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Residential Property
TRIBUNAL SERVICE

Decision of the London Leasehold Valuation Tribunal
s 24 of the Leasehold Reform, Housing and Urban Development Act 1993

Reference:	LON/00AW/OCE/2007/0337
Applicants:	86 Holland Park Freehold Limited (Nominee Purchaser) Chrisdell Limited and Lola Linker (participating tenants)
Respondents:	Elizabeth Jane Majubian and John Donaldson Saner as Executors of the Estate of the late Peter Majubian deceased (Landlord)
Property:	86 Holland Park, London W11 3RZ
Date of tenants' notice:	9 May 2007
Date of counter-notice:	13 July 2007
Application:	17 October 2007
Directions:	6 November 2007
Hearing:	13 and 14 May 2008
Date of inspection:	14 May 2008
Written submissions:	by 18 June 2008
Valuation date:	9 May 2007
Appearances:	*For the Nominee Purchaser*: Mr G Cowen, counsel, instructed by John May Law Mr Ian Asbury BSc (Hons) MRICS of Chesterton Global Limited, valuer *For the Landlord*: Mr C Semken, counsel, instructed by Collyer Bristow LLP Miss Jennifer Ellis FRICS of Langley-Taylor, valuer
Members of the Tribunal:	Mr T J Powell LLB Ms. M Krisko FRICS
Date of Tribunal's Decision:	5 August 2008

Introduction

1. By an Application dated 17th October 2007, the Applicant applied to the Tribunal for a determination of the price payable and the other terms of acquisition in respect of the collective enfranchisement of 86 Holland Park, London W11 ("the Property") under Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act").

2. The qualifying tenants' Initial Notice was given on 9th May 2007 at a proposed purchase price of £129,000 for the freehold of the Property on the basis that the Freeholders are entitled to a right to a leaseback of the flat on the first floor of the Property (Flat D), plus £250 for the freehold interest in the front external parts of the building ("the Appurtenant Premises").

3. By their Counter Notice dated 13th July 2007, the Respondents proposed a purchase price for the freehold interest in the Property at £255,000 plus £50,000 for the Appurtenant Premises. The Respondents also claimed the right to a leaseback of Flat D identified on a plan to a draft lease attached to the Counter Notice.

4. An application was made on 17th October 2007 to the Tribunal to determine the terms of acquisition that were in dispute between the parties. Directions were given for the conduct of the application on 6th November 2007 and the matter was listed for hearing before the Tribunal on 13th and 14th May 2008. Subsequent to the hearing, and by 18th June 2008, the parties' counsel made written submissions to the Tribunal.

Inspection

5. The Tribunal inspected the Property on 14th May 2008 and was given access to Flat F on the ground floor, to a store room at mezzanine level, between the first and second floors, and to a basement room accessible from the side passage. The subject Property is situated on the west side of Holland Park, opposite the junction of Holland Park and Holland Park Mews. It is a listed Grade II building in the Holland Park Conservation Area. The Property was built as a house in 1862. It is a five-storey,

double-fronted detached building on lower ground, ground and three upper floors. The Property has been converted to form six flats. Flat A is on the lower ground floor and has its own entrance at that level at the side of the house. The other flats are approached from the communal front door, entrance hall and staircase. Flats F and G are on the ground floor, Flat D/E is on first and part of the second floors, Flat C is on the second floor and Flat B is on the third floor.

6. The Tribunal inspected Flat F, a well-proportioned high-ceilinged two roomed flat with a large bedroom at the front with an en-suite, a living room at the rear with good views and access to the garden and a fully fitted kitchen with considerable added storage cupboards. The Tribunal also inspected the storeroom at mezzanine level, which was as described, 1m x 2m, too small for any other use and accessible only from the common parts landing. The basement room however was accessible from outside the building and was of a good usable size with a reasonable ceiling height and sufficient possibility for providing good natural light. The wall separating this room from Flat A had a section of wall which appeared to be a bricked-in former access.

7. The garden at the front of the Property is maintained by the Freeholder and all Lessees have access to it. The garden at the rear of the Property is demised to Flat A with an obligation to maintain. The Lessees of Flats F & G have rights of access and recreation. The rear of the Property has open views over nearby tennis courts.

8. At the date of the Initial Notice all flats, save for D/E were held on long Leases. Since the service of the initial Notice new Leases were granted or agreed by the Freeholder in respect of Flats C, D/E and G. It was agreed in a schedule, signed by the parties' valuers on 9th May 2008, that the valuation of the price payable will be on the basis that the new leases had been granted at the valuation date. While the Counter Notice dated 13th July 2007 made claim to a leaseback of Flat D, it was stated in section 1 of the valuers' agreed schedule that the leaseback claimed in respect of Flat D/E was no longer sought. However, as appears below,

the question of the Landlord's claim to a leaseback became a contentious issue at the hearing.

Agreed Facts

9. By the hearing on 13th May 2008, most of the valuation matters had been agreed as follows:

(i) The valuation is to be carried out in accordance with Schedule 6 of the 1993 Act;

(ii) No compensation is sought under paragraph 5 of Schedule 6;

(iii) The value of the rents receivable by the Freeholder from Flats A and B is £5,721. The value of the Freeholder's reversions in Flats A and B is £7,090. The aggregate of those two sums is £12,811;

(iv) The value of the rent receivable on the valuation date by the Freeholder from each of Flats C, F and G is £4,481;

(v) The value of the rents receivable by the Freeholder from each of Flats C and G that should be included in the purchase price (i.e. the value of the asset that will actually be acquired by the Nominee Purchaser) is £2,475;

(vi) The appropriate deferment rate is 5%;

(vii) A 50% share of marriage value is only payable in respect of Flat F;

(viii) The valuation date is the date of receipt of the claim i.e. 9th May 2007. At that date the actual and assumed flat leases had the following unexpired terms: A and B 120.63 years; C, F and G 69.13 years.

10. The matters in dispute were helpfully set out in section 6 of the valuers' agreed schedule, as follows:

Issue No:	Issue	Miss Ellis's position	Mr Asbury's position
1.	Value of Flat F in hand to the Freeholder	£960,000	£660,000
2.	Value of Flat F held on a Lease for 69.13 years	£825,000	£600,600
3.	Value of the areas in hand to the Freeholder	£183,500	£40,000

In addition, at the very outset of the hearing the disagreement arose between the parties as to the Landlord's entitlement to a leaseback in respect of Flat D/E as claimed in the Counter Notice.

Issue no.1: The value of Flat F in hand to the Freeholder

11. Evidence was given for the Tribunal by Mr Asbury, the valuer on behalf of the Applicant, and Miss Ellis for the Respondent.

12. Mr Asbury relied upon a number of sales of comparable properties in the Holland Park area in support of his valuation. Miss Ellis valued Flat F primarily by reference to the sale of Flat C in the same building about three months after the agreed valuation date of 9th May 2007 and also upon settlement evidence achieved on behalf of her clients in respect of a smaller number of comparable properties outside of the Holland Park area.

13. Mr Asbury valued the unimproved share of freehold value of Flat F at £660,000 based on a rate of £1,041 per square foot. Miss Ellis put the value of the freehold interest in Flat F at £960,000, which equates to £1,514 per square foot.

Mr Asbury's evidence

14. Flat F is one of the ground floor flats on the left-hand side, that is to say in the southern half of the Property. It is a one-bedroom flat which Mr Asbury described as being in "excellent" condition, having been refurbished three or four years before. The flat has a rear garden door leading on to a raised balcony with steps down to the garden, over which

the flat has rights of access and leisure. Mr Asbury said that Flat F is the only flat in the building "in really top condition". The other flats in the property were more dated: Flats A and B were occupied by Rent Act protected tenants and were in a very basic condition; Flat C was refurbished about 20 years ago; Flat D/E was in good order, although the current fittings dated from the 1980s; Flat G was the other ground floor flat which Mr Asbury had not inspected.

15. Mr Asbury's comparables were contained within Appendix G of his proof of evidence. The comparables were based on actual sale prices achieved in quite a wide range of Holland Park flats from the basement to the third floor of similar buildings. Most of the flats relied upon by Mr Asbury had 999 year leases and a share of freehold. Mr Asbury's comparables were all adjusted for location, time and condition. Some of the comparables were quite old, dating back to January 2003. The floor areas varied from 656 to 2,146 square feet. Some of the comparables, at 85, 87 and 89 Holland Park were very close by to the subject Property; others were located progressively further away towards the other end of the Holland Park area.

16. 85 Holland Park and, to an extent, 87 Holland Park shared the rear view of the subject property over tennis courts, whereas 89 Holland Park overlooked the backs of other gardens.

17. The comparables in Appendix G displayed different qualities in terms of condition, location, size and length of tenure. There were a lot of variables in the comparable schedule and Mr Asbury did his best to bring out common factors shared with Flat F. The main comparables that Mr Asbury discussed were the sales of flats on the ground floors of other buildings between January 2006 and September 2007. Ground floor Flat 5 at 85 Holland Park appeared twice in the schedule, representing an older and a more recent sale of the same flat.

18. Analysis of those sales gave Mr Asbury an average improved share of freehold value of £1,138 per square foot. Mr Asbury then made a downwards adjustment of £100 per square foot to strip out the value of tenants' improvements. With an agreed area of 634 square feet for Flat F,

Mr Asbury came to an unimproved share of freehold value of £658,100, rounded up to £660,000. Mr Asbury then applied 91% relativity (which is discussed below) to arrive at a leasehold value for Flat F held on a lease for 69.13 years of £600,600.

Improvements or repairs?

19. There was significant disagreement as to whether the changes made by the present tenant constituted "improvements" within the meaning of the Act so that they fell to be disregarded, or whether they were mere repairs or renewals in compliance with an obligation in the lease. The dispute at the hearing was supplemented by written submissions by the parties' respective counsel after the hearing.

20. In evidence, Mr Asbury stated that Flat F had been improved by the present tenant at her own expense. Her improvements included the re-arrangement of the bathroom to create an en-suite bathroom with shower, the refitting and up-grading of the kitchen fittings to include high quality integral fittings, alterations to door openings and the up-grading and improvement of all the electrical, heating and plumbing services. In his view "the flat is now arranged, fitted and equipped to an extremely high standard."

21. Mr Semken for the Respondent submitted at the hearing and later in writing that the approach of the Applicant's valuer had wrongly equated "decoration, modernisation and presentation" of the flats with "improvements". Decoration and repair, as required by the terms of the lease, does not constitute "improvements". He relied on the case of Shalson v Free Grammar School of John Lyon [2004] 1AC 802, a decision under the Leasehold Reform Act 1967. Quoting Hague on Leasehold Enfranchisement, he said that the concept of "improvement" requires the introduction to the premises of something different in kind so as to alter the premises, rather than merely keep them in repair. Even if works do constitute "improvements" by reason of being physical changes not falling within the tenants' obligations under the lease, it does not follow that they add value. Decorative flooring, high cost sanitary and other fittings, for example, are of an essentially cosmetic nature reflecting the personal

taste of the particular tenant. Moreover, they are essentially ephemeral and subject to changing fashions.

22. Mr Semken considered that each improvement relied upon by the Applicant's valuer should have been identified specifically, and each item should have been considered individually as to whether they add value. He argued that the Applicant had not proved any improvement adding value, so as to enable such element to be brought into account in the valuation exercise, within the terms of the statutory provisions.

23. For the Applicant, Mr Cowen accepted that the Applicant's Surveyor Mr Asbury had not conducted an exercise of valuing each individual improvement for each individual flat. However, in evidence Mr Asbury had clearly identified the improvements which had been carried out to the flats. Further, he also stated in evidence that he was aware that the improvements had been carried out by the tenant or her predecessor. He had then attached his best estimate of value to those improvements.

24. Mr Cowen submitted that it is often wholly unrealistic for a valuer to adopt a completely scientific approach to the value of improvements, listing specific improvements and then attaching a notional value to each. In this case, Mr Asbury had used his judgement and experience to draw conclusions concerning the effect on value of the improvements as there will be no direct evidence of this effect. He had adopted a common sense approach and had based his evidence on his knowledge and significant experience of property in the Holland Park area. Mr Cowen submitted that Mr Asbury's view as to the effect on value of the improvements was measured and reasonable and ought to be accepted by the Tribunal.

Miss Ellis's evidence

25. Miss Ellis adopted an entirely different approach to the valuation of Flat F. She did not wish to use the comparables proposed by Mr Asbury, because in her view too many adjustments were required. She preferred to value Flat F by reference to the sale of Flat C in the same building. Flat C was sold for £1.5 million on 30 August 2007, about three months after the valuation date of 9th May 2007. She argued that the advantage of using

this single comparable is that it required very little time adjustment; it is in the same building and therefore requires no location adjustment; and it is on the same length lease as Flat F (69.13 years) and therefore requires no adjustment in that regard.

26. The "raw" rate at which Flat C was sold was £1,334 per square foot. Miss Ellis considered that some adjustments were needed in respect of time, the nature of the accommodation, the floor, for the "no-Act world" assumption and for the respective sizes of the flats.

27. Miss Ellis put the benefit of the Act at about 3% of the sale price, putting the "no-Act world" value of Flat C at £1,455,000 or £1,294 per square foot. The Tribunal should mention at this point that Mr Asbury had not made any adjustment for the Act because he had calculated the leasehold value of Flat F by looking at the share of freehold value and working back, whereas Miss Ellis looked at leasehold values from the outset (and had then worked forward to calculate the share of freehold value).

28. Both valuers agreed that adjustments for time should be made using the Savill's index for PCL West Flats. That index decreased to 98.9% between the Flat C sale date of August 2007 and the valuation date of May 2007. This produced a time-adjusted rate of £1,280 per square foot for Flat F.

29. Miss Ellis made no adjustments for the different nature of accommodation between the two flats, considering that the various factors of difference balance each other out. However, she did make an additional 2% (say £25 per square foot) adjustment to reflect the fact that Flat C is on the second floor with no lift, whereas Flat F occupied half of the ground floor. This ultimately produced an adjusted rate of £1,305 per square foot for Flat F. With an agreed area of 634 square feet, Miss Ellis's valuation of Flat F on its current lease in the no-Act world was £827,370, but rounded down to £825,000 (compared with Mr Asbury's £600,600).

30. Miss Ellis then utilised a relativity rate of 86% (discussed below) to arrive at a share of freehold value of £960,000 (compared with Mr Asbury's £660,000).

The Tribunal's decision on values

31. The parties' valuers approached the capital valuation from two different directions: Mr Asbury derived his figures from the share of freehold values of comparable flat sales in the area, whereas Miss Ellis derived her figures from the leasehold value of the sale of Flat C within the building. It was therefore difficult for the Tribunal to compare like with like.

32. Miss Ellis was relying exclusively on the sale price of Flat C, which the Tribunal felt carried risks, given that no-one knows what is in people's minds when they purchase a property. Mr Asbury was against drawing any comparison with the sale of Flat C. He said that Flat C had 1990 fittings and that the "improvements" were dated. Flat C was a larger flat on the second floor of the building and the price achieved appeared to be exceptional given its location on the second floor without a lift. He also pointed to the lower heights of the ceilings in Flat C and the fact that any resident would have to negotiate the staircase to reach the flat.

33. Miss Ellis said that the sale of Flat C was not exceptional. The Flat had been sold to an off-shore company. She did not look at other sales, because she considered Flat C to be sufficient. She argued that people do not pay £1.5 million for a flat without knowing what they are doing.

34. The Tribunal's view is that the sale of Flat C appears to be a one-off, certainly by comparison with the other properties in the comparable Schedule in Appendix G of Mr Asbury's report.

35. As to the location of Flat C, Miss Ellis submitted that 86 Holland Park was better situated than other properties which Mr Asbury relied upon as comparables. However, the Tribunal considered that 85 and 87 Holland Park, which were on either side of the subject property, were equivalently located and 89 Holland Park was very similar, so that location itself could not explain the substantial price paid for Flat C.

36. Amongst the sales relied upon by Mr Asbury in his Appendix G, were five sales of ground floor flats in other buildings in the Holland Park area. Two of those sales were of Flat 5 at 85 Holland Park, in January 2003 and September 2007. The Tribunal considered that the location was so similar

to the subject property that on location grounds there could be no objection to their use as comparables. The other ground floor flats were at 57 Holland Park, which is a corner property directly opposite the subject property, somewhat wider, with a south-facing garden and an acceptable view. The Tribunal also took the opportunity to look at 32 Holland Park, where two ground floor flats had been sold in January 2006. Although the building itself was very similar to the subject property, the Tribunal accepted that it was further away than any of the other comparables involving sales of ground floor flats and that no. 32 did not appear quite as attractive a property.

37. On the whole, the Tribunal preferred the evidence of Mr Asbury, who had taken a number of different properties in the area, recording similarities and differences, whereas Miss Ellis had limited herself to one flat as a comparable, although the Tribunal did have regard to the comments she made about that property.

38. In Flat F, the Tribunal accepted that there were some improvements. The Tribunal agrees that there is an obligation to repair Flat F, but the problem when deciding between improvements and repairs is the lack of evidence about the previous condition of the flat, before improvements were carried out. The evidence with regard to improvements was too vague. Neither party presented any evidence as to what the flat had looked like beforehand. In the Tribunal's view the en-suite bathroom was clearly an improvement, but generally the evidence overall on this point was inconclusive

Calculations

39. The Tribunal has listened to all of the evidence presented by the valuers. It considers that there are arguments for and against relying simply on Flat C to reach a valuation of Flat F, but considers that there is a danger that such an approach amounts to cherry-picking of a high value sale.

40. The Tribunal agrees that some flats are better located than others. Some flats overlook the tennis courts, some have south facing gardens and some are on a noisier road than others.

41. The Tribunal considers that Holland Park is such a niche market that the precise location was not as important to a purchaser as the fact of being in Holland Park itself. Purchasers, if they had a choice, might seek out, for example, a flat with a better view or with a south facing garden, or on a quieter part of the road. As there was so little choice in the Holland Park area, these options are rarely open to a purchaser, who will therefore pay what the market commands.

42. The Tribunal has looked at the numerous sale particulars annexed to Mr Asbury's report, as well as the schedule of comparables. In the Tribunal's view there is often little to distinguish one flat from another. These also have the advantage of being sales with a share of the freehold, thus eliminating the need for No Act World adjustments.

43. When considering the sales of ground floor flats, which are put forward as comparables, the Tribunal was not inclined to include the very old sale of Flat 5 at 85 Holland Park in January 2003.

44. The Tribunal's approach was to take an average of all of those comparables in Appendix G, except for the basement and third floor flats, which the Tribunal considers were not appropriate as comparables. The Tribunal has looked at the average sale prices for flats on the ground floor and compared them with those on the first and second floors, and found that overall there was not a great deal of difference.

45. The Tribunal therefore concluded that there were a great deal of swings and roundabouts between the 10 properties on the ground, first and second floors, which appeared in Appendix G. The Tribunal used the adjusted square footages supplied by Mr Asbury in Appendix G and valued Flat F at the rate of £1,193 per square foot. The agreed area is 634 square feet, which puts the value of Flat F in hand to the freeholder at £756,362. As to improvements, the Tribunal noted that the comparable properties were at all stages of improvement: from unmodernised through to excellent condition, and the Tribunal considered that these even themselves out.

Issue no.2: Relativities

46. The parties' valuers contended for relativities of 91% on the part of the Applicant and 86% on the part of the Respondents. The Tribunal was given a copy of the Beckett and Kay Graph of Graphs, which plots the results of relativity research carried out by a number of practitioners (including an average of LVT decisions). The Beckett and Kaye compilation suggests that the appropriate relativity for leases with 69.13 years remaining is between about 83% and 93%.

Mr Asbury's evidence on relativity

47. Mr Asbury relied on the Beckett and Kay Graph of Graphs at paragraph 14.15 of his report, suggesting that the range was between 82% and 92%. He referred to the Lands Tribunal decision in Arrowdell v Coniston Court (North) Hove Ltd LRA/72/2005 to say that he could not rely upon the LVT graph (which shows an average relativity of 92% for this length of lease), based as it was upon historic decisions of the LVT as evidence.

48. Mr Asbury contended for a relativity of 91%, which he acknowledged reflects relativity at the upper end of the range of relativities indicated by the Graph of Graphs. He gave several reasons for this, namely that the subject property is in one of the capital's most prestigious residential roads, there are relatively few opportunities to acquire one-bedroom flats in this address and prospective purchasers are likely to be wealthy individuals or companies who would not be deterred by lease length. He also argued that in a residential market, which was extremely strong with rising values at the date of valuation, purchasers would be willing to pay relatively more for shorter lease flats than in more settled conditions. In his view, relativity was an elastic prospect prone to expansion or compression in differing market conditions.

49. Mr Asbury also considered the amount to be contributed in respect of Flat F, having had regard to the price that the owner of Flat G is said to have agreed to pay for a new 999 year Lease, namely the sum of £73,000. He analysed that sale in Appendix I of his report, with certain assumptions and came to the conclusion that in order to achieve a premium of £73,000 the freehold value of the flat must be £875,000 and the relativity must be

87%, neither of which he contended supported the £915,000 freehold figure or 86% relativity used in the Freeholder's valuation for collective enfranchisement purposes in respect of the similarly sized participating ground floor Flat F.

50. For her part Miss Ellis says that the sale of Flat G is not at all relevant and no conclusions can be drawn from it, because the figure had been plucked out of the air when the sale transaction proceeded after the service of the Notice of Claim, in the hope that the freeholder might achieve a better price for Flat G than would have been received in respect of Flat G as a non-participating flat in the collective enfranchisement.

51. In any event, the Tribunal took the view that the sale of Flat G was of limited benefit in coming to any valuation of Flat F, because it was not a market sale.

Miss Ellis's evidence on relativity

52. Miss Ellis maintained that there was insufficient comparable market evidence to draw conclusions about the value of a 69 year lease relative to freehold. As far as she knew, the sale of 86C was the only one in the location with a similar lease length to Flat F. Most of the flats sold in the area appeared to be held with a share of freehold and with a lease over 900 years.

53. Miss Ellis therefore fell back on settlement evidence within her knowledge and gave details of recent settlements that she had achieved on behalf of clients. She gave a list of various addresses throughout London, although the majority were in NW8. Some of the settlements were older, going back to March 2005 and all of them pre-dated the valuation date of the subject property. Their unexpired terms ranged from 67.3 to 70.04 years and the relativity range was from 84.75% to 98.2%. She then went on to analyse in each settlement her opponent valuer's opening freehold value in negotiations relating to those same properties (which were often not very far from Miss Ellis's own freehold valuation) and she concluded that a relativity of 86% at 69.13 years is reasonable, a figure which appears to be an average.

54. When asked about the lower capital values in the locations she had chosen as comparables, she said that it did not affect relativity, which was more or less the same wherever you go. For leases of 69.13 years, relativity was more or less the same and that was why her transactional evidence was as good as any.

55. In evidence Mr Asbury had emphasised that purchasers of flats in Holland Park were not dependent upon mortgages. He had argued that as the average period of ownership was about 7 years, the fact that there were only 70 years left on the lease would not affect relativity where purchasers were "non-mortgage dependent", and Miss Ellis appeared to agree with this in cross-examination.

The Tribunal's Decision on relativity

56. The Tribunal concluded that where a lease had 70 years unexpired, a person who invests will not be overly concerned about that length of lease.

57. Mr Asbury tried to analyse the £73,000 sale of Flat G. Miss Ellis said that it cannot be subject to simple analysis, because the freeholder just wished for a quick sale before enfranchisement. The Tribunal accepted that view and did not place very much reliance on the sale of Flat G.

58. Miss Ellis supplied settlement evidence within her knowledge. When the Tribunal looked at her examples more closely, those with remaining terms which were nearer to the remaining term of this property, that is to say with over 69 years unexpired, were nearer to the 88% relativity mark than the 86% that she had used.

59. Her properties were not of the same quality or in a similar location as those in Holland Park. The Tribunal accepts Mr Asbury's evidence that people buying in the Holland Park area would be more likely to be buying without a mortgage and would be less concerned about lease length.

60. For the subject Property in Holland Park, the Tribunal considers that it needs to go 1% higher. Looking also at the Graph of Graphs, the Tribunal determines that the appropriate relativity in this case is 89%. Applying this

percentage to the Tribunal's freehold value of £756,362 produces a leasehold value of £673,162 for Flat F.

Issue no.3: Value of the areas in hand to the Freeholder

3.1: Valuation of the store room

61. Mr Asbury referred to a small housemaid's closet with sink located on a half-landing between the ground and first floors. He said that the room is not immediately adjacent to any other flat in the building and so cannot be incorporated into any flat so as to enlarge the accommodation of any flat. The room is too small to be used as an occasional bedroom or study and is useful only as a cupboard in which cleaning materials used to clean the communal areas can be stored. The room may be convenient for cleaners to use, but is not essential for them to be able to discharge their cleaning duties. He made an addition to the enfranchisement price of £500 in respect of that room.

62. For her part, Miss Ellis valued what she described as the "mezzanine room" at £20,000. In her view, this room would provide useful additional storage for the lessee of any of the flats within the building or any of the surrounding buildings. She adopted what she called a "common sense approach" and in her view any local resident would be prepared to pay £20,000 for a long lease of the room, though in oral evidence Mr Asbury considered that Miss Ellis's figure was "fanciful".

The Tribunal's Decision

63. The Tribunal considers that with a building of this quality, the residents will want to employ a cleaner. The property really needs a cleaner's cupboard and it clearly has value to the residents. A purchaser of the building as a whole would want a cleaner's cupboard and would put a value on the cupboard.

64. The Tribunal was not convinced that a resident in another building in Holland Park would take a long lease of this small room. Based on what one might expect to pay for a cleaner's cupboard, at the rate of £5 per square foot and 7% in perpetuity, the Tribunal determines that the value of the room is £2,000.

3.2: Valuation of the basement room

65. Miss Ellis discusses the "room at lower ground floor level" on page 12 of her report. She says that its area was about 190 square feet. This compares with Mr Asbury in paragraph 14.38 of his report, which gives a gross internal area of the basement room of 274.4 square feet. In making her calculations Miss Ellis at paragraph 6.4 of her report then gives the basement room an area of 154 square feet.

66. Whatever the reason for these discrepancies, Mr Asbury based his valuation on the rental value of £10 per square foot if the room was used as a storeroom. He then capitalised the rental value of the room at 7% to produce a freehold valuation of £40,000. Miss Ellis valued the same room at £120,000, with the addition of £21,800 (as a correction from the printed £43,600) for the hope value of a future sale to the Lessee of Flat A at 50% of the increase in the value of Flat A.

67. In reaching her valuation, Miss Ellis relied upon the agreed value of basement Flat A at £773 per square foot. She argued that the basement room was a living space, not simply a store. She then multiplied the £773 per square foot (for Flat A) by the 154 square foot (for the basement room) to give her a valuation of £120,000, plus the hope value if the basement were to be added to Flat A in the future.

68. During the hearing, but especially afterwards in writing, the parties' counsel made submissions as to who was to be regarded as an excluded purchaser for the purpose of the calculation of the price payable for the freehold of the block. Both counsel agreed that the 1993 Act assumes that neither the nominee purchaser nor any of the tenants of the flats within the subject premises is to be regarded as a person buying or seeking to buy at the valuation date, and that this must include the owner of Flat A.

69. However, Mr Semken, for the Respondent Freeholder, sought to argue that the owner of Flat A should not be excluded from being a purchaser at any subsequent date and the fact that such excluded persons might

thereafter wish to purchase (the basement storeroom) is a factor that should be taken into account.

70. Mr Cowen for the Applicant rejected that analysis stating that the Act requires a valuer to take a "snapshot" in time as at the valuation date and the fact that the owner (of Flat A) may be in the market for the property in the future is irrelevant, because the valuation date is fixed and on that specific date, the owner (of Flat A) is not in the market. He argued that any other interpretation of the Act would bring a special purchaser back into the valuation exercise by the "back door" of a hope value, which can be realised one day after the valuation date and that would make nonsense of the true construction of the Act and the clear intention of Parliament.

The Tribunal's Decision

71. The Tribunal was faced with a problem about the square footage of the basement storeroom. Mr Asbury applied a rate of £10 per square foot per annum to rent the room and capitalised the rental value of the room at 7% over time. The Tribunal considers that the basement storeroom has a value which is more than as a room for storage.

72. While there was no planning advice before the Tribunal, the Tribunal does not see any reason why the basement storeroom should not be incorporated within the living space of Flat A at some time in the future. That being the case, it seems right to start at the agreed value for Flat A, which is £773 per square foot. In the Tribunal's view the basement storeroom is worth a proportion of that rate.

73. Bearing in mind that there is no planning permission and that costs would be involved in turning the basement storeroom into living accommodation, the Tribunal took half of the agreed value of Flat A (£773 per square foot) = £386.50 per square foot and multiplied it by the 190 square feet area proposed by the Respondent to give a value for the basement room of £73,435. This calculation allows for the fact that the basement storeroom will ultimately join with Flat A and, therefore, the Tribunal does not consider that there should be any additional amount for hope value.

74. The Tribunal, therefore, having determined the valuation matters in issue between the two parties, assesses the value of the freehold in the sum of £150,008. Full details of the valuation are set out in the Appendix to the Decision.

Additional issue: the landlord's claim for a leaseback

75. The valuers for both parties agreed that the issue of a leaseback did not affect the valuation in any way. Furthermore, it was stated in section 1 of the valuers' agreed schedule that the leaseback claimed in respect of Flat D/E was no longer sought.

76. However, despite this a dispute arose at the outset of the hearing as to whether the Respondents were still pursuing their claim for a leaseback of Flat D/E, whether they were entitled to a leaseback and whether or not the Tribunal should rule on such entitlement when determining the terms of acquisition.

77. These matters were addressed by respective counsel in subsequent written submissions by the Applicant, submissions by the Respondents and counter-submissions by the Applicant, all of which were received by the Tribunal and considered before it reached its Decision.

78. Flat D is occupied by Mrs Majubian, who is the widow of the original Freeholder the late Peter Majubian, one of the executors of his estate and one of the two Respondents. Apparently she is in her 80's and has lived in the flat for 40 years.

79. By their original counter-notice dated 13 July 2007 the Respondents claimed a 999 year leaseback of Flat D, and it was accepted by the Applicant that they were entitled to do so. However, on 26 September 2007 the Respondents granted a 999 year lease to Mrs Majubian in respect of flat D, together with parts of the common parts. The lease was later varied by the Respondents, apparently so that certain of the common parts were removed from the area demised.

80. The applicant did not dispute the respondent's right to grant the long lease in respect of flat D (although it considered it to have been an unnecessary

step, given the claim to a leaseback) but, as common areas were included in the lease to flat D, the Applicant considered that the Respondents had made a disposal in breach of the provisions of the Landlord and Tenant Act 1987, as they had failed to offer the other qualifying tenants an opportunity to exercise their right of first refusal. The Applicant also contended that the deed of variation was not retrospective, so that the allegedly unlawful disposal had not in fact been rectified.

81. On 30 April 2008 the Applicant served a Purchase Notice on the Respondents pursuant to section 12B of the 1987 Act, requiring Mrs Majubian to dispose of her interest in the lease of Flat D to the Applicant on the same terms on which it was made and for the same consideration.

82. The Respondent submitted that the lease plan had been wrongly drawn and that on its true construction the lease did not demise "prohibited parts," which the Applicant claimed triggered a right to acquire under the 1987 Act. Both respective counsel submitted that the Landlord and Tenant Act 1987 issue was an issue for the county court to decide and not for the Tribunal.

83. However, the question of whether a leaseback should be granted pursuant to the 1993 Act was very much a live issue for the Tribunal. The Applicant's case is that by virtue of paragraph 5 of Schedule 9 of the 1993 Act the Landlord is entitled to a leaseback of "...any unit contained in the specified premises which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it." The "appropriate time" is defined in paragraph 1 as "the time when the freehold of the specified premises is acquired by the nominee purchaser," namely at the time of the eventual transfer, an event which has not yet taken place. The effect of granting a lease to Mrs Majubian is to make her a "qualifying tenant" within the meaning of section 5 of the 1993 Act now, and therefore at the time when the transfer of the freehold takes place, so that in respect of Flat D, the landlord is no longer entitled to a leaseback.

84. Furthermore, the Applicant questions what premises could or should be included in any leaseback, since the original counter-notice proposed that

the basement room be included in the leaseback, but the long lease to Mrs Majubian did not.

85. For their part, the Respondents submitted that it was premature for the Tribunal to decide whether to order the grant of a leaseback or to dismiss the application for a leaseback. The first reason was that the hearing was fixed to determine valuation questions (something which the Applicant's counsel disputed strongly in his counter-submissions) and was limited to the three questions identified in the agreed Schedule signed by the valuers.

86. Secondly, he submitted that the question whether a leaseback should be granted is to be determined "at the appropriate time" (as defined above), i.e. at the date of the eventual transfer. The Respondents were entitled to keep the application for a leaseback "on foot" at present pending the outcome of the 1987 Act proceedings, that is to keep their options open. Both counsel accepted that whatever the outcome of those proceedings, any leaseback which might be granted would take effect in reversion upon the lease of Flat D, whether it be in the hands of Mrs Majubian or in the hands of the Applicant, and would therefore be of modest (if not negligible value), unless the lease of Flat D were to be surrendered or otherwise determined before the "appropriate time" (in which case it would take effect in possession and would be of substantial value).

87. In the light of that submission, counsel for the Applicant suggested that "the Tribunal rules at this stage that **if** the lease which has been granted remains in place as at "the appropriate date" then, as a matter of law, the Respondents will not be entitled to a leaseback" on the basis that would prevent there being any further delay or expenditure of costs on a point "which is almost certainly academic."

The Tribunal's Decision

88. The Applicant's Notice to the Tribunal dated 17th October 2007 was in the following terms: "We apply for the determination by a Leasehold Valuation Tribunal of the price payable and the other terms of acquisition under Section 24 of the [1993 Act]..." Paragraph 10 of the Notice refers to the

price that the Applicant considered appropriate, to which the Applicants have stated: "£129,250 allocated between the specified premises and the appurtenant premises as shown in the Notice of Claim subject to the right of the reversioner to a leaseback of the certain parts of the specified premises."

89. Paragraph 2 of the Tribunal's directions dated 6th November 2007 states that "the tenant must by 4 December 2007 return the draft transfer and leaseback (if applicable) to the landlord with any amendments shown in red."

90. At the outset of the hearing Mr Cowen indicated that he did not consider that the Respondents were entitled to a leaseback in respect of Flat D, because it was now occupied by a qualifying tenant (Mrs Majubian), but Mr Semken for the Respondents wanted to keep the application for a leaseback alive, but "parked" until after the valuation issues had been dealt with and the 1987 Act proceedings in the county court resolved.

91. The duty on a nominee purchaser to grant a leaseback is contained in section 36 of the 1993 Act. Section 36(2) states: "Any such lease shall be granted so as to take effect immediately after the acquisition by the nominee purchaser of the freehold of the specified premises." By section 91(1) "any question arising in relation to any of the matters specified in subsection (2) **shall**, in default of agreement, be determined by such a [Leasehold Valuation Tribunal]" (emphasis added), which includes in subsection (2)(b) "the terms of any lease which is to be granted in accordance with section 36 and Schedule 9."

92. Paragraph 5(1) of Schedule 9 states: "this paragraph applies to any unit contained in the specified premises which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it."

93. In the light of the above provisions, the Tribunal determines that it is necessarily seized of the question of the landlord's entitlement to a leaseback as one of the terms of acquisition and is bound to make a decision as to that entitlement.

94. The Tribunal was mindful of the dicta of Lord Justice Rix in the Court of Appeal decision of Cawthorne and others v. Micha'al Hamdan [2007] EWCA Civ 6, who commented on the statutory scheme in paragraph 29 as follows:

> "If the reversioner wants a leaseback of a flat in respect of which, at the time of the counternotice, there is not a qualifying tenant, he must say so in his counternotice. If he does so, then he will be entitled to the leaseback, so long as there is still no qualifying tenant immediately before acquisition by the nominee purchaser. (There are constraints on what a reversioner can do with the premises pending the process, under section 13, but these do not appear to preclude the landlord from granting a long lease of one flat: see Hague at paragraph 25-15, footnote 117.) Thus, the reference to the appropriate time does not extend to that moment the opportunity for the reversioner to serve a leaseback notice if he has not made proposals to that effect in the counternotice. Rather it imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counternotice, such that he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does have a qualifying tenant."

95. Accordingly, as things presently stand, the Tribunal determines that the Respondents are not entitled to a leaseback of Flat D because the current occupant, Mrs Majubian holds a long lease of the flat and is a "qualifying tenant" of it. Therefore, there is no need for the Tribunal to determine any questions relating to the terms of the leaseback proposed with the counter-notice.

96. If that position changes before the "appropriate time" namely before the transfer of the freehold to the Applicant, then hopefully the parties will agree the terms of any leaseback without the need to refer the matter back to the Tribunal.

97. The Tribunal has not been asked to approve the terms of the Transfer and assumes that this is agreed by the parties. However, if any dispute arises in relation to this, the matter may be referred back to the Tribunal.

Chairman: ..... I. Powell .....

Date: ..... 5-8-2008 .....

Leasehold Valuation Tribunal for the London Rent Assessment Panel
Section 24 Leasehold Reform Housing and Urban Development Act 1993
Determination of the Collective Enfranchisement Price in respect of
86 Holland Park, London, W11

Agreed Matters		
Date of valuation 10th May 2007		
Yield 5%		
Leases of C, F and G, expiring 23rd June 2076: Unexpired term 69.13 years		
Leases of A and B, expiring 24th December 2127: Unexpired term 120.63 years Flat D, subject to leaseback		
Value of participating flats A and B: Agreed value of term Agreed value of reversions	 5,721 7,090	 12,811
Value of non-participating flats C, D and G: Agreed value of term, Flat C Agreed value of Flat D Agreed value of term, Flat G		 2,475 Nil 2,475
Agreed value of term of participating Flat F		4,481
LVT Decision		
Reversionary value of Flat F: Unimproved value 634 sq.ft @ £1193 sq. ft. Capital value after enfranchisement: PV £1 69.13 years @ 5% 0.0343	 756,362	 25,943
Vacant possession value of mezzanine storeroom		2,000
Vacant possession value of lower ground floor room		73,435
Marriage value (for participating Flat F only: Value of freeholder's interest: £4481 + £25943 = £30424) Value after enfranchisement Less value of current lease (89% relativity) Less value of freeholder's interest MV 50%	 756,362 673,162 30,424 52,776	 26,388
Enfranchisement value		150,008