing tenancy as those terms apply at the relevant time, but with such modifications as may be required or appropriate to take account:
 - (a) of the omission from the new tenancy of property comprised in the existing tenancy; or
 - (b) of alterations made to the property demised since the grant of the existing tenancy; or
 - (c) in a case where the existing tenancy derives (in accordance with section 3(6) above) from more than one separate tenancies, of their combined effect and of the differences (if any) in their terms.
17. In addition, section 15 provides that from the original term date the rent payable for the house and premises shall be:
 - (a) the ground rent representing the letting value of the site (without including anything for the value of buildings on the site) for the uses to which the house and premises have been put since the commencement of the existing tenancy;
 - (b) the letting value at the date from which the rent based on it is to commence, but as from the expiration of twenty-five years from the original term date the letting value at the expiration of those twenty-five years shall be substituted, if the landlord so requires, and a revised rent become payable accordingly;
 - (c) the letting value shall be determined not earlier than twelve months before the specified time (the reasonable cost of obtaining a valuation for the purpose being borne by the tenant), and there shall be no revision of the rent as provided by paragraph (b) above unless in the last of the twenty-five years there mentioned the landlord gives the tenant written notice claiming a revision.

18. The purchase price payable by the tenant under section 9(1) is, therefore a site valuation with a 50 year lease extension (under section 14) assuming that the tenant and members of the family residing in the house are not buying or seeking to buy, to the effect that any element of marriage value is excluded, there is no right to acquire the freehold and the lease has been extended.
19. In summary, this is calculated as follows:
 - (i) The capitalised value of the rent payable under the tenancy from the date of service of the Notice of the Tenant's Claim until the original term date
 - (ii) The capitalised value of the section 15 rent payable from the original term date until the expiry of the 50 year extension (having regard to the provision for review after the first 25 years of the extension)
 - (iii) The value of the landlord's reversion to the house and premises after the expiry of the 50 year extension, on the basis Schedule 10 to the Local Government and Housing Act 1989 applies to the tenancy
 - (iv) The value of the landlord's right under section 17 to determine the 50 year extension for redevelopment purposes
 - (v) The effect of the new easements and restrictive covenants in the conveyance
 - (vi) The value of the other rights under the extended lease extinguished on the acquisition of the freehold
20. Where section 9(1) of the Act applies, the purchase price and cost of enfranchisement is determined on the basis of the value of the land and there is no marriage value.

The Lease

21. The lease dated 15 September 2014 was originally granted between Walton & Allen (Mansfield Road JV) Ltd (as Lessor) and Clive David Taylor and Andrea Jayne Davis (as Lessee).
22. The lease describes the Property as comprising the land and building edged red on the lease plan known as 136 Mansfield Road Nottingham.
23. The lease was granted for a term of 999 years from 1 April 2013 subject to an annual ground rent of £250 until 1 April 2023, rising every 10 years by the greater of the House Price Index or the All-Items Retail Price Index.

24. The next review date is 1 April 2023.

The Property

25. The Property comprises a three-storey mid-terraced house following the conversion of the original building to form 15 houses fronting Mansfield Road in a mixed residential and commercial area to the north of Mansfield town centre.
26. The ground floor accommodation is described as having a guest cloakroom, living room and kitchen, four bedrooms and two bathrooms with WC's. The property also has a basement which provides two further rooms but both are uninhabitable.
27. To the front and rear is a small garden garden/ patio area and there is parking separate to the main house situated in a parking area accessed off Fulforth Street as well as on-street parking along Mansfield Road.

Valuation Issues

28. The following issues have been identified by the parties:

(i)	Valuation Date:	4 December 2020 (Term unexpired 991.30 years)	
(ii)	Ground Rent:	<u>Applicant</u> £250	<u>Respondent</u> £405
(iii)	Capitalisation Rate	7%	EYC – 3.75% EYF – 6.0%

29. In enfranchisement cases the basis of valuation should follow the steps set out in paragraph 19 above however given the term unexpired is approximately 991 years the value of the 50 year extended lease at the end of the term and the value of the freeholders reversion are so far in the future that both parties agree that its calculation and value are effectively irrelevant.
30. In this case the value of the premium payable is therefore determined by the amount of the ground rent, the effect of the rent review increases and the capitalisation rate.

Conveyancing Terms

31. The Applicant seeks determination of the terms to be included in the transfer of the property under s10 of the Act and has provided a proposed form of TP1. The Respondent has not engaged with the Applicant on the draft deed, choosing instead to prepare its own form of transfer, which was the Applicant states was sent to his representatives following the Directions issued by the tribunal on 27 May 2021.
32. The TP1's differ materially in several respects. The Respondent's transfer effectively reproduces the rights, reservations, restrictions and covenants contained in the Lease. The Lease was granted on a standard form residential lease which obliged the landlord to keep the structure of the buildings on the estate and their surrounds, insured and in good repair, subject to the leaseholders contributing to the costs through a service charge.
33. The Respondent's proposed terms reflect the rights, covenant and conditions of the Lease, modified only to remove the landlord's covenant to insure and keep in repair the structure of the Property, and accordingly, Applicant's liability to pay for these items.
34. The Applicant has proposed terms which the Applicant contends:
 - Include rights that reflect those set out in Part II of the First Schedule to the Lease, as being "necessary for the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy" in accordance with S10(2)(i) and (3) of the Act.
 - Reserves rights that broadly mirror the reservations set out in the Second Schedule to the Lease, to comply with the criteria set out in s10(2)(ii) of the Act
 - Rejects the Respondent's TP1 on the grounds that it contains positive and restrictive covenants that that the Respondent is not entitled to include under s10 of the Act.
35. In relation to the positive covenants which would oblige the Applicant to contribute to the service charge and procure a similar covenant from any successor in title, the Applicant contends that the covenants do not fall within s10(4) of the Act and in the absence of any evidence that an estate management scheme is in place, the Respondent is not entitled to impose positive covenants under s10 of the Act.
36. In relation to the restrictive covenants and conditions, the Applicant contends that the Respondent is not entitled to continue the restrictive covenants contained in the Lease unless it can demonstrate that the

conditions in s10(4) are met. That is that the covenant is capable of benefitting other property and is:

- (i) is enforceable by one or more persons other than the landlord; or
- (ii) although enforceable only by the landlord, is “such as materially to enhance the value of the other property”.

37. The Applicant contends that the Respondent has failed to demonstrate an entitlement to reliance on s10(4) and is not therefore entitled to include the restrictions in the transfer.

38. The Respondent position is that its TP1 is structured to reflect the status quo. It incorporates the same covenants and conditions as were contained in the Lease. The terms are common to the other leases and to the transfers agreed in respect of other enfranchising leaseholders of the estate. Uniformity of rights and conditions across the estate is, the Respondent contends, important to allow full recovery of the costs of maintenance of the common areas and facilities for the benefit of the occupiers of the whole estate and for the protection of the Respondent. The Respondent states that its form of transfer mirrors uniform obligations which ensure the continuation of a high-class development.

39. The Respondent further states that terms it has proposed are the most important element to preserving the value of its reversionary estate and that its offer to compromise on a reduced premium of £7,000.00 was always on the basis that its prescribed form of transfer was accepted.

The Applicant's TP1

40. The extent outlined on the transfer plan should exclude the area tinted blue on the lease title plan (NT505695) which is not within the registered extent of the Respondents freehold title NT491019.

41. The land transferred should not include the parking space because it was not part of the land demised by the Lease. The lessee has no more than a right to park private motor vehicles in the allocated parking space provided that such vehicle is in good repair and is taxed and insured (First Schedule paragraph 8 of the Lease). Box 3 of the TP1 should therefore be amended to remove reference to the parking space. The section headed *Rights granted for the benefit of the property* should be amended to include an additional right in the same terms as paragraph 8 of the First Schedule to the Lease.

42. The *Rights reserved* should contain reservations in the same terms as paragraphs 3, 5, 6 and 7 of the Second Schedule to the Respondents TP1. These terms reflect the reservations contained in paragraph 3, 5, 6 and 7

of the Second Schedule to the Lease and are therefore within(s10(2)(ii) of the Act.

43. In contrast to the Respondent's TP1, the Applicant's TP1 does not contain any positive or restrictive covenants, The terms of any positive or restrictive covenants that should be included in the transfer deed have therefore been considered by reference to those contained within the Respondent's TP1.

The Respondent's TP1

44. The TP1 includes rights and reservations in the First and Second Schedules, which mirror those in the Lease. Most are also replicated in the Applicant's TP1, with the exception of the reservations at paragraphs 3, 5, 6 and 7 of the Second Schedule to the Lease. The Applicant does not dispute the reservations contained within the Lease fall within s10(2)(ii) of the Act and the transfer deed should therefore include these reservations.
45. The Respondent's TP1 also contains numerous definitions and provisos concerning the estate services and facilities, the service charge and estate rent charge securing the charge, the deed of covenant to be entered into by disponees of the estate; in addition to the operative terms at paragraph 6, and the Third, Fourth and Fifth Schedules, all of which are omitted from the Applicant's TP1 on the grounds that the Respondent has no entitlement under the Act to impose positive covenants.
46. In practical terms the omission of these positive covenants mean that the Respondent, who is contractually obliged under the other leases and transfers of the estate to carry out the services, would probably have to make up some or all, of any shortfall in respect of the 1/15th contribution that the Applicant was not contributing. The leases/transfers allow for some flexibility in calculating the appropriate proportions, but it is unlikely that obliging the other occupiers to pick up the shortfall would be regarded as an equitable variation to the current proportions.
47. The Applicant correctly identifies a failure in the legislation to deal adequately with the transfer of positive covenants for maintenance of common facilities. Unless the Applicant agrees to the inclusion of the positive covenants, which he clearly does not, then as they do not fall within the relevant provisions of s10, they cannot be included within the transfer deed.

48. Furthermore, the Lease does not stipulate that the use of the common facilities is subject to an obligation by the tenant to contribute to their repair and maintenance. The tenant's obligation to pay the service charge is linked only to the landlord's covenant to carry out the services. It is not therefore possible to impose a condition on the use of the common facilities that would effectively require the Applicant to contribute to the maintenance charges as a precondition of the use of the facilities.

49. That being said, where a tenant refuses to continue such covenants, the landlord can, in some circumstances, seek payment of compensation under s.9A. The Respondent has not however included a specific claim for compensation within its valuation, it has just stated that the transfer terms were significant in maintaining the value of its reversion and the reduced premium of £7,000.00, was put forward on the basis that the terms of its transfer would be accepted. There is unfortunately therefore no evidence before the tribunal on which it can determine the extent of any diminution in the value of the Respondents estate and consequently the value of any compensation that might otherwise have been claimable.

50. The Respondent's TP1 incorporates restrictions within the Third and Seventh Schedules that mirror those contained within the Lease. The tenant covenants in the lease are given only to the landlord and do not therefore appear to be enforceable by any person other than the landlord.

51. The legislation relating to the continuation of restrictive covenants needs to be considered.

52. Section 8(1) of the 1967 Act provides that, following notice by the tenant to enfranchise, the landlord is bound to make, and the tenant to accept, a grant of the house and premises in fee simple absolute, subject to the tenancy and to tenant's encumbrances, but otherwise free of encumbrances. Section 10 deals with the rights to be conveyed to the tenant. The following provisions are relevant:-

"10 (4) As regard restrictive covenants (that is to say, any covenant or agreement restrictive of the user of any land or premises), a conveyance executed to give effect to section 8 above shall include –

(a) ...

(b) such provisions (if any) as the landlord or the tenant may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy ..., being either –

(i) restrictions affecting the house and premises which are capable of benefiting other property and (if enforceable only by the landlord) are such as materially to enhance the value of the other property; or

(ii)

(c) ...

10 (5) Neither the landlord nor the tenant shall be entitled under subsection (3) or (4) above to require the inclusion in a conveyance of any provision which is unreasonable in all the circumstances, in view –

(a) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and

(b) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses.”

53. The Applicant does not dispute that there are similar covenants in the Lease and the transfers of other enfranchising leaseholders, or that the proposed restrictions secure the continuance (with suitable adaptations) of those covenants under section 10(4)(b) of the 1967 Act. The Applicant's case is simply that the basic rule applies i.e. that the Respondent cannot continue the restrictive covenants in the lease because the Respondent has not demonstrated that it can rely on the proviso's in 10(4)(b).

54. Three questions must therefore be answered in respect of the proposed restrictions:-

(1) Are they capable of benefiting other property (section 10(4)(b)(i))?

(2) The restrictions being enforceable only by the landlords (the Respondent), are they such as to materially enhance the value of the other property (section 10(4)(b)(i))?

(3) Are the restrictions unreasonable in all the circumstances, in view of the date at which the tenancy commenced and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy (section 10(5)(a))?

The answers to these questions will determine whether the proposed restrictions can be included in the TP1

54. The restrictions contained in the Third Schedule and are briefly as follows:

- Paragraph 4 - which restricts alterations to the height, elevation and external appearance of the Property, the making of alterations and addition thereto or the cutting maiming or removal of walls partitions or principle load bearing structures or any development, without the Respondent's consent.
- Paragraph 7 - which restricts any acts that might render void the Respondents insurance or result in an increased premium.
- Paragraph 8 – a restriction on external satellite dishes and aerials
- Paragraph 10 – restricts the use of the Property to residential use and prohibits business use without the Respondents consent.
- Paragraph 11 – restricts the use of the allocated parking space to a private motor vehicle, a motorcycle, or commercial vehicle not exceeding 1.5 tonnes which is taxed and insured.
- Paragraph 12 – is phrased as a positive obligation to comply with the Regulations in the Seventh Schedule – however the regulations are all effectively restrictive in nature and therefore fall within s10(4).

55. The Regulations set out in the Seventh Schedule are briefly as follows:

- Illegal immoral acts, damage, nuisance and annoyance to the Respondent or other occupiers of the estate.
- the use of unsuppressed electrical devices.
- keeping animals other than normal domestic pets.
- external facing advertisements/signs.
- estate agents boards.
- placing refuse anywhere other than in a suitable container.
- playing loud music. Radio, television, or instrument.
- external hanging of clothes.

56. The first question is whether these restrictions are capable of benefiting other property (section 10(4)(b)(i))? Unfortunately, very little argument was put forward on this point. The Respondent only commenting in its statement that dovetailing the terms of the transfer (as a whole, not just in relation to the restrictions) was for the benefit of the occupiers of the estate and the protection of the Respondent.

57. From its own experience the tribunal can determine that the ability of the freeholder to control the size and appearance of extensions and external alterations and also any works that might affect the structural integrity of the adjoining properties or the freeholders insurance, are restrictive covenants that are capable of benefitting the Respondents neighbouring freehold property,

58. Furthermore, the ability to control the use of the Property and the good neighbour restrictions are also restrictions that are capable of benefitting not just the Respondent's property but, if enforced, that of the neighbouring leaseholders and enfranchised freeholders, who are subject to the same restrictions.
59. The tribunal therefore determine that the proposed restrictive covenants are capable of "benefiting" (in a conveyancing sense and not as a matter of valuation) other property.
60. The second question under section 10(4)(b)(i) of the Act is whether, the proposed restrictions, being only enforceable by the Respondent, are such as materially to enhance the value of the other property.
61. The concept of a material enhancement in value can include the concept of maintaining a value which would otherwise deteriorate; see *Peck v Trustees of Hornsey Parochial Charities (1971) 22 P&CR 789*, *Le Mesurier v Pitt (1972) 23 P&CR 389* and *Moreau v Howard de Walden Estates Ltd LRA/2/2002*.

Material enhancement does not have to be proved by demonstrating material enhancement in value, in monetary terms, of a specific property. In *Higgs v Neroba LRA/2/2005*, the tribunal put the matter in this way at paragraph 60.

"In my judgment, and following these decisions, the concept of material enhancement includes both an increase in value due to restrictions and the maintenance of a value which would otherwise deteriorate. The concept is to be applied as a matter of general impression and not by attempting a detailed valuation exercise."

It must however be distinctly proved; see *Cadogan v Erkman [2011] UKUT 90 (LC)* and *Trustees of Sloane-Stanley Estate v Carey-Morgan [2011] UKUT 415 (LC)*, albeit in relation to collective enfranchisement under the Leasehold Reform Housing and Urban Development Act 1993, which makes similar provision concerning restrictive covenants that can be continued from the lease. In the latter of these two cases the Upper Tribunal expressed the matter in the following terms:

"For our part we adopt the observations in both the passages we have quoted. Of particular importance is the indication in the Erkman decision that evidence is required to establish that the restriction will materially enhance the value of other property of the freeholder, although quantification of such enhancement in value is not needed. That must, in our view, be the case, and mere assertions by counsel on behalf of the freeholder are not evidence and are not sufficient."

62. In this case there is a remarkable lack of evidence from the Respondent. The Respondent has provided a copy of the TP1 of 134 Mansfield Road and the first two pages of five other TP1s' that the Respondent states are on the same terms as those offered to the Applicant. The Respondent has not however advanced any argument concerning material enhancement, other than to state that the terms of the transfer were the most important element to preserving the value of the remainder of the Respondent's estate.
63. There has been no evidence from the Respondent as to its policies (if any) in respect of the estate, its experience of uses made of properties on the estate, its experience of managing the estate, or its experience of undesirable uses (if any) of properties. Reference in s10(4)(b)(i) is not to whether the restrictions are important to preserve the value of the Respondents property, the material enhancement must be actual, and we would have expected the Respondent to adduce specific evidence of how any policy it has of imposing specific covenants on properties within the estate operates to avoid specific deterioration of the values of the properties.
64. The material enhancement in value test is not therefore satisfied in respect of any of the restrictions copied through to the TP1 from the Lease, whether considered individually, in parts, or as a whole.
65. Having determined that the material enhancement test has not been met it is not necessary for the tribunal to consider whether the restrictions are otherwise, unreasonable (s10(5)(a)).
66. The tribunal therefore determines that the Property should be transferred to the Applicant on the terms of the Applicant's TP1 modified to take account of the matters set out in paragraphs 40, 41 and 42 above.

Issue No. 1 – Ground Rent

67. Mr Bates confirms the current ground rent is £250 per annum and under the terms of the lease is subject to review every 10 years to the greater of the House Price Index or the Retail Price Index.
68. Mr Bates considers this is an onerous provision as it produces a ground rent in excess of the suggested 0.1% prescribed by CML (UK Finance) which is accepted by most reputable lenders. Further Mr Bates considers the fact that the rent is subject to review every 10 years over a 999 year term it would not be acceptable to mainstream UK lenders and is also in breach of the pledge not to double ground rents over a 20 year period.

69. Mr Bates also considers that there is a risk of the freeholder terminating or forfeiting the lease during the term which could cause a lending issue for the leaseholder. Therefore, Mr Bates considers the Property under the existing lease terms is possibly un-mortgageable and likely to be of interest only to professional property investors at a discounted price.
70. In calculating the present ground rent Mr Bates adopts the RPI basis of valuation. He has adjusted the ground rent by £46 per annum for the balance of the term (988.5 years) reflecting the increase in the RPI from the base figure in March 2013 (248.7 - the start of the lease) to the latest published RPI figure in September 2020 (294.3) representing an 18.33% uplift to the base rent of £250. As regard the value of the reversion and marriage value Mr Bates considers this is effectively nil thereby arriving at a figure for the premium payable of £4,128.
71. Mr Hewitson also confirms the initial ground rent is £250 per annum which is subject to review every 10 years calculated by reference to the greater of the increase in the 'All Items' RPI index or House Price Index with the next review due on 1 April 2023.
72. Mr Hewitson has therefore adopted the Land Registry HPI for Nottingham Terraced Houses as the most relevant measure and based on this calculates that in March 2013 the index was 86.79 and at the date of the claim stood at 140.59 producing an increase of 61.99% giving a revised ground rent of £405 per annum until the next review.

The Tribunal's Decision

73. The Tribunal has considered the rent review provisions set out in the Eighth Schedule of the lease. It provides that the rent is to be reviewed every 10 years to the greater of the All Items RPI index or the Index of House Prices (HPI) published by the relevant Ministry or Department.
74. Mr Bates calculates that based on the RPI index the revised ground rent in 2023 should be £296 which Mr Hewitson also calculates produces approximately the same figure however concludes that the HPI basis does in fact produce a higher figure of £405 in accordance with the review clause.
75. The Schedule does not define HPI but the Tribunal agrees with Mr Hewitson that the most appropriate and relevant measure is to adopt the Land Registry HPI for Nottingham (Terraced Houses). This produces an increase of approximately 61.99% between March 2013 (86.79) and the date of the valuation (140.59) which in total produces £404.97 SAY £405.

76. The Tribunal therefore finds the ground rent for the purpose of calculating the premium is £405.

Issue No. 2 – Capitalisation Rate

77. Mr Bates advises that the leaseholder purchased the Property in April 2018 at £275,000 and that the current freeholder acquired the freehold interest at a price of £54,000. Mr Bates calculates this is a yield of 6.94% which is the basis for his adoption of 7%. And in further support of this Mr Bates refers to several Tribunal decisions where the capitalisation rates adopted are between 6.5% and 7%.
78. Mr Hewitson refers to the valuation approach being effectively a ‘cash-flow exercise’ and that issues relating to market value are not relevant. And in this case as there are no fixed increases and any future rent increases are subject to an index-based method there is an element of uncertainty and subjectivity in calculating this figure in advance of any published figures.
79. As a consequence, Mr Hewitson advises that there are two methods of calculation that are adopted in such circumstances. The first he refers to is EYF and the second known as EYC.
80. The EYF approach is to estimate the future rental income at successive reviews until the marginal additions become de minimis. This is effectively a subjective approach whereby an estimated average rate of increase is applied over a future period. The alternative EYC approach is to estimate the anticipated ground rent at the next review and to apply that from the first reversion to the balance of the term.
81. Mr Hewitson advises that as EYF is effectively valuing higher-value income streams (that increase every 10 years – from £405 as at 1 April 2023 rising to £15,943 as at 24 June 2163) a higher discount rate should be applicable than for EYC as it is more appealing to investors given the income growth potential in the future; in effect the yield adopted reflects the future income growth potential. Based on this Mr Hewitson adopts an EYF yield of 6% compared to 4.65% for EYC based on a 20% growth factor every 10 years.
82. In support of Mr Hewitson’s approach he refers to the ONS data from 1987 which shows a mean average RPI 0.27% per month equating to 3.27% per year and 32.4% over a 10 year period. This compares to the mean average rates for HPI over the last 20 years showing an average growth rate of 0.42% per month, 5.04% per year and 50% over 10 years.

83. Mr Hewitson suggests that previous Tribunal decisions prefer the EYC approach as it is less subjective and therefore adopted this approach.
84. Mr Hewitson also advises of the difficulty in establishing reliable evidence of ground rent transactions sold in the open market. Such transactions do take place according to Mr Hewitson however they are reported on an Initial Yield basis and as a consequence of the financial crash and the reduction in bank rates yields have fallen from 5 to 4% for standard ground rents with fixed rent reviews every 25 or 33 years. Furthermore, where there are guaranteed increases and shorter review patterns, Mr Hewitson considers that even lower yields are applicable in the investment market.
85. In addition, Mr Hewitson refers to 6 previous transfers of the freehold interest of neighbouring properties within the same estate in Mansfield Road. In 2019 the respondent sold 4 properties (No. 134, 138, 118 and 120 Mansfield Road) in 2019/20 each at £9,700 (reflecting an EYC of 4%) and 2 properties (No. 122 and 130 Mansfield Road) in 2020/21 at £13,500 each (reflecting an EYC of 2.9%). Mr Hewitson considers the former to be more in line with the general market returns expected for standard ground rents; and as a check Mr Hewitson also provides the EYF yields of 6.05% and 5.05% respectively. None of the tenants were represented but Mr Hewitson does not consider this a factor given they were relatively straight forward calculations that should have been easily understood by the lessees. However, Mr Hewitson does advise that he considers the sales at 4% do not fully reflect the benefit of indexation whereas the sales at £13,500 producing 2.9% are too low
86. Mr Hewitson also refers to previous Tribunal decisions and in particular:
- 18 Thornlaw Road Audenshaw MAN/00BT/OAF/2013/0018 where the Tribunal determined a yield of 5%. In that case the ground rent was £195 per annum rising by reference to the RPI to £246 and thereafter increasing every 10 years. In Mr Hewitson's view the case is identical to the subject dispute except that the landlord in this instance has the benefit of two indices to calculate any future rental increase which should therefore result in a lower yield applicable.
- Raymond Chorley v DATS (Holdings) Ltd MAN/00ET/OAF/2018/0025
Mr Hewitson represented the landlord where the lease was subject to a term of 999 years at an initial ground rent of £200 per annum which was subject to a periodic increase initially eventually reverting to 0.1% of the market value thereafter. In this case the yield adopted was 5.5%.

St Emmanuel House (Freehold) Ltd v Berkeley 76 Ltd CHI/21UC/OCE/2017/0025, 26 and 29 which, Mr Hewitson, advises refers more to the valuation approach adopted but where the EYC applied was 3.35%

Cedars (Belmont Hill) Ltd v Shamash LON/00AZ/OCE/2018/0120 a block of 10 flats were sold on 125 year leases with 21 year review patterns based on the aggregate value of the flats in the building. The Tribunal determined the capitalisation rate at 4.75% but the it found that indexation by reference to property values produced a greater increase than by RPI which in turn would affect the choice of yield.

And finally, Various Applicants v Elmbirch Properties plc CHI/29 and 43UG/OLR/0004 to 0013 where the flats were held on 125 leases with fixed ground rents that doubled every 10 years for the first 50 years reverting to RPI thereafter. In this case the capitalisation rate was determined at 6.15% by the Tribunal and according to Mr Hewitson the EYC is 5.39%.

87. In summary, Mr Hewitson has adopted an EYC of 3.75% to produce a valuation of £10,380 and an EYF of 6% to produce a valuation of £9,880 and based on these two figures arrives at a Premium of £10,000.
88. Mr Hewitson also provides a brief reply to Mr Bates's Report. In particular he refers to the fact that Mr Bates has failed to provide a valuation on both bases and disagrees with Mr Bates's comments concerning the review pattern, market value of the property in the future and the circumstances of the respondent at the time six years ago. As regard the Tribunal references showing capitalisation rates of between 6.5% and 7% Mr Hewitson comments as follows:

7 Weymouth Views

Mr Hewitson advises that the property is in a high value area of London and although the ground rent increases at fixed periods it only has 40 years unexpired. The capitalised ground rent is not therefore a major determining factor of the premium payable.

Flat 211 The Promenade St Leonards on Sea

Mr Hewitson advises that the details provided by Mr Bates are inadequate making no reference to the unexpired term and that the fixed uplift is not comparable to the subject property's lease.

46 Penns Court

Mr Hewitson advises that the details provided by Mr Bates are lacking and that the income profile is not comparable

57 Woodgrange Drive

Mr Hewitson again advise that the details provided by Mr Bates are inadequate and that the income profile is not comparable.

Finally, Mr Hewitson also has concerns with the fact that Mr Bates has failed to include a Statement of Truth in his report.

The Tribunal's Decision

89. The Tribunal is aware that the key determinants to the assessment of the appropriate capitalisation rate are generally considered to be length of lease, security of recovery, amount of ground rent, provisions for review and type of review provision.
90. The Tribunal agrees that the formula in the lease makes it difficult to predict with any certainty what the future ground rent increase will be and may lead to large increases. Further, where there is a risk of large rental increases, it is likely to have an impact on the marketability and mortgageability of the lease and property. Therefore, an approach which removes some subjectivity should lead to a more accurate assessment of the likely Premium payable.
91. The Tribunal is aware that UK Finance in its Lenders Handbook requests their instructing solicitors to consider and, if necessary, report to them any likely increases of potential concern to them. However, the Tribunal notes that the Handbook is voluntary for lenders and not all choose to use it. In such circumstances where a lender is not listed conveyancers are advised to contact the lender direct for instructions.
92. The Tribunal is also aware that mortgage lenders (and buyers) prefer ground rents to be as low as possible or subject to fixed increases that occur more slowly or less frequently during a lease's lifetime. Lenders are also constantly reviewing their lending and risk criteria and a property subject to onerous ground rent provisions is more likely to be harder to sell or re-mortgage as a result.
93. The Tribunal also agrees that the risk of a rising ground rent that becomes unaffordable can also lead to an increase in a leaseholder defaulting on its payment and ultimately lead to court proceedings and a judgment affecting their credit rating and the possible forfeiture of the lease.
94. Furthermore, a landlord has greater powers to take possession of a property and bring the lease to an end where a leaseholder has failed to

pay its ground rent if the ground rent is in excess of £250 per annum (or £1,000 per annum in Greater London). The Tribunal notes that the law treats the lease as if it were an ‘assured tenancy’. This means, rather than being obliged to go through a legal process known as ‘forfeiture of the lease’ (which not only affords a leaseholder more time to pay the outstanding rent but also protects the lender, whom the landlord must notify of the rent arrears) the landlord has an easier mechanism to bring the lease to an end.

95. The Tribunal has therefore carefully considered these risks arising from the frequency and method of the ground rent calculation and issues surrounding the lending criteria and potential un-affordability and the possible forfeiture of the lease in reaching its assessment of the appropriate capitalisation rate. The Tribunal however acknowledges that the property would still remain attractive to a professional investor albeit at a lower value than would ordinarily be expected in the wider market.
96. The capitalisation rate must also have regard to other asset classes and forms of investments and the expected returns an investor requires and the associated risks of holding that investment asset.
97. In view of the difficulty in calculating the likely ground rent increases at each rent review interval under the terms of the lease the Tribunal prefers the approach whereby the valuation removes the uncertainty of having to estimate the future rental increases and adopts the methodology of capitalising the current level of the anticipated ground rent at the next review to the remainder of the term.
98. The Tribunal therefore considers, having regard to the terms of the lease, rent review provisions and evidence adduced and based on its own expertise and knowledge of the market that the appropriate capitalisation rate is 5.25%.

Appeal Provisions

99. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Appendix

VALUATION

136 Mansfield Road Nottingham NG1 3HL

Applying that determination to the matters agreed by the parties, the Tribunal's valuation is as follows:

1. Term

Ground Rent	£250	
YP 2.32 years @ 5.25%	<u>2.11</u>	£527.50
Ground Rent	£405	
YP 991.3 years @ 5.25%	19.04762	
PV 2.32 years @ 5.25%	<u>0.888065</u>	£6,850.79
2. Reversion – 50 year lease		£0.00 (de minimis)
3. Reversion – Standing House		£0.00 (de minimis)
TOTAL		£7,378.29
PREMIUM PAYABLE, SAY		£7,400.00