



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

Case Reference : **BIR/00CN/OLR/2021/0004**

Property : **3 Phoenix Court West Drive Edgbaston
B5 7RT**

Applicant : **L Jacobs & M Shipton as Executors of D
Oscar (Deceased)**

Representative : **Mr K Chew of Lawrence & Wightman**

Respondent No.1 : **WEL (No. 1) Limited**

Representative : **Mr G Evans of eBureau Ltd. on behalf of
Stevensons Solicitors**

Respondent No. 2 : **Priory Estate Management (Edgbaston)
Ltd.**

Type of Application : **Application under section 48 of the
Leasehold Reform, Housing & Urban
Development Act 1993**

Tribunal Members : **N Wint BS (Hons) FRICS ACI Arb
V Ward BSc Hons FRICS**

Date of Decision : **28 July 2021**

DECISION

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1. The Tribunal determines the premium payable by the Applicants at **£24,925 (Twenty Four Thousand, Nine Hundred and Twenty Five Pounds)**.
2. The application to determine the landlords' recoverable costs associated with this case is stayed. The parties are to advise the Tribunal within 21 days of the date of this decision if costs are agreed or if they require the Tribunal to issue Directions in this regard.

REASONS FOR THE DECISION

Introduction

3. This is an application received by the Tribunal on 19 February 2021, under section 48(1) of the Leasehold Reform Housing and Urban development Act 1993 (the 1993 Act) to determine the premium payable to extend a lease and the other terms of the acquisition in addition to an application under section 60 (1) of the Act for a determination of reasonable costs in respect of Garage No. 6 and Flat No. 3 Phoenix Court West Drive Edgbaston Birmingham B5 7RT.
4. The Applicant served a Notice of Claim (to extend the current lease by 90 years at a peppercorn ground rent and otherwise in accordance with the existing lease) under section 42 of the 1993 Act dated 17 August 2020. The Notice proposed a total premium of £19,010 for the grant of a new lease (£18,919 payable to the Reversioner, £35 payable to the Intermediary Landlord together with a further £56 payable in accordance with Part III of Schedule 13 of the Act).
5. By way of reply the Respondent served a Counter-Notice under section 45 of the 1993 Act dated 12 October admitting the Tenants right to acquire a new lease on the relevant date of the Flat only as the Applicants Claim did not contain sufficient particulars to identify the garage and no plan was included to deduce title and that it appears that a garage was not within the curtilage of the block of flats within which the flat is situate
6. The Respondent submitted a counter proposal stating that the Landlord requires a total premium of £34,440 (£34,220 payable to the Reversioner, £80 payable to the Intermediary Landlord together with a further £140 payable in accordance with Part III of Schedule 13 of the Act). The Respondent also proposed that the new lease is to include the same terms

and covenants as the existing lease together with various additional clauses and amendments.

7. Directions were issued by the Tribunal dated 22 February 2021.
8. The Tribunal understands that that the draft lease setting out the proposed terms has been agreed and the application to determine the landlord's recoverable costs has been stayed.
9. Due to the Covid 19 public health emergency the Tribunal has not been able to inspect the Property. The parties have confirmed they are content to proceed without a hearing and by way of documents only.
10. In accordance with the Tribunals Directions the Applicant and Respondent have prepared and submitted their valuations. Mr Chew for the Leaseholder submits a valuation of **£21,434** and Mr Evans for the Freeholder a valuation of **£28,790**.

The Law

11. Section 48 of the 1993 Act prescribes that if a premium is not agreed it can be referred to the First-tier Tribunal (Property Chamber) where it can be assessed in accordance with the formula in Schedule 13 to the Act.
12. The relevant law in relation to the application under the Act is set out in Chapter II sections 39 to 62 and Schedule 13 to the Leasehold Reform, Housing and Urban Development Act 1993.
13. Chapter II of the Act relates to the individual right of a tenant of a flat to acquire a new lease of that flat. The law is contained in Sections 39 to 61B of the Act and Part 2 of Schedule 13 deals with the premium payable in respect of the grant of a new lease.
14. Section 42 sets out what must be contained in the tenant's notice. Section 45 sets out what must be contained in any counter-notice given in response by the Landlord.
15. Section 48 deals with applications where the terms of the new lease are in dispute or where there is a failure to enter into a new lease.
16. Section 56 deals with the obligation to grant a new lease and section 57 sets out the terms on which a new lease is to be granted.

The Lease

17. The underlease dated 6 April 1960 was originally made between Priory Development Company Limited (as Under-lessor) and Elwyn Jones (as Under-lessee). The lease describes the Property as all that flat on the ground floor of the Building known as 3 Phoenix Court show edged red on the lease plan.
18. There is a further underlease dated 6 April 1960 also originally made between the same parties in respect of the garage No. 6 West Drive, Pershore Road Edgbaston.
19. The lease in respect of the flat was granted for a term of 99 years (less 3 days) from 25 March 1958 subject to a ground rent payable of £10 per annum.
20. The lease in respect of the garage was granted for a term of 99 years (less 3 days) from 25 March 1958 subject to a ground rent payable of £1.00 per annum.

The Property

21. The Property is a ground floor flat situated in a part 5-storey and part 6-storey block of flats constructed in the late 1960's. There are separate blocks of garages located on West Drive.
22. The accommodation comprises a hallway with airing cupboard, living room, double bedroom, kitchen and bathroom extending to approx. 350 sq. ft. in total. Heating is provided by wall mounted electric panel radiators (in the lounge and bedroom only) and the windows are UPVC double glazed units.
23. Access to the flat is via a communal entrance door and hallway and there are communal gardens around the block. The garage is known as No. 6.
24. The flat is described as being in an average condition with basic kitchen fittings, a dated bathroom suite and basic decorations throughout.
25. Mr Evans advises that he has not inspected the Property due to the Covid-19 restrictions and has only carried out an external inspection.

Matters agreed between the parties

26. The following matters are agreed between the parties:

- (i) Unexpired Term: 36.59 years
- (ii) Capitalisation rate: 7%
- (iii) Adjustment to Freehold: 1%

Matters in dispute between the parties

27. The following matters are in dispute:

	<u>Applicant</u>	<u>Respondent</u>
(i) Valuation Date:	17 Aug, 2020	19 Aug. 2020
(ii) Extended Lease Value:	£86,000	£100,000
(iii) Existing Lease Value:	£64,000 (£55,334)	£59,358
(iv) Deferment Rate:	5.5%	5%
(v) Relativity:		
(a) Enfranchiseable Graph	67.97%	
(b) Value of Act Rights	13.54% 58.77%	
(c) Unenfranchiseable Graph		58.77%

Issue No.1: Valuation Date

28. Mr Chew for the Applicant advises that the Notice of Claim dated 17 August 2020 was served on the freeholders. Therefore, the valuation date for the purpose of the application is 17 August 2020 and as at that date the lease has 36.59 years unexpired.

29. Mr Evans for the Respondent advises that although the Notice of Claim is dated 17 August 2020 under Part 6 of the Civil Procedure Rules (CPR) the deemed date of service is the second day after it was posted (provided that day is a business day). As 17 August was a Monday the deemed date is Wednesday 19 August but calculates that, after rounding, the term remaining is 36.59 years unexpired.

30. The Tribunal finds that the valuation date for the purposes of this application is the date of the Notice served, 17 August 2020.
31. The unexpired term is 36 years, 7 months and 6 days (36.59 years).

Issue No.2: Extended Lease Value

32. Mr Chew has considered four extended lease sales on the development:
 - (i) No. 9 Phoenix Court sold in January 2020 at £104,000,
 - (ii) No. 27 Phoenix Court sold in June 2020 at £85,702
 - (iii) No. 32 Griffin Court sold in September 2020 at £96,600; and
 - (iv) No. 7 Griffin Court sold in March 2021 at £96,000.
33. Additionally, Mr Chew has considered 6 Griffin Court which has a balcony and appears to be in good order is on the market and under offer at £90,000.
34. Mr Chew concludes that the best evidence is 32 Griffin Court and 27 Phoenix Court both of which were sold either side of the subject Property's valuation date. Mr Chew suggests that the price achieved in respect of 9 Phoenix Court looks out of line whereas the price in respect of 32 Griffin Court and 7 Griffin Court are reflective of their good order and general condition unlike 27 Phoenix Court which is in need of modernisation.
35. Having regard to the general condition of the Property, the fact it does not have a balcony, possible noise issues given its proximity to the main entrance and the need for updating Mr Chew concludes that the extended lease value would be £86,000.
36. Mr Evans has considered the sale of 27 Phoenix Court and 32 Griffin Court the specific details of which concur with those of Mr Chew.
37. However, Mr Evans considers the subject Property to be superior by virtue of it being on the ground floor and having easy access to the communal gardens. Based on this Mr Evans concludes that the Extended Lease Value is £100,000.

38. The Tribunal agrees with Mr Chew that the evidence in respect of No. 9 appears out of line with the other evidence however this may be due to the fact that it has been refurbished (including a refurbished kitchen), is located on the 1st floor and includes a balcony.
39. The Tribunal considers No. 27 and No. 32 more helpful having regard to their similar condition and respective sale dates. Further both are similar in size and offer the same sort of accommodation except No. 32 has a balcony. It also appears from the details that neither have been modernised to the extent of No. 9. In addition, the Tribunal does not find that due to the fact the Property is on the ground floor it would achieve a higher value. Whilst ground floor properties may be more appealing to residents with mobility issues, they are considered less secure than properties on upper floors.
40. The Tribunal determines that the Extended Lease Value is £90,000.

Issue No. 3: Existing Lease Value

41. In the absence of market evidence Mr Chew has had regard to the Savills Enfranchisable Graph and made an additional adjustment for the No Act World deduction. Based on an Existing Lease Value of £86,000 (adjusted upwards to freehold by 1%) Mr Chew adopts a relativity of 67.97% (36.59 years remaining) and 13.54% for the Value of Act Rights to arrive at a valuation of £51,050.
42. However, Mr Chew also refers to No. 8 Griffin Court which sold in December 2018 at £75,500. According to the details provided the flat was in need of refurbishment and had approximately 42 years remaining on its existing lease. In addition, Mr Chew has considered the sale of No. 27 Griffin Court from December 2016 but discounts it on the basis of it being too historic.
43. Based on this and having regard to his experience and judgement Mr Chew considers that the existing lease value is £64,000 and after deducting 13.54% for No Act Rights arrives at £55,334.
44. Mr Evans also advises that in the absence of market evidence he has used the Graphs of Relativity but has taken an average of the Savills and Gerald Eve Unenfranchisable Graphs (and hence no need to make any further adjustment No Act World) to arrive at a total adjustment 58.77%. Based on an Extended Lease Value of £100,000 (adjusted upwards to freehold by 1%) arrives at a valuation of £59,358.

45. Both parties are in agreement that given the lack of reliable market evidence the best approach is to adopt graph-based evidence from Savills and Gerald Eve. Mr Chew has however considered the enfranchiseable graphs and Mr Evans the unenfranchiseable graphs but have effectively arrived at the same total adjustments.
46. The Tribunal considers that in the absence of any market evidence the most appropriate method is to adopt the graph-based approach.
47. The Tribunal is aware of the decision in *Sloane Stanley v Mundy* [2016] UKUT 0223 (LC) where the Upper Tribunal commented extensively on the unreliability of graph-based evidence. The Tribunal is also aware that the Upper Tribunal in *Elmbirch Properties Plc v two leaseholders* [2017] UKUT 314 (LC), at paragraph 37 expressed concerns about the use of a straight-line graph, although not going so far as to say they must not be relied upon.
48. However, given the lack of transactional based evidence the Tribunal is satisfied that there is good reason to depart from these decisions as there is insufficient market evidence to follow the view expressed by the Upper Tribunal on this point.
49. The Tribunal determines that based on the Extended Lease Value of £90,000 adjusted to freehold to £90,900 and reflecting the Graph evidence the Existing Lease Value is £53,419.

Issue No. 4: Deferment Rate

50. Mr Chew has adopted a deferment rate of 5.5%.
51. Mr Chew advises that this rate has been adopted by him in a number of negotiated cases and in cases previously heard by the Midlands Tribunal.
52. This, Mr Chew advises, follows *Sportelli* which decided a generic rate of 5% for flats and *Zuckerman* which increased the rate to 6% after being adjusted upwards to reflect lower capital growth rates in the West Midlands, obsolescence and the likely increased costs of management. However, following *Voyoda* and *7 Grange Crescent* the Upper Tribunal decided that the adjustments for obsolescence and management costs should only be considered in exceptional circumstances and Mr Chew therefore concludes that the correct deferment rate is 5.5%.
53. In further support Mr Chew refers to the decisions of *Flat 6 Elmwood Court Edgbaston* and *62 Michael Court Bristol Road Edgbaston* in which the Tribunal in both cases adopted a deferment rate of 5.5%.

54. Mr Evans for the Respondent has adopted a deferment rate of 5%.
55. Mr Evans's starting point is also *Sportelli*. In that decision Mr Evans refers to paragraph 88 which says that it is accepted that the deferment rate can be adjusted for location but based on the evidence adduced there was no justification for making an adjustment to reflect regional or local differences and that no adjustment to the real growth rate was appropriate given the long-term basis of the deferment rate and that any locational differences, in the absence of clear evidence suggesting otherwise, are to be assumed as being reflected in the freehold vacant possession value.
56. Mr Evans also refers to paragraph 114 in the *Sportelli* decision where the Tribunal effectively observes that its function is to promote consistent practice and predictability thereby avoiding the need to submit extensive financial and valuation evidence in every case. That is unless there is compelling evidence to the contrary.
57. Mr Evans also refers to paragraph 121 which again refers to the need for predictability and that subsequent Tribunals should be able to be guided by this decision but that they should also be able to use their own expertise where there is compelling evidence to the contrary. This, the Tribunal concluded, was because the deferment rate was unlikely to be affected by such factors as the prospect of long-term growth while other factors such as location and obsolescence will already be affected in the vacant possession value.
58. In effect the decision effectively goes on to say that the adoption of a deferment rate of 5% for flats needs to be considered in relation to the facts of each individual case. But in adopting a different rate, the valuer or Tribunal has to be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the particular property concerned.
59. *Sportelli* calculated that the generally accepted deferment rate for flats of 5% was made up of the risk-free rate (2.25%) less the real growth rate (2%) plus the risk premium (4.75%).
60. *Zuckerman*, which followed *Sportelli*, held that the deferment rate should be increased to reflect an investor's view that the long-term growth prospects (i.e. the real growth rate) in the West Midlands compared to that achievable in PCL would not be lower and to reflect this the risk premium should be adjusted upwards by 0.5%.
61. In *Clarise*, where Mr Evans also acted, the evidence adduced demonstrated a difference in property price growth between Kensington and Chelsea, the West Midlands and the UK as a whole. However, Mr Evans considered that the actual real growth rates in *Zuckerman* was not fully considered and that

these were simply assumed to be less than 2% whereas in his view the RGR exceeded 2%.

62. In further support of this Mr Evans refers to *Elmwood* and explains that the reason he was unable to provide evidence of growth rates from 1974/75 to 1995 was because Land Registry did not make such information available prior to 1995 and he only had details of sales of 32 of the 36 properties at Kelton Court.
63. In *Lanehead* Mr Evans states he did in fact provide evidence from 1974/75 which was for a period longer than *Zuckerman* and suggests that the Tribunal made certain assumptions regarding real growth rates based on price growth which were incorrect.
64. Based on this Mr Evans concludes that an upward adjustment in the deferment rate should only be made if it can be shown that the real growth rate was in fact less than 2% and considers that as this is not the case, as in shown in *Elmwood* and *Lanehead*, then *Zuckerman* should not be followed and for these reasons adopts 5%.
65. The Tribunal has carefully considered the respective arguments of Mr Chew and Mr Evans. The Tribunal is not persuaded by Mr Evans arguments and finds that the guidance in *Sportelli* to promote consistent practice in the application of the law remains and finds no compelling evidence to the contrary which would persuade the Tribunal to depart from this principal.
66. The Tribunal considers that the authority for the deferment rate for 1993 Act cases remains the decision of the Court of Appeal in *Sinclair Gardens Investments (Kensington) Ltd v Ray [2015] EWCA Civ 1231* (7 Grange Gardens).
67. The Tribunal therefore finds that the appropriate deferment rate is 5.5%.

Appeal Provisions

68. If either party is dissatisfied with this decision, they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, an application must be made, in writing, to this Tribunal for permission to appeal. Any such application must be made within 28 days of the issue of this decision (regulation 52 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013) stating the grounds upon which it is intended to rely on in the appeal.

Nicholas Wint FRICS

VALUATION

Phoenix Court West Drive Edgbaston Birmingham B5 7RT

The Tribunal determines that the value of the premium payable by the Applicant for the subject Property is calculated as follows:

Freeholders Present Interest

Term

Ground Rent	£11.00	
YP 36.59 years @ 7.0%	<u>13.08414</u>	£143.93

Reversion (to Freehold)

Market Value	£90,000	
<u>Add Freehold uplift 1%</u>	<u>£900.00</u>	
	£90,900	
PV 36.59 years @ 5.5%	<u>0.140991</u>	<u>£12,816.08</u> £12,960.01

Freeholders Proposed Interest

Extended Leasehold Value	£90,000	
PV 126.59 years @ 5.5%	<u>0.001139</u>	£102.51

Marriage Value

1. Proposed Interests

Freehold	£102.51	
<u>Add Leasehold</u>	<u>£90,000</u>	£90,102.51

2. Present Interests

Freehold	£12,960.01	
Existing Leasehold	<u>£53,419.00</u>	<u>£66,379.01</u>

Total Marriage Value £23,723.50

Marriage Value Share at 50% **£11,861.75**

Total Premium Payable £24,924.27

SAY £24,925.00



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Representative : **Mr K Chew of Lawrence & Wightman**

Respondent No.1 : **WEL (No. 1) Limited**

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6. The Respondent submitted a counter proposal stating that the Landlord requires a total premium of £34,440 (£34,220 payable to the Reversioner, £80 payable to the Intermediary Landlord together with a further £140 payable in accordance with Part III of Schedule 13 of the Act). The Respondent also proposed that the new lease is to include the same terms

and covenants as the existing lease together with various additional clauses and amendments.

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30. The Tribunal finds that the valuation date for the purposes of this application is the date of the Notice served, 17 August 2020.
31. The unexpired term is 36 years, 7 months and 6 days (36.59 years).

Issue No.2: Extended Lease Value

32. Mr Chew has considered four extended lease sales on the development:
 - (i) No. 9 Phoenix Court sold in January 2020 at £104,000,
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Issue No. 3: Existing Lease Value

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46. The Tribunal considers that in the absence of any market evidence the most appropriate method is to adopt the graph-based approach.
47. The Tribunal is aware of the decision in *Sloane Stanley v Mundy* [2016] UKUT 0223 (LC) where the Upper Tribunal commented extensively on the unreliability of graph-based evidence. The Tribunal is also aware that the Upper Tribunal in *Elmbirch Properties Plc v two leaseholders* [2017] UKUT 314 (LC), at paragraph 37 expressed concerns about the use of a straight-line graph, although not going so far as to say they must not be relied upon.
48. However, given the lack of transactional based evidence the Tribunal is satisfied that there is good reason to depart from these decisions as there is insufficient market evidence to follow the view expressed by the Upper Tribunal on this point.
49. The Tribunal determines that based on the Extended Lease Value of £90,000 adjusted to freehold to £90,900 and reflecting the Graph evidence the Existing Lease Value is £53,419.

Issue No. 4: Deferment Rate

50. Mr Chew has adopted a deferment rate of 5.5%.
51. Mr Chew advises that this rate has been adopted by him in a number of negotiated cases and in cases previously heard by the Midlands Tribunal.
52. This, Mr Chew advises, follows *Sportelli* which decided a generic rate of 5% for flats and *Zuckerman* which increased the rate to 6% after being adjusted upwards to reflect lower capital growth rates in the West Midlands, obsolescence and the likely increased costs of management. However, following *Voyoda* and *7 Grange Crescent* the Upper Tribunal decided that the adjustments for obsolescence and management costs should only be considered in exceptional circumstances and Mr Chew therefore concludes that the correct deferment rate is 5.5%.
53. In further support Mr Chew refers to the decisions of *Flat 6 Elmwood Court Edgbaston* and *62 Michael Court Bristol Road Edgbaston* in which the Tribunal in both cases adopted a deferment rate of 5.5%.

54. Mr Evans for the Respondent has adopted a deferment rate of 5%.
55. Mr Evans's starting point is also *Sportelli*. In that decision Mr Evans refers to paragraph 88 which says that it is accepted that the deferment rate can be adjusted for location but based on the evidence adduced there was no justification for making an adjustment to reflect regional or local differences and that no adjustment to the real growth rate was appropriate given the long-term basis of the deferment rate and that any locational differences, in the absence of clear evidence suggesting otherwise, are to be assumed as being reflected in the freehold vacant possession value.
56. Mr Evans also refers to paragraph 114 in the *Sportelli* decision where the Tribunal effectively observes that its function is to promote consistent practice and predictability thereby avoiding the need to submit extensive financial and valuation evidence in every case. That is unless there is compelling evidence to the contrary.
57. Mr Evans also refers to paragraph 121 which again refers to the need for predictability and that subsequent Tribunals should be able to be guided by this decision but that they should also be able to use their own expertise where there is compelling evidence to the contrary. This, the Tribunal concluded, was because the deferment rate was unlikely to be affected by such factors as the prospect of long-term growth while other factors such as location and obsolescence will already be affected in the vacant possession value.
58. In effect the decision effectively goes on to say that the adoption of a deferment rate of 5% for flats needs to be considered in relation to the facts of each individual case. But in adopting a different rate, the valuer or Tribunal has to be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the particular property concerned.
59. *Sportelli* calculated that the generally accepted deferment rate for flats of 5% was made up of the risk-free rate (2.25%) less the real growth rate (2%) plus the risk premium (4.75%).
60. *Zuckerman*, which followed *Sportelli*, held that the deferment rate should be increased to reflect an investor's view that the long-term growth prospects (i.e. the real growth rate) in the West Midlands compared to that achievable in PCL would not be lower and to reflect this the risk premium should be adjusted upwards by 0.5%.
61. In *Clarise*, where Mr Evans also acted, the evidence adduced demonstrated a difference in property price growth between Kensington and Chelsea, the West Midlands and the UK as a whole. However, Mr Evans considered that the actual real growth rates in *Zuckerman* was not fully considered and that

these were simply assumed to be less than 2% whereas in his view the RGR exceeded 2%.

62. In further support of this Mr Evans refers to *Elmwood* and explains that the reason he was unable to provide evidence of growth rates from 1974/75 to 1995 was because Land Registry did not make such information available prior to 1995 and he only had details of sales of 32 of the 36 properties at Kelton Court.
63. In *Lanehead* Mr Evans states he did in fact provide evidence from 1974/75 which was for a period longer than *Zuckerman* and suggests that the Tribunal made certain assumptions regarding real growth rates based on price growth which were incorrect.
64. Based on this Mr Evans concludes that an upward adjustment in the deferment rate should only be made if it can be shown that the real growth rate was in fact less than 2% and considers that as this is not the case, as in shown in *Elmwood* and *Lanehead*, then *Zuckerman* should not be followed and for these reasons adopts 5%.
65. The Tribunal has carefully considered the respective arguments of Mr Chew and Mr Evans. The Tribunal is not persuaded by Mr Evans arguments and finds that the guidance in *Sportelli* to promote consistent practice in the application of the law remains and finds no compelling evidence to the contrary which would persuade the Tribunal to depart from this principal.
66. The Tribunal considers that the authority for the deferment rate for 1993 Act cases remains the decision of the Court of Appeal in *Sinclair Gardens Investments (Kensington) Ltd v Ray [2015] EWCA Civ 1231* (7 Grange Gardens).
67. The Tribunal therefore finds that the appropriate deferment rate is 5.5%.

Appeal Provisions

68. If either party is dissatisfied with this decision, they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, an application must be made, in writing, to this Tribunal for permission to appeal. Any such application must be made within 28 days of the issue of this decision (regulation 52 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013) stating the grounds upon which it is intended to rely on in the appeal.

Nicholas Wint FRICS

