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Case No: HC11C00069

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane
London EC4A 1NL

Date: 17/07/2014

Before :

MR JUSTICE MANN

- -

Between :

Westbrook Dolphin Square Limited	**Claimant**
- and -	
Friends Life Limited	**Defendant**
- and -	
Westbrook Dolphin Square Residential 1 Limited	**Third Party**

- -
- -

Nicholas Dowding QC, Richard Snowden QC and **Anthony Radevsky** and **Andrew Thornton** (instructed by **Stephenson Harwood LLP**) for the **Claimant** and **Third Party**
Stephen Jourdan QC and **Mark Sefton** (instructed by **Maples Teesdale LLP**) for the **Defendant**

Hearing dates: 6th, 7th, 10th, 11th, 12th, 13th and 26th February 2014

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Introduction

1. This is an action in which the claimant ("Westbrook") seeks a declaration that it is entitled to acquire the freehold of a large residential complex (with limited commercial parts) built in the 1930s and known as Dolphin Square, London SW1. The application is made under the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). The claimant, as a nominee for tenants claiming the right, has served a notice under that Act and the defendant, which is the freeholder of the property, challenges the validity of that notice and the entitlement of the claimant (which is a nominee purchaser under the Act) to purchase. Under the Act such a challenge is to be made to the court. The county court has jurisdiction, and these proceedings started in the county court but were transferred to this court, no doubt because the transaction is such a substantial one and serious points of principle are said to arise. The size of the matter can be demonstrated by the fact that the price for the freehold which the claimant has specified in its notice triggering the procedure is over £111m, and the claimant obviously expects to have to pay more than that. The size of the property in question appears from the next section of this judgment in which that property is described.

2. The issues raised in this action are dealt with in a number of sections below. In addition to complex questions about leasehold enfranchisement, its procedures and valuations, they also include questions about the application of the *Ramsay* and *Furniss v Dawson* principles to a scheme intended to facilitate the application, whether the Human Rights Act applied so as to stand in the way of this enfranchisement attempt, what is meant by an "associated company" under the Companies Act 2006 and a question as to whether the freeholder is entitled to rely on section 423 of the Insolvency Act 1986 (transactions at an undervalue) to resist the enfranchisement. The case was conducted with conspicuous ability by Mr Nicholas Dowding QC and Mr Richard Snowden QC for the nominee purchaser (and for the third party, a representative tenant), and by Mr Stephen Jourdan QC for the respondent freeholder, both in terms of submissions and in terms of economic cross-examination. During the course of the trial I had a view of the premises which helped me in understanding some of the descriptions of parts of these unusual premises.

Physical nature of the property

3. Dolphin Square was built between 1935 and 1937 and it is a large and unique property. It is located in a seven acre site in Pimlico (SW1) bounded by Chichester Street to the north, St George's Square to the east, Grosvenor Road to the south and Claverton Street to the west. In the early 1990s it was listed in the Guinness Book of Records as the largest block of flats under one roof in the world, but in that respect it has now been

superseded by another property. Its layout appears from the plan in Appendix 1 to this judgment.

4. The building is made up of connected blocks (all named after admirals) and on the relevant date contained the following:

    1. 1229 flats in the following blocks: Rodney House, Duncan House, Beatty House, Howard House, Nelson House, Hawkins House, Raleigh House, Drake House, Grenville House, Frobisher House, Collingwood House, Hood House and Keyes House. All of the blocks have 9 floors of flats, save for Rodney House which has only 6 floors;

    2. An underground car park;

    3. A fitness centre (including swimming pool and gym);

    4. A number of offices;

    5. A parade of 9 shops;

    6. A restaurant and a bar;

    7. A spa; and

    8. A basement and sub-basement.

    In the centre of Dolphin Square there are 3½ acres of communal gardens, and to the south of Grosvenor Road, a tennis court, a croquet lawn and a boat mooring on the river Thames. The building has outside parking areas on the east and west carriageways.

5. The blocks of flats are physically what one would expect of purpose-built blocks such as these. Stairs and lifts lead up to corridors, and each flat has a front door giving on to a corridor. The basement areas, which are extensive, run underneath all the blocks, and it is possible to walk round the blocks at basement level without ever going into the open. The basements house a variety of different rooms and facilities. Some one would expect - heating apparatus, for example. Some basement rooms are let to commercial concerns. There is storage for occupiers of the flats and for commercial entities, and a launderette and laundry. Other areas are used as storage of materials for operation of the building.

The property arrangements affecting the premises

6. The Defendant is an insurance company and owns the freehold to Dolphin Square. Its freehold is subject to a headlease dated 13th September 1935 ("the headlease") and an underlease dated 31st December 1964 ("the underlease"). The headlease expires on 23rd June 2034, and the underlease on 21st June 2034. Various residential short occupational leases were granted out of that underlease. Until January 2006 the headlease was vested in Westminster City Council and the sublease in the Dolphin Square Trust. In that month

the headlease and underlease were acquired by companies in the American Westbrook group, namely Tannenberg Ltd and the claimant respectively.

7. The claimant ("Westbrook") and the group of which it formed part then set about re-structuring the property interests, partly in order to pave the way for this enfranchisement exercise and partly (it is said) to achieve a re-financing to return capital to original investors, though I do not consider this latter point to have been a particularly material consideration behind the actual form of restructuring. On 16th April 2007 the Claimant granted sub-underleases of 1,223 of the 1,229 flats in Dolphin Square ("the flat leases") to 612 companies ("SPVs", all Jersey companies) for terms expiring on 19th June 2034.

8. The SPVs all bear the name "Westbrook Dolphin Square Residential [X] Limited", in which X is an incremented number starting at 1. These are the "participating tenants" under the enfranchisement scheme. All of the participating tenants bar one participating tenant hold two flat leases each. Six flats in Dolphin Square are held directly by the claimant under the underlease and are let directly. Thus the bulk of the flats are now held by the SPVs.

9. All but 165 of the SPVs' flats are let by them to occupational tenants ("the residential tenants"). The remaining 165 flats were not dealt with in the same way. On 16th April 2007, each of those 165 flats was let by the relevant participating tenant to Mantilla Limited ("Mantilla") for terms expiring on 15th January 2028. Mantilla is another company in the Westbrook group. Mantilla lets out 147 of the flats (all the flats in Rodney House) on its own account to occupiers on furnished and serviced occupancy arrangements, said to be tenancies, of up to 89 days in duration (save that in 5 cases, the flats are let out for periods of 3 months or more). 17 more flats in Keyes House and Hood House are used as "guest rooms". This operation has acquired the name "Dolphin House", though that is merely a branding. It does not connote any separate corporate venture; it merely connotes an area of Mantilla's operations.

10. Mantilla's other operations involve managing the flats let by the SPVs, managing the whole premises generally and running the gym, spa, bar and grill and a private bar (formerly a champagne bar), which it does on its own account. In order to perform all its various functions it has a large reception area on the ground floor of Rodney House, and uses significant office space in the same building. The status of these parts of the premises (for the purposes of the Act) is significant and I shall have to describe this use further later on in this judgment.

11. Parts of the premises are let to commercial tenants, who hold from the claimants. They include the shops and some basement rooms.

12. On the relevant date (the date of the service of the enfranchisement notice in this case), the residential (occupying) tenants of flats occupied their respective flats under one of two forms of tenancy. The first is an option B lease ("option B tenancy") for a term expiring on 30th September 2018 (with an option to renew for a further term ending on 20th June 2034 and some enhanced security which it is unnecessary for me to describe). It is so called because all tenants who had been in occupation prior to July 2004 were offered two options, namely, option A, which was to receive a cash payment and either vacate or be granted an assured shorthold tenancy; and option B, which was to take an option B tenancy. The Option B tenants occupy under a concessionary rent. The second type of tenancy is an assured shorthold tenancy.

Financial matters

13. When the Westbrook group acquired its interest in 2006 it did so with its own funds and with a loan from Barclays Bank. In 2007, as part of the property restructuring arrangements, it effected a financing restructuring by borrowing £284.4m from Wachovia Bank. Under the arrangements the SPVs acquired and paid a premium for their respective leases. The aggregate amount of the premiums was the sum borrowed. So they borrowed that money and paid it up to the claimant. Under the terms of the loan the claimant was actually jointly and severally liable for the same liability to the lender. Thus all the SPVs and Westbrook were jointly and severally liable for the whole debt. The funds thus generated were used to repay Barclays and some original investors. The evidence was that the principal driver for this restructuring was to return capital to the investors, together with a return. Mr Donnor's evidence was that Westbrook also took "the opportunity provided by the refinancing to put in place an ownership structure that would allow an enfranchisement claim to be made". If it matters, I find that order of priority hard to believe. I am sure that the ownership structure had at least equal priority in the minds of Westbrook if it was not the dominant motivation for the actual form of the restructuring.

14. In addition to borrowing the premiums which were paid for the leases, the SPVs also had a £50m facility available to them, advanced by the claimant, in order to enable them to pay the interest on the Wachovia facility if necessary.

15. It is necessary to refer to this financial restructuring because its effect is the foundation for the attack mounted under section 423 of the Insolvency Act 1986 (transaction at an undervalue). A report given by surveyors (CBRE) to Wachovia contains valuation

material which was relied on by Friends Life and its present valuer in that context. I shall return to it in a later section of this judgment.

The corporate structure

16. The corporate structure put in place by the Westbrook group in 2007 is central to the enfranchisement claim because its effect is said to bring about a state of affairs in which SPVs are not entitled to more than two flats (which matters to the legislation), and the corporate structure above them is said to achieve a state of affairs in which no entity has control of them, and in which they are not associated companies for the purposes of the Act. If effective in that respect it means that they can each qualify as qualifying tenants for the purposes of the Act and are not excluded by holding too many tenancies.

17. The structure is best described by reference to the chart contained in Appendix 2 to this judgment. Tannenberg is a wholly owned subsidiary of WB Dolphin Square LLC ("LLC"), which is in turn owned by the investors. Tannenberg can now be ignored for present purposes.

18. The shares in each of the SPVs, the claimant (shown there as WB D Sq) and Mantilla are all held in the same way. LLC owns 50% of the voting deferred shares, the other 50% being held by "Holdings", which is Dolphin Square Holdings Ltd (another Jersey company). LLC also owns 100% of the non-voting ordinary shares. Thus voting rights are held equally between those two companies.

19. The share capital of each of the SPVs was £110, divided into 100 voting shares of 10p each and 1000 non-voting shares of 10p each. The voting shares were entitled to a fixed cumulative preferential dividend of 6% per annum on the capital for the time being paid up, and on a winding up the shareholders would be entitled to any arrears of dividend and a return of their capital. There was no other right to participate in the profits or assets of the company. All other rights of participation were attached to the non-voting shares.

20. The shares in Holdings are held on specially established discretionary trusts. The settlement is dated 11th April 2007 and is presumably intended to be governed by Jersey law - that was the assumption at the trial. The original trustees were two individuals apparently resident in Jersey. The Beneficiaries, who take such benefits as the trustees from time to time give them, are described in Schedule 3 as "WB Dolphin Square LLC and each of its Subsidiaries from time to time". "Subsidiaries" is defined as meaning:

> "A subsidiary within the meaning of Articles 2 and 2A of the Companies (Jersey) Law 1991."

21. There is a power to add beneficiaries, but the SPVs are specifically excluded from becoming beneficiaries as are the claimants and Mantilla. The deed contains a gift over in favour of charity. Clause 13.2 provides that all powers vested in the trustees are exercisable in their absolute and uncontrolled discretion.

22. Schedule 1 para 4.3 provides that:

> "No beneficiary shall be entitled in any way whatsoever to compel, control or forbid the exercise in any particular manner of any powers discretions or privileges (including any voting rights) conferred on the Trustees by reason of any shares or other rights of whatsoever nature in or over such company".

23. On 11th April 2007 LLC provided the trustees with a "Confidential Letter of Wishes". It expressed the wish that:

> "Failing notice to the contrary, you should manage to invest the Trust Fund either:
>
> a) as we shall from time to time advise, or
>
> b) at your absolute discretion."

Although there was no evidence on the point, I rather suspect that the words "manage to invest" are a mistake and should read "manage and invest". However, nothing turns on that.

24. The significance of this structure is that it is said to be to enable the claimant to say that the shares in the SPVs are not held by anyone who can control the voting, either directly or more remotely. 50% of the voting shares are held by LLC, and 50% are held by a separate company which is itself controlled by trustees who have a complete discretion over voting. This point goes to whether the SPVs are all sufficiently independent to be able to count as separate qualifying tenants.

Statutory provisions

25. The actual text of the relevant provisions of the Act and other legislation is set out in Appendix 3 to this judgment for ease of reference and to avoid the main body of this judgment being cluttered up with such detail. What follows is a commentary on the relevant parts of the Act in order to indicate their relevance to this case. I shall have to return to the detail when I come to determine the various issues that arise in this action.

26. Chapter I of the Act confers a right of collective enfranchisement (a right to acquire the freehold) on "qualifying tenants". Section 1 confers the right to enfranchise in respect of "relevant premises". That right is invoked by serving a notice under section 13, to which the landlord responds by serving its own notice under section 21. The tenants' notice must contain various details, including "the proposed purchase price for [various elements that the tenants must acquire]" (section 13(3) (d)). That gives rise to one of the issues in this case, which is whether the price for the freehold specified in the tenants' notice falls within that obligation. The reversioner's counter-notice under section 21 must also do certain things, including stating that, "for such reasons as are specified in the counter-notice" the reversioner does not admit that the participating tenants are entitled to make their claim. An issue arises as to whether one of the points in opposition that the freeholder now wishes to take is open to it because it was not identified and specified in its counter-notice.

27. As a result of the service of those notices, areas of dispute ought to be identified. By and large, disputes as to whether or not the tenants are entitled to purchase are dealt with by the court under section 22, and disputes as to the terms of the purchase (including price) are referred (now) to the First-tier Tribunal (Property Chamber). In this case all disputes have to be resolved via the first of those routes.

28. A key concept in the implementation of the Act is the "relevant date", by reference to which such things as the price are to be determined. That date is the service of the tenants' notice - see section 1(8).

29. The Act applies to buildings containing two or more flats - section 3. There is no dispute in that area in this case. Section 4 operates to prevent enfranchisement where an excessive proportion of the building (excluding common parts, which are left out of the count for these purposes) is occupied for purposes other than residential purposes. The proportion is now 25% by floor area (it was formerly 10%). There is a large dispute about that. This arises out of the fact that the whole premises contain commercial premises, premises occupied by the managing agent and other non-conventional occupational aspects of Dolphin Square. I shall have to deal with a number of questions

as to whether parts of the premises are occupied for residential purposes, are common parts or are occupied for non-residential purposes. There is also a dispute under this head arising from the terms and nature of the occupational tenancies in this case, which are said to prevent a large number of flats being residential for these purposes.

30. Section 5 deals with qualifying tenants. An important point arises under this section. If a person who would otherwise be a qualifying tenant is actually the tenant of 3 or more flats, then that person is treated as the qualifying tenant of none of them. Subsection (6) treats "associated companies" as one for these purposes, so flats held by an associated company would fall to be treated as held by one tenant for these purposes. The scheme in this case was set up to avoid the consequences of this by ensuring that 2 flats were held by each of more than 600 companies, and by trying to ensure that they were not "associated". The freeholder claims that, on the facts, they were "associated" for these purposes. If that is right then the tenants who seek to enforce the right are not actually qualifying tenants.

31. The lease of a qualifying tenant must be for more than 21 years - section 7(1). That does not give rise to a dispute in this case.

32. The qualifying tenants exercise their right to apply by serving a notice under section 13. That notice has to:

> "(3) … (d) specify the proposed purchase price"

for each of several elements. There is an issue as to whether the notice in this case complied with that requirement.

33. Section 15 provides for a nominee purchaser to conduct proceedings. The claimant in this case is such a nominee.

34. Section 21 provides for a counter-notice to be served by the reversioner (for the purposes of this action that is Friends Life). Amongst other things it must:

> "(b) state that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were … entitled [to exercise a right of collective enfranchisement]".

35. In the present case Friends Life's counter-notice did dispute the entitlement to enfranchise but did not take any point about the proportion of non-residential occupation in the building (the 25% point identified above). However, it now takes that latter point in this action. The claimant disputes that it can do so, in the light of its failure to say anything about it in its counter-notice.

36. Section 22 provides for proceedings relating to the validity of the tenant's notice. No material point arises in relation to it so I can summarise its effect. Where, as here, the reversioner serves a notice disputing entitlement, the tenant may apply to the court for a declaration of entitlement and, if the reversioner's objection fails, the court shall make a declaration to that effect. If it does so it will also make an order requiring the reversioner to serve a further counter-notice which deals with the terms of the enfranchisement (see section 24). These proceedings are those provided for by section 22.

37. Schedule 6 para 2 specifies the manner of calculating the price payable for the freehold. The proper operation of that paragraph is relevant to Friends Life's claim that the tenants' notice did not specify a proper price, and I shall consider it further in that context.

The notices

38. The notices in the present case were preceded by earlier notices and proceedings. Briefly stated, the SPVs caused a section 13 notice to be served on 24th September 2007, to which Friends Life served a counter-notice disputing entitlement. Proceedings followed, but they were discontinued on 16th February 2009, one week before the trial was due to start. This was apparently because the market had fallen (it will be remembered that the relevant date as at which the price is fixed is the date of the tenants' notice, not the date of the valuation) and the SPVs considered that a more favourable price would be obtained by abandoning the proceedings and starting again in due course, at a lower point in the market. The obviously undesirable waste of court resources in adopting this tactical course of action is not something that I have been called on to consider. I find it hard to characterise it as attractive.

39. Be that as it may, further notices were subsequently served, which are those which are the subject of these proceedings. I do not need to set to set out much of the detail. The claimant's notice, dated 30th April 2010, averred the grounds of the claim, namely that the premises were a self-contained building, 1,233 flats were held by qualifying tenants, and those flats were not less than two-thirds of total number of flats in the building. Under price it specified as follows:

> "**Price**
>
> The proposed purchase price is:
>
> For the freehold interest in the specified premises - £111,660,000
>
> [Further immaterial details]"

40. Friends Life's counter-notice was dated 6th July 2010 and took the following points:

> "3. The Reversioner does not admit that the May 2010 Notice was a valid initial notice under section 13 of the Act. Without prejudice to the generality of that non-admission, the Reversioner does not admit:
>
> 3.1 [a point no longer pursued based on the discontinuance of the previous proceedings]
>
> 3.2 that the May 2010 Notice was validly executed
>
> 3.3 that the price stated in the May 2010 Notice was a realistic one, having regard to the decision in *Cadogan v Morris* [1999] 1 EGLR 59.
>
> 4. Without prejudice to what is said in paragraph 3 above, the Reversioner does not admit that the SPVs were, on the Relevant Date, entitled to exercise the right to collective enfranchisement in relation to the Specified Premises, because the Reversioner does not admit that there was, on the Relevant Date, a qualifying tenant of any of the Flats. Without prejudice to the generality of that reason, particulars of it are given in the attached schedule, which forms part of this notice, headed 'Particulars'".
>
> 5. The Reversioner also reserves the right to apply to the Court for an order setting aside the Structure under section 423 of the Insolvency Act 1986."

41. The "Structure" was the corporate and lease structure referred to above. The Particulars contain more detailed reasoning as to why the creation of that "Structure" meant that there were no qualifying tenants. It uses the words "facade" and "sham", though those concepts (and particularly the legal concept of sham) did not emerge in the final reasoning at the trial. There was no reference to the proportions of the building that were and were not occupied for residential purposes.

The issues

42. Arising out of that factual background the following road-map of issues arises. I take them in an order of resolution which will assist in making logical sense of them as they fall for determination. At this point in this judgment I describe the issues in terms which are more narrative than closely defined, in the interests of clarity.

(1) Do the SPVs each have qualifying tenancies, or are they precluded from having them by virtue of their being "associated companies" for the purposes of the statute.

(2) In the light of the creation of the scheme put in place by Westbrook in this case (that is to say creating the corporate structure and leasehold structure identified above) in order to provide an opportunity for enfranchisement which would otherwise not exist, is Westbrook prevented from enfranchising because it was not the intention of Parliament to allow such schemes (because they would circumvent what is said to be the apparent intention of the statute)? This is a version of the point which the counter-notice described as a "sham" point.

(3) Would allowing enfranchisement in the above circumstances infringe Friends Life's rights under the Human Rights Act? This issue is related to the second.

(4) Is Friends Life entitled to argue the point that the building contains more than 25% of space occupied for non-residential purposes, in the light of the fact that it did not take that point in its counter-notice?

(5) If it is allowed to take that point, does the building in fact contain more than 25% of such space? If it does, enfranchisement is not permissible.

(6) If enfranchisement is not prevented by the above, is the tenants' notice ineffective because it does not "specify the proposed purchase price" within the meaning of the Act. This raises the following sub-issues:
   (i) Is there an objective test for validity based on an objectively justifiable price in valuation terms?
   (ii) Is there a subjective test for validity based on the views of the

tenant as to its justifiability in valuation terms?

(iii) If the answer to either of the above questions is Yes, does the section 13 notice in this case pass the test

(7) If the enfranchisement scheme would otherwise operate against Friends Life, can it claim to be the "victim" of a transfer at an undervalue for the purposes of section 423 of the Insolvency Act 1986, and thereby avoid its consequences. This involves two sub-issues:

(i) Was the grant of the SPV leases a transaction at an undervalue?

(ii) Even if it was, can Friends Life benefit from the section?

43. Issue (7) might logically be said to fit in higher up the list, but in opening and in argument it always featured at the bottom of the list. I shall keep it there.

Witnesses

44. I received evidence from the following witnesses.

Mr Neil Miller-Chalk

45. Mr Miller-Chalk is employed by Mantilla as a General Manager of the Dolphin Square estate. He gave uncontested evidence of the physical nature of the estate and details the manner of its use and occupation, including details of how Westbrook and the SPVs deal with their respective interests. He was cross-examined, but only to adduce more detail of various aspects of the user. His credibility was not in issue, and I found him a reliable witness.

Miss Juliet Steventon

46. Miss Steventon is the Finance Manager of Mantilla. She gave evidence about various financial arrangements involving SPVs and occupational tenants, and about arrangements made for the use of the car parking spaces and storage areas at Dolphin Square. She was asked only one question in cross-examination, so her evidence falls to be accepted in full.

Mr James Mannix

47. Mr Mannix is head of the residential investment team at Knight Frank (chartered surveyors). He carried out what he described as an appraisal for Westbrook of the values of the flats in Dolphin Square as part of an exercise of valuation preceding the service of the notice which is in issue in this case. His results were used by the valuer (Ms Ellis) as

part of her calculation of the price specified in the notice. He gave evidence of what he did in that connection (and of a similar exercise he had done 2 or 3 years before). To that extent he was a witness of fact, though his techniques were queried. As a witness of fact he was reliable.

Mr Mark Donnor

48. Mr Donnor is a Managing Principal of Westbrook Partners (the overall US investment umbrella) and a qualified chartered surveyor. His role is to find investments, to administer assets and to consider the liquidation of investments over time. He gave some evidence of the re-financing and re-structuring process in 2007 which gave rise to the present property holding and corporate structure. He dealt with Ms Ellis during the process leading up to the service of the section 13 notice in this case. His style as a witness was such as to suggest that he was pondering deeply every answer given, regardless of its triviality or seriousness, which in my view reflected a personal style rather than genuine internal reflection. He gave some incredible evidence about his views as to the likelihood of Friends Life accepting the sum in the tenants' notice in this case, but his credibility was not seriously challenged or impeached on any other point.

Mr Diego Rico

49. He too, like Mr Donnor, is a Managing Principal of Westbrook Partners, but only since 2011. Prior to that he obviously occupied another unidentified position with Westbrook Partners. His role involves overseeing tax structuring. Within the present structure he is a director of many companies in the present structure of the Dolphin Square companies including each of the SPVs, Brookhouse Capital and Tannenberg Ltd. He was cross-examined on his knowledge of the accounts of a sample SPV, from which it became apparent that his involvement was largely titular and he did not really know anything about the financial statements. He did not seem to consider that his post required any particular involvement with the SPVs, though to be fair the structure was such that not much involvement was required in practice. He showed a slightly disturbing disinclination to accept some fairly obvious propositions about the dependency of the SPVs on Westbrook.

Ms Jennifer Ellis

50. Ms Ellis was the surveyor who carried out the valuation or assessment exercise which underlay the price proposed in the notice. She is a surveyor with great experience in this general area. She was forthright with strong views. She gave evidence as to how she arrived at the figure for the purchase of the freehold that appeared in the notice, and was cross-examined on it to a degree. However, since the justifiability or otherwise of the figure was the subject of expert evidence she was not probed on all areas. She stoutly

maintained that her figure was justifiable both as a figure which it was right to put to a landlord and as a justifiable opening offer, which she clearly thought it was. She was an obviously honest witness who was (in the advice she gave) doing what she thought was in the best interests of her client.

Mr James Wilson

51. Mr Wilson was the expert valuer called by the claimant. He gave evidence going to the question of whether the price in the notice was within the range of reasonable valuations which a competent valuer could have arrived at, and limited evidence going to the valuation questions said to arise in the undervalue claim. In the latter context he expressed views relating to the value of the leases granted to the SPVs.

52. From time to time he struggled to maintain his position, giving the impression it was sometimes a bit extreme, and sometimes giving the impression that he was adopting a view required by his client's case rather than his own dispassionate view. However, his work was fairly thorough, and ultimately it is his reasoning which is important. I generally found his evidence to be more acceptable than Mr Scott-Barrett's (his opposite number).

Mr Simon Scott-Barrett

53. Mr Scott-Barrett was the chartered surveyor who gave evidence on the same points about the notice as did Mr Wilson. Like Mr Wilson, he has considerable experience in the field of leasehold enfranchisement valuation. He also gave some limited evidence on the value of the SPV leases and on the value of the claimant having assumed joint and several liability for the loan given to the SPVs to purchase their leases. This last point goes to the section 423 undervalue point raised in these proceedings. On this last point Mr Scott-Barrett admitted that he did not claim any expertise. His evidence on it therefore seems to be valueless.

54. It was a surprising characteristic of Mr Scott-Barrett's report that it seems to have been prepared in something of a rush (in the context of these proceedings). He had a little over a month between being first instructed and preparing his report, and he admitted that he was under some time pressure. That may explain why it was that when he had to consider comparables for part of his exercise he relied on comparables provided by Mr Jupp, a surveyor employed by the claimant. It may also explain why he concentrated on aspects of Ms Ellis's work which he considered were too favourable to her client and ignored the possibility that there might be other areas where she reached a conclusion more favourable to the freeholder, which (to a degree) might have balanced out the

alleged excesses he was looking at. Again, it may explain a failure to try to select more appropriate comparables than those he was presented with and to carry out adjustments to make his comparables more comparable. All in all I am afraid I got the impression of a not fully completed exercise leading to the presentation of some opinions which did not have the support one might have expected.

55. Some of the flaws in his approach to comparables were investigated in cross-examination. His objective was to produce a datum point in terms of rent which could then be applied to the Dolphin Square flats with adjustments to reflect differences as between the various flats. It was in the interests of Westbrook as claimant to have as low a figure as possible, and in the interests of Friends Life to have as high a figure as possible. The exercise of Mr Wilson (for Westbrook) produced a datum point of £613 per sq ft. Mr Scott-Barrett's first figure for Friends Life was £725, which he reduced at the trial to £705. However, he was forced to acknowledge that views could differ. When it came to final speeches Mr Jourdan did not seek to defend Mr Scott-Barrett's datum point and accepted that, on the evidence, £613 was appropriate, at least as being within the range of reasonable views. This is a significant departure from Mr Scott-Barrett's originally expressed views. It is capable of making a difference of many millions of pounds to the minimum figure which Friends Life says is appropriate for a tenants' notice. I consider that some of the evidence on comparables was somewhat too slanted. The position in which Mr Scott-Barrett found himself, and the ultimate indefensibility of it, causes me to regard the remainder of his evidence with much more caution than I would otherwise have expected. I think it reflects the fact that, at least in that part of Mr Scott-Barrett's evidence, he was seeking to defend (or establish) a position, working on material supplied by the client, rather than undertaking the ab initio open-minded exercise required of an expert. There were other areas too in which he relied on work done by Mr Jupp.

Mr David Stevens

56. Mr Stevens provided two very short witness statements giving some very limited evidence about the use of a very small part of the premises. His evidence was not challenged, so he was not called to give oral evidence.

The facts - what Ms Ellis and Mr Donnor did

57. Ms Ellis is a well-known surveyor in the field of leasehold enfranchisement and was first consulted by Mr Donnor in 2005 when Westbrook Partners was contemplating acquiring the head lease and underlease. The discussions continued after completion of the purchase and in early 2007 Mr Donnor asked her to set the ground rents and premium to be paid under the then intended SPV leases. She advised that higher than nominal ground rents would improve the value of the interest which had been acquired by Westbrook but

that they should not be fixed at too high a level. She was also asked to set premiums for the grant of the leases which aggregated to £284.4m. She did not know where that aggregate came from and apportioned the consideration in proportion to the number of bedrooms that each flat had and other virtues or drawbacks of the flats.

58. In about April 2007 Mr Donnor asked her to advise on the amounts which should be offered in a s.13 notice and she discussed methodology and the component variables with Mr Donnor, as well as various lines of argument that might be advanced in order to justify Westbrook Dolphin's case on the price to be paid. Her evidence, which I accept, is that she was not instructed to adopt an overly aggressive approach. She did not do that, but she did adopt an approach which, at the very least, assumed all questions in favour of her client and which was intended to be in the nature of an opening offer. Her intention was to leave all arguable points open for argument. She believed that if the matter went the tribunal the likely result would be more than her figure. This exercise resulted in the section 13 notice dated 24th September 2007, which (as appears above) was abandoned when the first set of proceedings based on it was discontinued in February 2009.

59. In March 2010 Ms Ellis was told that there would be a new enfranchisement attempt, and she was again asked to provide figures for the notice to be served. This time her exercise was basically an updated version of her previous exercise, proceeding on the same basis as to the level of the figures. Again, there was no pressure on her to produce an overly-low figure, but she understood that the perception of Mr Donnor (with whom she dealt) was that the opening figure should leave room for negotiation.

60. In order to assist her in her report Mr Mannix provided her with a list of comparables (or what he regarded as comparables). They were the sale prices of flats in the vicinity of Dolphin Square, but none were in Dolphin Square itself because no comparables of that nature exist. She did not carry out her own search for comparables. Mr Mannix also sent her a pricing exercise for each of the flats in Dolphin Square, based on his comparables and adjusting for the various flats with their varying differing qualities (size, storey, aspect and so on) in accordance with a scheme that he deployed. Ms Ellis worked from this material too. When Ms Ellis asked Mr Mannix (in an email dated 1st April 2010):

> "How would you describe these values?
>
> Optimistic/pessimistic/realistic/your choice of words?"

Mr Mannix replied:

> "These are "about right" to "slightly conservative". You could justify increasing them slightly but they would look to [sic] light if you reduced them by much."

61. Her "first pass" over the "likely outcome" figures showed that she expected the freeholder to get £176m for its interest (including a figure for the commercial property). That was not her figure to go into the notice - it was her assessment at the time of the likely outcome in the tribunal. Her email said that she would produce the "offer figures" before she flew off to Africa (which she was about to do).

62. Her report (which was dated 7th May 2010, after the date of the notice) showed how she arrived at an offer figure of £111,660,536, which was rounded in the notice to £111.66m (together with a figure for some additional land which is not material to this action). Her figure was an aggregate of £87,843,315 for the value of the freehold interest, and £23,858,031 as 50% of the marriage value. Within those figures there were a lot of elements, but not all of them were in issue for the purposes of this trial. The trial concentrated on 3 elements which went to make up her figure for the value of the freehold:

(i) The choice of comparables. Based on the comparables and calculations that Mr Mannix had provided her with, she assessed the freehold value of the flats at a price which proceeded from a "datum point" to which were applied factors tending to increase or diminish the value of the flat. She valued most of the flats on the footing of a 125 year lease, which she said was the equivalent of a freehold for the purposes of her valuation, and came up with a final figure. The appropriate datum point was one of two ingredients which were the subject of criticism in this action; the other ingredient was the approach to valuing Rodney House, which was said to introduce an insufficient differential between those flats and the others.

(ii) The choice of a deferment rate, used to assess the present value of a future sum. She chose a rate of 6%.

(iii) The inclusion in her values of a figure for "holding costs", that is to say a sum to reflect the potential cost to the freeholder while waiting to realise the investment made in the notional purchase which the valuation exercise requires. She introduced a deduction of over £87m from the value of the flats under this head, which was a 19% reduction from the freehold vacant possession price of the property.

63. All these concepts will be elucidated when I come to consider the criticisms of the result in more detail.

64. In arriving at her figures Ms Ellis had to deal with some alterations which would be required by a correct treatment of some flats that were non-participating flats (called the "Sugar Bureau flats" in the parlance of the case). She considered that they would require a small increase in her valuation figures but did not carry it out. She described their effect thus in an email of 28th April 2010 (having considered some points which would seem to have some sort of upward effect on her previously considered figures):

> "I would not bother to change the offer figures on that account. We know the offer is low. We now know it is a bit lower than we previously thought."

65. In her evidence she explained that the correction would have made little difference to the "bottom line" so she did not carry it out (and it was apparently not reflected in the notice figure), though she did reflect it in her final report.

66. Her approach was to produce figures which assumed all matters of factual doubt and valuation doubt were resolved in favour of Westbrook. So far as her subjective approach is relevant in the case, by the time of final submissions Friends Life accepted that she thought that her "holding costs" argument had a realistic chance of success, and that the freehold value with vacant possession ("FHVP") figures fell into the same category. However, Friends Life did not accept that the same applied to her deferment rate of 6%, submitting that this was plucked from the air with no particular arguments in mind, and they did not accept that she realistically believed that the Sugar Bureau flats could realistically be valued on the basis that she applied, namely disregarding works amounting to improvements. It is therefore necessary to make findings about those matters but not the others.

67. As to the deferment rate, when cross-examined on it Ms Ellis frankly admitted that she set it at 6% in order to give her some elbow-room in negotiation, not because she thought, at that time, that factors could be adduced to justify it as a rate applicable to this transaction. She acknowledged that if nothing additional had occurred to her by the time of a tribunal hearing which would justify such a high rate then she would not be able to support it in her expert evidence. In addition to giving her some room in the negotiation, I think that she also wanted to wait to see if anything more did occur to her, or if other factors came to light which would justify the higher rate. But at the time she had no intellectual or valuation justification for the rate on which she advised that the offer

should be based. That part of her report which dealt with the likely result used a rate of 5%. To that extent I consider that the factual point of Friends Life is well-founded.

68. The significance of the Sugar Bureau flats is identified above. Because they were not flats of participating tenants the valuation disregards applicable to the latter flats did not apply to them. That meant that the improvements made when the flats were created had to be valued and paid for, not disregarded. Advice had been given to that effect by solicitors, and Ms Ellis was aware of that fact. Despite that she valued the flats without the value of those improvements. The only justification for that was, again, that it gave her some leeway in negotiation, and because her stance enabled her to put forward the best figure from her client's point of view. I find that she did introduce a figure into the valuation which she did not think could be justified by any valuer or valuation evidence, and that to that extent her figure was lower that it would otherwise have been. The difference in the valuation of the Sugar Bureau flats, as flats, was in the region of £700,000, but by the time the difference in value was worked through into the final calculation it made a difference in the order of probably something over £200,000 by my calculation, which is not a particularly significant difference bearing in mind the other sums involved in this case.

69. Mr Donnor had given the instructions to which Ms Ellis responded. He accepted and agreed her approach of producing a figure which assumed that all arguable points of valuation would be decided in the tenant's favour. His witness statement says that "it was fundamental to [his] instructions in 2010 (as in 2007) that Ms Ellis should come up with an offer price that she could defend (i.e. she should not come up with the most aggressive figure possible)". I accept that evidence. In due course, having talked over some aspects of the matter (and in particular holding costs) he accepted the recommendation from Ms Ellis that the offer should be £111.7m, and he obtained proper authorisation to put the figure in the notice. It duly appeared there. His evidence in chief was that he thought that there was a chance that Friends Life would accept the offer, given the economic climate, the size of its investment in Dolphin Square and the possibility that they would not want the disruption and costs of a further set of proceedings. I do not think that he thought that there was any significant possibility of that happening. If he thought that at all, it can only have been on the basis of a "you never know" attitude. The possibility was no more than remote, and he would have known that. Even if Friends Life was minded to sell (as to which he had no evidence) it was not within the realms of reasonable possibility that it would accept the offer and not try to negotiate it upwards, and I think he knew that.

70. In sum, I find that Mr Donnor relied on Ms Ellis to determine the figure to go into the notice, and accepted her recommendation because he believed it was a figure she could justify. He had insufficient expertise to allow him to work out the figure for himself, or

to evaluate its constituent parts particularly closely. He knew it was a low figure, but insofar as it was based on unsustainable lines of argument, he did not know that himself. Like her, he regarded the figure as one which amounted to an initial offer and which gave nothing away in terms of future argument.

Issue 1 - associated companies

71. It is important to understand the scheme of qualifying as a qualifying tenant in order to understand the significance of this issue and the two which follow it.

72. As pointed out above, the scheme of the Act imposes limits on the number of flats which can be held by qualifying tenants. Under section 5(5), where a person would be regarded as a qualifying tenant of one flat, and would also be regarded as a qualifying tenant or 2 or more flats (i.e. three or more in total) then there shall be taken to be a qualifying tenant of none of those flats. Thus a person can be qualifying tenant of 2 flats, but not of 3 or more, and if he owns 3 or more then he is a qualifying tenant of none of them. So if the long leases had been granted to one company in the Westbrook group, there would have been no qualifying tenant. Westbrook has sought to avoid that consequence by granting no more than 2 tenancies to each of the SPVs, so they are not ruled out on this ground alone.

73. However, the Act builds in another qualification, intended to prevent a group of companies from avoiding the consequences of section 5(5) by simply putting one or more flats in hands of wholly-owned subsidiaries. Its effect is that where a flat is let to a company ("body corporate"), a flat let to an "associated company" shall be treated as if it were let to that first company.

74. The expression "associated company" is defined using section 1159 of the Companies Act 2006, which itself defines "subsidiary" and "holding company". The effect of the definition is that a holding company and its subsidiaries (as defined in the 2006 Act) are each the associates of the other. The definitions of subsidiary and holding company are therefore all-important.

75. Section 1159 (set out in the legislation appendix to this judgment) contains a definition based on voting control. A company is a "subsidiary" of a "holding company" if the latter holds a majority of voting rights, is a member with a right to appoint or remove a majority of the board, or is a member and controls voting rights pursuant to an agreement with others. The definition therefore depends on control.

76. Schedule 6 of the 2006 Act contains further elaborative provisions (see section 1159(3)). Mr Jourdan relied particularly on Schedule 6 paragraph 6, which deals with shares held as a nominee:

> "6(1) Rights held by a person as a nominee for another shall be treated as held by the other.
>
> (2) Rights shall be regarded as held as a nominee for another if they are exercisable only on his instructions or with his consent or concurrence."

77. The claimant's case is that the SPVs are not associated for these purposes. Although they all have a similar shareholding, no person has a majority of the voting rights, no person has the right to appoint directors and no person has control via an agreement with others. All the voting and control rights are split equally between LLC and Holdings, because each has 50%, and no more than 50%, of the voting rights. There is no agreement (or other arrangement) in place which gives either LLC or Holdings control. Holdings is not under the control of LLC because its shares are held by trustees of a discretionary trust, and those trustees are independent for these purposes. There is no question of any nomineeship in this case - the trustees are not the nominees of anyone for these purposes.

78. Mr Jourdan relies on the definition of nominee as establishing that the SPVs are associated with each other and with LLC as their holding company. His case is that the trustees of the discretionary trust could only exercise their voting rights in Holdings with the "concurrence" of LLC, which makes Holdings the subsidiary of LLC, which in turn makes the SPVs and LLC "associated companies" within the meaning of the 1993 Act, with the effect that all the SPV tenancies have to be ignored as qualifying tenancies.

79. In order to establish this Mr Jourdan traces the following route:

> (a) Holdings was a single purpose company, set up to exist as part of the structure, and to occupy the position in the structure given to it.
>
> (b) The beneficiaries of the trust were LLC and its subsidiaries from time to time. At the relevant date there were in fact two subsidiaries, but that is irrelevant for these purposes. It is the class that is important.
>
> (c) Given the purpose for which Holdings was set up, it was inconceivable that the trustees of the settlement would ever exercise their voting rights to change the corporate setup within Holdings (capital, articles, or directors) without the concurrence of LLC. They could not properly have done so.

(d) It would have been inconsistent with the single purpose for which Holdings was set up for the trustees to have changed any aspect of the structure without the concurrence of LLC. Although they had a discretion as to voting, they could not properly exercise that discretion without that concurrence, in the light of the fact that LLC was the architect of the scheme and the body for whose benefit it was implemented.

(e) This reality was reflected in a clause in the Wachovia credit agreement (the principal document governing the Wachovia loan), to which the claimant was an original party and to which the SPVs acceded. Clause 5 dealt with "Mandatory prepayment - change of control", and clause 5.2(a)(i)(A) described one of the changes of control as being if:

"any Borrower ceases to be a direct wholly-owned subsidiary of the shareholder [namely LLC]"

(f) The reality was also reflected (so far as the claimant was concerned) by the fact in each of the years 2007 to 2010 the annual Directors' Report reported that "The company is a wholly owned subsidiary and the directors have no interest in the company". While this statement was removed in a second version of the 2010 accounts, it nonetheless reflected what the true position was.

80. It is important to realise that in advancing his case Mr Jourdan was not basing it on any aspect of sham or pretence. He did not seek to say that the discretionary trusts were no such thing in reality, and that the trustees were committed, or obliged, to dance to the tune of LLC notwithstanding the terms of the trust. Mr Jourdan's submissions proceeded from the point of taking the terms of the trust (and the letter of wishes, which pre-supposed the existence of a proper discretionary trust) at face value. It was therefore a trust in which, as a matter of law, the trustees had a discretion as to the conferring of benefits and had the usual trustees' discretion as to the administration of the trust including the voting of shares which were the subject of the trust.

81. Despite that, Mr Jourdan submitted that on the facts of this case, and as a matter of law, the trustees could only exercise their voting power one way, and that was in the way that LLC wanted. They could not vote in a way which undermined the structure of the operation (or in other ways affecting the regulation of Holdings) in a way which LLC would not want, and therefore would need LLC's "concurrence" before voting. That meant that they were actually nominees for the purposes of section 1159, and that therefore the SPVs and LLC were associated with each other.

82. This argument is unappealing as a matter of principle. A discretionary trust is a discretionary trust, and a trustees' discretion is a discretion. They are, a fortiori, uncontrolled and uncontrollable, in their execution and exercise, by outside parties if the control is said to be prescribing how discretions are to be exercised. That is true at a

general level, and the express terms of the trust documentation make it clear in this case. Unless they are shams, they mean what they say. Thus in the normal case, and on the face of the documents in this case, there is no basis on which it can be said that the voting rights are "exercisable only on [LLC's] instructions or with [its] consent or concurrence".

83. There is, of course, a possible situation in which trustees might be able to act safely if they act with the concurrence of a beneficiary. If a trustee is concerned that a particular exercise of discretion might be attacked by a beneficiary as a breach of trust or misuse of a trust power then the trustee would be wise to seek the "concurrence" of the beneficiary. But that is not because the power can be exercised "only" with that concurrence. It is because the trustee might be liable for breach of trust (or vulnerable to an action for breach of trust) without that concurrence and obtaining that concurrence will remove doubt about it. That is a different concept. It is not an instance of the trustee being subject to the control of the beneficiary. It is an instance of a trustee ensuring that a beneficiary cannot complain that an act is a breach of duty.

84. One can contrast three hypothetical situations. In the first, trustees are required by the trust to act, in a given area, on the instructions of a beneficiary, whether those instructions are positive or negative (i.e. actually to do something they would not otherwise do, or to refrain from doing something they would want to do). The second is where the trustees are obliged by the trust deed not to do something without the consent of a beneficiary (for example, sell a property). The third is where the trustees are not under any express obligation to do a particular act, but consider that there is a risk of complaint of breach of trust if they take that course and seek a consent to make sure that beneficiaries do not and cannot thereafter object. The first of those situations would probably amount to sufficient control to fall within the "associated companies" provisions if the trust obligations related to shares. The second would probably not, and the third would certainly not. All there is in the third example is a protection from suit. Mr Jourdan's analysis does not create any more than the third situation, if indeed it creates even that.

85. That would not fall within the wording of the nominee provision in Schedule 6 of the 2006 Act. That is plain enough on the wording of the provision, but it is made plainer by other provisions of the Act with which the requirements of section 1159 (the choice of Parliament in the 1993 Act) can be contrasted. Mr Jourdan makes his point through combining the terms of the documents with the facts of the relationships, which are said to create the necessary control. His argument does not depend on the deed itself or some identifiable agreement. Mr Snowden pointed out in argument that the 2006 Act contains other provisions, with which one can contrast section 1159. The concepts "parent undertaking" and "subsidiary undertaking" are identified in section 1163. Unlike the definitions of "holding company" and "subsidiary", those concepts incorporate a level of

de facto control going beyond the strict consideration of voting rights. Something is a "parent undertaking" of a "subsidiary undertaking" if (inter alia):

> "(4) (a) it has the power to exercise, or actually exercises, dominant influence or control over it, or
>
> (b) it and the subsidiary are managed on a unified basis."

86. In this statutory context the test does not depend only on legal rights to control (though those fulfil the requirements as well). It can be more of a de facto control - one arising out of what can be seen to be the facts. This is to be contrasted with section 1159. The point was made in a commentary in Buckley on the Companies Acts, in relation to the Companies Act 1989 which first introduced these definitions:

> "Section 736 defines the relationship which makes one company a subsidiary of another for the purposes of the Companies Acts. The definition of 'subsidiary' in s 736 must be distinguished from that of 'subsidiary undertaking' in the new s 258 ... The definition of 'subsidiary undertaking' applies exclusively in relation to accounts; the term 'subsidiary' is used elsewhere. Moreover unlike the tests for determining whether a company is a 'subsidiary undertaking', each of the tests in s 736 depends on the existence of a legal right. The answer to the question whether a particular company is or is not a subsidiary of another does not therefore depend on a consideration of all the facts and circumstances of their relationship, as would be the case for instance under the new s 258(4)(a). Certainty in the application of the test of whether a company is a 'subsidiary' is particularly important in those provisions of the Companies Acts which create a criminal offence."

87. That contrasts the two tests. When it came to enacting the 1993 Act Parliament chose a test which depended on legal rights of control, and not on underlying facts about the relationship despite having the more fact-based assessment available to it in the same Act. In those circumstances it is appropriate to acknowledge that by finding that the control necessary for the purposes of the definition of "associated companies" is one which falls within the narrower and not the wider test.

88. Accordingly normal principles and the choice of cross-reference point away from the position taken by Mr Jourdan. However, he invokes authority in support of his

proposition that where a discretion can only be exercised in one way then there is a duty to exercise it in that way. In *Royal v Prescott-Clarke* [1966] 1 WLR 788 magistrates were held to have exercised a discretion wrongly when they failed to exercise it in the only way which was proper in the circumstances. In *Re: John Willment (Ashford)* [1980] 1 WLR 73 Brightman J held that a receiver appointed by a debenture-holder could only exercise his discretion as to what payments to make in one particular way (on the facts) "so perhaps it is not correct to describe it as a discretion at all". Mr Jourdan submitted that these cases supported his proposition that the concurrence of LLC would be required in the voting of the SPV shares, at least in relation to "structural" aspects of the SPVs respective constitutions.

89. Those cases do indeed indicate that there are circumstances in which a discretion can properly be exercised in only one way, but they do not help Mr Jourdan. They involve the exercise of a discretion in one particular limited set of factual circumstances which happened to arise in each case. If he is to be able to use the principles in those cases he must show that in all circumstances in relation to the voting of the shares the trustees have no real choice because a proper exercise of the discretion will, on all possible facts, always require the "concurrence" of LLC. He has not come close to showing that. Indeed, in my view he could never have done so. Apart from anything else, even if every exercise of their discretion was a "no choice" exercise, the discretion they would be exercising would not be a discretion which involved seeking LLC's agreement. It would be a situation on which the actual course of action would be obvious, so there would be no need to ask LLC. LLC might happen to agree in all those circumstances, but the trustees would not need to seek its agreement (concurrence). Those cases are therefore not in point.

90. Mr Jourdan put rather more faith in *Butt v Kelson* [1952] 1 Ch 197. He said it supported the proposition that in appropriate circumstances trustees could be under a duty to exercise voting rights attached to shares held by them on trust in a particular way, for the benefit of beneficiaries. He then sought to translate that to the present corporate and trust structure in order to say that in the circumstances as at the relevant date the trustees had a duty not to exercise the voting rights attached to the shares without the concurrence of LLC.

91. There was some debate before me as to the extent to which this case still represented good law, but before considering whether it is necessary to decide that it is first necessary to consider what it actually says and whether that gets Mr Jourdan home on the point. On the facts of that case the shares of a company were all held by trustees on fixed (not discretionary) trusts, and the trustees were also the directors. A beneficiary with a life interest wished to see documents relating to the conduct of a company's business, and sought a declaration that as a beneficiary he was entitled to inspect all documents which

came into the possession or power of the defendants (the directors/trustees) by virtue of their position as directors. At first instance Harman J granted a declaration in those wide terms (see p201). Romer LJ considered that that declaration was too wide (indeed, the respondents did not seek to maintain it - see pp 205-6), and summarised the position at p 207:

> "What I think is the true way of looking at the matter is that which was presented to this court by Sir Lynn Ungoed-Thomas, that is that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which are involved in that position, and that they can compel the trustee directors if necessary to use their votes as the beneficiaries, or as the court, if the beneficiaries themselves are not in agreement, think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose.
>
> In the present case, the trust holding gives complete control over the management of the company, and the sort of way in which I approach the plaintiff's right in this matter is this, that if he, firstly, specifies the documents of the company which he wishes to see; secondly, makes out a proper case for seeing them, and, thirdly, is not met by any valid objection by the other beneficiaries or by the directors from the point of view of the company, then the directors should give inspection, not because they can be compelled to do so as directors, but as a short circuit, if one may so describe it, to an order compelling them to use their voting powers so as to bring about what the plaintiff desires to achieve."

92. Mr Jourdan relied particularly on the first of those paragraphs.

93. The first thing to observe is that Romer LJ has not quite recorded the submissions of counsel, if the Law Report has got those submissions right - see page 202. Counsel accepted that the beneficiaries have "no greater rights" against the trustees than they would have if they were shareholders. That is not accepting that they have, in substance, precisely the same rights. He has already indicated that Harman J's order, which seemed to confer more or less those rights, was wrong. He then goes on to consider the course of action open to the beneficiaries. They apply in right of their status as beneficiaries, and it is implicit in his judgment that <u>if the circumstances permit it</u> they can require the trustees as shareholders to require the directors to disclose information, though he short-circuits

those two steps because the trustees and directors are the same people. I have stressed certain words in that proposition because it does not seem to me that the beneficiaries are given an unqualified right. There is a qualification if not all the beneficiaries agree; if they do not agree the court must consider the request (and application) proper (which involves considering the circumstances). And there is a qualification about the directors not objecting. In my view what he is saying is that it is open to beneficiaries to ask trustee/directors for shareholder information, and if they do not get it they can ask the court for a direction that they should receive it. Those are not controversial propositions. It is true that the first paragraph is phrased in terms of compulsion, but in my view, properly viewed, it does not confer an almost absolute right of the kind relied on by Mr Jourdan as part of his thesis. What the court is indicating is that if the beneficiary has a justifiable claim, and if there are no, or no sufficient contra-indications (from other beneficiaries, the trustees as trustees or in some circumstances the directors as directors) then the court is likely to make an order, even if that order requires the trustees to do something as serious as altering the articles.

94. This does not get Mr Jourdan to where he needs to be. It is, on analysis, another example of a situation in which, if the circumstances are right, trustees do not have a full range of discretion but will be compelled to exercise their discretion in a particular way. It does not demonstrate that in <u>all</u> circumstances the trustees have to exercise their discretion in a way required by a single beneficiary (which is all that LLC is), or even (in my view) if <u>all</u> the beneficiaries require it. Lewin on Trusts (18th Edn) at para 24-20 summarises the decision as follows:

> " … once a beneficiary had made out a proper case for disclosure the trustees were under a positive duty to exercise their voting rights to allow disclosure to take place."

95. Mr Jourdan adopts that, but even if it is right it does not go far enough for his purposes. That summary applies only if the particular facts in issue require disclosure. Mr Jourdan needs something more general than the application of such facts in particular circumstances. In my view the wording of Schedule 6(2) applies to the overall relationship in relation to those rights, not merely to particular situations. One does not slip in and out of a nominee relationship depending on whether particular facts require the exercise of a discretion in a particular way which the beneficiary may want. Even if there are possible facts in which LLC would be able to get a direction that the trustees do, or do not, vote the shares, one cannot say that that will be true in every conceivable situation. Short of that, the voting rights are not exercisable "only on his instructions or with his consent or concurrence".

96. Accordingly this route to nomineeship is not open to Mr Jourdan and his argument fails. It is not necessary for me to go further in relation to *Butt v Kelson* and consider whether it was decided *per incuriam* or whether it has been overtaken by later authority.

97. By way of post-script, I add that the mis-descriptions of the position in the accounts and Wachovia loan document do not improve the defendant's position on this point. They are simply misdescriptions. They cannot change existing legal relationships. They may reflect an expectation on the part of some individuals as to how the relationships would operate, but that does not affect the legal substance of the matter.

Issue 2 - the effect of the creation of the property and the corporate structure

98. As described in the counter-notice and pleadings, this issue seemed to be based, at least in part, on the invocation of the doctrine of sham, which has its roots in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. However, as developed at the trial it turned into something else. Mr Jourdan disclaimed reliance on the doctrine of "sham transactions", properly so called. Instead he advanced a submission said to be based on the proper interpretation of the Act and more closely allied to the *Ramsay* principles which have been applied to tax schemes.

99. Central to this submission is Mr Jourdan's description of the overall structure as being an artificial one. The structure which involves the grant of over 1200 new long leases to over 600 separate SPVs is said to be an "artificial" scheme, in the sense that either the scheme as a whole or the steps within it have no commercial purpose other than to escape from the consequences of statutory provisions which would otherwise have prevented such closely linked companies from enfranchising. The scheme was carefully devised to avoid giving more than 2 flats to each SPV (to have given 3 or more would have prevented the SPV from being a qualifying tenant at all), and then a scheme was carefully devised which prevented there being control in any superior corporate entity but which preserved the economic benefits of the leaseholding for the benefit of the group (essentially for LLC). It was submitted that looking realistically at the structure, and viewing the legislation purposively, Parliament did not intend the right of collective enfranchisement to be available in those circumstances, namely circumstances in which the leases of flats were granted for the sole purpose of avoiding sections 5(5) and 5(6) of the Act. It is said that this line of argument has been successfully deployed in tax cases as the *Ramsay* principle (*Ramsay v IRC* [1982] AC 300), and it is deployable here.

100. I find that the factual basis which underpins Mr Jourdan's submissions is established. It is plain that the Westbrook group as a whole set up the present structure with a view to being able to enfranchise, and that it was done with an eye to sections 5(5) and 5(6) so that the SPVs were not controlled by any one body. It is a somewhat elaborate and

carefully crafted scheme. There is no particular commercial purpose behind this particular scheme; it is done for enfranchisement purposes. The claimant did not really contend otherwise.

101. The main question under this issue is therefore whether that fact, against the statutory background, means that the scheme does not fall within the statutory scheme. Mr Jourdan's written submissions formulated his proposition thus:

> "An entity is not a "tenant of a flat under a long lease" for the purpose of section 5(1) if the entity was created and granted a lease for the sole purpose of enabling an enfranchisement claim to be made. Where the capital structure of affiliated companies is created for the sole purpose of avoiding section 5(6) then they are, nonetheless, to be treated as associated companies for the purposes of section 5(6). The 1,223 leases granted under the Structure were not meant to be, and are not, 'qualifying tenancies' under section 5(1). The 612 SPVs were not meant to be, and are not, to be treated as falling outside the test of association in s.5(6)."

102. In his reply Mr Jourdan formulated the point thus:

> "Our main argument is that an entity is not a 'tenant of the flat under a long lease' for the purposes of s.5(1) if the entity was created and granted a lease for the sole purpose of enabling an enfranchisement claim to be made when otherwise it could not have been."

103. This formulation emphasises a point which Mr Jourdan's submissions made clear at several points, namely that the question is one of statutory interpretation.

104. The main case relied on by Mr Jourdan was *Collector of Stamp Revenue v Arrowtown Assets* [2003] 6 HKCFAR 517, an authority in which Lord Millett identified and clarified the principles underlying the *Ramsay* line of cases. It involved a transfer of assets between companies which was intended to take advantage of relief which was available to companies which were "associated", and the association was defined as being a situation in which one company owned not less than 90% of the issued share capital of the other, or a third company owned not less than 90% of the share capital of each. In order to obtain relief a class of shares was issued in order to create a capital structure

which, on paper at least, fulfilled this requirement, but which were essentially valueless in terms of participation and voting rights and which could be bought in by the holders of the other shares for a very small sum. According to Lord Millett, it was actually important to the scheme that the shares should be valueless (see para 56), and Lord Millett held that they had "barely a shadowy existence" (para 152). The taxpayer succeeded in beating other anti-avoidance provisions but ultimately failed because, applying the sort of principles seen in *Ramsay*, it was held that the companies did not qualify for the exemption.

105. The recurring theme that runs through *Arrowtown* is that the principles being applied are principles of statutory construction. Thus Ribiero PJ said:

> "31. The opposing, and in my respectful opinion, preferable, view is that the *Ramsay* principle does not espouse any specialised principle of statutory construction applicable to tax legislation, whatever its language, but continues to assert the need to apply orthodox methods of purposive interpretation to the facts viewed realistically. In common with Lord Hoffmann in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 at para 49, I am of the view that Lord Brightman's formulation is not a principle of construction, but, as stated above, a decision that the Court is entitled, for fiscal purposes, to disregard intermediate steps having no commercial purpose *as a consequence of* an orthodox exercise of purposive statutory construction.
>
> …
>
> 35. Accordingly, the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

106. Lord Millett returned to this theme at various points in his judgment. He acknowledged the source of the principles as being the judgment of Judge Learned Hand in *Helvering v Gregory* [1934] 69 F 2d 809, in which he construed the word "reorganisation" as not including a transfer of shares by way of share exchange, notwithstanding the fact that literally it would. Lord Millett described this as:

> "a manifestation of a purposive approach to the statutory construction of a tax exemption."

107. When considering the reasoning in *Ramsay* he said:

> "116. The key lies in Lord Wilberforce's approval of the United States decisions and his indication that they encapsulated a process of thought which it would not be inappropriate for the courts of the United Kingdom to adopt. It was because it is the likely (though not inevitable) result of a purposive construction of fiscal legislation that it should normally be confined to transactions which have some purpose beyond the mere generation of tax relief. The no business purpose test provides a practical criterion for distinguishing between transactions which operate "in the real world" and transactions which operate in "the world of make-belief" and an appropriate criterion for distinguishing between losses of a kind which were within the contemplation of the legislature when granting relief from tax and losses which were not. It also provides a defensible rationale for leaving intermediate steps out of account, not because they did not take place, but because they fell outside the legislative intent."

108. So far as the tax consequences of planned transactions were concerned, Lord Millett said:

> "126. There is usually no difficulty in determining whether the transaction in question formed part of a larger transaction or series of transactions planned as a whole; or in determining whether the inserted steps (or in *Ramsay* the whole transaction) had any purpose other than avoidance of tax. These are questions of fact. The difficulty usually arises in determining how the words of the statute are to be applied to the end result. This is a question of law and depends on the legislative purpose of the relevant charging or exempting provision as the case may be."

109. He summarised the question in the case before him as follows:

> "151. … The question is not whether "share capital" is a legal or commercial concept, but whether share capital with the characteristics of the "B" non-voting shares and issued for the sole purpose of complying with the statutory formula were within the contemplation of the legislature when enacting s.45 of the Ordinance."

110. Turning those principles to the case before him, he considered the 90% test, and said:

> "155. There is no magic in the figure of 90%. The legislature could have chosen a different figure for its purpose. It is not its purpose to grant relief in respect of a transfer to a company which is 90% controlled by the transferor. Its purpose is more general: to grant relief to transfers between associated bodies. 90% is merely the test of association. If the test is not satisfied, there can be no relief. But it does not follow that, if the test is satisfied, there must be relief. That depends on whether the test is satisfied in circumstances contemplated by the section, that is to say where it can be said that the bodies are genuinely associated so that the transfer does not involve a significant change of ownership.
>
> 156. … But the legislature cannot have intended the 10% allowance to outsiders to be exploited so as to permit relief to be available in a case where the property was to all intents and purposes transferred to a 98% owner with the transferor retaining only 2% even if the literal requirements for exemption were complied with."

And he concluded:

> "157. Section 45 is not an end in itself. The words "issued share capital" in the section, properly construed, mean share capital issued for a commercial purpose and not merely to enable the taxpayer to claim that the requirements of the section have been complied with. It follows that the "B" non-voting shares issued to Shiu Wing are not "share capital" within the meaning of the section, and should be disregarded when calculating the proportions of the nominal share capital owned by Shiu Wing and Calm Seas respectively."

111. Based on that material, Mr Jourdan advances his statutory interpretation point. He submits that a purposive view must be taken of the statute, and when one looks at sections 5(5) and 5(6) one can see that the purpose of the statute was to bar enfranchisement at the behest of someone who in substance owns a large number of flats. He draws attention to the fact that under Chapter II of the Act, which deals with extensions of long leases, there is no similar bar - it does not matter how many long

leases an individual or company owns, he/it can still claim extensions. But Chapter I is different. The right is described as a "collective" right to enfranchisement (see section 1) and the structure set up by Westbrook has nothing of the collective about it. The right is being exercised in the interests of one commercial owner against another commercial owner. Sections 5(5) and 5(6) are the mechanism by which Parliament has chosen to achieve its objective. But those subsections, and the "association" test, are not ends in themselves - they are merely the tools for distinguishing a collective claim from a monolithic claim. The present claim is not a collective claim because ultimately all the leases are within the same single ownership. If Parliament had known about the device adopted by Westbrook it would not have considered it was consistent with its objectives. The Act should be construed so as give effect to that intention of Parliament.

112. In support of his submissions as to the purpose of those two subsections Mr Jourdan prays in aid extracts from Hansard which, he says, demonstrate the purpose. He prefaces his reliance by saying that "If there is any ambiguity or obscurity about the purpose of [the subsections]", no doubt seeking to bring himself within the test in *Pepper v Hart* [1993] AC 593 at 634D-E:

> "… reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity." (Per Lord Browne-Wilkinson)

113. I do not consider that Mr Jourdan can bring himself within that qualification. There is nothing ambiguous or obscure about the wording, and no words whose literal meaning would lead to absurdity. He is trying to introduce Hansard for a different purpose, namely to identify the purpose of a particular provision, which was added by amendment at the behest of a member of the House, not by a sponsoring minister. The statement he seeks to introduce is a statement by a Minister who explained why the amendment was proper and was supported. That is nothing like the limited recourse to Hansard which Lord Browne-Wilkinson permitted. Nor is it the same as identifying the mischief which legislation seeks to remedy, which can be identified in preceding reports. Mr Jourdan did not show me any other authority which would allow this reference to Hansard. I shall therefore ignore it (though it is right to record that I have read the extracts set out in Mr Jourdan's written final submissions).

114. The *Ramsay* principles have most often been applied to tax cases, but bearing in mind their root it is clear enough that they are not necessarily confined to such cases. That is apparent from the underlying principle - it is a process of interpretation of statute, and that describes a process which is applicable to all statutes, not just taxing statutes.

115. Mr Jourdan has identified cases in which the courts have struck down artificial schemes designed to "exploit a statute". He says that they support the application of the principles to property transactions. In my view only one of them can be said to have invoked a *Ramsay*-type line or reasoning.

116. In *Persey v Bazley* (1983) 47 P & CR 37 May LJ construed the word "severance" within the meaning of section 140 of the Law of Property Act 1925 as not including something which was in law a severance but where the severance was created as a device to enable the owners of part of the land to serve a notice to quit for that part which they would not otherwise have been able to give. He said (at page 44):

> "Notwithstanding the formal passing transfer of the legal estate as a result of the conveyances, I do not think that a transaction of this nature is properly described as a "severance" within section 140 of the Law of Property Act 1925. I am quite satisfied, had the mind of the draughtsman been directed to the circumstances which have arisen in this case, that he would not have intended section 140 to apply. ... It would be unwise and I do not propose to try to define what is meant by the word "severance" in section 140 of the Act. Each case will have to be dealt with on its merits as and when it arises. It is sufficient for the purposes of deciding the present appeal for me to say that in my opinion the 2 conveyances of September 28, 1977, did not affect such a severance."

117. May LJ did not express himself as following the reasoning articulated in *Ramsay*, but it is probably right to say that he was applying similar principles of statutory interpretation. Mr Dowding points out, correctly, that what the Lord Justice did in that case was to construe a word in the statute, and he says that is different from what is required in the present case. I shall have to return to that point.

118. *Gisborne v Burton* [1989] QB 390 was a case in which a landowner sought to remove protection given to an agricultural tenant by first creating a headlease in favour of his wife, who then granted the agricultural tenancy. A termination of the headlease would have brought about the termination of the agricultural tenancy without any of the security of tenure protection to which the tenant would otherwise have been entitled if his tenancy had been terminated by his actual landlord. Dillon LJ seems to have considered that this was not a true sham case, but it was a sham in a different sense, namely the parties adopted one form, but intended another effect - see p398D-F and his conclusion at page 399G:

> "In such circumstances the conclusion must be, in my judgment, that Mrs Christopherson was at highest a mere nominee or agent of Mr Christopherson to grant a tenancy to the defendant, and what actually happened was that Mr Christopherson granted such a tenancy."

119. At page 400F-H he applies a different principle, namely one under which the intention of Parliament to give statutory protection to a class of tenants could not be undermined by transactions intended to deprive them of that protection:

> "Essentially the scheme must fail because the Christophersons were trying to do by documents what, for the reasons given in *Johnson v Moreton* [1980] AC 37, the law does not permit, viz to grant the defendant an agricultural tenancy without the statutory protection."

120. Russell LJ decided the case more along the lines suggested in the first of the citations from Dillon LJ set out above:

> "I am firmly of the view that the lease to Mrs Christopherson was an artificial device the only object of which was to disguise the grant of a tenancy to the defendant and to evade the Agricultural Holdings Act 1948." (page 410B)

He expressed himself as not deriving a lot of assistance from the tax cases (page 410C-D).

121. In my view the correct view of this case is not that it is an instance of the court following *Ramsay*-type interpretation principles. There was no provision requiring interpretation. While the decision is based on an understanding of the intention and policy of Parliament, it is not based on interpretation points. Rather it is based on two different principles - first, one of policy of not allowing the parties to contract out of protection which Parliament has given to a class of tenants, particularly by artificial transactions, and second, an analysis of what the parties really intended. It involves construing the arrangements more than interpreting the statute.

122. *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369 was a case in which a tenancy agreement specified a rent for a later period of what was an assured tenancy and which was rent which was absurd for the property (and doubtless for the tenant) and was intended as a device to give grounds for possession for non-payment of rent in due course. The Court of Appeal held that the device did not work. Arden LJ considered the case was like *Gisborne*. She found that on its true construction the relevant Act did not allow the security of tenure provisions to be varied by agreement (para 48) and set herself the task of considering whether the relevant rent clause was a genuine agreement or "a provision to enable the landlord to recover possession otherwise than in accordance with the mandatory scheme" (para 51). She found:

> "55. In my judgment, when the facts of this case are examined as a whole, it is clear, that, as the Judge found, clause 8(b)(iii) was merely a device. It was in reality a provision which would enable the landlord to obtain possession of the premises. As such, clause 8(b)(iii) masqueraded as a provision for an increase of rent: it was not in substance a provision for the payment of rent. It was introduced to enable the landlord to bring the assured tenancy to an end when it chose. In some cases the tenant might be expected to leave voluntarily. In other cases such as this, the landlord would have to make an application to the court but (subject to the outcome of this appeal) that would only be a formality since the rent was much higher than a tenant could be expected to pay. The landlord, therefore, did not have to give the tenants the last opportunity which they obtain in the usual way to pay the rent arrears at the door of the court to avoid an order for possession. The landlord may, as Miss Padley submits, have intended to demand rent but it had no genuine expectation that it would ever receive any rent under clause 8(b)(iii).
>
> 56. As I see it, the effect of the Act of 1988 is that where a tenant is in a position to pay the sum genuinely reserved as rent at the time provided in the tenancy agreement or at such later date as Parliament allows, he should be free to do so and not lose possession. In my judgment the effect of this agreement is that the tenant is prevented from paying the genuine rent by a provision for payment of a sum which was never expected to be paid and which is not on its true analysis rent at all. That provision in my judgment offends against the mandatory scheme of the Act of 1988 and is unenforceable. I differ from the Judge in that in my judgment this device (as he fairly called it) is not permissible."

123. Pill LJ agreed in the result, but adopted a different route to get there. He found that the higher rent provision was inconsistent with the main object and intent of the agreement and fell to be disregarded for that reason (para 70).

124. Again, I do not consider that this is a case which assists Mr Jourdan. While it is a case which involves the interpretation of statute (or at least Arden LJ's judgment did), the exercise involved did not involve a *Ramsay*-type consideration of what Parliament intended. Her decision involved ascertaining the real nature of the transaction and determining that that real intention conflicted with the mandatory statutory regime which Parliament had imposed.

125. I therefore do not think that any of Mr Jourdan's authorities, apart from *Arrowtown*, materially advance his case. *Persey v Bazley* arguably applies *Ramsay*, but the nature of the exercise as analysed in *Arrowtown* makes it clear enough that that line is applicable anyway. The other cases involve attempts to contract out of statutory schemes, which is a different point.

126. Mr Dowding disputes the application of the *Arrowtown* analysis to this case. He points out one important difference in the nature of the statutory provisions. The court in *Arrowtown* was construing the phrase "issued share capital", which had no definition. Contrast the present case, where Parliament has provided a definition for a key concept in the context of ascertaining qualifying tenants, namely the "associated company" concept and the definition in section 5(6). He seeks to say that the reason that the scheme failed in *Arrowtown* was because (and only because) the B shares in question were devoid of any commercial content, not because there was a stamp duty avoidance scheme in play. Friends Life's attempt to attach the *Ramsay* principles to a construction of "tenant of the flat under a long lease" is not a proper exercise - the words cannot carry the import which Mr Jourdan's case requires them to bear. He also drew attention to examples of cases under other legislation where transactions entered into whose intention was to enable a claim (under the Leasehold Reform Act 1967) or to improve the landlord's claim were upheld - see *Wentworth Securities v Jones* [1980] AC 74 and *Hosebay v Day* (county court, unreported but dated 5th November 2009, not appealed on this point - [2010] 1 WLR 2317). In *Belvedere Court v Frogmore* [1997] QB 858 a lease to an associated company for the purpose of encumbering the freehold in the context of an application under the Landlord and Tenant Act 1987 was upheld despite Lord Bingham MR commenting on its artificiality.

127. It seems from *Belvedere Court v Frogmore* that the Court of Appeal was prepared to acknowledge that *Ramsay* principles are in theory applicable to property transactions. However, Lord Bingham MR expressed himself in a way which requires the courts to

exercise caution before applying it. At page 876 D-F he said (having rejected a sham argument):

> "I would also accept the judge's view that the Atherton leases were an artificial device intended to circumvent a result the Act would otherwise have brought about. But the finding of such a device did not defeat the reversioners in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74 nor the lessor in *Hilton v. Plustitle Ltd* [1989] 1 W.L.R. 149 and I am not for my part satisfied that in the field of real property the principles in *Ramsay* and *Furniss* entitle the court simply to ignore or override apparently effective transactions which on their face confer an interest in land on the transferee. Many transactions between group companies may be artificial. That does not entitle the court in ordinary circumstances to treat such transactions as null. I agree with the judge on this issue."

128. These are remarks that seem to support Mr Dowding's submissions. Having said that, it is right to say that Mr Jourdan's argument does not involve saying that the Westbrook structure did not confer the interests which it purported to confer. His argument is that those arrangements were not, on their true construction, within the meaning of the Act because of their artificiality and purpose.

129. The three cases referred to by Mr Dowding are interesting in that they demonstrate (not surprisingly) that not all attempts to get round what are perceived to be the objects of a statute are doomed to failure. However, they all concern different statutes and turn on their own facts and statutory provisions. It might be thought that a fourth case cited by him, namely *Smith v Jafton Properties* [2012] Ch 519 is potentially of more significance. In that case a company held a long lease of a building which it turned into four flats. It assigned two of the flats to one director and two to another. There was a dispute as to whether that gave the directors long leases within the meaning of the Act, and that part of the decision has no relevance here. Although it does not appear expressly in the report, the timing of the transactions was such as to lead one to think that the assignments were to enable the directors to make enfranchisement claims which the company could not make (because it had held four flats). Mr Dowding drew attention to the fact that there was no suggestion that this was a device which put the directors outside the scope of the Act. That is true; but one must be careful about vesting it with too much significance in that respect precisely because the point was not raised. It might also be said that the scheme there did not have the same degree of artificiality as the scheme in the present case.

130. Having considered those authorities it is necessary to come back to the important point, namely that Mr Jourdan's argument is one of statutory interpretation. It is not invoking a separate principle to the effect that attempts to evade statutory protections are to be struck down as a matter of public policy. In any event, not all attempts to avoid the consequences of statutes are struck down that reason - see, for example, *Hilton v Plustitle* [1989] 1 WLR 149, where the grant of a residential tenancy to a company, in order to avoid giving security of tenure which would only be available to an individual, was upheld. One is therefore looking for words which have to be interpreted. One is not looking to a general sort of "Parliament cannot have intended to allow this sort of thing" approach. It is a tighter approach than that. Mr Jourdan effectively acknowledged that by submitting that the words that need to be interpreted are "tenant of a flat under a long lease".

131. Before turning to that question it is helpful to consider the basis of the actual decision reached by Lord Millett in *Arrowtown*. Although that was ultimately a decision on its own facts, the rationale is informative in considering how the principles work.

132. The basis of Lord Millett's decision lies in paragraphs 155-157 of his judgment, set out above. The key words are in paragraph 157 - "the words 'issued share capital' in the section, properly construed, mean share capital issued for a commercial purpose and not merely to enable the taxpayer to claim that the requirements of the section have been complied with." However, that is not merely a reference to motivation. It is also a reference to real commercial effect. It was central to his findings that the shares said to create the 90% connection were in fact valueless, both in economic terms and in terms of control. "They had barely even a shadowy existence" - paragraph 152. That was why they had no commercial purpose, and that, coupled with the motivation, is why, on the true construction of the legislation, they did not amount to "issued share capital". That this is the essence of his reasoning is also apparent from his description of the proper approach in paragraph 151 (above).

133. With that in mind one turns to the words which Mr Jourdan invites me to construe. There is no disputing that the literal wording of the section is complied with. Each of the SPVs is a tenant; each of them has a lease (actually, two leases) of a flat; and each lease is a long lease. If one then looks to the real interest that each SPV has, it is a real commercial interest. It is a genuine long lease, with all the value that such a lease would have. There is nothing artificial or contrived about the lease itself. There is no parallel with any of the qualities of the shares in *Arrowtown*. The grant was a real grant with a real commercial purpose and effect. That seems to me to be a key distinction between this situation and Lord Millett's case.

134. Mr Jourdan's argument would have no basis were it not for section 5(5). He uses that to say that a person cannot be a tenant of the flat under a long lease for the purposes of section 5 if the only reason that he has become one is as a result of a scheme which has no purpose other than to avoid the application of subsections 5(5) and 5(6). This argument does not fit the reasoning and decision in *Arrowtown*. It does not go the quality of the interest that the SPVs have. It merely goes to motivation, and motivation by itself was not the basis of the decision in *Arrowtown,* or indeed other cases in the *Ramsay* line.

135. In my view this exposes the argument for what it is, which is not so much an attempt to construe words in the statute, but to divine a purpose behind a provision in the statute, extract that purpose and then apply a principle that a person should not be able to evade that purpose because it was Parliament's purpose. This is close to, if not the same as, the point in cases such as *Bankway* in which the court will not allow devices to evade a statutory regime. They are not cases which are really about construction of the statute, or at least not the process of construction invoked by Mr Jourdan. Yet Mr Jourdan did not put his case in that way. He nailed his colours firmly to the mast of an interpretation argument as exemplified in *Arrowtown*. What his argument does is to try to identify an underlying purpose and then find some words to which it can be attached as a matter of construction.

136. Mr Jourdan's argument relies on extracting an extended purpose from section 5(5), together with a specific development of subs (5) in subs (6). He says they manifest an overall purpose of allowing enfranchisement to a group of separate lessees acting collectively, but not to "one investor seeking to enfranchise against another". He says they provide a mechanism for determining whether the claim is a collective one or not. While subs (6) seeks to plug one particular method of evasion, its inclusion does not mean that other methods (such as the one adopted in the present case) are to be allowed.

137. I accept that one can, to a degree, divine some sort of purpose behind subsections 5(5) and 5(6), though it is probably not quite the one formulated by Mr Jourdan with its reference to "investor". A person who holds two flats as an investment can still claim to be a qualifying tenant. A group of investors who each hold two flats can get together and enfranchise. Parliament seems to have had its sights on the sort of people (whether investors or not) who have three or more flats. But one cannot move smoothly from that sort of finding to a wider finding of anti-avoidance measures of the nature implicit in Mr Jourdan's argument. One has to have regard to the wording which Parliament actually adopted in the statute. That wording is quite narrow and specific. Subsection (5) deals with real people with real interests - "a person [who] would be regarded as a qualifying tenant", and it then deals with that. It is no broader than that. There is no hint that it would cover, for example, a person who had the beneficial interest in three flats each held by separate trustees; or an individual who owns three companies, each of which holds the

long lease of a flat. The only express extension of the concept comes in subs (6), but that is very specific and deals with entities in a corporate environment. It is significant that Parliament took a narrow approach in the wording that it adopted. In casting the net wider than subs (5) by itself it has chosen a narrow definition when there are wider definitions that would have been available to it if it had a wide extension of the disqualification in mind. The definition of "associate" in the Insolvency Act 1986 (section 435) is an obvious example of what might have been adopted. Yet Parliament did not adopt such a definition. It stayed with the narrower wording. I accept that the argument that "If Parliament had meant X it could have said X" is an argument that can be deployed in most disputes about construction, which limits its value, but in this case it seems to me to have real force. I also accept that an attempt to plug one "hole" in an Act does not mean that there is no wider, overarching plug (if I may be allowed that mixed metaphor) in the form of a construction argument - see *NMB Holdings Ltd v Secretrary of State for Social Security* [2000] EWHC 369 Admin at pp 14-15. However, one has to have regard to what Parliament has actually enacted, and doing that in this case one sees that it has enacted two very specific provisions, from which it would be wrong to generalise to a purpose with the wide-reaching effects which Mr Jourdan's submissions would have.

138. I return to the question is one of construction. I am invited to construe the words "tenant of a flat under a long lease". Mr Jourdan's approach does not require me to construe "long lease" in a particular way, or to say that the SPV is not a tenant in a meaningful sense. The process of construction does not involve characterising any of the elements of the expression in any particular way by reference to the facts of the case (contrast the analysis of Lord Millett in *Arrowtown*). Nor does it involve an assessment of the commercial effect of the lease, or indeed of anything else. What it requires is a construction which is said to be needed by virtue of, first, the structure under which the SPV is held, and, second, the purpose of that structure. That is a long way from the process in *Arrowtown*. I was not shown any authority in which a process of construction is applied to a transaction and where the source of the construction lies first in the manner in which the shares of the participant are held, and second the reason for that holding (not the grant of the lease itself). It would be an extension of the process were I to do so here.

139. At the heart of Mr Jourdan's submissions is his case that if Parliament had appreciated that this sort of thing could happen it would have legislated to prevent it. That may or may not be so, but that is not determinative of much. The same sort of point was dealt with in *Jones v Wrotham Park Estates* [1980] AC 74. In that case, when faced with an enfranchisement claim under the Leasehold Reform Act 1967 the freeholder granted a reversionary lease on terms which had a very material upwards effect on the amount payable for the freehold. The House of Lords upheld the transaction even though some of their Lordships expressed the view that Parliament would have done something about it if it had known about the technique at the time of the Act. Lord Diplock said (at pages 105-6):

> "My Lords, it would seem most unlikely that either the draftsman of the Leasehold Reform Act 1967, or those members of either House of Parliament by whose votes it was passed, had envisaged the possibility that any ground landlord would enter into an intermediate lease in the precise terms adopted by Wentworth and Wrotham or in any other terms which would have the same economic consequences as between ground landlord and intermediate tenant. If it had been envisaged it seems likely that the draftsman would have done something about it to prevent its having the effect of enhancing the price payable by the resident tenant for the freehold; but how he would set about achieving this and what words he would have used to do so is a matter of pure speculation.
>
> My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd. [1971] A.C. 850* provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

140. Lord Salmon said (at 106H-107C):

> "In my opinion, it was clearly the policy of the legislature under the Act of 1967 that the tenant should obtain the freehold of his home at the ordinary market price and not at a price which had been inflated by a transaction such as the present. I have no doubt that if it had ever occurred to the legislature that a transaction such as the present might have been devised and put into operation, clear words would have been introduced into the Act, which would preclude such a transaction from affecting the market price which the tenant would have to pay for the freehold of his home. As it is, no such words appear in the Act; and accordingly it contains a gap. It is well settled, however, that the courts have no power to fill in any gap in an Act, even if satisfied that, had the legislature been aware of the gap, it would have filled it in: *Johnson v. Moreton [1980] A.C. 37* ; *Gladstone v. Bower [1960] 2 Q.B. 384* and Brandling v. Barrington (1827) 6 B. & C. 467 , 475 *per* Lord Tenterden C.J. Accordingly, there is nothing to be done by this House, sitting in its judicial capacity, other than to allow the appeal. It may, however, perhaps be worth consideration in other quarters whether the Act should be amended."

141. These speeches demonstrate that not all holes (if identified) can be filled by the courts. The present case may or may not demonstrate a hole, but if it does then it is one which, similarly, cannot be filled by what is otherwise a forced and illegitimate process of construction of words in the Act which are lighted on for that purpose. If one seeks to apply Lord Diplock's threefold test to the present situation I do not think that any of the limbs can be fulfilled.

142. I therefore find that the SPVs are not disqualified from being participating tenants by virtue of a process of interpreting the Act against them.

Issue 3 - the effect of the Human Rights Act 1998 on the interpretation of the Act

143. This point arises in the light of my conclusion on the previous point. The point taken is made under section 3 of the 1998 Act, which requires the Act to be interpreted in a way which prevents infringement of the 1998 Act. It is said that if conventional interpretation leads to the Act being applied in such a way which allows the SPVs to be qualifying tenants it would allow the 1998 Act to be infringed because it would infringe Article 1 of the first Protocol; therefore, deploying the 1998 Act, it becomes necessary (if possible) to adopt an interpretation which is consistent with that Act.

144. The claim made in this respect runs as follows:

(a) Article 1 Protocol 1 of the Convention protects property rights, but they can be overridden in pursuit of the public interest provided that there is a reasonable relationship and proportionality between the means of overriding and the aim sought to be realised. There is margin of appreciation given to national governments in this respect.

(b) Parliament had a clear policy in giving the enfranchisement rights, but the statutory provisions, if applied without reference to the Act (and on the hypothesis, which I have found to be correct, that they do not operate so as to prevent the claimant from relying on the "artificial" structure) do not give effect to the policy.

(c) Hansard demonstrates what the policy was, and even if it cannot be looked to in relation to the pure statutory construction point, it can be looked to to identify the objectives of section 5 for human rights purposes - *Wilson v First County Trust (No 2)* [2004] 1 AC 816.

(d) Inflexible rules applying an otherwise legitimate social objective can infringe the Protocol - see e.g. *Papachelas v Greece* [2000] 30 EHRR 923 (inflexible compulsory purchase rules); *Thomas v Bridgend* [2012] QB 51 (rigid rules preventing compensation for disturbance where the delay was the fault of the contractor who created the disturbance in the disturbance in the first place).

(e) The social policy of the Act is to allow a headlessee to claim new leases under Chapter II but not to enfranchise under Chapter I. Unless interpreted in the manner propounded by Friends Life, that intention can be subverted, resulting in an infringement of Article 1 Protocol 1; it would go beyond the legitimate aim of the statute.

(f) These submissions are supported by Article 14. On the claimant's interpretation the Act would fail to discriminate between situations in which the freeholder is deprived of his freehold in pursuance of a legitimate aim, and situations where no justification exists. That is a further justification for adopting Friends Life's interpretation.

145. This submission implicitly accepts that the scheme of the1993 Act, of itself, does not infringe Article 1. That would seem to be right on the authorities - *James v United Kingdom* [1986] EHRR 123; *Earl Cadogan v Sportelli* [2010] 1 AC 226 at para 48. It does not, however, argue that the Act construed as I have just held to be correct of itself infringes Friends Life's rights under Article 1. The point is tackled from another direction. Friends Life says that the purpose of Parliament was to prevent one investor from enfranchising against another investor. Unless the Act is construed in the way it propounds then that objective has not been achieved. That being the case, it is necessary to construe the Act so as to achieve it because otherwise Article 1 is infringed, because the Act has gone further than the legitimate aim which Parliament was pursuing.

146. There is a fundamental flaw in this reasoning. If Mr Jourdan is right about policy, then all that he has established is that the Act does not manage to fulfil that policy. It does not follow that Friends Life's Article 1 rights are infringed. In order to establish that Mr

Jourdan would have to demonstrate that without the alleged policy the Act would inevitably infringe, and that Parliament's drafting was a legitimate attempt, within the margin of appreciation, to move away from the baldly stated rights in the Article. He has not even attempted to do that. That seems to me to be an end of the argument. If it would have been legitimate for one investor to enfranchise against another, then all we have is that situation, and the Act is not infringed. It is not even Mr Jourdan's case that the introduction of subsections (5) and (6) were considered by Parliament to be necessary to prevent infringement of Article 1. They were (on his case) inserted merely because it was thought to be right in the circumstances, without reference to the Act. All that Mr Jourdan would have succeeded in establishing under this head (if he is entitled to resort to Hansard) is that Parliament (and a government minister) has not achieved what it had hoped to achieve. That does not, without more, give rise to an infringement of the Human Rights Act.

147. Mr Jourdan's invocation of Article 14 does not help him. It provides that the enjoyment of Convention rights shall be:

> "Secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

148. Mr Jourdan did not develop this other than to say that on the claimant's interpretation of the Act the statute has failed to discriminate between situations in which a freeholder is deprived of his property in pursuance of a legitimate social aim and situations in which no such justification exists. An arbitrary distinction exists between cases where there are "associated companies" and cases where an artificial mechanism such as that adopted in this case exists. It is not easy to follow this argument, and its brevity probably reflects the faith in it of its advancer, but it does not overcome the flaw in the main argument which I have identified above. All that has happened, assuming Mr Jourdan to be right about policy, is that Parliament has failed to implement its policy successfully. It has not been demonstrated that that leaves anyone in a position in which his human rights have been been infringed. The policy was not introduced in order to prevent an infringement. It was introduced within an overall scheme which is not said to infringe.

149. That being the case it is not necessary to consider other aspects of the argument, such as whether I can look at Hansard anyway, and what is actually demonstrated by Hansard. I have, for present purposes, assumed those points in Mr Jourdan's favour. This judgment will be long enough anyway considering points that have to be considered; I do not propose, at least under this section, to consider points which do not once I have made the determination that I have just made.

Issue 4 - the residential purposes point - is the freeholder entitled to take it?

150. Section 4 of the Act provides that there is no entitlement to enfranchise if part of the premises (other than common parts) is occupied other than for non-residential purposes, and if the aggregate floor area of those parts exceeds 25% of the internal floor area of the premises. It is common ground that at least part of the premises is non-residential for these purposes, but there is a dispute as to how much that is. Friends Life avers than 25% of the floor area is occupied for non-residential purposes, and I received a considerable body of evidence and submissions about the areas said to be non-residential, and submissions as to the extent to which one side or the other is right about that. However, before dealing with those points a prior point arises, namely whether Friends Life is entitled to take the point at all.

151. The point arises out of its counter-notice. Section 21(1) requires the reversioner to serve a counter-notice ("shall give a counter-notice"), and provides:

> "(2) The counter-notice must comply with one of the following requirements, namely—
>
> … (b) state that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were so entitled;"

152. The counter-notice given by Friends Life did not take the point about the proportion of non-residential occupational, but it now seeks to take it in this litigation. The claimant says it is not entitled to do so because of the absence of a reference to the point in the counter-notice. Friends Life obviously disputes that.

153. The claimant submits that it is right for the following reasons:

> (i) Section 21 is couched in mandatory terms - "shall" give a counter-notice (subs (1)) which "must" comply with certain requirements (subs (2)).
>
> (ii) There would be no point in requiring the reversioner to state reasons if later on he can rely on further, unstated, reasons for opposing the enfranchisement.
>
> (iii) Once a tenant serves a section 13 notice, the reversioner has a right of access to the property under section 17(1), and has 2 months to serve a counter-notice. That gives him an opportunity to find out what the position is on the ground if he does not already know.

(iv) This analysis is consistent with authority (to which I shall refer below).

(v) This analysis is consistent with the structure of sections 21 and 24. If a reversioner admits the entitlement of the tenants in his counter-notice (under section 21(2)(a)) but the precise terms of the acquisition are not settled within 2 months of the counter-notice, the Tribunal will determine the disputed terms. There is no opportunity for the reversioner to change his mind. The landlord has admitted the entitlement. In a notice which disputes entitlement he should be treated as admitting such matters as he does not put in dispute in his counter-notice.

(vi) To hold otherwise would lead to abuse and be unfair on tenants, who will have decided to make an application on the basis of what they see in the counter-notice.

154. In response to that Friends Life relies on:

(i) Authority which points the other way.

(ii) The inconsistency which will arise (if the claimant is right) between the position where a counter-notice is served and the position where it is not. If no counter-notice is served the nominee purchaser is entitled to apply for an order under section 25 of the Act that the premises be acquired in accordance with the tenant's proposals. The court can only make such an order if it is satisfied that the participating tenants were entitled to exercise the right to collective enfranchisement, so the section 4 point is capable of being in issue on that hearing. It would be anomalous if it were not in play at all where the landlord has served a counter-notice.

(iii) In other legislation in the same field Parliament has specifically enacted that only grounds specified on a counter-notice or notice can be relied on by a landlord - see e.g. Section 30(1) of the Landlord and Tenant Act 1954 which provides that landlord can only resist the grant of a new tenancy on such grounds as he has already specified in a notice. Parliament did not adopt that form of legislation in the 1993 Act, and that is a strong pointer in the direction of allowing a reversioner to take a point not appearing in his counter-notice.

155. The high point of Mr Jourdan's case on the authorities is *9 Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186. That case concerned the validity of a reversioner's notice under section 21. The reversioner had served a notice admitting the entitlement of the tenants to enfranchise (section 21(2)(a)), which meant that under section 21(3)(a)(i) it was to state which of the tenants' proposals were not accepted and give counter-proposals. The reversioner challenged the premium proposed, and proposed its own. The tenants alleged that that proposed premium was invalid because it was unreasonably high. In dealing with the point that arose in that case Auld LJ made some observations on how the exchanges of notices worked. At paragraph 6 he said:

> " … The Act provides a mechanism for resolution of that matter and satisfaction of other requirements of exercise of the right, consisting broadly of two stages. The first is that of an exchange of notices between the tenants, or their nominee, and the landlord, which serves to identify at an early stage whether and broadly what issue or issues there are between them as to the tenants' right to exercise the power and/or as to the terms, including price, of its acquisition. It does not serve, as the judge appears to have considered at para 25 of his judgment, as a means of securing a final definition of, or constraint on, the issue or issues for determination by the court or a leasehold valuation tribunal, if the matter goes that far. Rather, it serves as a useful negotiating stage during which any issues may be resolved so as to avoid, if possible, recourse to the second stage, namely application to the court to determine the tenants' entitlement to enfranchisement and/or, as the case may be, to a leasehold enfranchisement tribunal to determine the price and/or other terms."

156. That case supports Mr Jourdan's submissions in general terms in that it does not vest the landlord's notice with the significance which Mr Dowding needs. Arden LJ did not express a view on the point. Mr Jourdan submitted that Wilson J agreed with Auld LJ. He certainly agreed with his reasoning on what he described as the "first issue", but it is not clear that he intended to express agreement with the more introductory paragraphs in which Auld LJ's view was expressed. I do not consider that I can treat the view as one of the majority of the court, but it is certainly entitled to very serious weight. Mr Dowding submitted that it was obiter. I do not think it was, so far as Auld LJ was concerned. It was, in my view, a significant part of his reasoning, even if not strictly necessary in the sense that it could be taken out and the result would be the same. It does, however, have to be accepted that the point in issue in this case was not in issue in that one, and so the remarks were not directed clearly to it.

157. Pointing the other way is the County Court decision of HH Judge Roger Cooke in *The Bishopsgate Foundation v Curtis* [2004] EGLR 57. (It will become apparent that during the course of this case there was much more reliance on county court authority than one would normally expect to see. That is because cases under the Act do not normally come before this court because of the need to start in the county court. This case is an exception in being transferred to, and therefore heard in, this court.) That case concerned an application for a new lease under Chapter II of the Act, but there was a parallel provision for a landlord's notice stating reasons under section 45. Judge Cooke said (at para 13):

> "I am, however, plainly of the view that if a landlord gives a counter notice and starts proceedings under section 46, it is to be treated as making that application on the basis of the grounds set out in its counter notice (for which there is no machinery for amendment), and not on any other grounds. The whole purpose, as it seems to me, is to define the basic issues (and, indeed thereby give the tenant an opportunity to consider/reconsider its position) before proceedings start, and the landlord should not be entitled then to depart from that position and keep other matters "up its sleeve"."

158. Although that case was on a different provision, I do not think that that is a material basis for distinguishing between it and the present case. It was followed by Judge Cowell in *Farndale Court Freehold v G & O Rents* (unreported, 7th October 2011). Mr Jourdan invites me not to follow those cases.

159. The question in issue at this point of this case is one of statutory interpretation. It is therefore appropriate and necessary to see if there are any other indicia in the Act itself which assist in resolving the dispute.

160. Mr Jourdan relies on section 25 in this connection. He points to the fact that if a landlord serves no notice at all, all the tenant can do is apply to the court for a declaration as to entitlement. That is straightforward enough. However, not everything is assumed in the tenant's favour. Subsection (3) provides that:

> "The court shall not make any order on an application made by virtue of [the failure of the landlord to serve a notice] unless it is satisfied –
>
> "(a) that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises; ..."

161. Mr Jourdan submitted that this allowed the reversioner to run all reasons which might disqualify the tenants, and it would be strange if a landlord who gave no notice could do that when a landlord who served a notice without reasons could not. Mr Dowding's response was to attack Mr Jourdan's first premise. A landlord in the former situation could not take all points fully. It all depended on the burden of proof. The tenant bore

the burden of proof on the requirements in section 3 (whether there was a self-contained building, whether there were two or more flats and whether not fewer than two-thirds of the flats were held by qualifying tenants). The landlord bore the burden of proof under section 4, and would not be allowed to adduce a positive case about that if he did not identify the section 4 qualification as a reason for opposition in his counter-notice. The tenant would not be required to adduce any evidence on the point at all. The practical effect would be that the landlord could not run the point and the court would not investigate it.

162. I do not find this a satisfactory way of reconciling section 25 with the tenants' case on the notice. It does not deal rationally with the position in relation to the section 3 criteria. The landlord can still resist the grant by trying to show non-compliance with those, or at least knock down the tenant's case, but would not be able to say anything at all about the section 4 criterion. That does not seem to me to be a sensible distinction. Furthermore, the condition of getting relief under section 25 is clear - the tenants will not get their declaration unless the court is satisfied that the participating tenants were entitled to enfranchise. The 25% provision is a disqualification, and it is not suggesting that it is something that the court can ignore in this context. So there has to be some evidence about it, and the landlord can apparently go some way towards challenging the tenant (on the analysis of the claimant). It seems very odd that the reversioner can do that where it serves no notice, but not do it where there is a notice objecting to enfranchisement. If it were suggested (which in the present case it was not) that the same analysis should apply to both situations (the tenant has to prove its case but the reversioner cannot make a positive case) then that would be equally odd, and lead to some very artificial and muddling litigation.

163. I do not think that that analysis is required by the Act. Section 3 provides:

> "Subject to section 4, this Chapter applies to any premises … [which are flats in itself contained building and where two thirds of flats are held by qualifying tenants]."

The tenants would have to prove that in an application under section 25 - Mr Dowding did not suggest otherwise. Section 4 then provides an exclusion ("This Chapter does not apply to premises falling within section 3(1) if [etc]"), but the opening words of section 3 demonstrate that there is a link between the two sections, and there is one overall inquiry as to whether the premises qualify for enfranchisement. It is divided into two sections for (presumably) clarity of expression. In a section 25 application tenants would have to satisfy the court, overall, that the right to collective enfranchisement does exist, which ought to involve addressing all relevant parts of the exercise. Mr Jourdan pointed out that

section 4 also excludes any freehold which includes the track of an operational railway. If Mr Dowding's argument is right then, if that applied to the premises, but the landlord did not serve a counter-notice, that would be ignored in a section 25 application too, because the tenant need not address it. That cannot be right. Accordingly, looking at those provisions, it appears that all issues could be run in section 25 proceedings, and it would be anomalous if they could not be run where the landlord has served an opposing counter-notice.

164. The other provisions of the Act do not compel a contrary conclusion. The Act does not say, in terms, that a landlord is confined to his stated objections, so Mr Dowding is really relying on an implication. It is of some significance that there are no express words to that effect (contrast the express provisions of the Landlord and Tenant Act 1954), but it should not be overstated - the absence of express words might be said to give rise to the problem, not solve it.

165. There is also some assistance to be had from the counterpart provisions in Chapter II. One must be a little bit careful about using that Chapter to interpret Chapter I, because the rights conferred are different and the qualifications for applying for a new lease are different (in some respects). However, there are some parallels which can be legitimately drawn. Section 42 provides for a tenant to start the process by giving a notice, and Section 45 provides for a landlord's counter-notice, and subsection (2) is equivalent, for these purposes, to section 21(2) - its wording is actually the same except that "landlord" is substituted for "reversioner". The same regime of counter-notices therefore applies. There is no reason to suppose that the consequences of a failure to give reasons for opposition would be any different. Section 46 is the equivalent of section 22, with the significant distinction that the application is to be made by the landlord not the tenant and the court has to be satisfied that the tenant has no right, rather than being satisfied that it does (under Chapter 1). Let it be supposed that a landlord gives a notice which specifies opposition but no reasons. If Mr Dowding's arguments are right the landlord has to make an application but can adduce no positive case because he has not specified a reason. That does not seem a sensible result to me. That points against Mr Dowding's implication being the correct one in this Chapter, and the same ought to be true of Chapter 1.

166. I accept that this leaves the words requiring reasons in the notice as having uncertain effect. I also acknowledge that the wording of section 21 seems to impose a statutory obligation on the landlord to serve a notice, which strengthens the notion that there ought to be some teeth behind the apparent obligation to give reasons for opposition. However, Parliament did not prescribe the sanction, and I think that the anomalies that would arise if the sanction were that which the claimant claims are too great to justify the implication required.

167. Those are my conclusions on the Act as it stands. It follows that I prefer the views expressed by Auld LJ over those expressed by Judge Cooke. However, each side deployed authorities with which I should deal briefly.

168. Mr Dowding took me to *Burman v Mount Cook Land Ltd* [2002] Ch 256. That was a case under Chapter II, in which there was a dispute as to whether the landlord's alleged counter-notice was a counter-notice at all, bearing in mind its terms. It was held on the facts that it was not. In paragraphs 17-18 Chadwick LJ explained the importance of the landlord's notice, and the extent to which the landlord was under an obligation to state certain things in a notice. He pointed out the express statutory consequences which followed if the notice did or did not state certain things. Mr Dowding says that that shows the importance of a landlord informing the tenant of its position. That is probably right, but it does not address the position in this case. There is no question about the validity of the landlord's notice. This case does not materially assist.

169. In *Cawthorne v Hamdan* [2007] Ch 187 a reversioner on whom a section 13 notice was served, gave a counter-notice which did not specify that the landlord proposed a leaseback (section 21(3)(a)(ii) says that the counter-notice "must" specify such proposals). He tried to require a leaseback later, and the Court of Appeal held that he was too late - he should have made his proposals in the notice. Mr Dowding submitted that this case was consistent with a regime in which the counter-notice defined the issues. I agree that it is consistent with such a position, but in my view it does not clearly demonstrate the principle for all aspects of the notice.

170. In arriving at his decision on the point Lloyd LJ said:

> "Section 21(3) has a mandatory provision ("must … specify") requiring that, if the reversioner wishes to put forward a leaseback proposal, he must identify it in the counter-notice. That suggests that, if he does not do so then and there, it is too late." (paragraph 19).

171. That is a good starting point for Mr Dowding because of the apparently obligatory aspects of the service of the counter-notice ("shall" and "must"). The same sentiment emerges at the end of his judgment:

> "In my judgment, the mandatory terms of section 21(3)(a)(ii) have the effect that, at least as regards any flat which is not then held on a tenancy the tenant under which is a qualifying tenant, if the reversioner does not specify proposals for a leaseback of that flat, he cannot do so later." (paragraph 31).

172. He was apparently relying heavily on the mandatory wording. However, a study of the rest of his judgment indicates that he supported his view by reference to how the mechanics of the rest of the Act worked. In other words, he put the words in a wider context. That context is different from the context of the words which I have to construe, and the present context does not compel the same conclusion.

173. Mr Jourdan relied on the decision of Lindblom J in *Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT (LC), a decision on the right to acquire the right to manage under the Commonhold and Leasehold Reform Act 2002. There is a similar provision for the service of notices and counter-notices in that Act, with a valid counter-notice having to contain (if the application is opposed) an allegation that "by reason of a specific provision of this Chapter" the tenants are not entitled to their claims. Lindblom J rejected the proposition that there was a requirement that the counter-notice had to set out all the grounds of opposition which were to be relied on. At paragraph 34 of his decision Lindblom J held that there was no statutory requirement to that effect, since the section did not in terms limit the jurisdiction of the Tribunal to a consideration of the grounds of opposition raised. He went on:

> "Section 84(3) effectively defines the scope of a tribunal's jurisdiction as being to determine whether the RTM company was 'on the date entitled to acquire the right to manage the premises'. That is its statutory remit. There is no provision in section 84, or elsewhere in the 2002 Act, whose effect is to confine that jurisdiction to the contents of the counter-notice that has prompted the RTM company to apply for a determination of its entitlement to acquire the right to manage."

174. Section 84(3) is the analogue of section 22(1) of the Act. The Acts are not, in other respects, true parallels. The wording of obligation is absent from the 2002 Act, which refers to "may". That is therefore a point of distinction. However, the jurisdictional point referred to is a better parallel, and Lindblom J's reasoning in this respect coincides with my own. There is a requirement that the court should decide something, and it should do so on the basis of the proper facts, not artificially constrained facts. The same point was made in *Albion Residential Ltd v Albion Riverside [etc] Ltd* [2014] UKUT 0006 (LC), on the same Act - see paragraph 44.

175. In the circumstances I find that the claimant's point fails, and the defendant is entitled to take a point about the extent to which the residentially occupied part of premises does or does not exceed 75%.

Issue 5 - Residential and non-residential purposes - which premises qualify and how do the percentages work out?

176. The qualifying and non-qualifying use of parts of the Dolphin Square premises are agreed. However, there are significant areas of disagreement, which are capable of affecting the 25% calculation referred to above. The dispute can be broken down as follows:

> (a) There is a major dispute as to whether the terms on which the Dolphin House flats are let mean that they are or are not occupied for residential purposes within the section. This throws a very significant area into one side or the other of the square footage balance. If the claimant is right in its contention that the purposes are residential then that, by itself and without the other issues being decided in its favour, is enough to get the claimant above 75%. If it is wrong then the claimant needs to win on other points to get it there.
>
> (b) There is a similar dispute about corporate lets. This too, if the issue goes the claimant's way, is capable of giving the claimant success on the point.
>
> (c) There is a dispute as to whether certain parts of the premises are common parts. In relation to some the claimant says the premises are residential and the defendant says they are common parts. If the claimant wins on these then the parts go into the balance on the claimant's side. If it loses then the parts are ignored for the purposes of the calculation.
>
> (d) There is a dispute as to whether certain premises are common parts (the claimant's contention) or are occupied but for non-residential purposes (the defendant's contention). If the claimant wins on these then the parts are left out of the calculation. If the defendant wins they are thrown into the scale on the defendant's side, pushing the non-residential part closer to or above 25% (which is the defendant's objective).

177. I shall have to consider the disputed areas one by one (or at least those capable of having a significance in the dispute), but before doing so there are certain points of law arising in relation to the tests to be applied to the issues that arise.

Residential purposes - what is the test?

178. Section 4(1) provides that that Chapter does not apply to premises if parts of the premises:

> "are neither
>
> (i) occupied, or intended to be occupied, for non-residential purposes, nor
>
> (ii) comprised in any common parts of the premises"

and those parts exceed 25% or the internal floor area of the premises. Until an amendment in 2002 the figure was 10%. The key phrase for present purposes is "occupied … for non-residential purposes", and its obvious opposite "residential purposes". Mr Jourdan started his submissions by saying that the opposite of residential is not "commercial". I agree - the inquiry is as to whether occupation is not for residential purposes, not whether it has some particular other purpose. His positive submission was that "residential purposes" meant either use as a person's only or principal home, or use as a person's home with a degree of permanence even if not as the only or principal home. He suggested that occupation for a period of 6 months or more was required to achieve the necessary degree of permanence. The key concept underpinning these submissions seems to be "home".

179. There is no definition of the expression in the Act. Both sides sought to support their respective cases by reference to provisions containing residence related-concepts (though not using the same expression) in the Act as originally enacted. The original form contained the following expressions or concepts:

> (i) Section 6 set out a "residence condition" which tenants were required to fulfil:
>
> "(1) For the purposes of this Chapter a qualifying tenant of a flat satisfies the residence condition at any time when the condition specified in subsection (2) is satisfied with respect to him.
>
> (2) That condition is that the tenant has occupied the flat as his only or principal home—
>
> (a)for the last twelve months, or
>
> (b)for periods amounting to three years in the last ten years"

(ii) Section 10 contained a provision relating to a "resident landlord" who was someone who (inter alia)

> "at that time occupies a flat contained in the premises as his only or principal home"

(iii) Section 39(2) provided that a qualifying tenant was one who:

> "at that time occupies a flat contained in the premises as his only or principal home".

(iv) Section 42(3)(b) required the tenant to give particulars of certain matters, including:

> "particulars of the period or periods falling within the preceding ten years for which the tenant has occupied the whole or part of the flat as his only or principal home"

180. All those provisions have since been repealed. Mr Jourdan submitted that the draftsman clearly thought that the reader of the Act would be able to gather the meaning of the undefined "non-residential purposes" (and its opposite "residential purposes") by looking at sections 6 and 10 and gathering that the concept of "residence" involved using the property as that person's only or principal home. Mr Dowding used those sections, and the others, to the opposite effect. He contrasted those instances as showing that the draftsman knew what to say when he wanted to introduce the concept of "home", and he did not use that form of expression in section 4. He used a different and wider expression, and must therefore have meant something different, and not something which involved use as a sole or principal home. He supported his argument by pointing out anomalies which would arise, if Friends Life were right, in the application of section 13 (which requires that a notice be served by at least 50% of the qualifying tenants, who at that time had to fulfil the home-related condition) and section 4, which disqualified whole premises if less than 90% of the premises did not fulfil the "residential purposes" condition. While section 13 involves a head count of flats, and section 4 is an area-based figure, if one had a home-related condition in section 4 then the 50% requirement in section 13 would become largely irrelevant.

181. It is implicit in the submissions of Mr Dowding, and explicit in the submissions of Mr Jourdan, that the meaning and effect of "non-residential purposes" in section 4 was not changed by any of the subsequent amendments of the Act. I think that that is correct - see *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] 1 WLR 289 at para 23 (albeit on a different statute). In my view the express use of the concept of "home" is instructive when it comes to interpreting the expression "non-residential purposes", and I think that Mr Dowding, and not Mr Jourdan, is right in the conclusions to be drawn. It is possible for premises to be used for residential purposes without being anyone's home in

the sense of sole home, or principal home (I deal with this issue below) and if the draftsman had intended this expression to mean "home" he would have said so. I also note that Mr Jourdan's first submission as to its meaning ("only or principal home") is actually a repetition of a precise expression used in the Act. Mr Jourdan is therefore, to that extent, using the section in which it appears as if it were a precise definition. Looking at the Act, that seems to me to be inappropriate. Parliament cannot have intended that without expressing such an intention in terms. It has chosen an expression which suggests an objective view of premises, not tied to a particular occupant, and has not chosen an expression ("home") which is plainly occupant-specific. That, in my view, is significant.

182. I therefore think that, looking at the Act, the expression is not as narrow as Mr Jourdan submits. Mr Dowding also gains support for his position from the anomalies that he relies on, but they do not add all that much.

183. That, of course, only deals with what the expression does not mean. It does not deal with what it does mean, or what it includes. Mr Dowding submitted that it meant use for the usual activities of living - sleeping, eating and washing - and in support of that relied on the decision in *Owen v Elliott* [1990] 1 Ch 798. That case concerned the expression "let by him as residential accommodation" in a taxing statute. The activity in that case was described as use of part of premises as:

> "A private hotel and boarding house … in that they received guests for payment."

184. Some guests stayed for short terms of two weeks in the summer, others came for 3 or 4 months in the autumn to spring period. Millett J had held that this was not use as residential accommodation, but the Court of Appeal disagreed. Fox LJ recorded, without comment, the acceptance by the Crown that:

> "as a matter of the ordinary use of the English language" (p789G)

the expression included the lettings by the taxpayer, but in the then context (factual and statutory) it did not extend to the lettings made by the taxpayer. Fox LJ held:

> "I accept that the words "residential accommodation" must be construed in their proper context and that that context includes

> section 101 of the Capital Gains Tax Act 1979, but I see nothing in section 101 which displaces what is accepted to be the ordinary meaning of the words "residential accommodation." (p 790 A-B)

He did not say what the ordinary use of the words was, but was obviously proceeding on the footing that the sort of lettings in that case gave rise to residential use. Those lettings did not involve the concept of use as a "home", and Fox LJ went on to distinguish the section he had to construe with other provisions which, by using different wording, did deploy the concept (though not the word) "home". He went on:

> "Mr Moses [for the Revenue] said that the concept of a home is conveyed by the word "residence" alone". I do not feel able to accept that." (p790C)

185. Leggatt LJ said:

> "In sections 101 and 102 of the Capital Gains Tax Act 1979, the concept of occupation as a home is derived not from the use of the term "residence" by itself, but from its use in the phrase "his only or main residence." In my judgment the expression "residential accommodation" does not directly or by association mean premises likely to be occupied as a home. It means living accommodation, by contrast, for example, with office accommodation. I regard as wholly artificial attempts to distinguish between a letting by the owner and a letting to the occupant; and between letting to a lodger and letting to a guest in a boarding house; and between a letting that is likely to be used by the occupant as his home and one that is not."

186. That case, albeit one on a particular provision of a taxing statute, demonstrates that the concept of "home" (or "only residence") is not inherently built into the concept of "residence" in its ordinary sense. It supports Mr Dowding's submission in this case. In relation to the Act the only reason advanced for importing the concept into section 4 involves by looking to the other provisions, identified above, which deploy the former concept. However, it is no reason for extending the normal meaning of "residence" that different provisions, apparently deliberately worded in a different fashion, deploy it. That is, in fact, a reason for <u>not</u> extending it.

187. Mr Dowding also pointed to *Urdd Gobaith Cymru v Commissioners of Customs and Excise* [1997] V & DR 273 in which a chairman of the London VAT Tribunal had to consider the case of lodging accommodation at centres in Wales for students and teachers attending educational courses, and to determine whether that accommodation was "residential accommodation" for the purposes of VAT. He held that he had to have regard to the ordinary meaning of the words used, and went on:

> "13. I agree that "a residence" clearly implies a building with a significant degree of permanence of occupation. However, the word loses that clear meaning when used as an adjective. In ordinary English "residential accommodation" merely signifies lodging, sleeping or overnight accommodation. It does not suggest the need for such accommodation to be for any fixed or minimum period."

188. I am not sure whether the permanence referred to in the first sentence of that citation was intended to mean permanence attributable to the occupation of a particular single occupier, or permanence of a general use (as opposed to sporadic use). However, whatever might be meant by that, I agree with the rest of the formulation of the chairman, even though it is not binding on me. Mr Dowding is entitled to invoke this case in support of his submissions.

189. For his part Mr Jourdan relied on *Hosebay v Day* [2012] 1 WLR 2884, a case on the Leasehold Reform Act 1967. This case, unlike Mr Dowding's authorities, did not involve similar wording in a different statute. It involved different wording ("a house") in a different (albeit related) statute. Lord Carnwath held that a house which had been converted into a hotel with self-catering flats was not a "house", and Mr Jourdan invites the conclusion that it would be surprising if it were held that the building in *Hosebay* were used for "residential purposes" had that been the test. I do not accept that invitation. The question in *Hosebay* was a very different one. It involved a different word in a different statute, and the question of whether something can be called a house is a different one from the question of whether the nature of the use of the building can be called "non-residential purposes" (or "residential purposes"). I do not think that this case helps Mr Jourdan (or me).

190. In *Smith v Jafton* [2013] 2 EGLR 104 HH Judge Hand had to consider the application of the Act to flats let out as serviced apartments with a centralised booking system.

> "This provided places to stay similar to rooms and flats provided by hotels and aparthotels. In my judgment this kind of occupation is outside the scope of the [Act]." (para 152)

191. Although the result favoured Mr Jourdan, and he said it was right, he did not seek to defend its reasoning. He said the case ought to have been decided on the basis that the flats were not the home of anyone. This is hardly reliance on this case as authority, or even as a parallel. Of more use to Mr Jourdan, at least so far as some of the occupancy of Dolphin House is concerned, is the remark at paragraph 149:

> "The fact that no formal longer term relationships have ever been created and that the booking system and general pattern of occupancy is more akin to that of an hotel seems to me to indicate that the adaptation did not create premises for use for the purposes of occupation with a sufficient degree of permanence to say that the occupant was either "living in" the flat or using it as a "dwelling"".

192. Earlier passages demonstrate that the judge thought that "residential purposes" and "dwelling" were effectively synonymous. He was therefore impressed by the booking system and hotel-like operation when it came to concluding that the use of the building was not for "residential purposes".

193. This case involved a judgment on the facts of that particular case. It is not binding on me and it certainly does not support Mr Jourdan's case that "residential purposes" involves "only home" or "principal home". The actual decision was, as the judge acknowledged, a borderline decision. I do not think it helps me either way in this case.

194. Overall, I prefer Mr Dowding's analysis, relying on more compelling and closer authorities than Mr Jourdan's. I do not propose to formulate a test for "residential purposes", but I will say that the sort of considerations that arise from Mr Dowding's two authorities are useful touchstones.

195. This test has the additional merit of being more practical than Mr Jourdan's, which was "use with a sufficient degree of permanence to say that the occupier was either 'living in' the flat or using it as a 'dwelling'." His test depends on the subjective intention of the occupant from time to time (or may do so), and is less easy to apply than that propounded

by Mr Dowding, which is more objectively assessable. In *Panagopoulos v Cadogan* [2011] Ch 177 at para 19 Roth J said:

> "The 1993 Act sets out a complex statutory regime designed to operate in a field where the interests at stake are often very significant for the parties and where property values can change during the enfranchisement process. Therefore, in interpreting the statute, considerations of practicality and convenience are important."

That, too, supports the more objective test in Mr Dowding's authorities.

Common parts

196. The assessment of the percentages under section 4 excludes such part or parts as are:

> "comprised in any common parts of the premises" (s 4(1)(a)(ii)).

197. Section 101(1) contains a form of non-exclusive definition:

> "Common parts … includes the structure and exterior of that building or part and any common facilities within it".

198. As Roth J observed in *Panagopoulos,* that definition impliedly assumes an ordinary meaning of the words. He declined to produce a comprehensive definition, but said that:

> "I consider that it is intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all."

199. He went on to give examples such as boiler rooms and lift machinery.

200. Other general points can be extracted from the authorities:

> (i) It is not necessary that the part be devoted to purposes as a matter of obligation in the leases. In *Panagopoulos* Roth J gave as an example a gym which would be a "common facility". If the freeholder has provided a large room with exercise machinery "to which any resident may have access", then he considered that that constituted a common facility, and therefore a common part, even in the absence of a covenant in the lease to provide such a facility. I note, however, that the example given was of a gym which was placed there for the common benefit of the residents. The example given does not cover a gym which is also available to outsiders as part of a commercial enterprise. This is a point which arises in the present case, as will appear.
>
> (ii) It is not necessary for residents to have access to a part of the building for it to be a "common part". In the same case Carnwath LJ gave as an example a caretaker's flat. Although residents would not have access to that flat, he considered that it would be capable of being a "common part" – see paragraph 24.
>
> (iii) A part of the premises used by several occupants can be a “common part” even if the only users are commercial users and not residential users. HH Judge Hollis so held in *Marine Court [etc] Ltd v Rother District Investments Ltd* [2008] 1 EGLR 39. Although this is a county court case, I agree with the reasoning of Judge Hollis.

201. Other points arising will be dealt with in the context in which they arise when I consider various candidates for common parts later in this judgment.

Residential purposes - the bulk of the flats

202. The main dispute in relation to “residential purposes” related to the flats operated under the name Dolphin House and the “corporate housing” flats. The remainder of the flats (1,028 of them) are let on furnished or unfurnished assured shorthold tenancies. Heating and hot water are included in the rent. There is no dispute about “residential purposes” here - it is agreed that they are occupied for residential purposes. Interestingly, Friends Life did not suggest that it was appropriate to pursue an inquiry as to the status of any of these flats as a sole or principal home.

Residential purposes - Dolphin House

203. The broad nature of this part of Mantilla's operation appears above. It is a description of that part of the enterprise operated by Mantilla, with leases of the flats taken in its own name. The following aspects of the operation are significant:

(i) The flats which are the subject of this operation are of same nature, and similarly equipped, to other flats at Dolphin Square. They have the same sort of accommodation - bedrooms, kitchen, bathroom, living room.

(ii) 160 of the flats are let for periods of 89 days or less; 5 are let for periods of 90 days or more.

(iii) As at May 2010 the most frequently recurring length of stay was 2 days. The average length was 13 days, but a very significant number stay longer than 14 nights. 21 occupants stayed for longer than one month. Some occupants were repeat stayers. This sort of usage can be treated as typical.

(iv) The 5 extended stay flats were let for more than 3 months, and the occupant of one of them as at the relevant date is still there now. Another stayed for over a year.

(v) All 148 flats in Rodney House were Dolphin House flats. 17 rooms in Keyes House and Hood House were also part of the operation, but they were also designated as guest rooms which could be booked by residents of Dolphin Square to house guests on a temporary basis.

(vi) The users of the flats do so for a variety of purposes - those just visiting London as tourists, business visitors, conference attendees, those wanting a London pied-a-terre, those seconded to London for a limited period, those needing temporary accommodation during a relocation, and those visiting London for an extended period who prefer full living facilities as opposed to a hotel room. Mr Miller-Chalk described some residents as turning up with boxes of personal belongings other than clothes. In at least one flat the occupants had hung up their own pictures and posters.

(vii) All flats have to be pre-booked over the telephone or online, and there is a dedicated reception area in Rodney House for the Dolphin House operation. A tenancy agreement is signed, and a key (electronic) handed over. Bookings are not normally made for specific flats. Reservations can be made through travel agents. When they arrive some foreign guests are asked to provide their passport numbers (as they would be in a hotel).

(viii) The flats are run as serviced apartments. There is a more frequent maid service than for the corporate flats. However, occupants do their own cooking, washing-up and laundry (in the washing machines supplied, which, according to Mr Miller-Chalk, are a much-requested facility). Bed linen and towels are provided. Delivery of newspapers can be ordered, as can wake-up calls.

(ix) Mantilla pay the utilities bills and business rates on these flats.

204. Based on this usage, Mr Jourdan submits that this operation was a sort of self-catering hotel, operated by Mantilla on its own account. The flats are not used by people as their only or principal home, and most of them are not occupied with the degree of permanence required to say that an individual was "living in" the flat or using it as a "dwelling". Accordingly he can count this area towards the 25% of non-residential occupation that he needs to win on this point.

205. If the first of Mr Jourdan's tests were right he would succeed on this point. Most of the accommodation for most of the time would not be the sole or principal home of the occupants (there may be exceptions, particularly in relation to the 5 longer term flats) but the flats are (in substance) neither proffered nor accepted as homes. However, I have already rejected that test. The same is true of his "sufficient degree of permanence" test if one applies the 6 month cut-off proposed by Mr Jourdan. Most of the occupants do not come close to that. But that is not the test either.

206. Turning to the sort of considerations arising out of Mr Dowding's authorities on the point, the accommodation does seem to me to fulfil those considerations. The flats are used for the sort of living activities that go with residence - sleeping, cooking, washing, laundry, and other ordinary living activities. To characterise the premises as a sort of self-catering hotel, as Mr Jourdan does, does not actually answer the question in issue, but in any event it is not really accurate. The flats have some of the features of a hotel in terms of the booking arrangements, some of the facilities provided and a reception area, but unlike most hotels it has full cooking facilities and washing machines. They are fully self-contained flats, not analogous to hotel rooms. It seems to me to be quite appropriate to characterise the occupation as being for residential purposes. For the time being the occupants are conducting residence-like activities there. That seems to me to be the test (and the answer to the test), not whether they are using them as homes, or even residences. If one focuses on the purposes, they are residential, and are not turned into something else by the hotel-like services which are provided. The shortness of the stay does not affect the characterisation of the occupation.

207. Another point falls to be made in relation to the 17 flats which are made available as guest rooms. So far as they are so used, that use is genuinely ancillary to the residential use of the bulk of the flats. They may enjoy the services and features of occupants who are not guests of the other residents, but that does not prevent their use being an extension of the residential use of those other residents. It is even more appropriate to describe that occupation as being for residential purposes. That is not a complete answer in relation to those 17 flats, because the evidence was that the guest user was not constant. The flats were also used as part of the general Dolphin House operation. However, it is part of pattern of occupation which is, in my view, residential.

208. If follows that the claimant succeeds on this point. When the Dolphin House square footage is added to what is conceded to be residential, it takes the claimant above 75%, so in theory I do not have to consider the other disputed areas. However, in case this goes further I shall consider them anyway

Corporate housing

209. The description given to these flats is one of convenience. The flats in question were not necessarily let to bodies corporate. It is a name of convenience given to the concept of making 36 flats distributed around the complex available for lets of more than 3 months, as long-term serviced apartment accommodation (as Mr Miller-Chalk described it). The flats are not kept permanently for this purpose - if they are not let within the corporate housing scheme, they are let on more conventional assured shorthold tenancies.

210. Unlike the Dolphin House flats, these flats are owned by, and let by, the SPVs (using Mantilla as agent). The flats are indistinguishable from the other furnished flats in terms of their accommodation and furnishings (leaving on one side the possible presence of an additional alarm clock). They have a weekly maid service, linen and towel change, and receive heating and hot water as do all the other residents. However, unlike those other residents the utilities charges are included in the rental. Council tax is also part of the rent, and the tenants have the right to use the Fitness Club. The tenants were forbidden from bringing furniture and fixing fixtures without the consent of the landlord, and limited in the number of occupiers.

211. As at May 2010, the average length of corporate housing residents was 309 days. Two residents stayed for 3 months, and 26 stayed for between 3 months and a year. Mr Miller-Chalk listed the occupants as at 4th May 2010 and found that a lot of the lettings were to individuals, not companies. 8 were let to a Danish company for an extended period to house particular employees engaged in engineering work in this country. The claimant even adduced evidence from one particular occupant (no doubt carefully chosen for the purpose) who took a corporate housing tenancy for 5 months after returning to this country and while his London house was being refurbished. There seems little doubt that the flat was his home (in Mr Jourdan's terms) for that period, but that single case does not prove much for the purposes of this part of this case.

212. Mr Jourdan submitted that these flats were not occupied for residential purposes because they were, or were primarily offered as, short term accommodation for those who are away from home. He drew attention to the fact that the flats are advertised specifically as designed for people on relocation or secondment. I am not sure that this latter point is as helpful to Mr Jourdan as he thinks. It seems to me that there is a good chance that people

relocating are likely to be using the flat as their home for the time being, and those on secondment may well have a degree of permanence about their occupation. Be that as it may, since Mr Jourdan's tests are not, in my view, the right ones then his analysis does not help. I think that the position is even clearer in relation to these flats than in relation to the Dolphin House flats. It seems to me that it is even clearer that these flats are used for residential purposes, even if one adopts Mr Jourdan's description of their purpose. They are used for all the functions of living, and the nature and terms of the lets is such that they smack even less of a pseudo-hotel.

213. I also consider that Mr Jourdan's analysis demonstrates the problems with his test. It may well be the case that some of the occupants are very much on the cusp of using the flat as a sole or principal home within Mr Jourdan's preferred test. The same applies to his "sufficient degree of permanence" test. But one can only find out which side of the line they lie on by a difficult inquiry of each occupant. Mr Jourdan's own written final submissions (paragraph 159) disclaimed the need or appropriateness of making such inquiries, acknowledging that Parliament is unlikely to have intended that should happen. But it is only if one makes those inquiries that one can apply the tests proposed by Mr Jourdan. He advocated a broad brush view, looking at the use that was made of the building. That would not provide answers to his tests. A broad brush test requires a more objective assessment of the quality of the use measured against the nature of the accommodation. If one does that then in my view one comes up with the answer that the occupation is residential in nature, for the reasons given elsewhere in this judgment.

214. I therefore find that the claimant succeeds on this head too. This head, by itself, was sufficient to take Mr Dowding across the 75% boundary.

Other areas - generally

215. I now turn to the other areas as to which there is a dispute. The unusual nature of this site means that there are very significant numbers of other rooms and areas which have to be considered for the purposes of the statutory equation, and mercifully many of those are the subject of agreement between the parties. However, there remain significant areas of disagreement (though some verge on the de minimis). In the light of my previous conclusions these areas have become irrelevant, but I make some findings in case I am wrong on the points I have just decided. As will appear the disputes relate to a number of small areas, though an aggregate would be significant. As will also appear, some of the areas verge on the absurd in terms of quantum.

216. In the light of all these points I have felt it right to express my conclusions relatively briefly. That matches the way in which the evidence was presented (which was brief and,

for many of the smaller areas, unchallenged), and the manner of final submissions, which were very short written submissions in most cases unelaborated by oral argument.

Circulation space and cleaner stores at Rodney House

217. These are the areas, largely corridors, which give access to the flats in Rodney House. The dispute here is different from the disputes that I have hitherto considered. The claimant says these areas are common parts. Friends Life says that the categorising fate of these spaces goes with the fate of the Rodney House rooms. The circulation space cannot be residential accommodation, and since (like the other blocks) this circulation space cannot be accessed by the residents of the other blocks, it cannot be common parts either. They do not lead anywhere other than the Rodney House flats and the commercial space occupied by Mantilla within Rodney House. Friends Life therefore submits that they are not common parts.

218. It has already been agreed that the equivalent areas in the other blocks are common parts. On Friends Life's reasoning the only reason for not so holding in relation to these spaces is that Rodney House is not occupied for residential purposes. But since I have held that it is occupied for residential purposes this ground of distinction goes and the spaces fall to be treated as common parts. I would add that even if I had not so held in relation to the Rodney House flats I would still have held that they were common parts. They have all the qualities of common parts, and the fact that they do not connect with other blocks in the estate (which is true of the circulation spaces in all the other blocks) does not diminish that quality. Irrespective of what they serve, they are obviously common parts in any event.

219. The same applies to cleaner stores in Rodney House. They are agreed to be common parts in other areas of the site, and that must apply to Rodney House.

The basement garage

220. Many of the car parking spaces in the basement garage are used by tenants of the flats. No dispute arises as to them - they are occupied for residential purposes pursuant to section 4(2) of the Act:

> "Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any

> common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes."

221. Similarly, it is accepted that any parking spaces used by commercial occupiers of parts of Dolphin Square, or by non-occupiers, are non-residential for these purposes. However, disputes exist as to three other categories of car parking spaces. First, there are vacant bays (33 of them as at the relevant date), as to which the claimant says they were being marketed to existing and new residential tenants (and were therefore residential); bays used by Dolphin House/Fitness Club members; and parking for staff of Mantilla. I shall take them in turn.

The 33 vacant car parking spaces

222. I find the factual position as at the relevant date to be as follows. Tenants of the flats could seek a parking space in the basement garage. If allocated one, then a particular space would be allocated and would be available for the exclusive use of that tenant. A pass was issued, with a magnetic card to allow admission to the car park and a key for a drop-down pillar on each bay which prevented its use by anyone other than the permitted resident (if let in its erect position). Bays were also made available to, and allocated to, commercial occupiers. These are bays as to which no issue arises. No additional bays were allocated to commercial tenants after the relevant date.

223. As at the relevant date 33 bays were "vacant". Miss Steventon's witness statement says that the lettings team would have offered underground parking to all new residential tenants, and the spaces were marketed to them (but not Dolphin House tenants). If let, any given space would have been available exclusively to the tenant who let it. The relevant paragraph in her witness statement goes on to say:

> "No new commercial tenants were allocated bays in, or after, May 2010." [the month of the relevant date]

224. That evidence would tend to associate the vacant spaces closely with residential lettings, and support the view that the vacant spaces were available only to residential tenants. However, in her (very short) cross-examination she said that if one of the existing commercial tenants had applied to her for a space she would have provided it. That changes the picture. The spaces were being explicitly offered to existing and new residential tenants from time to time, but they would also have been available to commercial tenants. It is unfortunate that that piece of the evidential picture did not appear in the witness statement.

225. Mr Dowding's case is that these car parking spaces were "intended for use in conjunction with a particular dwelling contained in the premises" within subsection (2) albeit that no particular space was allocated to a particular dwelling in advance. An intention to allocate specifically in the future is sufficient for the purposes of the subsection. Had it not been for the possible commercial user I would have accepted that proposition. I think that spaces that are capable of being used, and intended to be used, exclusively in association with dwellings from time to time are intended for use in conjunction with a particular dwelling even though the association cannot be made at the relevant date. The subsection goes on to say "(and accordingly is not comprised in any common parts of the premises)". What it is doing, in part, is to contrast this sort of user with common parts. A group of car parking spaces which are unallocated but intended to be allocated to particular dwellings (and only to dwellings, not to anyone else) from time to time can certainly not be treated as common parts. No-one has the right to use them until one person has an exclusive right to use them. That does not describe "common parts". I think that the intention of the subsection is that the future specific association (with no general use in meantime) should be a sufficient association with the concept of residential use to bring the space within that use.

226. However, the possibility of letting to commercial tenants destroys that effect in the present case. It turns out that while the spaces are being promoted to residential users, they are not all reserved for residential users because they might be made available to commercial users. It cannot be said of any given space that it is "intended for use in conjunction with a particular dwelling". It is intended for use in conjunction with a particular dwelling or in conjunction with a commercial part of the premises, depending on who asks first. The conditions of subsection (2) are therefore not complied with and these spaces are not used for residential purposes. It is irrelevant for these purposes that none of the spaces were actually let to commercial tenants at the time or thereafter. The test has to be applied at the time, and the relevant intention at that time has not been demonstrated.

227. Mr Dowding's fallback position is that they are common parts because they provide the tenants with the facility of being able to rent a parking space. That does not make them common parts. It is of the essence of common parts that they have some real sense of common usage. There is no such sense of common usage for these spaces. Until they are allocated, no tenant can use one. When they are allocated only one tenant can use them. At no stage can the tenants, in common, use them. Mr Dowding drew attention to the contrast between residential use and common parts to which I have already drawn attention, and said that if they are not used for residential purposes they must therefore be common parts. That is not correct. There is a contrast, but it is an implicit contrast between facilities that are available to one particular tenant on the one hand and facilities

that are available to all tenants (or at least more than one) on the other. The unallocated spaces do not fall into either side of that contrast.

228. I therefore find that these spaces are neither residentially occupied nor common parts.

Bays used by Dolphin House residents/Fitness club members

229. 12 bays were reserved for use by Fitness Club members and Dolphin House residents. They were said to have been allocated by Security on a "first come first served" basis. The evidence is that they were primarily used by the latter category but sometimes by the former.

230. Mr Dowding submitted that this use made these bays common parts. I disagree. It would be an extremely forced use of the expression and concept to describe their use in that way. I fail to see how use by non-resident users of the club is in any sense use by occupants or landlord as a common part. The haphazard use as between Dolphin House residents and Fitness Club members means that there was no common use by occupiers of the building in the way in which common parts are used either.

Staff parking

231. Miss Steventon's evidence was that four bays (1, 2, 61 and 62) were allocated specifically to managers employed by Mantilla and one by a manager of Brookhouse Capital, a company which undertook asset management on behalf of the SPVs. Four more (90/91, 92, 93 and 94) were occupied variously by four employees of Mantilla, being one helpdesk employee, two members of the security team and a chef at the Bar and Grill. Three of those four bays were also available for use by Dolphin House residents and Fitness Club members. All four were allocated by security on a first come first served basis. Mr Dowding submitted that all these bays fell to be treated as common parts.

232. Mr Dowding submitted that 1 bay, used by the manager of the team letting flats at Dolphin Square (not Dolphin House) was a common part because it was used for the obvious benefit of the SPVs and was a common part because use by managing agents could be as much a common part as a caretaker's flat. I disagree. The analogy is false. I assume for these purposes that a caretaker's flat can be part of the common parts. This bay was not used in that way. It was used by an employee of a company which had its own commercial life and which operated for its own commercial functions. Those

functions might benefit the tenants, but that is not the sole test of common parts. There has to be some element of common usage, albeit indirect, and this sort of use does not qualify.

233. The next bay was that used by the employee of Brookhouse Capital. This company conducted oversight of Mantilla, leasing strategy, debt servicing, oversight of construction works on Dolphin Square projects and "oversight of operational legal issues" (whatever that means). Mr Dowding said that this made the space "common parts" because it was used for the provision of services to the tenants. I disagree. It would be complete misuse of the words so to describe it, and the provision of services to the tenants is not the sole test. Many of the services are remote from the tenants anyway.

234. Two more bays were used by managers at Mantilla. As will appear below, I do not consider that Mantilla's occupation made its offices "common parts", so use of these spaces by its managers cannot qualify either.

235. As for the remaining four, all the uses to which these spaces might randomly be put fail to qualify as common parts for the reasons given above - all the uses individually fail to qualify, so in aggregate they fail to qualify too.

The fitness club and spa area

236. The fitness club is run by Mantilla on its own account as a commercial operation. It comprises a gym and a swimming pool. Mr Miller-Chalk confirmed in cross-examination that it was intended to make a profit (though it had not done so yet). Its use is available to both residents and non-residents, but non-residents make up most of users - in 2010 it had 2,189 members, of which 81% were non-residents. Residents of the Dolphin House operation and the corporate flats had free use of it. The other residents were entitled to membership at a reduced rate when compared with the rates charged to non-residents.

237. Schedule 1 of the SPV leases gave the SPVs various rights, most of them the usual sort of easements which tenants in blocks of flats will need and have. Paragraph 10 gives:

> "A right to use the Amenity Areas subject to observance of any regulations issued or published by the Landlord from time to time and payment of any specific charge or subscription for the use of such Community Areas."

238. The “Amenity Areas” are defined to include:

> “the garden tennis courts .. gymnasium restaurant spa and such other areas as may be provided for by the Landlord from time to time.”

Thus the fitness club is made an “Amenity Area”.

239. In 2010 these rights were implemented by a right to join the gym, and a reduced subscription was offered.

240. Mr Dowding’s case is that the gym was part of the common parts. He pointed to *Panagopoulos v Earl Cadogan* [2011] Ch 177 at para 45 where Roth J said:

> “45. Moreover, I do not think that to satisfy the definition [of "common parts"] the part must be devoted to this purpose as a matter of obligation in the residents' leases. For example, Mr Munro gave the example of a gym as something that would constitute a "common facility", and I agree. But if the freeholder has devoted, say, a large room in the basement to serve as a gym and placed exercise machinery there, to which any resident may have access, I consider that this constitutes a common facility (and thus a "common part") even if there is no covenant in the leases to provide such a facility."

241. Based on this, Mr Dowding seemed to submit that any gym provided by the landlord would be a common part. In my view that is not what Roth J was saying. It all depends on the terms on which the gym is made available. If it is a gym whose prime purpose is to provide facilities for the residents then it may well qualify. However, that is not the case here. The gym is run as a commercial operation by Mantilla which hopes to make a profit from it. It has been let to Mantilla, presumably for that purpose. The bulk of the users are not residents at all. It is not provided primarily for the residents; the residents may, like anyone else, use it, but they still have to pay for the privilege (albeit a reduced amount). Mr Dowding also used the parallel of a caretaker's flat which has been held to fall within the common parts. That is not a true parallel. The caretaker's flat is occupied by the caretaker (and provided to the caretaker) so that he/she can provide services to the

residents in the form of looking after the building in which all the residents have an interest. There is no element of the exploitation of that flat for other dominant commercial purposes of the landlord (or anyone else). Nor does Mr Dowding's analysis of the rights of the tenants as being "property rights" assist him. I am not at all convinced that that is a correct description, but even if it is it is not sufficient to make the right to join Mantilla's gym something which turns the gym into common parts for the purposes of the statute.

242. I therefore find that the fitness club is not part of the common parts for the purpose of the statute. I reach this conclusion without relying on the fact that the SPV leases have a separate definition of “common parts”, which does not include the fitness club, though that point hardly helps the claimant.

243. As at May 2010 the area currently used as a spa (treatment centre), and used as a spa until 2007, was closed for refurbishment. It has since re-opened. Its status is the same as the fitness club - it is let to Mantilla, which seeks to run it at a profit; it is part of the “Amenity Area” under the SPV leases but it is open to all. Prior to its being closed residents got a 10% discount. However, there is no evidence of anything like a membership.

244. This area is no more a “common part” than the gym. It is a commercial enterprise which is open for the use of residents as it is for anyone else. The inclusion of it as part of the Amenity Area is probably a hollow right if it is a right at all. A resident would no more be turned away than any other member of the public. The spa lacks all features of what would normally be understood to be common parts. It is therefore excluded from that category.

The club lounge and the champagne bar, and the Bar and Grill

245. The club lounge and champagne bar are now closed, but they were open at the relevant date. The Bar and Grill remain open.

246. The club lounge and champagne bar were what their names suggest. They were areas which were leased and operated by Mantilla. They were available for the use of anyone up to 11pm, after which time the bar was available for use only by Dolphin House residents (who had to show their key card) or to bar members. Membership was free, but 24 hours had to elapse between joining and using the bar. There is an undated

membership list which shows that of 235 members, 230 were residents of Dolphin Square.

247. These were not parts of the building which serve the residents in common as opposed to parts which they individually occupy. They were parts of the building which were open to members of the public and, again, were a business operated by Mantilla for its own benefit. It may be true that residents would form a natural, and perhaps substantial, part of the clientele, but that is not sufficient to make it a common part. There is no evidence it was provided primarily for them. After 11 pm it was not available to them as such. It was available only to Dolphin House residents, and members, so being a resident was not a sufficient qualification after that time. One had to join. It was the case that most members were residents but they did not have to be.

248. The bar can certainly be described as an amenity available to the residents (amongst others), but that, and the other facts, are not sufficient to make it a common part. It was not directed to them as a common facility, and was not available solely to them.

249. The Bar and Grill is a restaurant serving breakfast, lunch and dinner. It is open to members of the public. Mr Miller-Chalk does not have precise figures, but assesses that 60% of the clientele were probably Dolphin House clients, and the vast majority of the remainder would have been residents, with some Fitness Club users and non-residents. Yet again, Mantilla has a lease of it, and hopes to turn a profit on it, though it sounded as though it has not managed to do that yet.

250. I find that once again this area lacks the necessary element of being a facility which is for, and intended to be for, the common usage of residents as residents and as part of their residential rights under their leases. It is a commercial enterprise being undertaken by an entity (not their landlord) for that entity's own commercial purposes, which offers the facilities to the world at large. This remains the case even though the predominant users may in fact be residents, and the users would be viewed as a natural, if not captive, market. The situation is no different from what it would have been had a company opened a restaurant immediately outside Dolphin Square, hoping to catch the residents as customers but also hoping for outside custom as well. That would not make it a common part. It is not rendered any more of a common part by the fact that it is within the meaning of "Amenity Area" in the lease. Once again any "rights" conferred by the lease are fairly meaningless. Residents and non-residents would be treated alike, and if Mantilla decided to close down the operation the residents could not compel its reinstatement.

251. Accordingly the Bar and Grill is not a common part either.

Mantilla's first floor administration office

252. This is a substantial office which is used by Mantilla to carry out functions in relation to Dolphin Square. It is held under a lease and is used by that company for its various purposes, that is to say:

(a) As managing agent of the claimant as landlord of the SPV leases.
(b) In its business as letting agent for the SPVs, in exchange for a fee.
(c) Its business as a holder of leases of the flats within the Dolphin House operation, and the running of that business.
(d) Its operation of the businesses of the gym, spa and restaurant.

253. Part of the space is also used by two asset managers of Brookhouse Capital, which "oversees" Mantilla.

254. Mr Dowding's submission was that these offices are a common part because they are used for the discharge of functions which are for the shared benefit of the tenants in the same way as a caretaker's flat would be a common part. It was submitted that the position would be same as an office created in a block of flats and dedicated to use by a managing agent or landlord for administration purposes.

255. In my view the parallel with a caretaker's flat and the landlord's office plainly fails on the facts. Mantilla is not just carrying out management of the building as such for the tenants. It is carrying out its own substantial business in relation to Dolphin House, and carrying out the other businesses to which reference has been made already. Insofar as it is arranging lettings for the SPVs, it is assisting the SPVs in conducting their own businesses of letting, not managing the building as such. It is doing all these as part of its own business, carried on on its own account. It also allows its own overseers to occupy part of the space (the Brookhouse Capital personnel). This lends further colour to the real nature of the occupation, which is not simply for the management of the building for the tenants. Even if the instance of the managing agents is a good one which would lead to the office being a common part (which I assume without deciding), the position of Mantilla is nothing like that. Only part of its activities are those which are the equivalent of such a managing agent. I do not know what portion of its business falls within that category because figures were not produced, but the other aspects of its business are obviously very substantial indeed and prevent the parallel which is suggested. There is a difference between activities which relate to the tenant's occupation or enjoyment of a

building which has to be managed and activities which relate to the tenants' commercial exploitation of their respective flats. The former is only part of the activities of Mantilla supported by its office.

256. Accordingly Mantilla's first floor offices are not part of the common parts.

Mantilla's offices on the ground floor

257. These offices have a different use. There is a reception area on the ground floor (dealt with in the next section of this judgment), adjacent to which is a further Mantilla office. It comprises:

(a) An office, canteen and meeting area for the Mantilla lettings team.
(b) An office for residents to come and report faults.
(c) Storage of tenancy agreements for the flats.
(d) A thoroughfare for residents and users of the Fitness Club, Bar and Grill and shopping arcade to reach those areas, and the internal gardens.

258. The lettings dealt with in this office are new lettings of the SPV flats (not the Dolphin House operation or corporate housing), renewals of those leases, general queries from residents and non-urgent requests from residents (such as non-urgent replacements).

259. These areas are said to be common parts because they are used by Mantilla staff engaged in functions in connection with the management of Dolphin Square and the SPVs' flats, and because they are a thoroughfare. That description of the activities is accurate as a summary, but it does not make the offices common parts. There is a distinction between activities in which the tenants merely have an interest, and activities which are sufficiently closely related to the occupation of the building to make the conduct of those activities common parts. Mantilla are providing services relating to the management of flats under lettings. They are not providing services relating to the occupation of the building in which all tenants have an interest (or in which tenants occupying the relevant part have an interest) - contrast the caretaker's flat. The mere fact that all tenants have the same sort of interest in their activities, and engage Mantilla for the same sort of thing, does not make the offices in which that is done a common part of the building. It makes the office the place from which Mantilla carries out its commercial operations, which is different, and the common (or more accurately similar) interests of the tenants does not make it a common part.

260. Use as a thoroughfare is capable of making the part thus used a common part - indeed, that sort of usage might be thought to be a paradigm. However, that part is a small part of the whole, and it was not demonstrated that it was used as of right. In those circumstances the use of that part is merely the use to which Mantilla chooses to put part of the premises from which it conducts its business. It is not a part in which all tenants have a sufficient common interest to make it a common part.

The Dolphin House reception area and office

261. Another part of the ground floor is given over to a reception area and office which is used to service the Dolphin House operation, as a reception, sitting area (for Dolphin House tenants), access to the lounge and champagne bar (in 2010), booking administration area for Dolphin House and receiving booking requests in respect of guests.

262. Mr Dowding submitted that these were common parts in the same way as the circulation space in Dolphin House is a common part, and also relied on the use by residents to book a guest room and access other parts of the premises. This is a hopeless submission. These are offices and a reception area from which Mantilla conducts its own operations on its own account and have nothing of a common part about them. The fact that residents may wish to go there to make bookings is of no significance. Nor is the fact that there is a thoroughfare, for the same reasons as just given in respect of the other ground floor offices.

263. These parts are therefore not common parts.

Ground floor meeting room

264. This is a meeting room used by Mantilla for meetings it needs to conduct in its activities - meeting contractors conducting activities at the site and for certain meetings with tenants, for residents who may hire it (some of them are not charged) and for outsiders who may hire it. It amounts to 131 sq m and is hardly worth arguing about, but that did not prevent its being argued about.

265. This is said to be a common part. It is not. It is part of Mantilla's property which it exploits for its own purposes. There is no exclusive, or even substantial, use for the purposes of managing the building as such, and no tenant has any greater right or opportunity to use it than does an outsider. This point should never have been argued as a common part, either on substantive or on quantum grounds.

Rooms used in conjunction with various aspects of the activities conducted at Dolphin Square

266. There next follows a number of parts of the building which are used in conjunction with various aspects of the businesses carried on at the building - their use is ancillary to a principal use of other parts of the buildings. Mr Dowding submitted that they were all common parts because they were all used in conjunction with areas which the claimant contended were common parts. That seems an odd submission to me in relation to some of them, because the issue in relation to some of the principal areas did not involve the principal areas being common parts.

267. Taking these items one by one (using numbering appearing in a Scott Schedule prepared for these proceedings), and as briefly as possible, I find their designation is as follows:

Item 41 - Laundry used for the purposes of the Dolphin House operation. I have held the flats to be residential, but this laundry is not. It is used for the purpose of Mantilla's business and is non-residential, not a common part.

Item 42 - Corporate housing furniture storage. This is used for the purpose of the corporate housing lettings and controlled by Mantilla. It does not have the quality of a common part; nor is it residential. It is non-residential.

Item 43 - Laundry. It was not clear to me what business or activity this supported but it lacks the element of common use required for common parts. It seems to be part of Mantilla's business and is therefore non-residential

Item 52 - Bar and Grill Storage cupboard (90 sq feet). The claimant says that these are common parts because the Bar and Grill is a common part. The premise fails, and therefore so does the conclusion. This is non-residential.

Item 63 - cupboard containing Bar and Grill gas intake (28 sq feet) - as item 52.

Item 75 - Bar and Grill storage - as Item 52.

Item 162 - Old Spa and Fitness Club storage - As 52.

Item 189 - swimming pool plant room - as 52.

Item 201 - Dolphin House paint store (25 sq ft) - as item 41.

Item 209 - Bar and Grill store - as item 41.

Item 221 - Linen room for Dolphin House and corporate housing - as 41 and 42.

Item 245 - Dolphin House archive - this is part of the office use - it is therefore non-residential.

Vacant tenants' lockers

268. This is a dispute of uncertain area scope (at least it is uncertain as far as I am concerned) about some vacant lockers. They are described by the claimant as tenants lockers, but that pre-judges a dispute that arises into them. In this context it must be remembered that there are a number of commercial tenants in the building.

269. The building contains a number of rooms in the basement which contain large numbers of lockers which are available for tenants. A very large number of those lockers were allocated to residents. There is no dispute as to those - the defendant accepts that the area of those lockers falls to be treated as residential use. The same applies to the area of those locker rooms which is not occupied by the lockers (such is the detail to which this debate has descended, in case it matters). The dispute in this area arises in relation to lockers that were not allocated as at the relevant date. The parties have debated the square footage occupied by those individual lockers. Mr Dowding submits that the areas occupied by those lockers should be treated as residential because they were intended to be let to residents in the same way as vacant car parking bays are said to be residential. Mr Jourdan disputes that. That is the dispute that I have to resolve.

270. This argument fails for the same reason that it fails in relation to the vacant car parking bays. The evidence about lockers came from Miss Steventon, whose evidence did not go so far as to say that these lockers were reserved for residential tenants. Her evidence was to the effect that the commercial usage of lockers was low, and it was unlikely that any commercial tenant would have taken a vacant locker in 2010. However, she does not say that the lockers were reserved for residential tenants, and in the absence of a reservation for that purpose their use cannot be regarded as residential. And like the vacant car parking bays, they cannot be treated as common parts either. They therefore fall to be treated as non-residential.

Four tenants' storerooms

271. This point relates to four storage rooms which do at least have the merit of aggregating to a decent number of square feet (unlike the disputed lockers). Insofar as they were unallocated (which I understand them to have been) at the relevant date their fate is the same as the lockers and for the same reason. If they were allocated then their allocation goes with the nature of the user to which they were allocated (residential or non-

residential). If they were unallocated they cannot be treated as common parts (no tenant had a right to use them) and they must therefore be treated as non-residential.

Other "vacant" areas

272. These are areas numbered 19A, 33, 34, 60, 112, 120, 122 and 240 in the Scott Schedule prepared for the purposes of isolating the parties' contentions in this action. They are a selection of rooms or cupboards, with a disused payphone booth (no 34 - 11 square feet - which I think is the smallest area which the parties have chosen to fail to agree). None of them were used directly for residential purposes and the evidence (which is extremely sketchy) does not show that any parts were, at the relevant time, allocated to any residence, or even for residential purposes. One room (112) was being used for storage by an electrician working at the building, but there is no indication as to whether that was a permanent enough dedication for it to be treated as a common part. I wondered whether the site of the payphone box might be a common part, but there is little evidence of that. In the circumstances the evidence points to these being rooms in the gift of the landlord to be used from time to time as it wished, and that means they should be designated as non-residential.

Rooms and areas occupied by Mantilla for storage and archive purposes.

273. These are mainly basement rooms used for storage, Some of that storage is of records of Mantilla - employment and PAYE records, TV service supply records, fire certificates, and other documents. Other storage was for furniture used in the Dolphin House operation and other furniture. Mr Dowding submits that these were common parts. I disagree. They are all used to support the business activities of Mantilla which, for the reasons appearing above, is not sufficient to make them common parts. They fall to be treated as non-residential, not common parts.

Areas occupied by residents without permission

274. Three basement rooms were occupied without permission by residential tenants. Mr Dowding submitted that this gave them a residential quality pursuant to section 4(2) of the Act, and that the absence of permission was immaterial. It is likely that permission would have been given if asked. He submitted that this approach is supported by the approach taken in *The Bishopsgate Foundation v Curtis* [2004] 3 EGLR 57 at paras 29-31.

275. I fail to see how section 4(2) assists. These are not areas "used, or intended for use, in conjunction with a particular dwelling" within any reasonable meaning of those words.

The areas might be allocated to a particular dwelling if an application were made and terms agreed, and one might predict that such an application might be met with success, but pending such a thing happening the areas are not within section 4(2). The evidence does not even enable me to reach the conclusion that the areas were appropriated to residential use generally, much less an individual residence. Accordingly Mr Dowding's reasoning fails. I confess I did not understand his reference to *Bishopsgate* (which was made in written submissions and not expanded orally.)

Rooms used by third party contractors

276. There are two rooms which were occupied by contractors who were said to be providing services to the SPVs or the occupying tenants. One was a contractor carrying out refurbishment works on flats, and the other was a handyman who did general works for residents who stored his basic kit in the room. Mr Dowding says that this makes the rooms common parts.

277. As appears elsewhere in this judgment a caretaker's flat can be part of the common parts but not every use which benefits residents or tenants means that the area from which that is conducted is a common part. I do not think that a room used by contractors who are carrying out refurbishment works qualifies. A caretaker is intended to further the occupation of the building generally, so his flat can, on that basis, be a common part, but the same is not true of refurbishing contractors. Their use of the room is one associated with the exploitation of the flats as residences, not the furtherance of their shared occupation of the building. That room is therefore not a common part.

278. The same is true of the handyman's room. If he were providing services to the landlord or managing body, to further the enjoyment of the building as a whole, the position might be different. But on the evidence he is a contractor who provides ad hoc services to residents. The services do not relate to their enjoyment of the building as a whole (which is a prime quality of services relating to common parts). So his room is not a common part either.

Keyes conference room

279. In 2010 this was used by Mantilla as a staff training room and by residents for events. In 2011 it was let to a commercial tenant. The use in 2010 does not make it a common part (as Mr Dowding submitted it did). It was used for the purposes of Mantilla's commercial business, and the availability for residents for purposes from time to time does not make

it a common part. The fact that Mantilla felt able to let it to a commercial tenant demonstrates that the use by residents was ad hoc and not anything to do with the leases.

Launderette

280. This is a facility in the basement available to all tenants but run by a Mr Henry who charges for its use. He rents the room, according to the oral evidence of Mr Miller-Chalk. Mr Dowding contends that this is an essential facility for residents without washing machines and it is a common part.

281. Whether or not it is an essential facility, it is not a common part in my view. The tenants/residents may have a common interest in the facility existing, but it is not a facility in which the tenants have installed their own machinery; nor is it a facility in which the landlord has installed machinery for the tenants (contrast the gym in the example given by Roth J). It is a facility which is provided by a third party to whom the room has been let for that purpose. I completely fail to see how this makes it a common part. Its essentialness does not make it so.

Rooms occupied by Dolphin Square 2005 Ltd

282. This company is a company which looks after the interests of the Option B tenants. It occupies a couple of rooms from which it discharges its functions and stores its records. There is no suggestion that this user has any degree of permanence about it, or that it is enjoyed pursuant to the terms of the lease. It is a also a use confined to some only of the tenants. It cannot be a common part.

Long corridor in the basement - the shooting gallery

283. In the basement of two of the blocks there is a long corridor-like space running under it, which provides access to the boiler room and lift motor room. It connects the boiler room in Nelson House with the lift motor room in Hawkins House, with a short dead end at one end. When I saw it it had some scaffolding parts stored in one “alcove” off it. It is called the shooting gallery because Dolphin Square legend has it that it was used as a pistol range by the Free French in the Second World War.

284. It is common ground that the boiler room and lift room are common parts. Since the main function of this corridor is to provide access to those rooms (though one of them has alternative access), and despite the fact that residents do not actually have access to it, it seems to me that this area is like a corridor giving on to those other admittedly common

parts. Mr Jourdan said it was an empty space, not a corridor. Any corridor is likely to be an empty space, so this nomenclature does not help much. I consider that Mr Dowding succeeds in his contention that this is a common part.

The residence/non-residence/common parts point - conclusion

285. I have set out my conclusions above without reference (in the main) to the amount of the areas involved and without putting those areas in context. The parties should be able to work out how the findings translate into square feet, but if there are any disputes about that then I will rule on them if it appears that the exercise is worth it.

Issue 6 - The section 13 notice point

286. This issue turns on the part of section 13 which requires that a tenant's notice should specify the "proposed purchase price", and in particular what is required by those words. This breaks down further into the following issues:

(i) Do the words impose an objective test for validity based on an objectively justifiable price in valuation terms; or
(ii) Do they impose a subjective test for validity based on the views of the tenant as to its justifiability in valuation terms?
(iii) If the answer to either of the above questions is Yes, does the section 13 notice in this case pass the test.

Is there a valuation test for a section 13 notice?

287. Mr Jourdan submits that there is a valuation-based criterion which applies, and his first submission is that "purchase price" in s13(3)(d) should mean "purchase price calculated in conformity with the requirements of Schedule 6, which would prevent the specification of a price which was too low to be justifiable". He relies on the unfairness that would otherwise result were a landlord to fail to serve a counter-notice in time (see above). He also invokes the original wording of section 13 which contained a subsection (6) providing that before serving a notice the tenant had to obtain a valuation prepared by a qualified surveyor, to specify that that had been done and to name the surveyor. That valuation had to be prepared:

> "in conformity with the provisions of Schedule 6 so far as relating to the determination of the price payable under this Chapter for the interest in question".

It is argued that since a valuation had to be prepared on that basis, the "proposed purchase price" had to be in accordance with the section as well. That provision has since been repealed, but it has been held that the fact that the repeal does not affect the interpretation of the rest of section 13 - *Boss Holdings v Grosvenor West End Properties* [2008] 1 WLR 298 at para 23.

288. Mr Dowding advanced arguments against this position. Briefly, he submitted as follows:

(i) He relied on the words used in the statute ("proposed purchase price") and submitted that imposing some sort of criterion would impose an undue strain on the meaning of the word (see Wilson J in *9 Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186).
(ii) He pointed to cases in other contexts in which "proposed" did not carry extra burdens - *Sun Life Assurance v Thales Tracs* [2001] 1 WLR 1562 and *Davstone (Holdings) Ltd v Al-Rifai* (1976) 32 P & CR 18.
(iii) Parliament could have proposed a test but did not, and used words which make a test difficult to formulate.
(iv) If a subjective test is adopted it involved difficult inquiries.
(v) Whatever the test, it opens up the possibility of preliminary issues about valuation being argued on applications about the validity of notices, which is undesirable. Those applications may operate unfairly against the tenants who might be forced to disclose valuation advice prematurely, and even waive privilege, lest adverse inferences be drawn against them.
(vi) The statutory purpose of section 13(3)(d) should be seen to be setting the stage for negotiations rather than anything else.
(vii) There are other incentives for the tenants not to specify too low a price - doing so would be more likely to obstruct a sensible deal and to lead to unnecessary litigation in the tribunal.
(viii) The main counter-argument is the fact that if the landlord fails to serve a counter-notice he will be stuck with the tenant's rent figure. That this is the case is plainly so - *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55. However, that is not enough to justify a forced reading of the statute, and in any event the concept of a failure to take a procedural step leaving a person saddled with the effect of a previous notice is well-known in the law - see e.g. Part II of the Landlord and Tenant Act 1954.
(ix) No authority binds this court to find that there is a criterion which should be applied other than using "proposed" in a normal sense of being suggested in the notice with no added valuation-based test.

289. Mr Dowding is right in his last submission, that there is no authority which strictly binds me. I also think that there is much to be said for his other points, and absent the authorities to which I am about to refer I might have decided the point in his favour. Mr

Jourdan's point on the repealed provision is not, in my view, a strong one, and it is noteworthy that in *Cadogan v Morris* [1999] 4 EGLR 59 at p61A-B Stuart-Smith LJ did not think much of it either. His other main point, however (the effect of an uncountered tenant's notice) is of more significance, and has been given real weight in Court of Appeal authorities. That authority points firmly in the direction of there being some applicable criterion, and bearing in mind its weight I consider that it would wrong for me to ignore it and the direction in which it points. The authorities are as follows.

290. In *Cadogan v Morris* [1999] 1 EGLR 59 the Court of Appeal had to consider a tenant's notice under section 42 of the Act, claiming a new lease. A notice under that section must:

> "specify the premium which the tenant proposes to pay" (subs (3)(c))

so the wording is an equivalent wording to that in section 13. Interestingly, the section never included a provision equivalent to section 13(6) providing for a prior valuer's report. The tenant specified £100, which was absurdly low - the range of possible values was apparently £100,000 and £300,000. The landlord challenged the validity of the notice on the basis that the proposal was not good enough. The submission of his counsel was that the proposal as to the premium "must be a bona fide and genuine one, not a nominal figure or one that bears no relation to the true value". The tenants' counsel resisted this implication though he conceded that section 13 required a proposal to be "realisitic and genuine", because of the presence there of the requirement of a surveyor's report. Stuart-Smith LJ (which whom the other two members of the court agreed) could not see a logical distinction between section 13 notices and section 42 notices for this purpose (p61B). His reasoning therefore started from that concession.

291. Stuart-Smith LJ went on to give some further reasoning:

> "I do not think it necessary to read any words into section 42(3)(c). The tenant is required to specify the premium that he proposes to pay. He did not do so; he deliberately specified a figure that he did not propose to pay. I do not think the tenant is required to offer his final figure that he may be prepared to go to, but he should, in my view, offer a realistic figure. The judge was troubled by the difficulty in telling whether the offer was a realistic one. I very much doubt whether in practice this will present the difficulties that the judge envisaged. It ought to be possible both for the landlord and the judge to recognise whether the offer is a realistic

> one or simply a nominal or wholly unrealistic one. The landlord would need to be on fairly firm ground if he sought to challenge a substantial offer, even if he thought it was considerably too low. The court will obviously allow a fairly wide margin. If the landlord unsuccessfully challenges the validity of the notice, he will find himself paying the costs. On the other hand, even if it is the tenant's opening bid, it should, in my view, be a realistic one. I decline to lay down any more precise guidelines. In this I follow what Sir John Donaldson MR said in *Cresswell v Duke of Westminster* [1985] 2 EGLR 151 at p152:
>
> 'Where we draw the line I do not know, I doubt whether it is in anybody's interest that I should attempt to draw that line. Many cases will answer the question on their own facts.'
>
> "This seems to me to be an application of the well-known elephant test. It is difficult to describe, but you know it when you see it. I think we can trust to the good sense of landlords not to make frivolous applications and County court judges to take a robust line and not get enmeshed in hearing detailed evidence. A brief enquiry, if necessary with limited evidence from tenant and landlord, should suffice."

292. What is apparent from this judgment is that Stuart-Smith LJ thought that some sort of minimum standard applied to the need to specify the purchase price. What is, with respect, less clear is what that is - I deal with that in the next section of this judgment.

293. In *9 Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186 the Court of Appeal had to consider a landlord's notice under section 21 of the Act which was said to contain a counter-proposal figure for the purchase of his interests which was unrealistically high. It was said by the tenant that it was, with the alleged effect that the counter-notice was invalid. It was said that the wording of section 21, which requires a "counter-proposal", was subject to the same criterion of validity as a tenant's notice under section 13, and had to be "realistic". A surveyor who had originally supported the landlord's figure later accepted that he had valued the interests too highly and that the landlord's figure was outside the scope of reasonable valuations. Auld LJ acknowledged that *Cadogan v Morris* applied criteria to the tenant's proposals, but declined to apply the same criteria to the landlord's counter-proposals because the consequences of each of the notices was not the same. If a landlord did not respond to the tenant's notice he was stuck with the proposed figure (see above), but that did not apply to the tenant in relation

to a landlord's notice. Accordingly it was not necessary to apply, or imply, criteria to save the landlord so he did not do so.

294. Arden LJ carried out an analysis of the various possible meanings of the word "proposal" and concluded that, in the context of section 21, it did not require any gloss such as "genuine" or "realistic" (paragraph 73). She started from dictionary definitions and considered authority. She came to her conclusions in relation to section 21 in a passage starting at paragraph 68. It is apparent from her reasoning that she started from an assumption that section 13 did require the application of some criterion to the validity of the notice but distinguished section 21 because of the differences in consequences if the landlord failed to serve a counter-notice - see her acceptance in paragraph 71 of the reasons advanced by counsel recorded in paragraph 69.

295. Wilson J agreed with Auld LJ.

296. It is apparent from all three judgments that they considered that some restrictive criteria applied to the tenant's proposed price in a section 13 certificate even though the point was not technically before the court.

297. Mr Dowding submitted that neither *Cadogan v Morris* nor *9 Cornwall Crescent* was binding on me in relation to section 13 because neither of them concerned that section. He advanced various submissions supporting his case that, as a matter of principle, there were in fact no restrictions on the price that might be proposed in a section 13 notice. They were of varying strength, but they made up a strongly arguable case, and absent the Court of Appeal authority (including *Sun Life Assurance v Thales Tracs* [2001] 1 WLR 1562) I might have decided the point in his favour. However, while he may be right in saying that the Court of Appeal decisions are not strictly binding because they did not involve section 13 and the views expressed about section 13 are based on assumptions rather than findings, the strength of the assumptions and the manner in which they are deployed would mean that would be wrong for me to depart from them. I therefore find that section 13 is not a section in which the tenant can use whatever figure it wishes in the price proposal. Certain criteria do apply. The next question is what they are.

What is the test?

298. There was a marked divergence between the parties as to what the test or criterion applicable to the tenant's proposed purchase price is (if there is one). Their respective cases were:

> (i) The claimants' case is that the tenant's figure must be a genuine opening offer as opposed to a nominal figure.
> (ii) The defendant's first case is that the test is an objective one - is the purchase price within the range of figures which is capable of being the "purchase price" for the relevant interest under the Act?
> (iii) The defendant's alternative case is a subjective one - are the tenants proposing a figure which they genuinely believe could be a "purchase price" calculated in conformity with Schedule 6.

299. This dispute exists because the nature of the test does not emerge in a clear way in the leading Court of Appeal authorities. In *Mount Cook v Rosen* [2003] 1 EGLR 75 (decided before *9 Cornwall Crescent*) Judge Knight QC sitting in the Central London County Court considered *Cadogan v Morris* in another case on section 42 (not section 13) and apparently determined that the proposed price should be "realisitic". He went on to say:

> "I have difficulty in finding that a realistic figure is one that cannot be justified by valuation evidence."

300. That thinking would support Mr Jourdan's objective test, but no-one suggested it was binding on me, and since then we have had *9 Cornwall Crescent*, which has to be taken into account in determining any test.

301. In terms of authority the starting point is *Cadogan v Morris*, both because it came first and because it was the basis of the reasoning of some members of the Court of Appeal in *9 Cornwall Crescent*. I have set out the relevant passages above. The following formulations appear from that passage:

> (i) Stuart-Smith LJ started by accepting a concession that the proposal had to be "realistic and genuine".
> (ii) The figure must be "realistic". He contrasts this with something which is "simply a nominal or unrealistic one".
> (iii) One has to reject a figure which the tenant did not propose to pay. That seems to me to be a question of bona fides.
> (iv) He recorded the landlord's formulation which contrasted "a bona fide and genuine [proposal]" with "a nominal figure or one that bears no relation to the true value" (p60H - the emphasis is mine), but apparently did not accept it because in the Lord Justice's formulation the test became whether the price was "a realistic one or simply a nominal or wholly unrealistic one".

302. What he does not suggest is a lower limit based on the bottom of the range of possible valuations under Schedule 6. It seems to me that had Stuart-Smith LJ had such a test in mind he would have expressed himself very differently and would have accepted the landlord's formulation which I have identified above. Of course, the nuances of the test were not a matter which was central to the case before him, because it was obvious that the amount offered would have failed any of them. However, this authority does not support an objective test which requires the proposed price to be within the band of possible valuations for the freehold interests. Furthermore, his remarks about how disputes would be resolved (namely in short order) clearly indicate that a test based on actual possible valuations would not have found favour. The case before me demonstrates the procedural consequences that Stuart-Smith LJ did not consider should arise.

303. So what one takes from this case is the following:

(a) An offer must not be nominal.
(b) It must not be so low that the tenant cannot intend to pay it, or it is not bona fide, in the sense that any tenant would know it would be regarded objectively as ridiculous.
(c) It must be an offer that would be taken to be serious and indicating good faith and presaging a sensible negotiation.
(d) I do not think that the tenant has to believe that it is a bid which is likely to be accepted with any significant degree of likelihood. Anyone putting forward a negotiating proposal (which this bid must be taken to be) will know it is highly unlikely that the counterparty will accept the offer (unless it is almost absurdly high). Any reasonable tenant is likely to anticipate a counter-offer, because that is what happens in the real world.

304. The case was then considered by the Court of Appeal in *9 Cornwall Crescent*. Each of the members of the court took a different approach to the question before them, or rather, not before them because they had decided that their particular provision did not have any criteria.

305. Auld LJ identified the question as being whether the test was subjective or objective - see his title at p1197H. Counsel for the tenant argued that the test for both tenant's and landlord's notices should have an objective element so that it could be determined "whether the proposed price is clearly outside the bracket of valuations of any reasonably competent valuer" (para 39). The landlord's counsel submitted that a different test would be applicable to tenant's and landlord's notices (with the latter being less stringent), or alternatively that if the test was the same for both it should be the *Cadogan v Morris* test applied as a subjective one, good faith being critical (para 40). Auld LJ then went on:

> "41. As I have mentioned, tenants' notices and landlords' counter-notices for which the Act provides do not have the function of pleadings of identifying the issues for the purpose of determination of the appropriate price through litigation if the parties cannot come to terms. Subject to the *Willingale v Globalgrange Ltd* consequence in default of a valid counter-notice, they are primarily a means of enabling the parties to identify whether there are, or are likely to remain, issues between them which may require resolution either by negotiation or, failing that, and after crystallisation in formal terms, by litigation. If there is a wide gap at the notice and counter-notice stage between the tenants and the landlord, each relying on their own valuers or otherwise, neither is unduly prejudiced. If they cannot agree, they can take the matter to the leasehold valuation tribunal; that is what it is there for. The county court should be wary of developing what could turn into parallel litigation of attempting to resolve fundamental disagreements as to valuation, often as between highly experienced and competent professional valuers, at the notice and counter-notice stage by developing a form of "strike-out" or default procedure. This is especially so in a process in which there are inevitably opening negotiating figures, which, as Stuart-Smith LJ acknowledged in Cadogan v Morris, may be no less genuine on that account. Quite apart from the difficulties for the court of discharging such a jurisdiction, it would not be the form of "brief inquiry … with limited evidence from landlord and tenant" that I believe Stuart-Smith LJ had in mind."

306. Such remarks are inimical to the suggestion that an objective test by reference to valuations is the relevant test. Such a test would open up the sort of disputes which both he and Stuart-Smith LJ said would be inappropriate. What Auld LJ said about the purpose of notices had been foreshadowed at paragraph 31 where he said (of section 13 and 21 notices):

> "Their common purpose, as the general scheme provided by Chapter I indicates, is to set the scene for a process of negotiation, not in general a definition of issues for final determination of the matter by litigation."

307. That, too, is not particularly consistent with an objective test based on a valuation range.

308. He then went on to express views which he acknowledged would be obiter and tentative - para 41. At paragraph 43 he considered the terms of Stuart-Smith LJ's judgment and then concluded:

> "44. The combination of the subjective element of a genuine offer made in good faith and a possible objective element that it should also not be "wholly unrealistic" is not easy in this context. And I do not think that Stuart-Smith LJ intended it. It seems to me that the primary consideration for him was the genuineness of the proposal, as a proposal and subject to a negotiating margin. The notion of a proposal that is not "wholly unrealistic" or, in the case of a landlord, not "absurdly high" is in most cases likely to arise for consideration only in extreme cases where it may serve as an aid to the court's assessment of the genuineness of the proposal. As I have mentioned in the last paragraph, and as the judge observed at para 62 of his judgment, Stuart-Smith LJ's contemplation of the county court's resolution of such an issue by a brief inquiry with limited evidence from the tenant and landlord, not apparently, their respective professional valuers, suggests that it was the subjective element of genuineness of the proposal that was uppermost in his mind. I am, therefore, of the view that, if the judge needed to consider this at all, he was right to find that lack of good faith is the sole necessary precondition of a declaration of the invalidity of a landlord's counter-notice under these provisions."

309. That is not a finding in favour of an objective test of the kind encapsulated in Mr Jourdan's first formulation of the test. Good faith is the central test. An offer can be made in good faith even if it is outside the range of acceptable values.

310. Arden LJ started with some dictionary definitions of "propose" and its derivatives and went on to consider its use in various contexts. They included the context of section 42 of the Act and a consideration of what was decided in *Cadogan v Morris* - see her "First case" at paragraph 54. Of that she said:

> "57. In my judgment, in *Cadogan v Morris* this court by implication took the view that the word "proposes" in the context of section 42(3)(c) meant "intends" rather than "puts forward for consideration". That is not surprising since the statute uses the word "proposes" followed by the infinitive. This court then went on to make a number of references to a "realistic" figure. But this was after the court had decided the point of construction, which it did by holding:

> "I do not consider it necessary to read any words into section 42(3)(c). The tenant is required to specify the premium he proposes to pay. He did not do so; he deliberately specified a figure that he did not propose to pay."

> After this (and before dealing with the landlord's counter-notice) this court dealt with practical objections that had been raised. The tenant did not have to set out his final figure. The judge would not find it difficult to tell whether the premium was a realistic one, and so on. Accordingly, although in this further discussion this court refers many times to a "realistic figure", it did so for the purposes of dealing with these practical objections to its construction, not for the purpose of overlaying on the statute an additional requirement that the figure for the premium be "realistic". Accordingly, I do not consider that those references serve to introduce a new requirement, that the offer be realistic. If, however, the offer is not realistic, that will be a matter from which the court can infer that the tenant did not in fact intend to pay the premium specified and thus that the tenant's notice did not comply with the 1993 Act. But there is no additional requirement that, even if the premium stated is one which the tenant proposes or intends to pay, the premium should be realistic."

311. That passage too seems to me to be inconsistent with an objective valuation-based test, and nothing else in Arden LJ's analysis of other sections is any more supportive of Mr Jourdan in that respect.

312. Wilson J did not express a view on this part of the debate (see his paragraph 84).

313. Thus in my view *9 Cornwall Crescent* does not lend any support to the view that the criterion for validity should be an objective test which requires a tenant's proposed price to be within reasonable valuation limits. Nor does *Cadogan v Morris*. *9 Cornwall Crescent* points away from such a test, and that conclusion accords with my own independent views. Like some of their Lordships, I consider that the valuation-based test requires too much of the word "proposed". Valuation matters are to be dealt with by the Tribunal, and it is undesirable, and unlikely to have been Parliament's intention, to have valuation issues canvassed before the court with all the cost and complexity that this very

case demonstrates, only to have the real valuation issue (the price that the tenants should actually pay) decided in a similarly complex hearing in the Tribunal. Of course, the cases in which that would occur would probably not be common, but that is not the point. Furthermore, such a test would pose an unnecessary and inappropriate risk for the tenants. If the valuation-based test were the right one a tenant who wanted to make an offer at the bottom of the range (which is not at all improper) would want to avoid the risk of getting it wrong, thereby serving an invalid notice. So the tenant would be well advised to add something to the apparent bottom of the range figure just in case, and thereby be deprived of the opportunity of getting a lower figure. Valuation in this area is a complex matter, and things can change in the valuation process. That was demonstrated in the present case in relation to a datum point for comparables. After much evidence and cross-examination, and a drive-round view of comparables which I conducted with counsel and which was relevant only to the comparables point, Friends Life abandoned its position on this important figure and accepted the tenants' figure (see below). It is not desirable that this sort of risk should attend the validity of the tenants' notice figure, or litigation affecting it.

314. I have not lost sight of Mr Jourdan's submission based on the now repealed section 13(6) and (7) which formerly required the tenants to obtain a valuation before serving a notice - see the previous section of this judgment. Again, I do not think that it has much weight. Although the tenants were required to obtain a report, there is no express link in the statute between that report and the valuation; one would have expected some sort of link or reference had it been intended to require that the price be in accordance with that valuation. It is more likely that that valuation was intended to make sure that tenants were making an informed decision before embarking on the whole process.

315. That means that the choice is between the two more subjective tests posed by each of the parties (or possibly some variant of one or the other). I will take Mr Jourdan's first.

316. The test that he proposed is that appearing above - are the tenants proposing a figure which they genuinely believe could be a "purchase price" calculated in conformity with Schedule 6? This differs from the test floated in his opening skeleton argument ("the tenant must think the figure might realistically be acceptable to a reasonable landlord") despite his attempts in his closing submissions to suggest otherwise. I shall consider the later formulation of his test.

317. This seeks to get Mr Jourdan half way back to a valuation in accordance with Schedule 6. If "calculated in conformity with Schedule 6" requires the tenant to have considered Schedule 6, it in effect requires the tenant to have taken advice on the valuation and then to have pitched the proposal accordingly. A tenant cannot pitch an offer which he

believes to be in conformity with Schedule 6 without considering Schedule 6, and in practice that would be likely to mean asking a surveyor for advice. The practical position would then be that which Parliament removed as a requirement, that is to say a surveyor's advice would have to be obtained. Since there was no explicit or inferential link between the surveyor's advice and the proposed figure when there was such a requirement it would be odd if there were an indirect one either then or now. Mr Jourdan submitted that on this footing the offer did not need to match up to an objective standard of reasonableness, and that is probably true in that it theoretically leaves it open to form an erroneous view of the effect of Schedule 6 and still propose a valid price, but the proposal still has to be geared to Schedule 6, at least in the mind of the tenant.

318. As with the objective test, in my view this over-burdens the word "proposed". As Arden LJ in pointed out *9 Cornwall Crescent*, "propose" can either refer to a state of mind, or it can refer to something put forward for consideration (see her judgment at paragraph 49). Neither meaning goes so far as to bring in the sort of reference to Schedule 6 which Mr Jourdan's formulation requires. Such an importation would require an elaboration of the requirement going some way beyond the natural meaning of the word, even in a context where there are some limits to what can be a valid "proposal" for the purposes of section 13. I do not think there is anything in the purpose or nature of the section which would require that extension.

319. It is also capable of producing an anomalous result. Suppose the tenants propose a figure which they believe to be outside the range of possible valuations but which they wish to propose as a starting point for what they hope will be a negotiation. Then suppose that it turns out that the figure is actually within the range. On this test, because it turns on the subjective views of the tenant, the notice would be bad. That would be a very odd result.

320. The authority which I have cited is also against this sort of interpretation. Unless the word "realistic" is intended to import this sort of requirement in Stuart-Smith LJ's thinking in *Cadogan v Morris*, there is nothing in his reasoning which would even begin to support it. I do not think that his use of that word imports such a valuation-based way of thinking. He uses the word to distinguish proposals which are "nominal" or "wholly unrealistic". That does not correlate to real valuations. Furthermore, he also says:

> "even if it is the tenant's opening bid, it should, in my view, be a realistic one".

That suggests that the realism is related to its quality as an opening bid, not by reference to valuation. There is nothing "unrealistic" about an opening bid that is below an objective valuation. The receiver of the bid would probably expect it to be pitched there. The bid sets the scene for a negotiation, a feature which Auld LJ thought was significant.

321. In *Howard de Walden Estates v Aggio* [2009] AC 39 the House of Lords had to consider various technical questions under the Act but not including valuation questions. In the course of his reasoning Lord Neuberger said:

> "It is true that, in *Cadogan v Morris* [1999] 1 EGLR 59, the Court of Appeal held that, where a tenant had included a figure that he could not reasonably have expected to achieve in his notice under section 42, the notice was invalid. Assuming that that decision was correct, it seems to me plainly distinguishable, as was recognised in the subsequent Court of Appeal decision of *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* …"

322. Mr Jourdan relied on the first sentence as justifying his interpretation of *Cadogan v Morris.* Mr Dowding relied on the second as perhaps suggesting some doubt about the decision. In my view both submissions vest this passage with too much significance. There is no indication that the effect of the decision was the subject of any active debate, thereby diminishing what might otherwise have been the effect of the first sentence, and that is probably reflected by the opening words of the second sentence which merely indicate the assumption on which Lord Neuberger was operating rather than some doubt on the point.

323. I have already set out those parts of Auld LJ's judgment in *9 Cornwall Crescent* which bear on the point. Nothing in those passages would support Mr Jourdan's submission. Whatever the precise requirement may be, there is no suggestion that it is valuation-based, even in subjective terms. The same applies to the views of Arden LJ.

324. I therefore reject Mr Jourdan's suggestion of the subjective test.

325. That leaves Mr Dowding's test - the tenant's figure must be a genuine opening offer as opposed to a nominal figure. This test is much more in keeping with the three judgments which I have discussed above. It is not articulated in any of them, but it is the version

which is most consistent with them. An offer can be a genuine opening offer without necessarily being within a valuation range. In order to be genuine it must be bona fide in the sense that it will be seen by any reasonable landlord as a real offer and not merely the insertion of numbers in a form. It does not have to be an offer which the tenant believes will be or even may be accepted. Most people embarking on a negotiation will not expect their first offer to be accepted. They will expect a counter-offer, and then expect to end up in a horse-trade of sorts. The fact that they do not really expect their first offer to be accepted does not make it any less genuine or bona fide as an offer (or as a proposal). This test seems to me to be entirely consonant with the wording of the Act, with a sensible scheme for the Act, and with authority.

326. That is therefore the test that I shall apply in reaching my decision in this case.

327. There is one other factor that I have considered in the course of arriving at my determination of the test to be adopted. The authorities indicate that the reason that there is a criterion at all in relation to a tenants' proposal is because of the "default" consequences if a landlord does not serve a counter-notice in time - the landlord is stuck with the tenants' figure. The existence of the criterion prevents the landlord from having to sell at a knock-down or nominal price. It would be most consistent with the objective of the criterion to have a test which required an offer to be at least within a reasonable band of objective valuations, because then not only would the landlord be protected from having to sell at an absurdly low price, he would have the protection of a minimum valuation price, albeit perhaps not the higher valuation price he might have been able to get if had served his counter-notice. If the test that I have found to be the correct one is applied the landlord does not have the same degree of protection in that he might be saddled with a price that is outside a valuation range. I acknowledge that point, but I do not think it is sufficient to compel me to find that the test should involve falling within a reasonable valuation. The test achieves a proper balance between the legitimate interests of the landlord and the tenants. The landlords are protected from having to sell at a stupid price, even if it turns out to be lower than a valuation would have generated, and the tenants are allowed to start the commercial process of negotiation and (if necessary) third party determination from a point which is fair to them as well.

Does the claimant's notice pass the test in this case?

328. The tenants' proposed price in their notice was £111m odd. That is obviously not nominal in absolute terms, and on the facts of the present case is equally not nominal in any relative terms - the price of Dolphin Square is not obviously so vast that that sum can be treated as nominal. It was, in my view, bona fide in the sense that it was a real offer which was intended to be taken seriously as such and which no reasonable landlord would dismiss as patently absurd or nonsensical even if it was unlikely to be accepted. It

passes every aspect of the correct test, whatever glosses or alternative formulations one might like to apply to it.

329. However, in case this case goes further I should express some views as to whether it would pass the other tests. Unfortunately this requires the consideration of some detailed evidence.

330. First there is Mr Jourdan's subjective test - are the tenants proposing a figure which they genuinely believe could be a "purchase price" calculated in conformity with Schedule 6? This depends on the tenant's view of the valuation range applicable to the property. On the evidence the position was, I find, that Mr Donnor thought that the figure proposed in the notice was within the range. He had asked Ms Ellis for a figure she could justify, he received a figure, and he thought it was a figure with the qualities that he had asked for. Being translated, that means that he, as the representative of the client for these purposes, must have thought that it was a figure which fell within the range of possible valuations within Schedule 6. The decision was taken along with others in the client, and it was not ultimately his alone. There was no in depth investigation in cross-examination of the thought processes of others (those processes might have been manifested to others) and no evidence in chief about it either. This is not surprising because the test was not formulated in the way it ultimately was until final submissions, and the earlier formulation of the test did not call for such evidence.

331. If one looks at Ms Ellis's state of mind the position might be different. I have summarised her thinking above. Her cross-examination was conducted in a manner which was more focused on the objective test as Mr Jourdan formulated it in his final submissions. If her state of mind was in issue then it ought to have been put, in terms, that she knew her figures for the notice were not in the range of reasonable figures which would give rise to the purchase price. It was not, in those direct terms. What Mr Jourdan did was to establish that in at least two areas Ms Ellis was adopting a methodology which, at the time, she had identified no basis for defending, but which she included to give her "elbow room" in her negotiations and in respect of which she wished to reserve her position in case she could develop arguments to defend them. Those two areas were those mentioned above - the value of the Sugar Bureau flats and the deferment rate. The latter in particular is capable of having a marked effect on the valuation. Since she was making all assumptions in her client's favour (which was a perfectly legitimate approach), and since these were assumptions which she could not justify on valuation principles at the time, it follows as a matter of logic that she will have produced a figure which, by her own lights, would be below the range of values applicable to the interests to be purchased. This was never put to her in terms, which is an unsatisfactory state of affairs on such an important issue (and probably indicative of the fact that Mr Jourdan had not quite formulated his subjective test at the time) but I think it is a sufficiently

logical deduction from her evidence to allow Mr Jourdan to rely on it (if relevant) even though the actual question was not put.

332. The important point, however, is "if relevant". It is only relevant if Ms Ellis's state of mind is the important one. There may be situations involving the service of a notice in which it would be appropriate to attribute a surveyor's state of mind to the tenants, but this is not one of them, in my view. In the present case the tenants were a body which can be treated as being educated and which, through Mr Donnor, made up their own minds as to the appropriate figure, and it is appropriate to attribute his subjective state of mind to the body of participating tenants. His state of mind, via those with whom he discussed the point, was, on the evidence I heard, one in which it was believed that Ms Ellis's figure was within valuation bounds, as I have already found. That is sufficient to make the notice comply with Mr Jourdan's subjective test if that is the relevant one. The unexpressed qualifications of Ms Ellis should not be attributed to the tenants on the facts of this case. I would add that the potential difficulties which can arise in this sort of area in the application of this test might be thought to be another reason why the test is not a happy one to have governing the validity of the notice.

333. Last, I turn to the objective test preferred by Mr Jourdan. Considering whether the offer complies with this test ("Is the purchase price within the range of figures which is capable of being the "purchase price" for the relevant interest under the Act?") is a much more complex exercise in this case, even though it has been simplified down from what it might have been by sensible concessions and agreements between the parties and a further change of position on the part of Friends Life at the beginning of final submissions.

334. The question which has to be considered under this head is whether or not the value of the interests to be acquired, as they appear in the tenants' notice in this case, are below the lowest point of a range of figures which would be appropriate when calculated in accordance with Schedule 6. Schedule 6 involves a reasonably complex calculation with a number of factors, and they are rendered even more complex by the unusual nature of the Dolphin Square complex with its various differing constituent parts. However, by the time of the trial a lot of the actual and potential valuation differences had been resolved between the experts, and the question of whether the amount proposed for the freehold (the £111.66m figure) was lower than the lowest reasonable valuation was said to turn on the fate of 3 or 4 principal issues.

335. The experts went about their tasks in differing ways. Mr Scott-Barrett for the landlord started with Ms Ellis's valuation and considered the elements which made it up. He criticised those elements which he considered to have been wrongly calculated and made

appropriate adjustments, and concluded that the lowest relevant freehold value (the equivalent of the £111.66m figure in the notice) was £185m (in round terms). Having considered Mr Wilson's report he thought that some adjustments fell to be made and the result was a reduced figure of £172m. An important element of that was the freehold vacant possession value (FHVP) of the flats. This figure was used to provide a base figure to which various other adjustments were applied. The parties adopted the technique of finding a datum value, based on comparables, which they adjusted for the various individual flats to reflect their different qualities. I have referred above to Mr Scott-Barrett's and then Friends Life's shift in position on this, Mr Scott-Barrett's original datum figure was £725 psf, which he reduced to £705 psf. This was the figure that he set out to defend in his cross-examination, and he did not formally resile from it. Mr Wilson's figure was £613 psf, based on a different set of comparables. At the end of the section of Mr Scott-Barrett's cross-examination dealing with this area he accepted that if it was reasonable to use Mr Wilson's comparables then £613 psf was a sensible datum point. When Friends Life's written final submissions appeared they indicated that there was no longer a dispute about that datum point, so Mr Wilson's figure became (in effect) an agreed figure for the purposes of the action. In effect (though not in terms) Friends Life was implicitly accepting that Mr Wilson's comparables were arguably an appropriate set, so his datum point derived from them was an appropriate figure to take. The effect of that is to reduce Mr Scott-Barrett's final figure to around £132m. This is a striking reduction, though it still leave his "lowest possible" figure at significantly above the figure in the notice.

336. Mr Wilson carried out a de novo valuation, not using Ms Ellis's as a starting point. Having made all assumptions in favour of the tenant, his "lowest arguable value" was just under £109m, which is, of course, less than the figure in the notice.

337. As I have indicated, many valuation matters were agreed, or not disputed, for the purposes of this action and the valuation differences crystallised around the following points (now leaving out the datum point just referred to):

(a) What adjustment should be applied to the value of the Dolphin House flats by virtue of their planning status?
(b) What deferment rate should be applied to the FHVP as part of the valuation exercise?
(c) Should there be any deduction from the value in respect of what were described as holding costs.
(d) Should there be a cross-check by reference to rental values.
(e) Should there be a reduction for the risk that not all the flats would be vacant at term.

338. In terms of the difference the first three items are the most material ones. Before considering all of them I remind myself that the relevant question in this case is not which surveyor is right in terms of numbers to be applied. Because the exercise is intended to ascertain what is the lowest reasonable figure which can be put forward in applying Schedule 6 the important point is not so much whether one surveyor or the other is right in propounding a given figure, but whether the figure which generates the lower overall value (which means Mr Wilson's figure) is properly arguable. The next few sections of this judgment deal with the principal areas of dispute which have to be resolved in order to come to a decision who wins on the objective test for validity (assuming, contrary to my finding, that it is applicable).

Adjustments to the value of Dolphin House

339. It was common ground that the Dolphin House flats should attract a higher value at least in part because it has a planning permission which permits lettings for terms less than 90 days. A permission which allows such short lets attracts a premium. Mr Wilson put the premium at 2.5%. Mr Scott-Barrett put it at 19%.

340. Mr Wilson's reasoning for such a relatively low premium was that while short lets might allow more rent, it also required more management and there was a greater risk of voids (a higher risk in winter than in summer). Accordingly any greater rental value did not translate directly into equivalent net rents or added capital value. Furthermore, there was a danger of losing that permission. If any of the flats were used for longer term lettings then a change back to shorter terms would require a change of use consent, with a risk that it would not be granted. He acknowledged that there should be premium, but said it was "fairly marginal".

341. Mr Scott-Barrett's approach was somewhat derivative. Mr Mannix had prepared an appraisal of the value of the flats, including the Dolphin House flats, in 2007, in connection with the first enfranchisement application, and he updated it in 2010. His technique was similar to that adopted by the valuers - he established a base value and adjusted flat values according to their special, or less than special, features. For the Dolphin House operation flats he applied a premium of about 19% because they were in better condition than the rest of the flats. There was no apparent rationale for that number. It would seem that Mr Scott-Barrett worked from that and applied the same uplift to reflect condition and the more advantageous planning consent. The relevant paragraph in his report reads:

> "6.33 JPVM applies an uplift for the Rodney House flats of 19% to reflect their better condition. There is also a stark contrast in the

> rents achievable in these flats due to their special planning status allowing for hotel style occupation I consider therefore that this is the minimum additional value for those flats and therefore following the JPVM uplift but no higher, I arrived at minimum values for the Rodney House flats at £905 psf"

342. In the following paragraph he reflects the fact that the in-house surveyor for Friends Life had included a slightly lower figure and he had confirmed with this valuer that the latter did not consider the disparity a matter of concern, and on further reflection agreed with the higher figure.

343. This is a not particularly reasoned approach. He seems to have started with someone else's figure and uplift, rather than arriving at figures himself, and then confirmed the figure with yet another person. This does not demonstrate the independence that an expert witness would normally be expected to demonstrate. He does not support his uplift with any calculated reasoning (but then neither does Mr Wilson).

344. His cross-examination did not supply any greater detail, though he did refer to the rents being much higher, so he must have addressed himself to some figures. His conclusion in relation to Mr Wilson’s uplift was that it was unreasonably low.

345. The question for me is not which surveyor has produced the correct figure for valuation purposes but whether, in the circumstances, Mr Wilson’s figure is unreasonably low, that is to say below the lowest uplift that could properly and reasonably be applied by a valuer in a valuation exercise. With some hesitation I find that it is not. I do not think that in this respect Mr Wilson was adopting a party line or suggesting a figure which he must have known was unreasonable. He was not moved in his views in course of cross-examination and I do not think it has been demonstrated that his view was unreasonable. Bearing in mind the thinness of Mr Scott-Barrett's exercise, his bold statement that 2.5% is unreasonably low carries little weight. I rather suspect that had he provided some sort of calculated rationale for his view that he would have been able to carry the day. The absence of a calculated rationale leaves me with a finding that it has not been demonstrated that Mr Wilson was unreasonably low.

346. That being the case, I find in favour of the tenants in this particular respect and that this element of Mr Wilson's calculation survives.

What deferment rate should be applied to the FHVP figure?

347. A valuation under Schedule 6 requires (amongst other things) a current valuation of the freehold, deferred to the end of the term of the leases. The technique for achieving that, in these circumstances, is to produce a current value of the freehold with vacant possession and then to discount its value by virtue of the fact that it cannot be enjoyed until the end of the lease. The discounting is done by virtue of a deferment rate. This rate is deemed to be applied to a principal sum, and is a compound rate of interest, applied to that sum to the end of the term of the lease, to arrive at the present capital value. Thus the deemed principal sum can be established. The valuation judgment which has to be made is as to the amount of that rate. The higher the rate, the lower the principal sum. So the purpose of this part of the valuation exercise is to ascertain the current sum which, together with compound interest at the deferment rate, would equate to the current freehold vacant possession. That principal sum is treated as the current value of freehold for the purposes of the Schedule 6 calculation. It is a key element in the valuations in the present case, and it turns on the choice of deferment rate. Ms Ellis applied a deferment rate of 6% for the purposes of formulating the figure in the notice, though in her report to her client she used 5% as the proper rate. Mr Wilson says that 6% is within the bounds of reasonableness and said that a rate of 6%, or even 7%, could be justified. Mr Scott-Barrett says that these rates could not be justified, and that 5% is the maximum proper rate. If he is right then the lowest reasonable valuation figure would be above Ms Ellis's £111.66m figure. The impact that this point is capable of making is demonstrated by the fact that in the present case an increase in the deferment rate from 5% to 6% produces a 20% reduction in the value of the freehold reversion.

348. Despite the fact that the correct deferment rate might be thought to be question of valuation judgment in each case, the proper rate to apply in leasehold enfranchisement cases has been the subject of authority which seeks to narrow the scope of debate by indicating what it is expected to be with a view to limiting the debate in most cases. This authority forms the backdrop to the dispute between the experts as to what could be considered a properly arguable deferment rate.

349. In *Cadogan Estates Ltd v Sportelli* [2007] 1 EGLR 153 the Lands Tribunal had various enfranchisement cases before it, raising a number of questions about valuation. The question of the appropriate deferment rate arose in those cases. The case went to the Court of Appeal ([2008] 1 WLR 2042) where the Court of Appeal recorded the determination of the Tribunal as to appropriate constituent elements of the deferment rate. They were:

Risk free rate - real growth rate + risk premium.

350. That was the approach of the experts in this case - it was not suggested that the deferment rate should have different constituent parts from that just set out. Furthermore they were agreed that the risk free rate should be 2.25% and that the real growth rate should be 2%. (The meaning of those terms appears in the Tribunal's decision at paragraphs 15ff, but since there is no dispute as to them I do not need to lengthen this judgment by elaborating them.) The dispute came in relation to the third element, risk premium, and that dispute centered around whether the circumstances of this case justified a departure from what the Tribunal had said in the case was the generally correct risk premium for flats. That requires further explanation.

351. The *Sportelli* cases arose at a time when landlords were querying whether the deferment rate should change from what had become a sort of norm in "Prime Central London" ("PCL" - 6%) - see the Tribunal decision at paragraph 3. Other rates were argued for and applied elsewhere. The Tribunal sought to use the opportunity to give some guidance as to (inter alia) the deferment rate to be applied (after an earlier attempt in a case called *Arbib*) - paragraph 5. Having heard a lot of detailed evidence the Tribunal arrived at what it called a "generic" rate in order to seek some sort of standard with general (though, as will appear, not universal) application. It summarised its conclusions in paragraph 79:

> "79. With these particular considerations and the totality of the evidence in mind we have reached the conclusion that Professor Lizieri's assessment of the risk factor is about right. Our conclusion is that the market in such investments would require a risk premium of 4.5%. Overall, therefore, we would take a risk premium of 4.5%, in combination with a risk-free rate of 2.25% and a real growth rate of 2%, producing a generic deferment rate of 4.75%."

That was the rate appropriate to houses. To that the Tribunal added a further 0.25% to the risk premium element in respect of flats to allow for management problems:

> "95. … We think, however, that an adjustment needs to be made to reflect the management problems, although we do not consider it appropriate to differentiate between flats that are the subject of headleases and those which are not. Nor do we think that the management concerns are necessarily so much less for a single flat than for a block to warrant a different adjustment. Even where flats are efficiently managed, service charge and repairs problems inevitably occur, and the management exercise in itself is, we feel, sufficiently more complex to warrant a generalised 0.25% addition for flats. We do not consider that any fine-tuning below this percentage is justified."

352. So on that basis the deferment rate for Dolphin Square would be 5%. The Tribunal made it clear that the two rates (for houses and flats) should be treated as being a strong guideline of general application:

> "121. … It is obviously undesirable, and indeed it would be impossible, for the sort of financial and valuation evidence that we have heard to be called and considered in every enfranchisement case. It is, in our judgment, unnecessary that it should be, because LVTs and this Tribunal are entitled to rely on their own expertise, guided by this decision. The prospect of varying conclusions on the deferment rate in different cases reached on evidence that was less comprehensive than that before us can therefore be avoided by LVTs adopting the practice of following the guidance of this decision unless compelling evidence to the contrary is adduced. This is justified because, as we have explained above, the deferment rate is unlikely to vary according to factors particular to the individual case. Some factors, including in particular the prospect of long-term growth, will not vary from case to case, while other factors, such as location and obsolescence, will already be reflected in the vacant possession value."

353. This was qualified in paragraph 123:

> "123. The application of the deferment rate of 5% for flats and 4.75% for houses that we have found to be generally applicable will need to be considered in relation to the facts of each individual case. Before applying a rate that is different from this, however, a valuer or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate."

354. The case went to the Court of Appeal, which made some observations about the nature of such guidelines and introduced some qualifications. Carnwath LJ (with whom the other two members agreed) approved the technique of the Tribunal giving strong guidance:

> "99. I agree with the Tribunal that an important part of its role is to promote consistent practice in land valuation matters. It was entirely appropriate for the Tribunal to offer guidance as they have

> done in this case, and, unless and until the legislature intervenes, to expect leasehold valuation tribunals to follow generally that lead."

355. However, he introduced a qualification as to the applicability of the guidelines outside the PCL area:

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

356. Thus the guideline deferment rate would not necessarily apply outside the PCL area.

357. The deferment rate was modified in relation to a Birmingham property in *Zuckerman v Trustees of the Calthorpe Estates* [2009] UKUT 235 (LC). In that case, and on its facts, the Upper Tribunal held that there was a greater risk of deterioration in the subject flats which was not reflected in the vacant possession values, and that a purchaser would have required an increase of 0.25% in the risk premium to reflect it (paragraph 46). A further 0.5% was added to reflect a lower anticipated growth rate in that part of Birmingham when compared with PCL (paragraph 53), and a further 0.25% to reflect the additional dangers to a landlord which it had become apparent would be posed by the regulations which apparently restricted the right of landlords to recover service charges if the rules were not complied with. This last factor was something which had become apparent to the market since *Sportelli*. This gave rise to a deferment rate, in that case, of 6%.

358. Mr Scott-Barrett took *Sportelli* as his starting point and noted a number of subsequent cases in which attempts to argue for an increased deferment rate had failed. He noted *Zuckerman*, but said that the factors which operated there to increase the deferment rate to 6% did not apply to Dolphin Square. He pointed to Ms Ellis's report to her client in which she expressed the view that none of the *Zuckerman* factors would apply to Dolphin Square, including the third which was apparently applicable to flats (because the intermediate lease in the present case would mean that the freeholder would not have to carry out direct management). He concluded that "no reasonably competent valuer could have used a deferment rate of 6% in May 2010 for Dolphin Square". At the heart of his view was the strong guideline nature of *Sportelli*.

359. Mr Wilson's report on the point was more fully argued (as one would expect it to be, since he was arguing for a departure from *Sportelli*). He started from the premise that *Sportelli* contained strong guidance, and that a departure from it had to be conducted by analysing the constituent parts of the rate. He did not seek to justify a departure from the risk free rate or the real growth rate, but in relation to the risk premium he said that it would he reasonable to argue for an increase of 1% over the *Sportelli* 5% to take into account the following factors:

> (a) 0.25% for the third of the elements in *Zuckerman* (the risks of unrecoverable service charges).
>
> (b) A further 0.25% for the same sort of risk to allow for the greater scale of Dolphin Square and its services charges when compared with the very much smaller *Zuckerman* premises.
>
> (c) A further 0.5% to reflect increased risk in relation to volatility and illiquidity associated with Dolphin Square when compared with *Sportelli.* This is a function of the size of an investment in Dolphin Square.

360. That gets Mr Wilson to 6%. However, he also went on to argue that it would be reasonable to seek a further 1% adjustment to the deferment rate to reflect the risk associated with an unusually large investment in one lot. In popular parlance this would be reflected in the phrase "a discount for bulk". His evidence was that there were two ways of reflecting such a discount - one could either increase the deferment rate by the extra 1% (producing an effective reduction in the freehold value of 20%) or apply a straight discount to the aggregate market value of the flats. He in fact adopted the latter technique in his report.

361. The effect of *Sportelli* is such that whether Mr Wilson's approach was within the range of reasonable valuations depends on whether Mr Wilson's departures from *Sportelli* would have been reasonable arguments for a valuer to have put forward in May 2010. Westbrook does not have to demonstrate that they were correct; it merely has to demonstrate that they were arguments which could reasonably have been adopted by a

valuer so that the resulting valuation was within a reasonable range of valuations. Mr Scott-Barrett was clear in his statement that they were not. It is therefore appropriate to examine Mr Wilson's factors separately.

362. His first factor was the addition of the *Zuckerman* factor (0.25%) to reflect the perceived risks of irrecoverable service charges.

363. Mr Scott-Barrett did not really reason much about this in his report. He seemed largely content to rely on what Ms Ellis had said in her own report. In cross-examination he relied heavily on what he said was the position, namely that tribunals were defending *Sportelli* stoutly and not departing from it, and the existence of a headlease (as in the case of Dolphin Square) would insulate the freeholder from the consequences which were intended to be reflected in the *Zuckerman* addition (0.25%). In the particular case of Dolphin Square there was not a risk which needed to be reflected by such an addition. He was aware of the fact that in *Sportelli* the tribunal had indicated that the addition of the 0.25% for the perils of management was not affected by whether there was a headlease or not, but in *Zuckerman* the tribunal said in terms that the additional 0.25% for the perils of irrecoverable service charges would not have been allowed had there been a head lease, and he said that valuers including himself took the view that *Zuckerman* superseded *Sportelli* on the point. However, he did not sound positive about that, and seemed to indicate that there was uncertainty in the area:

> "Q. Can I does suggest to you again that he [i.e. a valuer] might reasonably
>
> have taken the view, and I accept it may well not be
>
> yours, that the Zuckerman comment was not consistent
>
> with Sportelli and therefore Sportelli ought to prevail?
>
> A. It is certainly not how I interpreted it. I don't think
>
> it is -- I don't think it is reasonable, but I see what
>
> you are driving at.
>
> Q. If we --
>
> MR JUSTICE MANN: Sorry, forgive me. I don't quite
>
> understand your answer.
>
> A. I don't think it is reasonable. I see the juxtaposition

> of the two cases, I see that Zuckerman came later, and
>
> I think valuers, including myself, interpreted it that
>
> there was a difference between whether there is
>
> a headlease, and there wasn't. Therefore, that --
>
> I think it did supersede Sportelli in that respect.
>
> Quite what the sort of precedent of Sportelli, which has
>
> been very strongly regarded, whether that overwhelms it
>
> I don't know. It's the juxtaposition of two cases, it
>
> becomes rather a legal matter.
>
> (Day 6 page 30)

364. Mr Wilson's experience was different. He said (without giving particulars) that following *Zuckerman* valuers advising tenants added the *Zuckerman* 0.25% irrespective of whether there was a headlease or not. He drew attention to a later case (*City & County Properties v Yeats* [2012] UKUT 227) in which the Upper Tribunal held that the mere existence of a headlease did not justify disallowing the *Sportelli* 0.25% for management aspects, and the further *Zuckerman* 0.25% for the service charge risk. Because of the size of the block in the present case, the risks were increased so the *Zuckerman* factor should be doubled to 0.5%. He did not accept that the existence of a headlease (or, in this case, two intermediate leases) which would have to fail in order to throw any sort of maintenance burden on the landlord made any difference. He considered that the risk to the landlord justified the addition to the risk premium element of the deferment rate. He also did not accept that the fact that, in circumstances in which the freeholder became exposed to the risk of not recovering maintenance contributions, in those same circumstances he would have the benefit of a considerable rent roll, made any difference to the addition of the extra element. He therefore maintained his stance that the addition of a double *Zuckerman* amount to the risk premium was justified.

365. A consideration of whether a reasonable valuation would contain that element involves considering the force and effect of *Sportelli*, and the extent to which its strong guidelines were variable, of *Zuckerman* itself, and of the headlease point. The following points seem to me to emerge from those cases and the evidence:

(i) *Sportelli* was intended to provide the strongest guidance as to

deferment rates to remove most of the debate about its constituent parts.

(ii) The Tribunal intended it to have widespread application. The Court of Appeal limited its effect to the PCL area (see above), though outside that area it is obviously intended to be a starting point from which departures would have to be justified.

(iii) Dolphin Square is not in the PCL area, as that area is understood. It is a few hundred yards outside it. However, Mr Wilson accepted (eventually) that there was nothing arising out of this geographical feature which required a variation of the deferment rate. It was, in effect, irrelevant.

(iv) It is therefore appropriate to treat *Sportelli* as having the same force in relation to Dolphin Square as it has in relation to PCL properties.

(v) *Sportelli* is not a completely inflexible set of rules. The Tribunal said:

> "123. The application of the deferment rate of 5% for flats and 4.75% for houses that we have found to be generally applicable will need to be considered in relation to the facts of each individual case. Before applying a rate that is different from this, however, a valuer or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate."

366. It is therefore theoretically open to Mr Wilson to suggest that it would be reasonable to consider a departure from its strictures in the sense that departures are not completely barred, but any departures should be properly reasoned. The question that arises in this part of this litigation is whether Mr Wilson's reasons are good enough to be properly arguable.

367. This point turns initially on the effect of the headleases in the case of Dolphin Square. When the Tribunal in *Zuckerman* reached its conclusion in paragraph 56 of its decision it said:

> "I conclude that, in the eleven cases with which I am currently concerned, investors would have required an addition of 0.5% to reflect the greater management problems associated with flats than with houses. In reaching this conclusion, I have borne in mind that the subject flats are no longer subject to the original headlease. Had that headlease still been in existence, I would not have

> considered it appropriate to depart from the *Sportelli* uplift of 0.25%."

368. Thus the Tribunal in that case considered that the absence of a headlease was an important factor in allowing an additional 0.25% above *Sportelli*. Interestingly, it does not seem that the existence of a headlease would make a difference to the original *Sportelli* 0.25% for flats (which is what the Tribunal in *Sportelli* indicated they thought was right). The logic of this distinction was not pursued in the Tribunal decisions. If the existence of a headlease is capable of removing the risk from the service charge element, why is it not capable of removing the risk of getting involved in management in *Sportelli*?

369. Mr Wilson's argument depends on the statement about the headlease in *Zuckerman* (said to be obiter) being challengeable generally (because it was not part of binding guidance) or not applicable to the facts of this case. In cross-examination he was challenged on his argument, and it was also put to him that he ought to have taken account of the benefits of the rents, which would accrue in circumstances in which there was some sort of obligation to provide services (see above). He did not think that that made a difference. Mr Jourdan emphasised that point in cross-examination and in his final submissions. It is doubtless a worthy point, but if it is such a good point it is surprising that Mr Scott-Barrett made nothing of it. Mr Scott-Barrett's report did not contain a reasoned view on the matter.

370. I have considered all the evidential material, and have also borne in mind the decision in *Yeats*. That would not have been material available to a valuer in May 2010, but it does demonstrate the arguable nature of the some of the points made in this case. In the end I think that Mr Wilson's arguments on the headlease point are thin, but I do not think it has been demonstrated that they are thin to the point of being unarguable, and therefore a view which no reasonable valuer could have held in May 2010. The case of the defendant was not helped by the thin nature of Mr Scott-Barrett's evidence on the whole point. It lacked intellectual rigour, and was somewhat mechanistic in its application of *Sportelli*, though I acknowledge that his first report was prepared in ignorance of what Mr Wilson would say. I find that the claimant's case succeeds on the arguable nature of the addition of a *Zuckerman* factor.

371. The next point is a little easier, on the evidence. Mr Wilson said that the *Zuckerman* factor required an addition of an extra 0.25% to the risk premium because of the scale of Dolphin Square. In a short question and answer at Day 6 p31-2 Mr Scott-Barrett seemed to accept that if the headlease point did not rule out the *Zuckerman* addition, then it was arguable that the scale of Dolphin Square justified the addition of an extra 0.25% above

the *Zuckerman* 0.25%. It was not disputed that if increments were appropriate, then 0.25% steps were appropriate. I therefore find that that 0.25% was arguable too.

372. Mr Wilson's next point is his addition of 0.5% for volatility and illiquidity. His reasoning was that the hypothetical sale and purchase of Dolphin Square would be a very substantial transaction - it would be the largest single open market sale (deemed) of which he is aware save for the Olympic Village. It was very much larger than the transaction in *Sportelli* or any of the other reported Tribunal decisions. The relevant date (May 2010) was not long after the Lehmans Brothers crash of autumn 2008 and the financial problems which followed. There was continued nervousness in the property market, exacerbated by an immediate past growth in capital values (from August 2009 to March 2010), which led to a risk of a fall. The time taken by Westbrook itself to acquire the intermediate leases (almost 2 years) demonstrates the extra complexities involved in a transaction of this kind. All that led Mr Wilson to say it would have been reasonable for a valuer to assess that a purchase of the reversionary interest in May 2010 would have attributed a significantly greater risk to volatility and illiquidity than that which had been considered in *Sportelli*. The relevant addition was two steps, i.e. 2 x 0.25% (0.5%). He sought to justify the principle of adding this element by pointing to an extra element added to the deferment rate for a large investment in *Arbib v Earl Cadogan* [2005] 3 EGLR 139. He defended his position in cross-examination.

373. Mr Scott-Barrett did not deal with this point in his report - perhaps not surprisingly, since he may not have seen it coming. In cross-examination his basic position was that volatility and illiquidity were points that the Tribunal in *Sportelli* had taken into account in arriving at the risk premium figure, and therefore the amount to be allowed for that element was essentially fixed by that case. As he put it (Day 6 p40):

> "I didn't distinguish Dolphin Square, because this was
>
> very much a "one size fits all" deferment rate that was
>
> established by Sportelli."

374. Once more he said that tribunals had been disinclined to depart from *Sportelli*, though he at this point drew attention to his own firm's attempts to persuade a tribunal otherwise, which might be thought to reflect to some degree on the reasonableness of the attempts of others to do the same. He did not consider that changes in the market in the two years preceding the relevant date affected the interpretation or operation of *Sportelli*, and he did not think that the nature of the property gave rise to a different quality of risk in terms of illiquidity.

375. The components of the risk premium were closely considered by the Tribunal in *Sportelli*. It plainly considered that volatility and illiquidity were very significant components, and that real house prices were cyclical and prone to shocks. In its decision the Tribunal observed:

> "76. It is, in our judgment, the combined effect of the other components, volatility and illiquidity, that must have the major impact on the risk premium … Tradeability would, we think, be important as one of its components, and it is this that would make the volatility of the housing market and the relative illiquidity of the investment significant factors in the mind of a purchaser.
>
> 77. In this assessment of the characteristics of the market and the factors that would influence it we therefore prefer the evidence of Professor Lizieri, which we have summarised earlier. We think that the landlord's witnesses substantially underestimated the risks. We agree with Professor Lizieri that, since real house prices are shown to be prone to shocks and to be strongly cyclical, with persistent periods of negative growth, an investor in a long-term reversion would be very conscious of the risk that the market could be depressed at the point at which he wished to sell his interest, even though, as compared with equities, the residential property market is rather less volatile. Reversions would suffer in comparison with equities from illiquidity resulting from high transaction costs and the length of time to complete a transaction, and the latter factor would, we think, be perceived as adding substantially to the risk associated with volatility."

376. It did not break out a particular percentage element in its findings that the overall risk premium required was 4.5% (paragraph 79). However, in the light of the fact that it contemplated that its figure for the deferment rate was to be taken as generally fixed, it would not be possible to argue that in any particular case volatility and illiquidity is open to re-argument. The Tribunal (and subsequently the Court of Appeal) must be taken to have intended that the fixing of the deferment rate in the large majority of cases must prevent such arguments being taken.

377. The question therefore comes whether it is arguable that the size of the Dolphin Square property means that it should be viewed specially in terms of risk and volatility. I agree with Mr Jourdan's submission (and the point that he put in cross-examination) that the

then recent experience of the Lehman Brothers collapse and uncertainty in the property market did not require or justify a different view of volatility and illiquidity generally. Such reverses are part of the cycle which the Tribunal in *Sportelli* found to be part of the market and which were reflected in the risk premium figure which the Tribunal decided upon. However, Mr Wilson's arguments based on the size of the transaction did have some attraction, and some limited support in authority. While it is true to say that the size of the investment may not be that large in terms of investments by institutions, it is still very much larger than the investments in *Sportelli* and the other authorities and may warrant a different view being taken by the risks of volatility and illiquidity. It was suggested that any greater risk was reflected in the fact that the *Sportelli* percentage (whatever it was) would be applied to a larger FHVP sum, resulting in a greater amount which would compensate for the greater risk. That, however, is not necessarily an answer. Mr Wilson's argument involve there being a different level of risk arising out of such a large transaction, not merely a different sum of money at stake. I was not satisfied that this view was unreasonable.

378. Once again, while I think that the arguments may be thin, I do not find them to be thin to the point of unarguable, either as arguments or in terms of amount (0.5%), though the impression that I was left with was that that figure was somewhat pushing it. All in all, I find that this figure was (perhaps just) within the range of reasonable argument.

Discount for holding costs or scale

379. The source of this idea is twofold. In her report Ms Ellis allowed a deduction of 19% in respect of what have been loosely described in this action as holding costs. This was an aggregate of various elements that she took into account, made up of things that she said a purchaser would deduct from the aggregate freehold value in formulating a bid. They were the cost of sale or letting once the reversion fell in, the cost of holding a number of vacant flats (on the assumption that they could not all be put on the market at the same time), finance costs and a profit (10%). The third of those elements is something that she herself more narrowly (and more accurately) described as holding costs, but I shall use the term to describe all her deductions for the sake of convenience.

380. Mr Wilson applied a deduction of a similar amount but on a differently reasoned basis. He approached what a purchaser would pay on a broad brush basis, assuming sales of the flats over 5 years with a 10% profit, and produced a present value of 78% odd of the aggregate of values. He also considered the effect of a 1% addition to the risk premium (which produces a roughly 20% deduction from the aggregate value - see above). He considered that the size of the transaction could arguably justify such an addition to the risk premium. However, he preferred to take size into account by making a broader brush overall discount on the footing that a purchaser would sit back and consider what to pay and would require a discount of 20%, which he termed a scale discount (a "discount

for bulk", in the colloquial expression which he accepted in his evidence). He acknowledged that he had no evidence to support this way of going about things, but pointed to two cases in which he said the question of whether the value of the property at reversion was less than the aggregate value of its component parts was considered. This was said to support his case that it was reasonably arguable that such a deduction should be made in order to arrive at a price which was within the band of reasonableness.

381. In his report Mr Scott-Barrett did not meet Mr Wilson's argument (because he had not yet seen it - Mr Scott-Barrett's report came first), but he met the points relied on by Ms Ellis. He considered a holding costs discount was precluded by *Sportelli* - it was within the risk premium. Adding this additional factor was said to be not supported by two further cases in which the point was taken. He also said that this factor did not reflect the reality of the market because holding costs of that kind would only be relevant to a purchaser who was going to sell individual flats on, and such a purchaser would not be the most likely purchaser of Dolphin Square. A more likely purchaser would be someone who wanted to hold as a long term investment. He supported this point by reference to a transaction in the South Kensington Estate in which his firm had been involved. He also considered that the individual elements that Ms Ellis relied on were unreasonably high, and that if she was right in making any holding costs deduction (in her terms) then the maximum sum which should be allowed would be 5%.

382. Whether this element is a reasonably justified (though not necessarily correct - I do not have to decide that) deduction must depend on the expert evidence in this case, so I will put Ms Ellis's views on one side and concentrate on the evidence of Mr Scott-Barrett and Mr Wilson.

383. Mr Wilson was challenged on a number of bases. They included the following:

(i) He had taken account of the state of the market and volatility at the time in his thinking on this point, and such a factor was already built into the *Sportelli* calculation of risk premium. He responded that despite the fact that *Sportelli* was not supposed to be open for argument in every case, the present case justified a departure.

(ii) His judgment was informed by the purchase price paid by Westbrook, and it was suggested that that was a very different transaction and could not help the judgment that had to be made under Schedule 6. It seemed to me there was force in this criticism.

(iii) Any increase in risk presented by the size of the transaction would be reflected in the fact that in money terms the increased sums involved would, when the *Sportelli* risk premium was applied to them, automatically (and as a matter of mathematics) result in a greater sum to reflect the greater risk. I find

that this criticism was true to a point, but it is possible to argue that the size of the transaction introduces a greater qualitative, and not merely a greater arithmetically calculated quantitative, risk.

(iv) He had sought to index the price that Westbrook had paid to demonstrate that Westbrook had got a sort of discount for bulk, but when he heard evidence from Westbrook witnesses he acknowledged that he was not necessarily working on the full value that had to be taken into account. This became, in my view, a weak supporting factor in his thesis.

(v) His valuation contained a model which assumed a sale of flats over several years after the notional purchase, and the costs associated with those sales. He was challenged on the appropriateness of that assumption, on the footing that such sales would not necessarily take place. Mr Jourdan's case was that the most likely purchaser was someone who would hold the flats and continue to let them out, and not sell them. Mr Scott-Barrett had said that a person looking to break up the property in this manner would be an underbidder to the person who bought to hold and let, so this sort of calculation was irrelevant. However, in his cross-examination Mr Scott-Barrett conceded that a reasonable valuer would take into account that when the reversion fell in it might, by then, be desirable to sell flats rather than to hold them. I therefore find that allowing for such a possibility in the valuation is something that a reasonable valuer would do.

(vi) In March 2007 valuers called CBRE provided a valuation to Wachovia in connection with the refinancing. Their valuation does not explicitly allow for a scale discount, and this was put to Mr Wilson as undermining his thesis. He asserted that one could not tell whether or not they had built in something similar in one of many sophisticated elements that made up their valuation. I find that it is impossible to say whether or not Mr Wilson is right about that. I gained little assistance from the absence of an express reference to scale discounts in this other valuation.

384. Two points arise out of all this. First, is any sort of scale difference allowable as a matter of principle, and second, if it is, what is the highest amount which is reasonably arguable as part of a reasonable valuation range?

385. As to the first, I do not think it is possible to say that no such discount would be allowable as part of a reasonable valuation. Mr Scott- Barrett thought it was ruled out by *Sportelli*. I do not think that *Sportelli* is that rigid. I do not think that it is sufficiently plain that, on the particular facts of this case (bearing particularly in mind the size of it), the deferment rate in *Sportelli* already has a proper amount built in for it. There are arguments for saying that it does, but I do not think that they are so obviously correct that no reasonable valuer could take a different view. Part of Mr Wilson's reasoning was that a purchaser would want to consider the break-up value (which then introduced his brief calculation as to selling rates and costs). While Mr Scott-Barrett would not have done that himself, he did not think that a purchaser taking into account the break-up value in

his bid was doing something completely negligent, though he did take a stronger view about generally applying a discount for bulk - he did that that was probably negligent (or "unsupportable").

386. That the argument would not be regarded as completely closed off by *Sportelli* is supported by what happened in a decision of the LVT given on 24th November 2010 in an enfranchisement dispute concerning 82 Portland Place, London W1. The tenant's surveyor had sought to introduce a "purchaser's margin", which was essentially the same point as Mr Wilson's 20% deduction based on the risks and costs of disposing of the flats at the end of the term. He proposed a deduction of just over 20% from the freehold vacant possession value. The tribunal held there was force in the idea but "reluctantly" concluded that they were constrained by *Sportelli* from acceding to it, because of the contrary submission that the risks were intended to be taken account of in the risk premium (paragraph 74). They thought that *Sportelli* imposed a "straitjacket" from which they could not escape, notwithstanding that they thought that the factual premise that a purchaser would take into account the relevant risks and a desire to make a profit was a realistic one (at paragraph 75) and went on:

> "To conclude that the risk premium is inevitably the same for a block such as 82 Portland Place, comprising different types of accommodation held on leases of different lengths, as it will be for a simpler investment such as a small block of identical flats in which all the leases terminate at the same time, does not strike us as realistic. Were it not for the guidance of the Lands Tribunal as to the nature of the risk premium, we might well have concluded that an additional risk premium of 0.25% for flats was insufficient in the present case to allow for the risks and problems of which Mr Beckett spoke.
>
> 76 ... Now that the *Sportelli* approach has introduced standard deferment rates, we consider that other previously accepted components of the valuation may have to be reconsidered.
>
> 77. Our own view, unfettered by authority, would be that the open market value of the block and at Schedule 6 should be arrived at by using a valuer's normal approach, based on analysis of the property market rather than the financial market. We believe, indeed we are satisfied, that Mr Beckett is likely to be right to say that in the real world the investor, arriving at his bid for the freehold interest in this property, would factor into his bid his holding costs and his need to make a reasonable profit and that in the circumstances he

> would not necessarily assume that the open market value of the whole block, comprising as it does, many diverse interests, is the same as the sum of its individual parts."

387. I am told that permission to appeal in that decision was given, but that the appeal has not yet come on for hearing notwithstanding the fact that 3½ years have elapsed.

388. That was therefore a case in which a valuer was prepared to form and express a view that *Sportelli* did not preclude the sort of deduction which Mr Wilson wishes to make in the present case. He did so at a date which was some 6 months after the relevant date in the present case, but that is an immaterial time difference. The tribunal thought that there was much in the point, but felt that the constraints of *Sportelli* prevented its giving effect to its judgment. That was the tribunal's view of *Sportelli*. It was not, and is not, an unreasonable view for a valuer to take that *Sportelli* requires some elaboration or reinterpretation in relation to such matters, and to build that into a valuation. The reluctance of the tribunal in arriving at its decision in my view demonstrates that. Were it otherwise the decision in *Sportelli* would ossify debate on the point and would mean that it could never be raised again in this field because (if the defendant's right in saying that a notice has to specify a price which is within a reasonable band valuation) a notice could never be served which reflected the point (in favour of the tenants) because it would always be too low. That would not be a sensible position in this field.

389. Having considered the debate between the experts, it seems to me that, as a matter of principle, the point is sufficiently open to allow a valuer to take a reasonable view that a deduction of the kind proposed by Mr Wilson is permissible as part of the calculation and it is not ruled out of court by *Sportelli*. Of course, I say nothing as to the correctness of that view. The only decision that I have to reach is whether or not the view is sufficiently arguable to be part of a tenants' calculation when serving a notice, on the assumption (which I have already helped to be false) that the figure in the tenants notice must fall within the range of values that a valuer might come up with. The debate on the point was, I am sure, not as full as it would have been had the point really arisen in a real valuation exercise, and I also remark that the nature and scope of the exercise that was conducted before me really demonstrates yet again how inappropriate it is to have such debates conducted as part of a determination of the validity of the notice.

390. The next question, having decided the principle, is whether or not Mr Wilson's 20% figure (or his 1% addition to the deferment rate) is arguably a reasonable figure. I confess that at first blush it struck me as being excessive. The reasoning in support of it was limited – his 1% figure was merely stated as an impressionistic figure, and his 20% deduction figure was arrived at as a result of an assessment of sales, sales periods and costs which would have required no more than the back of an envelope. His exercise,

and the underlying assumptions, were not the subject of the sort of prolonged testing that one would have expected in a full valuation exercise. I wondered whether the exercise was a somewhat spurious rationalisation of a figure which Mr Wilson wanted to reach. However, I will not (but only just) attach that description to it, and I notice (for what it is worth) that in the *Portland Place* case a similar figure was proposed and apparently did not strike the tribunal as excessive. Of course, the fact that such a figure might have been thought to be arguable in that case does not mean that it would be right in the present case. However, that factor does at least remove Mr Wilson's figure from the realms of the absurd or inadmissible. I am therefore prepared to find that his deduction at that stage is within the views that a reasonable valuer might take as at the relevant date, albeit probably at the extreme end.

391. In coming to that conclusion I have not ignored the other case referred to by Mr Wilson, namely a decision of the LVT in relation to Chelwood House, 15-25 Gloucester Square, London W2, given on 18th January 2007. In that case the tribunal considered that a similar argument in favour of a similar deduction to that which Mr Wilson seeks to justify in this case was not one which could properly be run. As far as one can tell, the tribunal considered that the relevant factors were already wrapped up in the deferment rate. I do not consider that that decision demonstrates that Mr Wilson's argument is, as a matter of principle or amount, untenable.

Other points on the value figure in the notice

392. One or two other points were referred to in the reports, and are referred to above, but they did not figure in Mr Jourdan's final submissions, and since they were much smaller points than those I have already addressed it is not necessary for me to refer to them.

Conclusion on the tenants' notice - valuation figure

393. I therefore conclude that Mr Wilson's proposed lowest figure for a Schedule 6 valuation, as set out in his report, is not outside the band of reasonable valuation figures that a reasonable valuer could propose and reasonably justify, albeit it is almost certainly right at the bottom of the range. I have held that the tenants' notice did not have to contain a figure which has to be justified as being within the range of values that a reasonable valuer could propose and properly justify, but if that conclusion is wrong then it follows the figure in the notice falls within that bracket and does not fail the test.

The Insolvency Act 1986 section 423 point

394. As its last defence (in the order in which the points were taken), Friends Life relies on this section. In outline, Friends Life's point is that the creation of the structure involving the creation and granting of leases to the SPVs is a "transaction" within the section, that the purpose of creating and operating that structure was to prejudice the interest of Friends Life (by enabling an acquisition of the freehold which would otherwise not be possible) and that it was at an undervalue for two reasons. The first is that the price paid by the SPVs for their leases (£284.4m) was less than their full value. The second is that additional value was given by the claimant because it undertook a joint and several liability for the Wachovia loan without any corresponding benefit. Accordingly, it is said that the claimant received less than it gave and there was an undervalue. Friends Life is said to have been a "victim" of this arrangement within the section, and it counterclaims for relief in the form of an order that the SPV leases be surrendered and the section 13 notice cancelled.

395. Westbrook maintains that the section is simply inapplicable to this sort of situation because Friends Life has no relevant claim within the section, it is not a victim within the section, there was no relevant transaction within the section, Westbrook did not have a relevant purpose within the section and there was no significant undervalue in any event.

396. It will be apparent that this claim, and the defence to it, contains a number of strands. I will have to take each of them separately.

Section 423 - generally

397. The relevant parts of section 423, and ancillary provisions, provide as follows:

> "**423 Transactions defrauding creditors**.
>
> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> (b) he enters into a transaction with the other in consideration of marriage [F1or the formation of a civil partnership]; or
>
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in

> money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
>
> ….
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor"".

398. A claim may be made by a "victim" of the transaction - section 424(1)(c). Section 423 provides for certain specific relief, but without prejudice to the generality of section 423(2), thus emphasising that the range of relief open to the court is very broad.

399. The only other potentially relevant provision of that Act is section 436 which deals with the expression "transaction" -

> "**436 Expressions used generally**
>
> … 'transaction' includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly."

Undervalue

400. I shall consider first the question of undervalue and its impact on this case, on the assumption that there was an undervalue of the kind alleged by Friends Life and on the assumption that the other requirements of section 423 are fulfilled.

401. The paradigm case for the application of section 423 involves people who are clearly creditors. The section is plainly intended to allow the unscrambling of transactions which deplete the assets of a debtor which would otherwise be available for creditors. That is how its purpose is summarised in *Armour & Bennett* on *Vulnerable Transactions in Corporate Insolvency* Chapter 3:

> "3.1 Part XVI of the Insolvency Act 1986 is headed "Provisions Against Debt Avoidance". Its provisions render vulnerable attempts by debtors to dissipate their assets so as to prevent creditors from obtaining satisfaction of their claims."

402. Similar general statements appear in authorities. For example:

> "The object of s. 423-425 being to remedy the avoidance of debts, the 'and' between para (a) and (b) of s 423(2) must be read conjunctively and not disjunctively… [The power given by the section] it not a power to restore the position generally, but in such a way as to protect the victims' interests; in other words, by restoring assets to the debtor to make them available for execution by the victims." (*Chohan v Saggar* [1994] BCC 134 at p141c-d, per Nourse LJ)

> "9. A claim under s 423 is a claim for some appropriate form of restorative remedy, to restore property to the transferor for the benefit of creditors, who may then seek to execute against that property in respect of obligations owed by the transferor to them." (*4Eng Ltd v Harper* [2010] BIPR 1, per Sales J].

403. When thus described it would seem impossible for the present transaction to come within its ambit. There is no question of any transaction having been done to defeat anyone's creditors. There is no doubt that the statement in the textbook represents the general understanding of the purpose of the section, and that understanding would coincide with

the Cork Committee's recommendation as to the replacement of section 172 (which plainly had that purpose). However, it might be said that the authorities do no more than re-state an assumption in circumstances in which the facts did not present any challenge to the assumption, and they do not necessarily rule out the application of the section of the facts in the present case. Mr Jourdan's approach requires a fairly literal approach to the section, and relies on the fact that the section does not, in terms, apparently confine itself to people who can be described as "creditors", and it does not overtly confine itself to the circumstances stated in the assumption. He submits that the section requires an undervalue, and one of the stated purposes in subsection (3), and claims that the present case falls within that wording.

404. It is therefore necessary to scrutinise the section more closely to see whether its actual terms justify confining it to the circumstances to which it is assumed to apply or whether it might be capable of applying in the present case

405. In my view it is plain that the section is aimed at a situation in which there are two separate vices – undervalue, and a purpose identified in section 423(3). The section is aimed at providing a remedy where an injustice is caused by a combination of the two. It is not intended to operate where the undervalue is something incidental which is not relevant to the prejudice. The undervalue is not merely a piece of background which happens to exist but which does not contribute to the injustice; it is at the heart of the injustice, or prejudice. That is important in the present case, because Mr Jourdan's case on prejudice does not depend in any way on there being an undervalue (assuming there was one) on the occasion of the grant of the SPV leases. His complaint about prejudice would be exactly the same even if the leases had been granted for full value. Interestingly, it would analytically be the same if the leases had been granted at an over-value. If that had happened there would have been an undervalue the other way, and Mr Jourdan would doubtless point to that undervalue as opening the door to his claim. That shows up the oddity of his argument.

406. The proper analysis is that the victim has to be a victim of both the improper purpose and the undervalue. He/she must suffer an adverse consequence from the undervalue. The undervalue is not some sort of non-causative gateway requirement. It is part of the vice at which the section is aimed and must be a relevant undervalue:

> "(1) This section relates to transactions entered into at an undervalue …"

It is by and large creditors who will suffer from that element, so it becomes right to analyse the purpose of the section in the manner appearing in the cases and textbook to which I have referred. Although the word "creditor" is not used, the word "debtor" is, in subs (5), and although it is introduced as a descriptive term, the choice of that term is not without significance. It is obviously true that the section chooses to use the word "victim" rather than creditor, so there may be circumstances in which someone other than a creditor could complain, but the victim still has to be someone who suffers adverse consequences from the undervalue.

407. Mr Jourdan argues that a complainant does not have to be the victim of the undervalue, and relies on *AMC v Woodward* [1995] 1 BCLC 1 and *National Westminster Bank v Jones* [2002] 1 BCLC 55.

408. In *AMC v Woodward* a farmer mortgaged his farm to a lender and subsequently granted his wife his tenancy when arrears gave rise to an obvious prospect that the lender would seek to enforce the charge. The first instance judge held that on the facts the relevant intention to prejudice the bank (by obstructing a possession claim) was made out but there was no undervalue because the rent reserved was the full market rent and no other values should be taken into account. The Court of Appeal reversed the decision on the latter point. It was held that it was appropriate not merely to measure the value of the rent, but to take into account the other benefits to the wife that arose in the form of the ransom position she was in in relation to the bank, and it concluded that the value she received was far greater than the value (the rent and the value of her covenants) that she conferred (see p 11d-g).

409. The issue in this case was whether there was an undervalue or not, not whether part of the vice lay in the undervalue. There was no real discussion of the point which I am currently considering. Nevertheless, when analysed it was a case in which it can clearly be said that part of the vice lay in the undervalue. At page 10(h) Sir Christopher Slade recorded the argument of counsel for the bank as including this point:

> "Furthermore, and most significantly, the transaction, if effective, placed her vis-à-vis the plaintiff in what Mr Moss described as a 'ransom' position. If the tenancy was effective, the plaintiff would have had to negotiate with and no doubt pay a high price to her before it could obtain vacant possession of the farm and sell it for the purpose of enforcing its security and repaying the debt owed to it by the first defendant. Thus, it was submitted, the transaction plainly conferred, and was intended to confer, on her significant

> enhanced benefits beyond the rights granted by the tenancy agreement itself, for which enhanced benefits she did not pay."

410. Although Sir Christopher Slade did not in terms accept that submission, it is plain enough that he agreed with it. It demonstrates that part of the vice of the transaction was the undervalue itself, reflected in the impact that that undervalue had on the bank (which was a creditor). The undervalue was not something that happened to exist and which made no difference to the creditor. It was of the essence of the transaction itself and had an impact on a victim. Accordingly, this case does not support Mr Jourdan's point.

411. The same is true of Mr Jourdan's other case, *AMC v Woodward*. That was another case of farmers granting a tenancy, this time to a company of theirs, in the face of security enforcement. The judge held that there was an undervalue because the freehold was devalued by the transaction. That was of direct effect on the mortgagee. It was not an incidental matter. The undervalue would affect all creditors, and would affect them as well as a secured creditor. It was not an incidental feature of the scheme.

412. Since the undervalue in this case (assuming for present purposes that there is one) is entirely incidental to the intended effect of the transaction and, in particular, its effect on Friends Life, it does not give rise to a section 423 claim. It is not necessary to decide whether that is as a matter of jurisdiction or whether it is a matter of discretion when it comes to relief. Since section 423 is intended to remedy the effects of transfers at an undervalue which, as such, have an effect on victims, and since there is no effect in this case, it would not be right to grant a remedy or to view section 423 as conferring one.

Is there a relevant claim within the meaning of section 423?

413. The claimant takes the point that there is no relevant claim within the meaning of section 423(2)(a) and (b) – Friends Life is not "a person who is making, or may at some time make, a claim against Westbrook because the claims that it has are not claims within this provision". Westbrook is not a "debtor", Friends Life has no "claim" against it and makes no claim which would fall to be satisfied out of its assets. The most that Friends Life has is a right, or future rights, arising out of its own property, namely its reversion. That claim is not in any way affected by Westbrook's financial position or any dealing with its own assets. In my view this point is related to the point I have just decided – in some way it is another way of looking at that point.

414. Mr Snowden (who argued this point for Westbrook) submitted that one should look back to the report of the Cork Committee (Cmnd 8558, 1982) which considered the sections which preceded section 423. The origins can be traced back to the Fraudulent Conveyances Act 1571, through to section 172 of the Law of Property Act 1925. The Cork Committee report considered the topic in Chapter 28, and Mr Snowden points out that it proposed clarification of the then existing provisions and did not suggest that the power which it proposed (which became section 423) should extend beyond the avoidance of transactions by a debtor company which prejudiced its creditors. The section assumes a debtor-creditor sort of relationship, and that does not describe the relationship between Friends Life and Westbrook.

415. I accept Westbrook's case on this point. In order to be able to bring proceedings under (or to benefit from) section 423 a person has to have a "claim" which gives rise to interests which are prejudiced (paragraph (b)) or a claim which is prejudiced by assets being put beyond the reach of that person (paragraph (a)). Friends Life is not such a person. It cannot seriously be argued that assets are put beyond the reach of Friends Life by the transactions in this case, so the only relevant paragraph to consider is paragraph (b). Friends Life has no claim against Westbrook (or other the tenant for the time being under the immediate headlease); nor will it be making one in any relevant sense. It has a reversion on a lease, which is a proprietary interest. It is not a "claim". It is a present proprietary right, and in due course that right will become unencumbered by the lease when the lease comes to an end. None of that gives rise to a "claim" within the meaning of section 423. If the tenant holds over at the end of the lease then there will be a claim (in a broad sense) and a right to possession. But even if that were a relevant claim it would not be prejudiced by the transaction.

416. The proper analysis of the present case is that Friends Life has a proprietary right or an item of property. That right is vulnerable to any claims that might be made to it. Westbrook has put itself in a position in which it can make a claim to that proprietary interest. The claims, if any, go that way round. To that extent it can be said that the interests of Friends Life have been prejudiced, but what is prejudiced is not a claim against Westbrook but a right to continue to hold a piece of property. That is not a claim for the purposes of section 423.

Is Friends Life a victim?

417. This is another aspect of the undervalue point taken above. Westbrook submitted that Friends Life was not a victim (and therefore could not be an applicant - section 424). It was not a victim because it was not prejudiced <u>by the undervalue</u> even it if was somehow prejudiced by the transaction. It follows from my analysis above that I accept this submission. The sort of prejudice that it suffered, which has nothing to do with the

undervalue, does not make it a victim because such a person, in accordance with the purposes of the section, needs to have been affected by the undervaluation aspect.

418. Mr Jourdan sought to counter this sort of analysis by pointing to *Clydesdale Financial Services v Smailes* [2011] 2 BCLC 405, which is said to support the proposition that a person can be a "victim" without being a creditor. That case was somewhat complicated on its facts, but the relevant aspect was a claim by an insurer (Focus) which provided (inter alia) financial guarantee insurance (FGI) to solicitors. The solicitors went into administration and their business was sold on what was essentially a pre-pack sale by administrators. That sale was challenged as being a sale at an undervalue under section 423 by both the guaranteed creditors and by Focus. In interim proceedings the judge (David Richards J) held that Focus had no standing as a direct creditor because the debts relied on were not good debts for that purpose. Its standing as an applicant under section 423 (a "victim") came into question, and it was said Focus's claim ought to be struck out because it was not a creditor.

419. David Richards J held that the claim should not be struck out because Focus was still a "victim". He said:

> "**[73]** Section 423(5) defines a victim of a transaction as a person 'who is, or is capable of being, prejudiced by it'. In choosing the term 'victim' and this definition, it is I think clear that it was intended to be a wider category than simply creditors. The words used are ordinary English words with no technical meaning and the correct approach in any given case is to ask whether, on the facts of the case, the claimant is a person who is, or is capable of being, prejudiced by the transaction. The fact therefore that Focus is not a creditor does not decide the case against it.
>
> **[74]** If the sale was at an undervalue, the amount directly recoverable by CFS, or by Focus on a subrogated claim, will be reduced and the amount payable by Focus on a claim by CFS under the policies will be increased. It is irrelevant that because of AS LLP's pre-existing insolvency, there would in any event be a shortfall on CFS' recovery from AS LLP and a liability of Focus on the policies. The prejudice lies in the increase in the shortfall. It is also irrelevant if CFS has yet to make a claim on the FGI policies. As CFS has the right to make such claims, Focus is a person 'capable of being prejudiced' by a sale at an undervalue.
>
> **[75]** I conclude therefore that Focus has a real prospect of establishing that it is a victim of the sale."

420. In those words David Richards J plainly expressed the view that an applicant did not necessarily have to be a "creditor", and he emphasised the description of "victim" rather than any given particular legal status. However, it does not follow from that that one looks to the definition of victim in literal terms and nothing more. Two things are apparent from the case. First, if Focus was not a creditor with a current claim at the time, it was a contingent creditor - that was in effect acknowledged in the reference to the subrogated claim. Second, it is plain that even if Focus was not a creditor, it was still capable of being affected by the undervalue itself - see paragraph 74. The undervalue was not something which was incidental to Focus's position and which made no difference to it. It was capable of materially affecting Focus's position.

421. Accordingly, what was said in the case does not assist Friends Life under this head.

Is there a relevant transaction with a relevant purpose?

422. Westbrook raised a query about whether there is any relevant transaction at all without making any particular positive submissions. It pointed out that Friends Life did not point to a single transaction which fell to be impeached under the section and pointed to what it said were anomalies in Friends Life's approach. Mr Jourdan's closing written argument points to the wide definition of "transaction" in section 436 (see above) and *Feakins v DEFRA* [2007] BCC 54 where it was said to have been accepted that a "transaction" can be made up of a number of different steps or elements. Mr Jourdan's case was there said to be that the "transaction" in this case was the creation of the "Structure" (i.e. the pattern of leases) and the section 13 notice.

423. Without wishing to give or subtract any weight to or from Friends Life's case, I am prepared to assume for present purposes that there is a transaction somewhere in the facts of this case for the purposes of the section 423. There are sufficient obstacles to this claim for it to be unnecessary to prolong this judgment in considering whether or not this is another one.

424. For a transaction to fall within section 423 it has to be entered into with one of two relevant purposes:

> "(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make." (section 423(3)).

425. Mr Jourdan submitted that there was such a purpose in the present case, because the Westbrook group had "the purpose of preventing the Defendant from recovering possession of Dolphin Square on the expiry of the Underlease and Headlease."

426. Although Mr Jourdan did not in terms identify which of the two statutory purposes he was relying on, as I have already observed there is no case at all for saying that purpose (a) might have existed. The only candidate is therefore purpose (b).

427. In my view Mr Jourdan does not correctly identify the purpose of the transaction for the purposes of the statute. The purpose was plainly to give the Westbrook group an opportunity to enfranchise which it did not hitherto have. That was admitted by Mr Donnor in cross-examination, and indeed in doing so he was confirming the terms of the purpose as it was suggested to him by Mr Jourdan (Mr Jourdan did not put to him that the purpose was to remove the right to possession). Removing the ability of Friends Life to get vacant possession at the end of the leases was a consequence of that purpose (if successfully achieved) but it was not, in any meaningful sense, a real purpose any more than it was a purpose to stop Friends Life getting any rent under the head lease.

428. The purpose was thus to enable Westbrook (or some other nominee purchaser, but in reality the group as a whole) to acquire Friends Life's freehold. At this point in the argument one comes back to the analysis made above. I suppose that in a general sense that might be regarded as prejudicial to the interests of Friends Life, but not in relation to any claim which it might make in any relevant sense (or probably in any meaningful sense at all). The section is aimed at claims which would or could entail a claim into the assets of the person in question, and there is nothing like that in the present case. Westbrook's purpose (or the purpose of other group companies) was to put the SPVs, via their nominated purchaser, in a position to exercise a statutory right. That is nothing like the purpose required by this subsection.

429. The case on this point becomes more absurd when one considers one aspect of the undervalue, namely the giving of what was in effect a guarantee by Westbrook in respect of liabilities under the Wachovia loan. I deal with this point in the section of this judgment dealing with "Undervalue and the guarantee".

Was there an undervalue for the purposes of the section?

430. The undervalue relied on by Friends Life is an undervalue in terms of Westbrook's position when the SPV leases were granted. It involves comparing the amounts received from the SPVs (£284m odd - the aggregate consideration received) with the consideration given by Westbrook. This latter consideration has two elements - the value of the leases granted and the value of the obligation undertaken by Westbrook in relation to the loans from Wachovia. It will be remembered that as part of the restructuring in 2007, the premiums paid by the SPVs came from money borrowed from Wachovia, and that all the SPVs, and Westbrook, joined in the repayment covenant - see the Financial Matters section above. Thus Westbrook was effectively in the position of a guarantor in relation to those moneys. It is said that the value of the combined elements of the consideration said to have been provided by Westbrook exceeded the value of the sums received by it for the grant of the leases to the SPVs - hence the alleged undervalue.

431. It is therefore necessary to consider two values - the value of the SPV leases, and the value of what is said to be the guarantee given by Westbrook. I do so with some reluctance for two reasons - first, the section 423 point fails anyway, for the reasons given above, and also because the point had something of an afterthought, or "while we are there we might as well run it" about it. In his final speech Mr Jourdan described the value of the flat point as "minor" (in contrast with the value of the guarantee point), though that did not tally with the apparent importance given to it in the case hitherto. Furthermore, as will appear, Mr Scott-Barrett, who gave expert evidence on the valuation point, did not carry out his own valuation of the flats but relied on the valuation of others, and admitted he was not qualified to carry out a valuation of the guarantee. However, in case the case goes further on section 423 I shall express my conclusions on the point, though more briefly than might otherwise have been the case.

Undervalue and the leases

432. The burden of establishing an undervalue for the purposes of section 423 is plainly on the person alleging it - that was not disputed. One would therefore have expected a full, original valuation exercise to have been carried out in relation to the flats. However, Mr Scott-Barrett did not do that. He relied on someone else's valuation.

433. On 21st March 2007 CBRE (CB Richard Ellis) prepared a valuation of Dolphin Square for Wachovia Securities, who were lending money on the refinancing operation identified above. Wachovia was taking, and did take, security for its lending over the Westbrook interests. CBRE valued the leases for that purpose. Its valuation was on a discounted

cashflow basis and it came up with a figure of £316,500,000 for the valuation of Westbrook's interest. This figure takes the leases, assumes the grant of a 90 year lease extension in September 2009 (under legislation) and takes off the cost of buying that deemed extension. The £284.4m aggregate value of the consideration of the SPVs was 90% of that valuation figure, being the sum that Wachovia lent. On the basis of no extension of the lease, CBRE valued it at £292m.

434. When it came to his expert report Mr Scott-Barrett simply pointed to that valuation and indicated a couple of matters that needed to be taken into account. When properly read his report did not even contain words which suggested that he was prepared to adopt it as his own. In his own words:

> "I assumed the CBRE valuation would be a reliable and reasonable valuation, and took it as read."

435. His evidence revealed that he did not bring much separate judgment to bear on how the calculation was carried out, or even consider it very much at all. He simply used this valuation as a starting point (and almost as an ending point as well). He also accepted that a discounted cashflow valuation, as a primary valuation technique, was unusual and would more often be used as a cross-check, though he said that Dolphin Square was an unusual property. He had been given a list of 2007 comparables by Mr Jupp, but had not looked at them, apparently for lack of time.

436. Mr Scott-Barrett offered two respects in which he said that the CBRE valuation was or may have been an undervalue itself. The first is that it fails to take into account what he called "churn" in the Option B tenancies. The terms of these tenancies gave the tenants concessionary rents. When the leases came to an end there would be an opportunity to increase the rents to market rents. Mr Scott-Barrett made the point that that was not reflected in the valuation, and that there was recent experience which indicated that, of the 407 Option B tenants in 2007, 49 of them have vacated by the valuation date. In doing so he was relying on figures provided to him by Mr Jupp. He carried out no investigation of why there appeared to be an increased rate of departure (which there was) in 2008 and 2009 but accepted, when it was put to him, that it may well have been attributable to the (unforeseen) economic crisis. Mr Wilson thought that any adjustment for churn would most probably have had a marginal effect on the valuation, due to the extra costs and voids that would have to be provided for when an Option B tenant left. On the evidence I heard I am not satisfied that any adjustment would fall to be made for this churn. I am, however, satisfied that Mr Scott-Barrett's comments were due to a concern to try to find reasons why the CBRE valuation might itself be an undervalue. They were borne more of a desire to critique the valuation, and critique it in one direction only, than to arrive a proper valuation figure of his own.

437. Mr Scott-Barrett's second observation went to a cross-check carried out by CBRE, done by looking at what were said to be sales values from comparables. He observed that CBRE did not seek to index their comparables to the date of the valuation itself, with the result that their square foot figure (£694 psf) was itself an undervaluation. This is a casual way of arriving at the real value of the leases - indeed it does not arrive at a valuation figure. While I accept that a significant undervalue for the purposes of section 423 can probably be demonstrated without demonstrating a precise "true" figure, this sort of generalised observation of a back up figure in a valuation which Mr Scott-Barrett has not actually decided on for himself and elements of which he has not checked is not an exercise (or observation) which is going to assist him. Furthermore, the relevance of the comparables was not accepted, and was not tested. Mr Wilson carried out an exercise with comparables and arrived at a figure of £630 psf. It was suggested to him in cross-examination that his comparables were not in the correct location, but it is not apparent whether that criticism would now be made in the light of the fact that the dispute about comparables in relation to the enfranchisement valuation exercise fell away (see above). In all these circumstances it is not possible to give this observation of Mr Scott-Barrett any weight.

438. Mr Scott-Barrett did acknowledge one respect in which the £316m was not the appropriate figure to be looking to in order to ascertain what value should be attributable to the residential leases from the CBRE valuation. His report acknowledges that what CBRE was valuing included the commercial premises, and that an adjustment (downwards) to the £316m figure had to be carried out to reflect that. He did not carry out any exercise in order to ascertain what that adjustment might have been, even though it ought to have been possible bearing in mind the nature of the CBRE exercise was a DCF exercise – he could have adjusted the cashflow and other assumptions accordingly. He merely observed that the commercial rents were less than 10% of the total, and said that that factor, together with what he regarded as an undervaluation of the leasehold interests as a whole and the fact that the total figure paid by the SPVs was only 90% of that figure (presumably the valuation figure) supported his view that the price paid by the SPVs was about 10% of the value of the leases at the time they were granted.

439. This, again, is a very casual exercise. It does not provide any confidence in the rigour of the valuation exercise itself. In his final submissions (though not in his cross-examination of Mr Scott-Barrett) Mr Snowden proposed various analyses which reflected the commercial element. Taking the proportion of the rents represented by the commercial elements of Dolphin Square, and applying that to the CBRE calculation, he suggested the value of the flat element of the lease was £275m in 2007, and roughly the same if one took the 2009 split of rentals. In his own final submissions Mr Jourdan disputed the relevance of this exercise, but not the detail. The relevance is plain enough to me - it is intended to take Mr Scott-Barrett's methodology of starting with the CBRE

valuation and adjust it by taking out the commercial element to find out the value of what Mr Scott-Barrett was looking for, namely the residential element, in order to show that the price paid by the SPVs was no less than that element. The numbers produced by Mr Snowden demonstrate that even on his basis Mr Scott-Barrett has not succeeded in his objective.

440. I do not need to deal with other details of this aspect of the dispute. Friends Life's contention that the aggregate of the premiums paid by the SPVs was significantly less than the value of what they got, or what Westbrook parted with, is not made out.

Undervalue and the guarantee

441. By the time of final speeches this had turned into the principal element of the section 423 undervalue point. Put shortly, it is said that the transaction was at an undervalue because (as pointed out above) Westbrook had undertaken a joint and several liability for the whole of the Wachovia loan, along with the SPVs. Having sold the leases, any increase in the value of the leases would benefit only the SPVs, while if their value fell and Wachovia exercised its security over them Westbrook would be liable for any shortfall when the leases were sold. Westbrook therefore gave the SPVs more than the flat leases - it also gave the benefit of this guarantee.

442. This point once involved an attempt by Friends Life, through the expert evidence of Mr Scott-Barrett, to put a value on this benefit. He considered the matter in terms of a premium which would be a reasonable demand for assuming the contingent liability under the guarantee, and came up with a figure of 10% of the purchase price in his first report, which he adjusted downwards to 7.5%, which equates to over £23m. However, Mr Scott-Barrett accepted at the end of his evidence that he had no expertise in the valuation of guarantees in this situation. He had conducted no research as to what premium would be required by a commercial provider of guarantees if asked to provide a similar guarantee. In his final submissions Mr Jourdan accepted that he was left with no expert evidence on the point.

443. That left Mr Jourdan with a rather more general point. The guarantee was a real one, and it had a value above the value of what Westbrook received (£284m). On any footing this guarantee was not paid for by the SPVs, so if they paid a proper price for the flats themselves, they got an additional unpaid for benefit and that amounts to an undervalue for the purposes of section 423.

444. I shall assume for the purposes of this part of the debate that this liability under the loan agreement was part of a relevant "transaction" for the purposes of section 423, though I have strong doubts as to whether it ever could be. The position of the transaction in the overall structure of the case illustrates even more clearly the disconnect between what is said to be the undervalue in this case and the alleged victim status of Friends Life, which I have dealt with above. It really has nothing to do with the purchase of the freehold and to allow it to infect that transaction is nothing to do with the policy of the Act. However, I put all that on one side for the purposes of considering whether there is an undervalue at all.

445. There is a point here in relation to the purpose which has to be established in order to invoke section 423, as foreshadowed above. If this is the only element of undervalue that has arisen in the transaction, and assuming it to be a relevant transaction for these purposes, it is not possible to find, on the evidence, that the purpose of it was to prejudice Friends Life. Not only that, it is impossible to imagine how that might be case. Even if one assumes that the purpose of the wider scheme had that purpose, the purpose of this narrower part does not include that purpose. Nor can its purpose be properly viewed as part of an overall purpose. It was entirely incidental to that purpose. It was merely part of the terms negotiated between a bank and a borrowing group.

446. Notwithstanding all the other obstacles standing in the way of a section 423 claim, I pass on to consider briefly whether this part of the financial structure can be viewed as a transaction at an undervalue.

447. I am prepared to accept that the giving of a guarantee without any consideration for that guarantee is capable of being a transaction at an undervalue for the purposes of section 423, and in many cases the existence of not much more evidence than that will be likely to suffice to demonstrate an undervalue. I am also prepared to accept for these purposes that in many straightforward cases the value of the guarantee for these purposes would obviously be significant for the purposes of the section without one necessarily having to put a figure on it. However, those simple facts do not apply to this case. The facts surrounding the guarantee, and the circumstances in which it might be called (which have to be ascertained if one is to establish the value of the liability under the guarantee) have to be carefully considered.

448. It is unnecessary to set out the actual terms of any part of the financing. It is sufficient to record that there was no loan to value covenant in the loan documentation, and the only circumstances in which Wachovia would be likely to call in the guarantee was in the event of the SPVs failing to make an interest payment. That was, on the facts, unlikely because Westbrook, in a separate transaction, had made a £50m facility available to the

SPVs which was available to enable them to make interest payments should they otherwise not be able to do so. Mr Scott-Barrett accepted that this meant that the risk of the guarantee being called on was minimal. That combination of circumstances, and the effect on the likelihood of the guarantee being called, meant that it did not have a significant value for the purposes of carrying the consideration-valuing exercise that has to be carried out in the present case.

449. Mr Jourdan did not appear to have an answer to this, other than to extract from Mr Scott-Barrett in re-examination a view that on that analysis one had to throw into the calculation the fact that a loan facility was made available by Westbrook. That would increase the value of what Westbrook was providing. That was a new point in the calculation, and had not been put forward as part of Friends Life's case at any point prior to then. Since it arose in re-examination only its real effect was not tested in any way in the case. That is the first problem with it.

450. The second problem is that it does not work in Mr Jourdan's favour anyway. The fact that the loan is an added factor does not mean that it was giving significant added value. That would depend on a number of factors, none of which were considered in the case. To my eyes whether it had a value for the SPVs (for these purposes), or an outgoing value for Westbrook, would depend on the SPV's ultimate ability to repay the loan. If the loan was likely to be repaid then the loan, when made, would acquire the equivalent value of the matching repayment obligation. It is only if it can be seen that it would not be repaid that the loan has a relevant value for the purposes of a section 423 consideration calculation. At the time of the transaction the loan had not been made anyway, so it was not an obvious immediate addition of value.

451. Furthermore, and returning to the guarantee, it was accepted by Friends Life (and submitted by Westbrook) that the value of the contingent liability under the guarantee had to be considered with the benefit of hindsight - *Phillips v Brewin Dolphin* [2001] 1 WLR 143 at para 26. Mr Wilson gave unchallenged evidence that the values of the flat leases had gone up to an aggregate of over £352m. Mr Scott-Barrett had not carried out a modern valuation exercise, but did not feel able to challenge those figures, and accepted (as he had to) that that gave a lot more cover to the amount of the original loan. In those circumstances it is now apparent that there is no significant ultimate risk to Westbrook on the guarantee, either because the SPVs have the means to discharge the loan, or because they have the means to provide an indemnity. That means that the value of the guarantee has to be treated as nil, or at least not significant.

452. Mr Jourdan's only riposte to this is to say that if one looks at the matter with hindsight, the value given by Westbrook to the SPVs by the loan guarantee, without which they

could not have purchased the flats is the increase in the value of the flats. Since the flats are now worth over £352m the real value of the guarantee can not be seen to have been at least the increase in value between £284m and that greater figure. So the loan guarantee had a considerable value for which Westbrook received nothing.

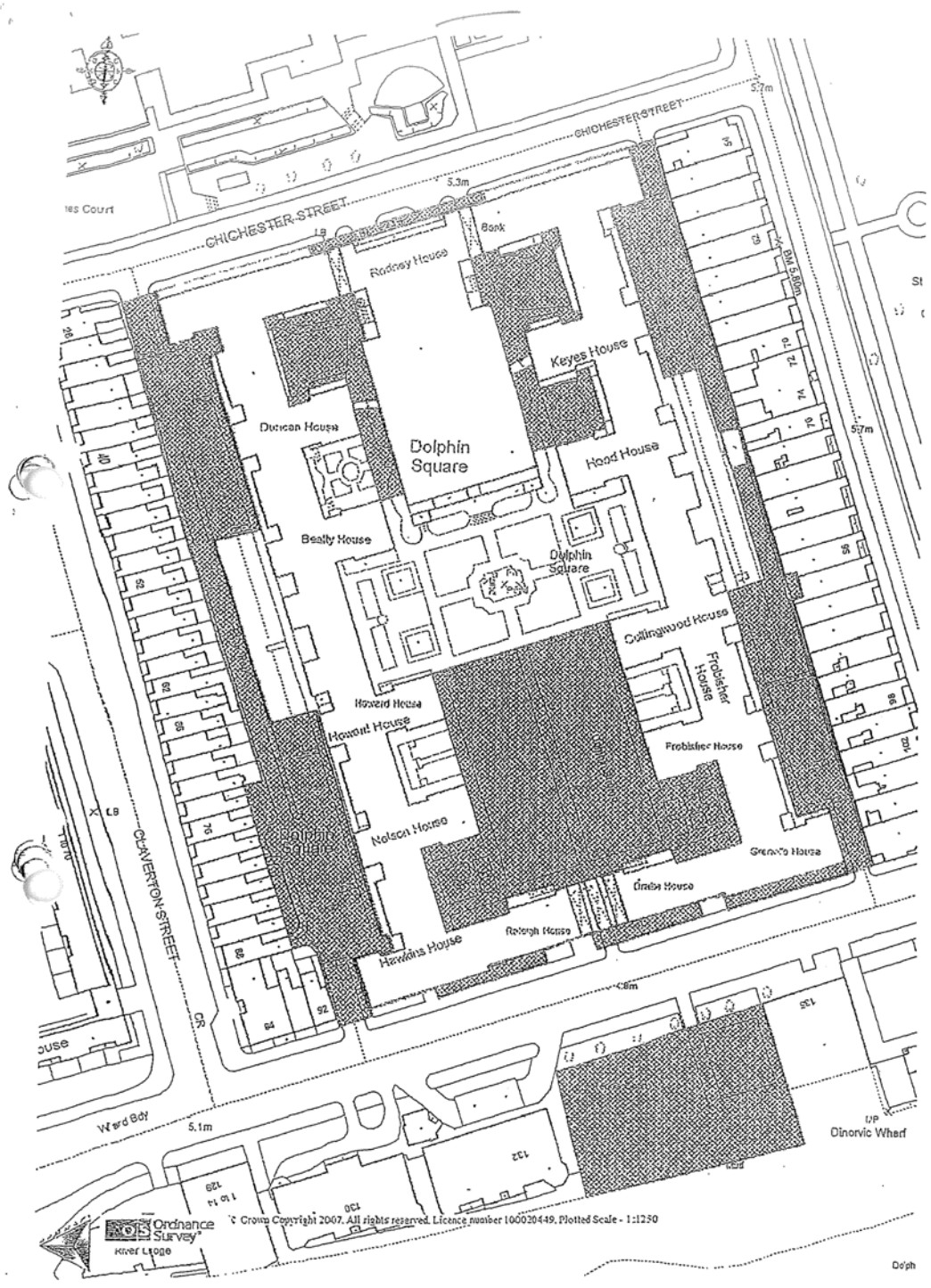
453. The answer to that point is that it looks at the matter from the wrong point of view. What one is valuing at this stage of the exercise is the value of the consideration provided by Westbrook, which is said to have given rise to the undervalue, and match it against the value provided by the SPVs. One is entitled to use hindsight to value contingencies in order to assess the values given and received, but looking at the increase in the value of the flats is not valuing any contingent part of the consideration provided by the SPVs. The increase in the value of the flats is no part of the consideration provided by the SPVs, nor does it go to the valuation of any part of the consideration provided by them.

454. It follows, therefore, that the effective giving of the guarantee by Westbrook did not constitute an undervalue for the purposes of section 423.

Overall conclusion

455. I therefore find that all challenges to Westbrook's enfranchisement application fail and that Westbrook is entitled to its declarations as to its entitlement to enfranchise and other relief. I shall hear submissions, if necessary, as to the precise form of relief to which it is entitled.

APPENDIX 1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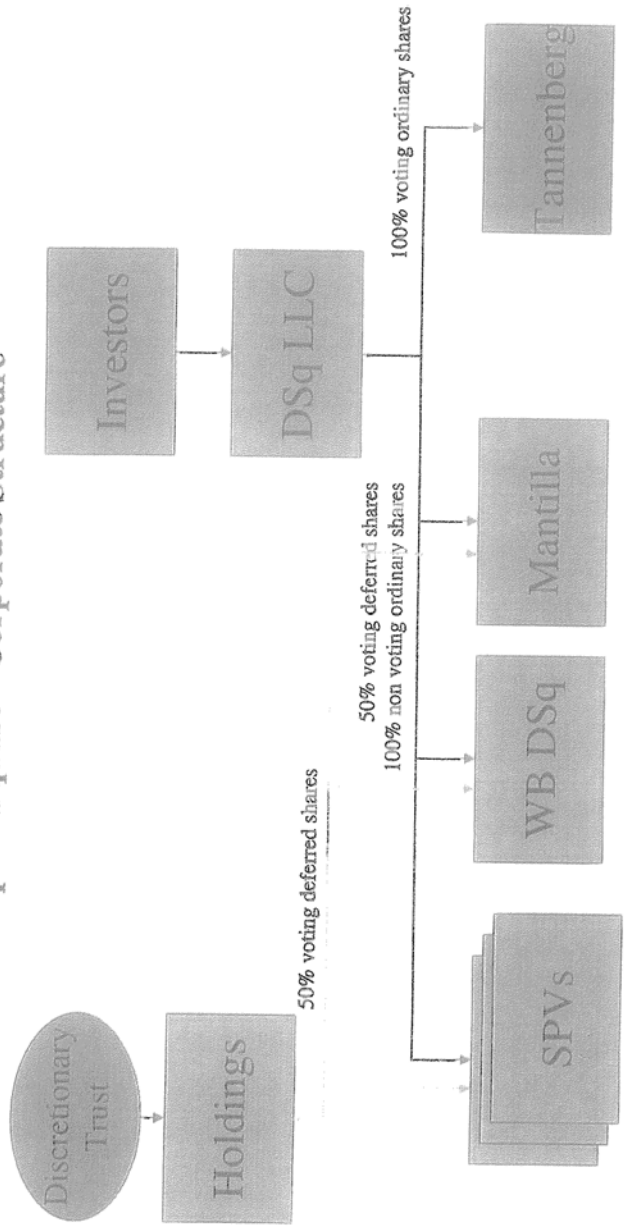
Rodney House
Bank
Keyes House
Duncan House
Dolphin Square
Hood House
Beatty House
Dolphin Square
Cullingwood House
Howard House
Howard House
Frobisher House
Frobisher House
Nelson House
Dolphin Square
Grenville House
Drake House
Raleigh House
Hawkins House
CHAVERTON STREET
Ward Boy
5.1m
Chorvic Wharf
Ordnance Survey
© Crown Copyright 2007. All rights reserved. Licence number 100020449. Plotted Scale - 1:1250

APPENDIX 2


Dolphin Square - Corporate Structure
Discretionary Trust
Holdings
50% voting deferred shares
Investors
DSq LLC
50% voting deferred shares
100% non voting ordinary shares
100% voting ordinary shares
Tannenberg
Mantilla
WB DSq
SPVs

Appendix 3 – extracts from the relevant legislation

Leasehold Reform, Housing and Urban Development Act 1993

1993 CHAPTER 28

CHAPTER I COLLECTIVE ENFRANCHISEMENT IN CASE OF TENANTS OF FLATS
Preliminary

1 The right to collective enfranchisement.

(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf—

(a) by a person or persons appointed by them for the purpose, and

(b) at a price determined in accordance with this Chapter;

and that right is referred to in this Chapter as "the right to collective enfranchisement".

(2) Where the right to collective enfranchisement is exercised in relation to any such premises ("the relevant premises")—

(a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and

(b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.

(3) Subsection (2)(a) applies to any property if . . . at the relevant date either—

(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or

(b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).

(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—

(a) there are granted by the person who owns the freehold of that property—

(i) over that property, or

(ii) over any other property,

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

(b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted.

(5) A claim by qualifying tenants to exercise the right to collective enfranchisement may be made in relation to any premises to which this Chapter applies despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise that right.

(6) Any right or obligation under this Chapter to acquire any interest in property shall not extend to underlying minerals in which that interest subsists if—

(a) the owner of the interest requires the minerals to be excepted, and

(b) proper provision is made for the support of the property as it is enjoyed on the relevant date.

(7) In this section—

"appurtenant property", in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;

"the relevant premises" means any such premises as are referred to in subsection (2).

(8) In this Chapter "the relevant date", in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13.

……..

3 Premises to which this Chapter applies.

(1) Subject to section 4, this Chapter applies to any premises if—

(a) they consist of a self-contained building or part of a building. . .;

(b) they contain two or more flats held by qualifying tenants; and

(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.

(2) For the purposes of this section a building is a self-contained building if it is structurally detached, and a part of a building is a self-contained part of a building if—

(a) it constitutes a vertical division of the building and the structure of the building is such that that part could be redeveloped independently of the remainder of the building; and

(b) the relevant services provided for occupiers of that part either—

(i) are provided independently of the relevant services provided for occupiers of the remainder of the building, or

(ii) could be so provided without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building;

and for this purpose "relevant services" means services provided by means of pipes, cables or other fixed installations.

4 Premises excluded from right.

(1) This Chapter does not apply to premises falling within section 3(1) if—

(a) any part or parts of the premises is or are neither—

(i) occupied, or intended to be occupied, for residential purposes, nor

(ii) comprised in any common parts of the premises; and

(b) the internal floor area of that part or of those parts (taken together) exceeds 25 per cent. of the internal floor area of the premises (taken as a whole).

(2) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.

(3) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.

(3A) Where different persons own the freehold of different parts of premises within subsection (1) of section 3, this Chapter does not apply to the premises if any of those parts is a self-contained part of a building for the purposes of that section.

…

5 Qualifying tenants.

(1) Subject to the following provisions of this section, a person is a qualifying tenant of a flat for the purposes of this Chapter if he is tenant of the flat under a long lease....

(2) Subsection (1) does not apply where—

(a) the lease is a business lease; or

(b) the immediate landlord under the lease is a charitable housing trust and the flat forms part of the housing accommodation provided by it in the pursuit of its charitable purposes; or

(c) the lease was granted by sub-demise out of a superior lease other than a long lease..., the grant was made in breach of the terms of the superior lease, and there has been no waiver of the breach by the superior landlord;

and in paragraph (b) “charitable housing trust” means a housing trust within the meaning of the Housing Act 1985 which is a charity within the meaning of the Charities Act 1993.

(3) No flat shall have more than one qualifying tenant at any one time.

(4) Accordingly—

(a) where a flat is for the time being let under two or more leases to which subsection (1) applies, any tenant under any of those leases which is superior to that held by any other such tenant shall not be a qualifying tenant of the flat for the purposes of this Chapter; and

(b) where a flat is for the time being let to joint tenants under a lease to which subsection (1) applies, the joint tenants shall (subject to paragraph (a) and subsection (5)) be regarded for the purposes of this Chapter as jointly constituting the qualifying tenant of the flat.

(5) Where apart from this subsection—

(a) a person would be regarded for the purposes of this Chapter as being (or as being among those constituting) the qualifying tenant of a flat contained in any particular premises consisting of the whole or part of a building, but

(b) that person would also be regarded for those purposes as being (or as being among those constituting) the qualifying tenant of each of two or more other flats contained in those premises,

then, whether that person is tenant of the flats referred to in paragraphs (a) and (b) under a single lease or otherwise, there shall be taken for those purposes to be no qualifying tenant of any of those flats.

(6) For the purposes of subsection (5) in its application to a body corporate any flat let to an associated company (whether alone or jointly with any other person or persons) shall be treated as if it were so let to that body; and for this purpose “associated company” means another body corporate which is (within the meaning of section 736 of the Companies Act 1985 [now section 1159 of the Companies Act 2006) that body’s holding company, a subsidiary of that body or another subsidiary of that body’s holding company.

The initial notice

13 Notice by qualifying tenants of claim to exercise right.

(1) A claim to exercise the right to collective enfranchisement with respect to any premises is made by the giving of notice of the claim under this section.

(2) A notice given under this section ("the initial notice")—

(a) must

[(i) in a case to which section 9(2) applies, be given to the reversioner in respect of those premises; [and

(ii) in a case to which section 9(2A) applies, be given to the person specified in the notice as the recipient;] and

(b) must be given by a number of qualifying tenants of flats contained in the premises as at the relevant date which—

(i). . . . . .

(ii) is not less than one-half of the total number of flats so contained;

. . . . . .

[(2A) In a case to which section 9(2A) applies, the initial notice must specify—

(a) a person who owns a freehold interest in the premises, or

(b) if every person falling within paragraph (a) is a person who cannot be found or whose identity cannot be ascertained, a relevant landlord,

as the recipient of the notice.]

(3) The initial notice must—

(a) specify and be accompanied by a plan showing—

(i) the premises of which the freehold is proposed to be acquired by virtue of section 1(1),

(ii) any property of which the freehold is proposed to be acquired by virtue of section 1(2)(a), and

(iii) any property. . . over which it is proposed that rights (specified in the notice) should be granted. . . in connection with the acquisition of the freehold of the specified premises or of any such property so far as falling within section 1(3)(a);

(b) contain a statement of the grounds on which it is claimed that the specified premises are, on the relevant date, premises to which this Chapter applies;

(c) specify—

(i) any leasehold interest proposed to be acquired under or by virtue of section 2(1)(a) or (b), and

(ii) any flats or other units contained in the specified premises in relation to which it is considered that any of the requirements in Part II of Schedule 9 to this Act are applicable;

(d) specify the proposed purchase price for each of the following, namely—

(i) the freehold interest in the specified premises, [or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises]

(ii) the freehold interest in any property specified under paragraph (a)(ii), and

(iii) any leasehold interest specified under paragraph (c)(i);

(e) state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and contain... in relation to each of those tenants,...—

(i) such particulars of his lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term,

(ii). . . . . .

(iii). . . . . .

(f) state the full name or names of the person or persons appointed as the nominee purchaser for the purposes of section 15, and an address in England and Wales at which notices may be given to that person or those persons under this Chapter; and

(g) specify the date by which the reversioner must respond to the notice by giving a counter-notice under section 21.

(4). . . . . .

(5) The date specified in the initial notice in pursuance of subsection (3)(g) must be a date falling not less than two months after the relevant date.

(6). . . . . .

(7). . . . . .

(8) Where any premises have been specified in a notice under this section, no subsequent notice which specifies the whole or part of those premises may be given under this section so long as the earlier notice continues in force.

(9) Where any premises have been specified in a notice under this section and—

(a) that notice has been withdrawn, or is deemed to have been withdrawn, under or by virtue of any provision of this Chapter or under section 74(3), or

(b) in response to that notice, an order has been applied for and obtained under section 23(1),

no subsequent notice which specifies the whole or part of those premises may be given under this section within the period of twelve months beginning with the date of the withdrawal or deemed withdrawal of the earlier notice or with the time when the order under section 23(1) becomes final (as the case may be).

(10) In subsections (8) and (9) any reference to a notice which specifies the whole or part of any premises includes a reference to a notice which specifies any premises which contain the whole or part of those premises; and in those subsections and this “specifies” means specifies under subsection (3)(a)(i).

(11) Where a notice is given in accordance with this section, then for the purposes of this Chapter the notice continues in force as from the relevant date—

(a) until a binding contract is entered into in pursuance of the notice, or an order is made under section 24(4)(a) or (b) or 25(6)(a) or (b) providing for the vesting of interests in the nominee purchaser;

(b) if the notice is withdrawn or deemed to have been withdrawn under or by virtue of any provision of this Chapter or under section 74(3), until the date of the withdrawal or deemed withdrawal, or

(c) until such other time as the notice ceases to have effect by virtue of any provision of this Chapter.

(12) In this Chapter “the specified premises”, in relation to a claim made under this Chapter, means—

(a) the premises specified in the initial notice under subsection (3)(a)(i), or

(b) if it is subsequently agreed or determined under this Chapter that any less extensive premises should be acquired in pursuance of the notice in satisfaction of the claim, those premises;

and similarly references to any property or interest specified in the initial notice under subsection (3)(a)(ii) or (c)(i) shall, if it is subsequently agreed or determined under this Chapter that any less extensive property or interest should be acquired in pursuance of the notice, be read as references to that property or interest.

(13) Schedule 3 to this Act (which contains restrictions on participating in the exercise of the right to collective enfranchisement, and makes further provision in connection with the giving of notices under this section) shall have effect.

21 Reversioner's counter-notice.

(1)The reversioner in respect of the specified premises shall give a counter-notice under this section to the nominee purchaser by the date specified in the initial notice in pursuance of section 13(3)(g).

(2) The counter-notice must comply with one of the following requirements, namely—

(a) state that the reversioner admits that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises;

(b) state that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were so entitled;

(c) contain such a statement as is mentioned in paragraph (a) or (b) above but state that an application for an order under subsection (1) of section 23 is to be made by such appropriate landlord (within the meaning of that section) as is specified in the counter-notice, on the grounds that he intends to redevelop the whole or a substantial part of the specified premises.

(3) If the counter-notice complies with the requirement set out in subsection (2)(a), it must in addition—

(a) state which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which (if any) of those proposals are not so accepted, and specify—

(i) in relation to any proposal which is not so accepted, the reversioner's counter-proposal, and

(ii) any additional leaseback proposals by the reversioner;

(b) if (in a case where any property specified in the initial notice under section 13(3)(a)(ii) is property falling within section 1(3)(b)) any such counter-proposal relates to the grant of rights or the disposal of any freehold interest in pursuance of section 1(4), specify—

(i) the nature of those rights and the property over which it is proposed to grant them, or

(ii) the property in respect of which it is proposed to dispose of any such interest,

as the case may be;

(c) state which interests (if any) the nominee purchaser is to be required to acquire in accordance with subsection (4) below;

(d) state which rights (if any) [any] relevant landlord, desires to retain—

(i) over any property in which he has any interest which is included in the proposed acquisition by the nominee purchaser, or

(ii) over any property in which he has any interest which the nominee purchaser is to be required to acquire in accordance with subsection (4) below,

on the grounds that the rights are necessary for the proper management or maintenance of property in which he is to retain a freehold or leasehold interest; and

(e) include a description of any provisions which the reversioner or any other relevant landlord considers should be included in any conveyance to the nominee purchaser in accordance with section 34 and Schedule 7.

(4) The nominee purchaser may be required to acquire on behalf of the participating tenants the interest in any property of [any] relevant landlord, if the property—

(a) would for all practical purposes cease to be of use and benefit to him, or

(b) would cease to be capable of being reasonably managed or maintained by him,

in the event of his interest in the specified premises or (as the case may be) in any other property being acquired by the nominee purchaser under this Chapter.

(5) Where a counter-notice specifies any interest in pursuance of subsection (3)(c), the nominee purchaser or any person authorised to act on his behalf shall, in the case of any part of the property in which that interest subsists, have a right of access thereto for the purpose of enabling the nominee purchaser to obtain, in connection with the proposed acquisition by him, a valuation of that interest; and subsection (3) of section 17 shall apply in relation to the exercise of that right as it applies in relation to the exercise of a right of access conferred by that section.

(6) Every counter-notice must specify an address in England and Wales at which notices may be given to the reversioner under this Chapter.

(7) The reference in subsection (3)(a)(ii) to additional leaseback proposals is a reference to proposals which relate to the leasing back, in accordance with section 36 and Schedule 9, of flats or other units contained in the specified premises and which are made either—

(a) in respect of flats or other units in relation to which Part II of that Schedule is applicable but which were not specified in the initial notice under section 13(3)(c)(ii), or

(b) in respect of flats or other units in relation to which Part III of that Schedule is applicable.

(8) Schedule 4 (which imposes requirements as to the furnishing of information by the reversioner about the exercise of rights under Chapter II with respect to flats contained in the specified premises) shall have effect.

Applications to court or leasehold valuation tribunal

22 Proceedings relating to validity of initial notice.

(1) Where—

(a) the reversioner in respect of the specified premises has given the nominee purchaser a counter-notice under section 21 which (whether it complies with the requirement set out in subsection (2)(b) or (c) of that section) contains such a statement as is mentioned in subsection (2)(b) of that section, but

(b) the court is satisfied, on an application made by the nominee purchaser, that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises,

the court shall by order make a declaration to that effect.

(2) Any application for an order under subsection (1) must be made not later than the end of the period of two months beginning with the date of the giving of the counter-notice to the nominee purchaser.

(3) If on any such application the court makes an order under subsection (1), then (subject to subsection (4)) the court shall make an order—

(a) declaring that the reversioner's counter-notice shall be of no effect, and

(b) requiring the reversioner to give a further counter-notice to the nominee purchaser by such date as is specified in the order.

(4) Subsection (3) shall not apply if—

(a) the counter-notice complies with the requirement set out in section 21(2)(c), and

(b) either—

(i) an application for an order under section 23(1) is pending, or

(ii) the period specified in section 23(3) as the period for the making of such an application has not expired.

(5) Subsections (3) to (5) of section 21 shall apply to any further counter-notice required to be given by the reversioner under subsection (3) above as if it were a counter-notice under that section complying with the requirement set out in subsection (2)(a) of that section.

(6) If an application by the nominee purchaser for an order under subsection (1) is dismissed by the court, the initial notice shall cease to have effect at the time when the order dismissing the application becomes final.

24 Applications where terms in dispute or failure to enter contract.

(1) Where the reversioner in respect of the specified premises has given the nominee purchaser—

(a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 22(3) or section 23(5) or (6),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute.

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the nominee purchaser.

(3) Where—

(a) the reversioner has given the nominee purchaser such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b) all of the terms of acquisition have been either agreed between the parties or determined by a leasehold valuation tribunal under subsection (1),

but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6), the court may, on the application of either the nominee purchaser or the reversioner, make such order under subsection (4) as it thinks fit.

(4) The court may under this subsection make an order—

(a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);

(b) providing for those interests to be vested in him on those terms, but subject to such modifications as—

(i) may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and

(ii) are specified in the order; or

(c) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6);

and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above.

(5) Any application for an order under subsection (4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).

(6) For the purposes of this section the appropriate period is—

(a) where all of the terms of acquisition have been agreed between the parties, the period of two months beginning with the date when those terms were finally so agreed;

(b) where all or any of those terms have been determined by a leasehold valuation tribunal under subsection (1)—

(i) the period of two months beginning with the date when the decision of the tribunal under that subsection becomes final, or

(ii) such other period as may have been fixed by the tribunal when making its determination.

(7) In this section “the parties” means the nominee purchaser and the reversioner and any relevant landlord who has given to those persons a notice for the purposes of paragraph 7(1)(a) of Schedule 1.

(8) In this Chapter “the terms of acquisition”, in relation to a claim made under this Chapter, means the terms of the proposed acquisition by the nominee purchaser, whether relating to—

(a) the interests to be acquired,

(b) the extent of the property to which those interests relate or the rights to be granted over any property,

(c) the amounts payable as the purchase price for such interests,

(d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e) the provisions to be contained in any conveyance,

or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of section 1(4) or 21(4).

25 Applications where reversioner fails to give counter-notice or further counter-notice.

(1) Where the initial notice has been given in accordance with section 13 but—

(a) the reversioner has failed to give the nominee purchaser a counter-notice in accordance with section 21(1), or

(b) if required to give the nominee purchaser a further counter-notice by or by virtue of section 22(3) or section 23(5) or (6), the reversioner has failed to comply with that requirement,

the court may, on the application of the nominee purchaser, make an order determining the terms on which he is to acquire, in accordance with the proposals contained in the initial notice, such interests and rights as are specified in it under section 13(3).

(2) The terms determined by the court under subsection (1) shall, if Part II of Schedule 9 is applicable, include terms which provide for the leasing back, in accordance with section 36 and that Part of that Schedule, of flats or other units contained in the specified premises.

(3) The court shall not make any order on an application made by virtue of paragraph (a) of subsection (1) unless it is satisfied—

(a) that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises; and

(b) if applicable, that the requirements of Part II of Schedule 3 were complied with as respects the giving of copies of the initial notice.

(4) Any application for an order under subsection (1) must be made not later than the end of the period of six months beginning with the date by which the counter-notice or further counter-notice referred to in that subsection was to be given to the nominee purchaser.

(5) Where—

(a) the terms of acquisition have been determined by an order of the court under subsection (1), but

(b) a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (8),

the court may, on the application of either the nominee purchaser or the reversioner, make such order under subsection (6) as it thinks fit.

(6) The court may under this subsection make an order—

(a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (5);

(b) providing for those interests to be vested in him on those terms, but subject to such modifications as—

(i) may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were determined as mentioned in that subsection, and

(ii) are specified in the order; or

(c) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (8);

and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above.

(7) Any application for an order under subsection (6) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (8).

(8) For the purposes of this section the appropriate period is—

(a) the period of two months beginning with the date when the order of the court under subsection (1) becomes final, or

(b) such other period as may have been fixed by the court when making that order.

CHAPTER II INDIVIDUAL RIGHT OF TENANT OF FLAT TO ACQUIRE NEW LEASE

Preliminary

39 Right of qualifying tenant of flat to acquire new lease.

(1) This Chapter has effect for the purpose of conferring on a tenant of a flat, in the circumstances mentioned in subsection (2), the right, exercisable subject to and in accordance with this Chapter, to acquire a new lease of the flat on payment of a premium determined in accordance with this Chapter.

(2) Those circumstances are that on the relevant date for the purposes of this Chapter—

(a) the tenant [has for the last two years been] a qualifying tenant of the flat;...

(b). . . . . .

(2A). . . . . .

(2B). . . . . .

(3) The following provisions, namely—

(a) section 5 (with the omission of subsections (5) and (6)),

(b) section 7,. . .

(c). . . . . .

(d). . . . . .

shall apply for the purposes of this Chapter as they apply for the purposes of Chapter I; and references in this Chapter to a qualifying tenant of a flat shall accordingly be construed by reference to those provisions.

[(3A) On the death of a person who has for the two years before his death been a qualifying tenant of a flat, the right conferred by this Chapter is exercisable, subject to and in accordance with this Chapter, by his personal representatives; and, accordingly, in such a case references in this Chapter to the tenant shall, in so far as the context permits, be to the personal representatives.]

[(4)For the purposes of this Chapter a person can be (or be among those constituting) the qualifying tenant of each of two or more flats at the same time, whether he is tenant of those flats under one lease or under two or more separate leases.

(4A). . . . . .

(5). . . . . .

(6). . . . . .

(7) The right conferred by this Chapter on a tenant to acquire a new lease shall not extend to underlying minerals comprised in his existing lease if—

(a) the landlord requires the minerals to be excepted, and

(b) proper provision is made for the support of the premises demised by that existing lease as they are enjoyed on the relevant date.

(8) In this Chapter “the relevant date”, in relation to a claim by a tenant under this Chapter, means the date on which notice of the claim is given to the landlord under section 42.

The tenant’s notice

42 Notice by qualifying tenant of claim to exercise right.

(1) A claim by a qualifying tenant of a flat to exercise the right to acquire a new lease of the flat is made by the giving of notice of the claim under this section.

(2) A notice given by a tenant under this section ("the tenant's notice") must be given—

(a) to the landlord, and

(b) to any third party to the tenant's lease.

(3) The tenant's notice must—

(a) state the full name of the tenant and the address of the flat in respect of which he claims a new lease under this Chapter;

(b) contain the following particulars, namely—

(i) sufficient particulars of that flat to identify the property to which the claim extends,

(ii) such particulars of the tenant's lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term,

(iii). . . . . .

(iv). . . . . .

(c) specify the premium which the tenant proposes to pay in respect of the grant of a new lease under this Chapter and, where any other amount will be payable by him in accordance with any provision of Schedule 13, the amount which he proposes to pay in accordance with that provision;

(d) specify the terms which the tenant proposes should be contained in any such lease;

(e) state the name of the person (if any) appointed by the tenant to act for him in connection with his claim, and an address in England and Wales at which notices may be given to any such person under this Chapter; and

(f) specify the date by which the landlord must respond to the notice by giving a counter-notice under section 45.

(4). . . . . .

[(4A) A notice under this section may not be given by the personal representatives of a tenant later than two years after the grant of probate or letters of administration.]

(5) The date specified in the tenant's notice in pursuance of subsection (3)(f) must be a date falling not less than two months after the date of the giving of the notice.

(6) Where a notice under this section has been given with respect to any flat, no subsequent notice may be given under this section with respect to the flat so long as the earlier notice continues in force.

(7) Where a notice under this section has been given with respect to a flat and—

(a) that notice has been withdrawn, or is deemed to have been withdrawn, under or by virtue of any provision of this Chapter, or

(b) in response to that notice, an order has been applied for and obtained under section 47(1),

no subsequent notice may be given under this section with respect to the flat within the period of twelve months beginning with the date of the withdrawal or deemed withdrawal of the earlier notice or with the time when the order under section 47(1) becomes final (as the case may be).

(8) Where a notice is given in accordance with this section, then for the purposes of this Chapter the notice continues in force as from the relevant date—

(a) until a new lease is granted in pursuance of the notice;

(b) if the notice is withdrawn, or is deemed to have been withdrawn, under or by virtue of any provision of this Chapter, until the date of the withdrawal or deemed withdrawal; or

(c) until such other time as the notice ceases to have effect by virtue of any provision of this Chapter;

but this subsection has effect subject to section 54.

(9) Schedule 12 (which contains restrictions on terminating a tenant's lease where he has given a notice under this section and makes other provision in connection with the giving of notices under this section) shall have effect.

101 General interpretation of Part I.

(1) In this Part—

“business lease” means a tenancy to which Part II of the Landlord and Tenant Act 1954 applies;

“common parts”, in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it;

…

“dwelling” means any building or part of a building occupied or intended to be occupied as a separate dwelling;

…

(2) In this Part “lease” and “tenancy” have the same meaning, and both expressions include (where the context so permits)—

(a) a sub-lease or sub-tenancy, and

(b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),

but do not include a tenancy at will or at sufferance; and the expressions “landlord” and “tenant”, and references to letting, to the grant of a lease or to covenants or the terms of a lease, shall be construed accordingly.

…

(4) Where two or more persons jointly constitute either the landlord or the tenant or qualifying tenant in relation to a lease of a flat, any reference in this Part to the landlord or to the tenant or qualifying tenant is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant or qualifying tenant, as the case may require.

Companies Act 2006

PART 38
COMPANIES: INTERPRETATION

Meaning of "subsidiary" and related expressions

1159 Meaning of "subsidiary" etc

(1) A company is a "subsidiary" of another company, its "holding company", if that other company—

(a) holds a majority of the voting rights in it, or

(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,

or if it is a subsidiary of a company that is itself a subsidiary of that other company.

(2) A company is a "wholly-owned subsidiary" of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.

(3) Schedule 6 contains provisions explaining expressions used in this section and otherwise supplementing this section.

(4) In this section and that Schedule "company" includes any body corporate.

SCHEDULE 6 MEANING OF "SUBSIDIARY" ETC: SUPPLEMENTARY PROVISIONS

Introduction

1 The provisions of this Part of this Schedule explain expressions used in section 1159 (meaning of "subsidiary" etc) and otherwise supplement that section.

Voting rights in a company

2 In section 1159(1)(a) and (c) the references to the voting rights in a company are to the rights conferred on shareholders in respect of their shares or, in the case of a company not having a share capital, on members, to vote at general meetings of the company on all, or substantially all, matters.

Right to appoint or remove a majority of the directors

3(1) In section 1159(1)(b) the reference to the right to appoint or remove a majority of the board of directors is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters.

(2) A company shall be treated as having the right to appoint to a directorship if—

(a) a person's appointment to it follows necessarily from his appointment as director of the company, or

(b) the directorship is held by the company itself.

(3) A right to appoint or remove which is exercisable only with the consent or concurrence of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

Rights exercisable only in certain circumstances or temporarily incapable of exercise

4(1) Rights which are exercisable only in certain circumstances shall be taken into account only—

(a) when the circumstances have arisen, and for so long as they continue to obtain, or

(b) when the circumstances are within the control of the person having the rights.

(2) Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

Rights held by one person on behalf of another

5 Rights held by a person in a fiduciary capacity shall be treated as not held by him.

6(1) Rights held by a person as nominee for another shall be treated as held by the other.
(2) Rights shall be regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence.

…

Rights attributed to holding company

8(1) Rights shall be treated as held by a holding company if they are held by any of its subsidiary companies.
(2) Nothing in paragraph 6 or 7 shall be construed as requiring rights held by a holding company to be treated as held by any of its subsidiaries.

(3) For the purposes of paragraph 7 rights shall be treated as being exercisable in accordance with the instructions or in the interests of a company if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of—

(a) any subsidiary or holding company of that company, or

(b) any subsidiary of a holding company of that company.

Disregard of certain rights

9 The voting rights in a company shall be reduced by any rights held by the company itself.

Supplementary

10 References in any provision of paragraphs 5 to 9 to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those paragraphs but not rights which by virtue of any such provision are to be treated as not held by him.