LRA/133/2006

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – Leasehold Reform, Housing and Development Act 1993 – whether appeal to take effect by way of rehearing or only by way of review – whether the price to be paid for certain property falling within section 1(2) remained in dispute for the purposes of section 24(1) – deferment rate in the light of Cadogan v Sportelli

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **DAEJAN INVESTMENTS LIMITED** **Appellant**

and

THE HOLT (FREEHOLD) LIMITED **Respondent**

Re: The Holt,
London Road,
Morden,
SM4 5AP

Before: His Honour Judge Huskinson and
A J Trott FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
On 14, 15 and 22 February 2008

Gary Cowen instructed by Wallace LLP for the Appellant
Nathaniel Duckworth instructed by Jaffe Porter Crossick for the Respondent

The following cases are referred to in this decision:

Arbib v Earl Cadogan [2005] 3 EGLR 139
Earl Cadogan v Sportelli [2006] RVR 382 and CA [2008] 2 All ER 220
Ulterra Limited v Glenbarr (RTE) Company Limited [2007] 04 EG 174
Land Securities Plc v Westminster City Council [1992] 44 EG 153
Wellcome Trust Limited v Romines [1999] 3 EGLR 229
9 Cornwall Crescent London Limited v London and Kensington and Chelsea RLPC [2005] EWCA Civ 324
Denison Close Limited v The New Hampstead Garden Trust Limited LON/ENF/717-1902.
Mathews v St Leonards Properties Limited LON/NL/4006/05
Hildron Finance Limited v Greenhill Hampstead Limited Lands Tribunal LRA/120/2006 (unreported)

DECISION

Introduction

1. The Appellant appeals to the Lands Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ('the LVT') dated 18 July 2006. This decision was made under section 24 of the Leasehold Reform Housing and Urban Development Act 1993 on an application to the LVT by the Respondent as nominee purchaser in respect of The Holt, London Road, Morden Surrey. The application was for a determination by the LVT of the terms of acquisition which remained in dispute between the Respondent, as nominee purchaser, and the Appellant, as freehold owner and landlord.

2. The Respondent's application to the LVT, which is dated 7 June 2005, stated in paragraph 11 that none of the terms of acquisition had been determined or agreed between the parties and in paragraph 12 it stated, as regards the terms which are in dispute: "the Property, the price, costs and transfer". We were told that at the hearing before the LVT it was agreed between the parties that the LVT should determine certain matters in dispute, in particular regarding price and extent of the property to be acquired, and that the parties should seek to agree the final form of the transfer in the light of the decision (with recognition of the possibility of the application to the LVT being restored should these remaining matters not be capable of agreement). It should be noted here that one of the Appellant's grounds of appeal to the Lands Tribunal is that in fact a certain matter, namely the price to be paid for the land referred to in paragraph 6 below as "the green land", had been agreed between the parties and was no longer in dispute, such that the Respondent's application to the LVT was in error when it said that none of the terms of acquisition had been agreed between the parties and such that the LVT had no jurisdiction to determine a price for this green land.

3. The nature of The Holt is described by the LVT in paragraphs 8 to 13 of its decision:

> "8. It was a three storey block circa 1930 of brick and concrete construction with primarily painted stucco finish under a part tiled covered pitched roof and part flat roof. The block was arranged on four sides of a square with an open colonnade at the London Road end on the ground floor only.
>
> 9. The block had internal staircases leading to flats on the first and second floors, with some of the flats accessed by open balconies to the front. At the rear there were fire escape balconies.
>
> 10. The block was situated in level communal grounds, with the front area given over to hard standing for car parking. The rear was landscaped with lawns, flowerbeds and mature trees.
>
> 11. To the left hand side of the block was a service road with flowerbeds which lead to car parking (which is not part of this enfranchisement save for one car parking space).

12. The area within the square of the block was roughly landscaped with a gated service road which appears to be used for emergency purposes only.

13. The common parts were basic and shabby, with plain concrete stairs without floor covering."

4. The flats in the building were all subject to one or other of two forms of lease. There were before us an example of each form, one being the lease dated 21 January 1977 in respect of flat 7 and the other being the lease of 2 July 1986 in respect of flat 33. As regards the lease of flat 7 the following provisions of the lease may be noted:

(1). The lease granted to the lessee certain easements rights and privileges as recorded in the first schedule including:

"1. Full right and liberty for the Lessee and all persons authorised by him (in common with other persons entitled to the like right) at all times by day or by night to go pass and repass over and along the service road and pathways leading to and from the main entrance of the said Buildings and the passages landings and staircase leading to the Flat

2. ....

3. The free and uninterrupted passage and running of water and soil gas and electricity from and to the Flat through the sewers drains and watercourses cables pipes and wires which now are or may at any time hereafter be in under or passing though the said Buildings or any part thereof

4. The right in common with the Lessor and the other lessees in the said Buildings to use the said communal gardens and the pathways leading thereto whilst the same shall remain as such"

(2) The lease contained a covenant by the lessee to pay a service charge equal to a percentage of the expenses of certain matters including

"The costs of keeping the communal gardens in and about the said Buildings in good order and condition while the same shall remain as such".

However while the lease contained an obligation to contribute to these costs there was not any specific covenant by the Appellant as lessor to maintain the communal gardens.

As regards the lease of flat 33 the only point of difference of the wording to which attention was specifically directed was the difference in the wording of the provisions regarding the communal gardens in that the right conferred in the first schedule was in the following terms

"The right in common with the Lessor and the other Lessees in the Buildings to use the communal garden areas or land forming part of the common parts whilst the same shall in the Lessor's absolute discretion be made available to the Lessee but so that access on foot to the Flat shall always be available to the Lessee."

5. It was accepted that at no stage had the Appellant sought to terminate the rights to use the communal gardens as described in the leases such that the communal gardens were still available for the lessees to use as at the date of the Respondent's section 13 notice mentioned below and indeed at all times thereafter (there still not having been any notice of termination).

6. By a notice given under section 13 of the 1993 Act and dated 19 August 2004 the participating qualifying tenants notified the Appellant of their proposal to acquire the freehold of The Holt. In accordance with the provisions of section 13(3) the notice specified, and was accompanied by a plan showing, (i) the premises of which the freehold was proposed to be acquired by virtue of section 1(1), and (ii) the property of which the freehold was proposed to be acquired by virtue of section 1(2)(a). The notice showed the former premises (namely the building itself) as edged in red on the plan and the latter premises edged in green (and this property which was proposed to be acquired under section 1(2)(a) is hereafter called "the green land"). In accordance with the provisions of section 13(3) the notice specified a separate purchase price in respect of (i) the buildings and (ii) the green land. The proposed purchase price for the green land was £14,000. The notice gave particulars of the proposed nominee purchaser, namely The Holt (Freehold) Limited, ie the Respondent.

7. By a counter-notice under section 21 dated 3 March 2005 given by the Appellant to the Respondent the Appellant admitted the claim to purchase the freehold of the buildings (ie the premises proposed to be acquired under section 1(1) of the Act) but gave notice that certain proposals were not accepted and made various counter proposals. The relevant text is contained in paragraphs 3 and 4 of the counter-notice and is in the following terms:

> "3. The following proposals are not accepted:-
>
> (a) That the property at which the freehold is proposed to be acquired by virtue of Section 1(2)(a) of the Act is that shown edged green on Plan No.2 and now attached to the Initial Notice and known as gardens, amenity land, drive and garage 16 The Holt.
>
> (b) That the purchase price for the freehold interest in the Specified Premises be £1,017,000.00.
>
> (c) that the purchase price for the property within paragraph 2 of the Initial Notice be £14,000.
>
> 4. In relation to the proposals which are not accepted the Reversioner's counter proposals are as follows:-
>
> (a) That the property of which the freehold is proposed to be acquired by virtue of Section 1(2)(a) of the Act referred to in paragraph 2 of the Initial Notice and shown edged green on Plan No.2 attached to the Initial Notice be:- none
>
> (b) That the purchase price for the freehold interest in the Specified Premises be £342,424.00.

(c) That the proposed purchase price for the freehold interest in the property to be acquired by virtue of Section 1(2)(a) of the Act and referred to in paragraph 2 of the Initial Notice be £nil. If, (which is denied) the Nominee Purchaser is entitled to acquire this interest in this property the proposed purchase price is £14,000."

In paragraph 5 of the counter-notice the Appellant proposed that certain rights should be granted under section 1(4)(a) of the Act over the green land, and the substance of the proposed rights were then set out in paragraph 5 of the counter-notice. Paragraph 6 of the counter-notice described certain rights which the Appellant desired to retain for itself over the specified premises and paragraph 7 of the counter-notice made proposals for certain provisions the Appellant considered should be included in a conveyance to the nominee purchaser. Paragraph 8 contained leaseback proposals.

8. On 7 June 2005 the Respondent made the application to the LVT referred to in paragraph 2 above. In due course each side prepared expert evidence and the respective experts, Mr Eric Shapiro BSc (Est Man), FRICS, IRRV, FCIArb on behalf of the Appellant and Mr B R Maunder Taylor FRICS MAE on behalf of the Respondent prepared a document entitled Statement of Agreed of Facts and Issues which was in the following terms:

"1. The attached schedule sets out details about each flat: which lessees are participating, lease term, ground rent pattern, and summary accommodation details. The information on the schedule is agreed.

2. There is an issue between the parties as to the property to be enfranchised:

- The Applicant contends for the specified premises outlined in red and the appurtenant property outlined in green on the plan attached to the Initial Notice.
- The Respondent proposes that the specified premises outlined in red shall be enfranchised but not the remainder of the property outlined in green.

3. The parties are agreed that Flats 6, 24, 26, 27, 28, 36 and 41 will be leased back to the Respondent.

4. There are issues between the parties as to the various rights to be included in the Transfer as set out in Paragraphs 5, 6 and 7 of the Counter-Notice.

5. The parties are agreed that the valuation date is the date of the Tribunal hearing.

6. There is an issue between the parties as to the yield rate for capitalising the ground rent income and the deferment rate for calculating the prospects of capital gain by reference to the method of deferring the reversion:

- The Applicant contends for 9% p.a. if both the specified premises and appurtenant property are transferred.

- The Respondent contends for 7% p.a. as the capitalisation rate for the term and 6% as the deferment rate irrespective of whether the specified premises and appurtenant property are transferred or only the specified property.

7. There is an issue between the parties as to the long lease value of each flat after enfranchisement:

   - The Applicant contends for £165,000

   - The Respondent contends for £170,000.

8. There is an issue between the parties as to the relative value of the flats with their existing lease compared with the long lease value of the flats:

   - The Applicant contends for £155,000 before adjustment for the effect of the Act.

   - The Respondent contends for 88%.

9. The parties are agreed that there is nil compensation payable under Paragraph 2(1)(c) of Schedule 6 of the Act.

10. There is an issue between the parties as to the valuation effect of the Respondent retaining the freehold interest (subject to rights) of some or all of the appurtenant property.

    - The Applicant contends that this will adversely affect both the market values of the flats and also the value which a willing buyer in the marketplace (the hypothetical investor) would be willing to pay for the freehold of that part of the property to be acquired.

    - The Respondent contends that there is no valuation effect.

11. It is hoped that the parties will agree the recoverable valuation and legal fees but, at the date of signing this Statement, no fee proposals have been made by the Respondent."

9. At the hearing before the LVT there was a dispute as to whether the Respondent was to be entitled to purchase the freehold of the green land (as opposed to merely being granted rights over the green land in pursuance of section 1(4) of the Act) and what the enfranchisement price should be. As already mentioned above there is disagreement as to whether there was any dispute regarding the price to be paid for the green land, supposing that this was to be acquired by the Respondent despite the Appellant's objection to its acquisition and reliance on section 1(4).

10. On the question of whether the Respondent should be entitled to acquire the freehold of the green land under section 1(2) the Respondent argued that the counter proposals regarding rights to be granted over the green land were insufficiently wide to confer upon the Respondent

the rights the Respondent was entitled to receive under section 1(4). It was further argued that it was not open to the Appellant to enlarge the offered rights over the green land by way of concession at the hearing. It was said the Appellant was bound by the terms proposed in the counter-notice. On this point the LVT accepted the submissions of the Respondent in paragraphs 17 to 26 of its decision. It held the offered rights in the counter-notice were too narrow and there was no power to expand them later and that the Appellant had one opportunity only to set out its proposals and that therefore the Respondent was entitled to acquire the freehold of the green land.

11. As regards the price to be paid for the green land the LVT stated as follows in paragraphs 27 to 31 of its decision:

> "27. It is necessary that the Tribunal considered the price that the Applicants have to pay for the appurtenant property. In the Applicant's notice a value of £14,000 was inserted and the Respondent in its counter-notice claimed £14,000 if its claim to retain the land was not upheld.
>
> 28. At the hearing no evidence was put forward by either side relating to the value of the land. At the inspection the Tribunal noted considerable established parking at the front of the building which they considered might have some value and so by a letter dated 16 June 2006 the Tribunal invited both parties to provide written submissions on the value of the appurtenant land.
>
> 29. By a letter dated 19 June 2006, Mr Maunder Taylor, for the Appellants, considered the value of the land and, in particular, the parking at the front of the building. He concluded that the land had no value in the market place because of the rights granted in the leases to the leaseholders which he had dealt with in detail.
>
> 30. By a letter dated 26 June 2006, Wallace & Partners for the Respondents repeated the claim for £14,000 contained in the counter-notice but provided no evidence to support that figure. Attached to their letter was a submission by Counsel solely relating to the Respondent's claim to retain the land and was, in effect, a repeat of the evidence at the Tribunal. As it did not address the issue of value of the appurtenant land, it was of no help to the Tribunal.
>
> 31. The Tribunal was persuaded by the arguments contained in Mr Maunder Taylor's submissions particularly in relation to the rights of the lessees over the land and, in the absence of any evidence from the Respondent, concluded that the land had no value in the marketplace and have included a nominal £1 in its valuation."

Accordingly the LVT included merely a nominal £1 for the purchase price of the green land.

12. The letters of 16, 19 and 26 June 2006 referred to by the LVT in this passage involved the following:

(1) A letter dated 16 June from the LVT indicating a preliminary view that the green land should be included and stating that the LVT observed during its inspection after the hearing that the area in front of The Holt is used for casual parking and stating that during the hearing neither valuer put forward any evidence of value for this land. The LVT invited either party, if it wished, to make representations on that one matter.

(2) The letter of 19 June 2006 from Mr Maunder Taylor stating that in his opinion there was no additional value for the use of the area in front of The Holt for casual parking.

(3) The letter of 26 June 2006 from the Appellant's solicitors which enclosed further submissions on the question of whether the green land should be part of the property to be purchased or whether merely rights over it should be granted (the LVT had not invited further submissions on this point). As regards the question of value the letter stated

> "With respect to the Tribunal's preliminary view that the appurtenant land should be included and any subsequent valuations resulting from this preliminary view we would advise the Tribunal that the reason the valuer's (sic) did not provide any evidence as to the value of the appurtenant land was because the same was dealt with in the Counter Notice and we refer the Tribunal to paragraph 4(c) of the Counter-Notice at page 31 of the hearing bundle. The Respondent accepted that should the appurtenant land be transferred to the Applicant the sum payable by the Applicant for the freehold interest in this land would be £14,000."

13. So far as concerns the state of the valuation evidence before the LVT regarding the green land:

(1) Mr Maunder Taylor on behalf of the Respondent prepared his valuation on two bases, namely supposing the green land were included in the enfranchisement and supposing it were not. In paragraph 10.1 he gave his opinion that the properly calculated premium 'payable for the enfranchisement, assuming the appurtenant property is included in the enfranchisement', was £214,000. In paragraph 10.2 he gave his opinion that the properly calculated premium payable for the enfranchisement, 'assuming that the appurtenant property is excluded in the enfranchisement', was £189,500.

(2) Mr Shapiro on behalf of the Appellant expressed the opinion that there was no difference in value for the flats whether the green land was retained by the Appellant (with rights granted over it to the Respondent) or whether it was included in the purchase. He noted that it was proposed that the Respondent acquired the freehold interest of the block and had rights of user over the green land. He expressed the opinion that the value of the premises to be acquired was £415,239.

14. As regards the price to be paid for the buildings the central point relevant to this appeal to the Lands Tribunal is the question of the deferment rate. The LVT took into consideration the evidence of the experts before it and also its own knowledge and the Lands Tribunal's decision in *Arbib v Earl Cadogan* [2005] 3 EGLR 139. The LVT concluded that the appropriate deferment rate was 7.5% and it calculated the price using that rate. In the result the price ultimately determined by the LVT, after the correction of an error by a correction certificate dated 13 September 2006, was £285,246 as calculated in accordance with the valuation schedule attached to that correction certificate (page 23 of the bundle).

15. The Appellant's original application was for permission to appeal on two grounds, namely the question of whether the Respondent was entitled to acquire the freehold of the green land and, if so, the question of the price to be paid for the green land. However, on 15 September 2006, shortly after the LVT's decision in the present case and prior to the determination of whether permission to appeal should be granted to the Appellant, the Lands Tribunal gave its decision in the important case of *Earl Cadogan v Sportelli* [2006] RVR 382. This prompted the Appellant to make a further application for permission to appeal seeking permission to challenge the deferment rate adopted by the LVT, it being argued that having regard to *Sportelli* a deferment rate of 5% should have been used.

16. By a decision dated 20 February 2007 (not 2006 as stated on the document) the President of the Lands Tribunal granted permission to the Appellant to appeal both upon the matters raised in the original application and also on the *Sportelli* point.

17. The parties duly submitted their statements of case. In September 2007 the parties' respective counsel prepared a Statement of Issues and Valuations. Valuation evidence was exchanged (as had always been contemplated would happen in the respective statements of case). However, in Mr Duckworth's skeleton argument to the Lands Tribunal it was for the first time argued that the appeal to the Tribunal must be treated as only an appeal by way of review such that no valuation evidence should be called and such that, having regard to this Tribunal's decision in *Ulterra Limited v Glenbarr (RTE) Company Limited* [2007] 04 EG 174, the Tribunal could not interfere with the deferment rate decided upon by the LVT. At the hearing before us we were asked to decide this point first, namely whether the hearing was merely by way of review such that no evidence should be received, because the parties had their valuers ready to give evidence and if we had decided the matter should proceed by way of review the valuers could have been dispensed with. We now turn to that point.

Review/rehearing

18. We gave our decision upon the review/rehearing point orally at the hearing on the morning of 14 February 2008. Our decision was recorded and a transcript is available if required. The parties agreed it was not necessary for the full reasoning to be set out again in this decision. We therefore set out a summary of the points raised and our conclusions.

19. Mr Duckworth based his argument upon the Practice Directions of the Lands Tribunal and in particular paragraph 5.8 which states that an application for permission to appeal must make clear whether the applicant is seeking (1) an appeal by way of review or (2) an appeal by way of review, which if successful will involve a consequential rehearing, or (3) an appeal by way of rehearing. It is stated that

> "Unless the application otherwise specifies, the application will be treated as an application for an appeal by way of review."

Mr Duckworth argued that neither of the applications for permission to appeal stated that an appeal by way of rehearing was sought and that therefore the applications must be taken as applications for an appeal by way of review and that there was nothing in the grant of permission or any subsequent documentation to alter that. We rejected that argument because:

(1) An appeal to the Lands Tribunal from an LVT is a statutory right of appeal under section 175 of the Commonhold and Leasehold Reform Act 2002, subject only, so far as the statute is concerned, to the obtaining of permission to appeal. In the present case permission to appeal was obtained. The secondary legislation, namely the Lands Tribunal Rules 1996 as amended, makes provision for applications for permission to appeal and the granting of permission to appeal. Rule 5F states

> > "If the Tribunal grants permission to appeal it may do so on such conditions as it thinks fit"

Accordingly the Tribunal can cut down the ambit of an appeal by imposing conditions. However, absent the imposition of such conditions, an appeal to the Lands Tribunal is not restricted to a review but is an unrestricted appeal under section 175 which would enable the Appellant to call evidence and to enjoy an appeal by way of rehearing, this being the normal nature of an appeal to the Lands Tribunal unless restricted by the imposition of conditions, see *Land Securities Plc v Westminster City Council* [1992] 44 EG 153 and *Wellcome Trust Limited v Romines* [1999] 3 EGLR 229.

(2) Further, and separately from the foregoing, we concluded that the Appellant's second application for permission to appeal (ie regarding the *Sportelli* point) did impliedly specify that what was being sought was an appeal by way of rehearing, because the application expressly stated that it was intended to call expert evidence, whereas on a review that would not be appropriate. Further the President when granting permission to appeal clearly contemplated that the *Sportelli* point would be available to the Appellant at the appeal (which it would not be if this was limited to an appeal by way of review, see *Ulterra v Glenbarr*).

(3) Separately from all the foregoing if, contrary to our conclusions, the present appeal was properly to be treated as an appeal by way of review when the appeal was called on on the morning of 14 February, we concluded that consistent with the overriding objective we could without prejudice to the Respondent (because the Respondent's expert witness was present and ready to give evidence) enlarge the ambit of the appeal so that it was to proceed by way of rehearing.

We indicated that we did, insofar as it was necessary for us so to do, enlarge the ambit of the appeal (our primary conclusion being that it was not necessary to do this).

20. As a result of our ruling the appeal proceeded by way of rehearing and evidence was called from Mr Ian Asbury BSc (Hons) MRICS of Chesterton on behalf of the Appellant and Mr B R Maunder Taylor FRICS MAE on behalf of the Respondent.

Issues

21. As stated in the document entitled Statement of Issues and Valuations, the three grounds of appeal before us were, when the case commenced on 14 February 2008:

1. Whether the premises to be acquired by the Respondent are to include the freehold of the green land rather than merely rights over the green land.

2. Whether the LVT had jurisdiction to consider the question of the price to be paid for the green land (supposing the freehold is to be acquired) or whether there was in fact no dispute regarding this point by reason of the parties being agreed that the appropriate figure was £14,000.

3. The question of the deferment rate to be applied in the valuation of the premises to be acquired.

The Tribunal sat on 14 and 15 February and heard the expert evidence and the full submissions of Mr Cowen in support of the appeal on these three grounds. It was then necessary to adjourn to 22 February for the case to be concluded, ie for Mr Duckworth's submissions and Mr Cowen's reply. However by a letter to the Tribunal dated 20 February 2008 the Appellant withdrew ground 1 of its grounds of appeal, thereby accepting that in any event the LVT's decision should stand insofar as it determined that the premises to be conveyed were to include the green land. In these circumstances it is neither necessary nor appropriate for us to make any findings on ground 1 (we heard no argument from Mr Duckworth on it) nor to indicate either approval or disapproval of the LVT's reasoning upon the point.

Statutory provisions

22. Section 1(1) of the Leasehold Reform Housing and Urban Development Act 1993 confers on qualifying tenants of flats contained in certain buildings (see section 3) the right to have the freehold of those premises acquired on their behalf by a nominee purchaser and at a price determined in accordance with the Act, this right being referred to in the statute as "the right to collective enfranchisement". Section 1(2) to (4) were of central relevance to this case when the appeal was opened, but this is no longer the case now that the Appellant has withdrawn ground 1 of its grounds of appeal. We nonetheless set out the previously relevant provisions of section 1(2) to (4) so that the nature of the earlier dispute regarding whether the green land was to be acquired

can be understood. It is against the background of that dispute that Issue 2 arises. Section 1(2) to (4) provides:

> "(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) ....
>
> (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."

23. Section 13 makes provision for the giving by the qualifying tenants of a notice of claim to exercise the right to collective enfranchisement. Subsection (3) makes provision as to various matters which this notice must contain including:

> "(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) ....

(b) ....

(c) ....

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

(i) the freehold interest in the specified premises ....

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

(iii) ....

Section 13(12) defines what is meant by the expression "the specified premises".

24. Section 21 makes provision for the reversioner's counter-notice. The first matter which must be stated is whether the reversioner admits the right to collective enfranchisement or whether the right is denied under section 21(2)(b) or is to be resisted under section 21(2)(c). If the counter-notice contains an admission of the right to collective enfranchisement the counter-notice must in addition comply with subsection (3), namely it must (so far as presently relevant)

"(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."

25. Section 24 of the Act makes provision, inter alia, for an application to the LVT where any of the terms of acquisition remain in dispute. Section 24(1) and (8) provide as follows:

"(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

(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)."

Issue 1:

This was withdrawn by the Appellant, see above. It is now agreed that the Respondent will acquire the freehold not only of the specified premises but also of the green land.

Issue 2: Appellant's submissions

26. Mr Cowen submitted that the question for the Lands Tribunal on Issue 2 was whether for the green land the Respondent was required to pay £1 (as decided by the LVT) or £14,000 (as contended by the Appellant). He submitted that this turned upon a point of law, namely whether having regard to the matters mentioned below the LVT had jurisdiction to determine the price to be paid for the green land (Mr Cowen submitting that the LVT had no such jurisdiction). He submitted that it was not for the Lands Tribunal to reach its own conclusion on any valuation evidence as to whether the LVT was correct in assessing the value of the green land at £1. The argument was simply that the LVT had no jurisdiction to make any determination as to the price to be paid for the green land. In support of this argument Mr Cowen advanced the following points:

(1) He drew attention to section 24(1) which is available to the parties where any of the terms of acquisition remain in dispute – in these circumstances a party can apply to the LVT for the LVT to "determine the matters in dispute".

(2) He submitted that supposing (contrary to the Appellant's primary argument before the LVT) the green land was to be conveyed to the Respondent, then there was no dispute regarding the price to be paid for the green land because both parties had expressly stated £14,000 in, respectively, the section 13 notice and the section 21 counter-notice.

(3) He submitted that a matter is in dispute unless and until a consensus is reached, but that in order to reach a consensus (so as to result in there no longer being a dispute on a particular matter) there does not have to exist the formality of a contractual agreement (compare the wording referring to a binding contract in section 24(3)).

(4) He drew attention to the wording of the section 13 notice and the section 21 counter-notice. He rejected any suggestion that the counter-notice was ambiguous or that its meaning was unclear. He contended that what in effect the counter-notice said was: if, which is denied, we are wrong about not being obliged to sell the green land then we agree your proposed price of £14,000 for the green land.

(5) He drew attention to two decisions of a leasehold valuation tribunal to the effect it is not open to a party to treat as in dispute (and therefore capable of being determined by the LVT on an application under section 24) a matter on which the parties have in fact reached consensus having regard to the terms of the relevant notice and counter-notice, see *Denison Close Limited v New Hampstead Garden Trust Limited* LON/ENF/717-19/02 and also *Mathews v St Leonard's Properties Limited* LON/NL/4006/06.

(6) He submitted that once a consensus has been reached then neither party can resile from this, otherwise one could have the situation that a notice is served and a counter-notice is served accepting all of the nominee purchaser's proposals, but notwithstanding this the nominee purchaser could still go back on some (or all) of its own proposals and refer such matters to the LVT for determination. That could not be right, especially bearing in mind that if a reversioner does not serve a counter-notice at all then the nominee purchaser can seek a transfer on the terms proposed in its section 13 notice, but cannot seek to alter these terms by referring them to an LVT.

(7) He submitted there was nothing inconsistent in the foregoing approach when compared with the judgment of Auld LJ in *9 Cornwall Crescent London Limited v Kensington and Chelsea RLBC* [2005] EWCA Civ 324 at paragraph 4 and following, where Auld LJ discusses the statutory scheme. This discussion is concerned with the scheme for negotiating items which have not been agreed on the face of the notices and should not be read as entitling either party to resile from matters which are expressly agreed.

(8) Mr Cowen submitted that the question of whether the price to be paid for the green land remained in dispute (for the purposes of giving jurisdiction to the LVT under section 24) was a question which was to be decided on the basis of the notice and the counter-notice, such that it was not open to look at subsequent events and to see whether there was, at some later time, consensus between the parties or not. Even if there was an apparent dispute between the parties at some later time this did not alter the fact that there was no dispute between the parties on the formal documents, namely the notice and the counter-notice, and it was not open to the parties to resile subsequently from that state of affairs.

(9) In any event, even if the submission in the foregoing subparagraph was wrong, Mr Cowen pointed out that the Respondent did not in any express or clear way resile from the agreement reached on the formal documents. Thus in the Statement of Agreed of Facts and Issues there is nothing stating that there exists a dispute regarding the price to be paid for the green land. Mr Cowen drew a distinction between (a) the value of the green land and (b) the value of the buildings on the basis that (i) the green land was purchased and (ii) the green land was not purchased (such that the buildings only enjoyed rights over the green land). He submitted that paragraphs 6 and 10 of the Statement of Agreed Facts and Issues were directed towards the valuation of the buildings and showed disagreement between the valuers as to the value of the buildings depending on whether the green land was or was not also purchased, but he submitted there was nothing in the document indicating disagreement as to the value of the green land itself. He further pointed out that if there had been a dispute regarding the value of the green land it could be expected that there would have been expert evidence as to the value of the green land before the LVT, but there was none. As regards paragraph 10.1 of Mr Maunder Taylor's expert report (see paragraph 13(1) above) Mr Cowen submitted that the fact that he had not put a separate figure on the green land should not be read as a contention that nothing should be paid for the green land – he submitted that Mr Maunder Taylor was simply not concerned with the value of the green land. As regards Mr Shapiro's evidence to the LVT this concentrated only on the value of the buildings.

(10) In the circumstances Mr Cowen submitted it was scarcely surprising that no evidence was called before the LVT as to the value of the green land – this was because the parties were not in dispute but instead were in agreement that, if the green land was to be sold, the price was to be £14,000.

(11) As regards the points dealt with in the LVT's letter of 16 June 2006 and Mr Maunder Taylor's response of 19 June 2006 these did not concern the general question of the value of green land but were concerned with the possibility of charging for parking on the front forecourt.

Issue 2: Respondent's submissions

27. In summary upon Issue 2 Mr Duckworth submitted:

(1) The section 13 notice and section 21 counter-notice did not give rise to any agreement on the price to be paid for the green land – thus the Respondent was entitled to treat this matter as one of the terms in dispute and to seek a decision on the point from the LVT.

(2) The conduct of the parties after the service of the counter-notice demonstrated that no agreement had in fact been reached as to the price to be paid for the green land.

(3) Even if agreement was reached on the notice and counter-notice as to the price to be paid for the green land, the Respondent was entitled to and did change its mind subsequently and resile from such agreement, with the result that the point was a matter in dispute which the LVT had jurisdiction to decide under section 24.

28. In more detail Mr Duckworth advanced the following points:

(1) Matters remain in dispute for the purposes of section 24 unless the parties reach a consensus by express or implied agreement. He accepted that such agreement does not have to have the formalities of a contract.

(2) He argued that the counter-notice was ambiguous and that no consensus could be found by reference to the notice and counter-notice. He drew attention to the express wording in paragraph 3 of the counter-notice stating that one of the proposals which was not accepted was the proposal that the purchase price for the green land was to be £14,000.

(3) He argued that, for the purpose of seeing whether an agreement in the sum of £14,000 was in fact reached, it was permissible to look at the conduct of the parties in the round after the service of the counter-notice. Doing this he argued that, by reason of the following matters, it could safely be concluded that no agreement was ever reached on the purchase price for the green land.

(4) He drew attention to the terms of the application to the LVT, which stated in paragraph 11 in response to the standard form question as to whether any terms had already been determined or agreed between the parties that the answer was "none". He drew attention to the absence of any indication in the Statement of Agreed Facts Issues that the price for the green land was agreed. He also drew attention to the absence of any such statement in the experts' reports and, in particular, to paragraph 10.1 of Mr Maunder Taylor's report where it is stated that £214,000 was the price payable for the enfranchisement assuming that the green land was included in the enfranchisement.

(5) If, contrary to his first two arguments, the proper conclusion is that an agreement was reached on the notice and counter-notice as to the price to be paid for the green land, then Mr Duckworth argued it was open to the Respondent to resile from such agreement. He argued that there might be various legitimate reasons why it would be proper for a nominee purchaser to do

so, eg if there had been some typographical error in the proposal in the notice or if a new comparable, relevant in valuation terms, had become available.

(6) In considering all the foregoing matters he argued that *Hague on Leasehold Enfranchisement* 4th Ed 27-18 was relevant. This recognised that the valuation of the specified premises usually includes the valuation of the additional land in a global figure, which was considered to be unobjectionable. It is there recognised that it is extremely difficult to put a separate value on a garden adjacent to a block of flats.

Decision on Issue 2

29. For the reasons which we now give, we are unable to accept Mr Cowen's arguments. We conclude that the LVT, having decided (contrary to the Appellant's arguments) that the green land was to be included as part of the property to be purchased by the Respondent, did have jurisdiction to determine the price to be paid for the green land.

30. The terms of the application to the LVT were wide and stated that the terms which were in dispute were "the Property, the price, costs and transfer". Accordingly the LVT had jurisdiction to determine the price to be paid for the green land unless it could be said that this was not a term of acquisition which remained "in dispute at the end of the period of two months beginning with the date on which the counter-notice .... was so given" within section 24(1) of the Act.

31. The Appellant relies on the scheme of the Act and the detailed terms of sections 13 and 21 and invites the Tribunal, on the basis of these matters, to reach a conclusion that there was no dispute regarding the price to be paid for the green land. As this argument, which seeks to restrict the otherwise broad jurisdiction of the LVT under section 24(1), relies upon the detailed and formal requirements of sections 13 and 21, it is in our view proper to test the argument by reference to the detailed wording used by the Appellant in the counter-notice. This document in paragraph 3 expressly states that certain proposals are not accepted, including the proposal that the green land shall be acquired under section 1(2) and

> "That the purchase price for the property within paragraph 2 of the Initial Notice be £14,000"

Where a technical argument is raised, seeking to exclude the LVT's jurisdiction, based on the proposition that the £14,000 had been agreed and was not in dispute, it is an unfortunate starting point for the Appellant to find that the formal document, on which it itself relies to show agreement, expressly states that the allegedly agreed sum of £14,000 is not accepted. We consider that this of itself is sufficient to entitle the Respondent to treat the price to be paid for the green land as being in dispute, such as to give jurisdiction to the LVT under section 24(1). We do not consider that the express wording of paragraph 3 of the counter-notice can be ignored by reason of the apparent contingent agreement to £14,000 contained in paragraph 4 (ie a counter proposal of the same sum namely £14,000 in the event that the green land is to be acquired).

32. The Appellant had the opportunity to agree to the Respondent's proposals regarding the green land, which were that the Respondent should acquire the green land for £14,000. However the Appellant did not take this opportunity but instead rejected the opportunity by saying that the Respondent should not acquire the green land at all. If the Appellant had agreed the Respondent's proposals for the green land (ie that the Respondent should acquire the green land for £14,000) then both parties could safely have put the green land issue wholly on one side as no longer being a point of dispute. But here the Appellant opposed the purchase of the green land and instead argued that the Respondent should only be granted rights over the green land (being rights of an arguably insufficiently permanent kind). This created a dispute on a point of substantial significance which, on Mr Maunder Taylor's evidence, would have a marked effect on overall valuation considerations. On the basis of the notice and counter-notice the Respondent was entitled to conclude that there was a substantial dispute regarding the green land and was entitled to decide to apply to the LVT to resolve (inter alia) all disputes regarding the green land. We do not consider that the Appellant, having given rise to this substantial dispute regarding whether the green land should be purchased at all, was entitled to rely on the counter-notice (despite its express wording in paragraph 3) as a contingent acceptance of the £14,000 in the Respondent's notice which bound the Respondent and required the Respondent to proceed thereafter on the basis that £14,000 was agreed for the green land if, at however remote a date, it became decided by judicial decision or by capitulation by the Appellant that the green land should be transferred after all.

33. Accordingly we conclude that there was on the face of the notice and counter-notice a dispute as to the position regarding the green land and that the Respondent was entitled to treat this as a dispute regarding all aspects of the green land, including the price to be paid for it. Accordingly the LVT had jurisdiction to determine this price and did so (namely it determined the nominal sum of £1 should be paid).

34. Having regard to the foregoing we do not need to consider the question of the extent, if at all, to which a party can resile from a position where a consensus has been reached on a particular term of acquisition on the face of the notice and counter-notice.

35. We reach the above conclusion by reference to the contents of the notice and the counter-notice alone. If however the subsequent conduct of the parties is also looked at then this serves to confirm rather than to contradict the conclusion which we have reached. We do not accept Mr Cowen's submissions that the Respondent never sought to resile from a figure of £14,000 for the green land. We have in mind (a) the terms of the application to the LVT (which stated that none of the terms of acquisition were agreed) and (b) the absence of any statement in the Statement of Agreed Facts Issues that £14,000 was agreed for the green land and (c) the contents of paragraph 10.1 of Mr Maunder Taylor's expert report to the LVT which made it clear that he was assessing a global figure to cover the entire enfranchisement (ie including the purchase of the green land) at the figure he there gave. He clearly was not assessing a figure just for the specified premises, with some other additional figure to be paid for the green land.

36. In case we are wrong on Issue 2 such that the Respondent is bound to pay £14,000 for the green land and the LVT had no jurisdiction to determine a price for the green land, then we add

the following findings. As is shown in our consideration of Issue 3 (below) we are required, on this appeal by way of rehearing, to assess the appropriate deferment rate to apply in respect of the Respondent's enfranchisement of The Holt in the light of the evidence called before us and in particular in the light of *Sportelli*. It was Mr Maunder Taylor's evidence to us that if only rights were granted over the green land (rather than the freehold of the green land being acquired) then this would have an adverse effect on the appropriate deferment rate and would result in a significantly lower total enfranchisement price. We can see force in that argument. However, we do not have to consider it in detail because it is now accepted that the green land will indeed be transferred to the Respondent. Accordingly, in performing our valuation on Issue 3 we proceed on the assumption that the hypothetical purchaser of the freehold interest in the specified premises under Schedule 6 paragraph 3 of the 1993 Act will be buying on the assumption that he will also obtain the freehold of the green land, rather than merely rights over the green land. So far as concerns the value of the green land itself, if this were in dispute it would fall to be decided under paragraph 10 of Schedule 6. However the LVT decided the value of the green land was £1 and there is no appeal against this decision as a matter of valuation, nor has any evidence been placed before us to show that the value of the green land is some greater figure. There is only an appeal against the LVT's determination on this point on the basis that the LVT had no jurisdiction to determine the price to be paid for the green land, which it is submitted must remain at £14,000 as stated in the counter-notice. Accordingly we proceed on the basis that the green land in fact does have only nominal value.

37. If we are wrong in our conclusion on Issue 2 and if the Respondent is obliged to pay £14,000 for the green land (despite it only having nominal value) then we consider that this must be taken into consideration when assessing the value of the Appellant's freehold interest in the specified premises. In short the hypothetical purchaser under paragraph 3 of Schedule 6 would only be prepared to pay a price as determined by us under Issue 3 below (involving a 5% deferment rate in accordance with *Sportelli*) if that purchaser knew he would simultaneously be acquiring the green land. However, this hypothetical purchaser would naturally wish to know how much he was being required to pay for the green land. If told that he would have to pay £14,000 for the green land, whose true value was £1, he would decrease his bid accordingly (by £13,999) for the specified premises.

38. Thus we only reach our conclusion (as to which see below) that the appropriate deferment rate for the present enfranchisement is the rate of 5% as contended for by the Appellant on the assumption that the Respondent will also be acquiring the freehold of the green land at the nominal additional cost of £1. The Appellant is not entitled to a price for the specified premises based on a deferment rate of 5% plus a further £14,000 on top for the green land.

Issue 3

39. We now turn to consider Issue 3 and the question of the appropriate deferment rate when valuing the Appellant's freehold interest in the premises to be acquired. We set out below a summary of the valuers' evidence before us, a summary of counsels' respective submissions and our conclusions. Before doing so however there is a preliminary matter to be considered

regarding the Tribunal's proper approach to this aspect of the appeal which arises out of submissions made by Mr Duckworth in relation to the burden of proof.

Burden of Proof

40. Mr Duckworth accepted, as he was bound to do, our ruling that the present appeal to the Lands Tribunal was an appeal by way of rehearing rather than by way of review. However, he argued that, consistently with the fact that this was an appeal by way of rehearing, the following principles applied:

(1) It is established by *Wellcome Trust Limited v Romines* and the various cases referred to therein, especially at p 231, that, while an appeal to the Lands Tribunal which takes place as a rehearing must be determined on the evidence presented to the Lands Tribunal, there is an onus on the Appellant to prove that the decision of the LVT was clearly wrong.

(2) Mr Duckworth accepted that if there came before an LVT today an application to decide the purchase price for the reversioner's freehold on a collective enfranchisement such as the present, then having regard to the decision in *Sportelli* it would be for the nominee purchaser to adduce evidence and satisfy the LVT that some deferment rate other than 5% should be adopted. Mr Duckworth accepted that this follows from the *Sportelli* decision.

(3) However in the present case, this being an appeal to the Lands Tribunal by way of rehearing, the burden of proof is switched. As the burden lies on the Appellant to show that the LVT's decision on deferment rate was clearly wrong, the starting point is not for the Respondent to show the existence of factors as recognised in *Sportelli* which justify a deferment rate higher than 5% – instead the starting point is the question of whether the Appellant has proved to the Lands Tribunal that the adoption of a deferment rate higher than 5% (the LVT in fact adopted 7.5%) was clearly wrong.

(4) Mr Duckworth referred to the decision in *Ulterra v Glenbarr* and submitted that this showed that the effect of the *Sportelli* decision was not automatically, and as a matter of law or necessary valuation practice, to make wrong any LVT decision on deferment rate which was greater than 5%. Instead the matter turned on evidence.

(5) Accordingly, the Appellant did not discharge the burden of showing that the LVT's decision in the present case on deferment rate was clearly wrong merely by pointing to the *Sportelli* decision. It was necessary to go further and for the Appellant to prove (the burden being upon it) that valuation evidence existed which, coupled with the *Sportelli* decision, established that the LVT's 7.5% deferment rate was clearly wrong. Mr Duckworth submitted the Appellant could only do this by proving the absence of any valuation evidence which could justify a departure from the 5% recognised as the starting point in *Sportelli*.

(6) In short the burden was on the Appellant to prove the absence of any evidence justifying a departure from 5%. The burden was not on the Respondent to prove the presence of valuation evidence justifying a departure from 5%.

(7) Mr Duckworth submitted that the Appellant had failed to prove the absence of such evidence. The consequence of this was that the Appellant had failed to establish that the LVT's deferment rate of 7.5% was clearly wrong. The result therefore must be that this rate of 7.5% must stand.

41. We are unable to accept that we should reach the conclusion Mr Duckworth invites us to reach pursuant to this line of reasoning. Our reasons are substantially those advanced in argument by Mr Cowen and are as follows:

(1) We accept that the proper approach of the Lands Tribunal is not to disturb the conclusion of the LVT upon the relevant point (here the question of the deferment rate) unless we are convinced that that conclusion is clearly wrong.

(2) We also accept that the *Sportelli* decision does not automatically and without more mean that a decision on deferment rate higher than 5% must be wrong and must be disturbed – see *Ulterra v Glenbarr*.

(3) However it is our task in this appeal by way of rehearing to examine the valuation evidence in the light of *Sportelli* and to conclude whether the LVT's decision at 7.5% for the deferment rate is clearly wrong. It is not incumbent on the Appellant to prove the absence of any considerations which justify any departure from the *Sportelli* 5%, such that unless the Appellant convinces us that there should be no departure at all from 5% then the result is that the deferment rate automatically reverts to the 7.5% adopted by the LVT.

(4) As it happens, for the reasons given at length below, we have ultimately concluded that the proper deferment rate is indeed 5%. It follows, of course, that we are therefore convinced that a deferment rate of 7.5% (as found by the LVT) is clearly wrong. We say this with no disrespect to the LVT because its decision was reached without the advantage of the detailed analysis in *Sportelli*.

(5) However if, for instance, we had concluded that there did exist some particular circumstances which as a matter of valuation justified a departure from a 5% deferment rate (such that the Appellant had failed to persuade us that no such evidence existed justifying any departure from 5%) our task would have been to consider what the proper deferment rate should be and, if having done so we were convinced that the LVT's deferment rate of 7.5% was clearly wrong, we should apply the deferment rate identified by us.

(6) We reject any suggestion that unless convinced by the Appellant that there should be no departure at all from the 5% deferment rate we must automatically conclude that the Appellant has failed to discharge the burden of showing the LVT's decision was clearly wrong with the result that the deferment rate must be fixed at 7.5%. If, for instance, we had concluded that the deferment rate

should be 6% (we have not so decided) we should obviously therefore decide this appeal by applying a 6% deferment rate.

(7) In short having regard to the valuation evidence which is analysed in detail below we are convinced that a deferment rate of 7.5% is clearly wrong and must be disturbed.

The deferment rate: evidence

42. Mr Asbury referred to the decision of this Tribunal in *Cadogan v Sportelli*. The Tribunal gave guidance that the appropriate deferment rate for flats was 5% and said that LVTs should adopt that figure "…unless compelling evidence to the contrary is adduced." The Court of Appeal in *Sportelli* [2008] 2 All ER 220 noted that the cases before the Tribunal related entirely to properties within the prime central London (PCL) area and that the evidence was directed principally to the market within that area. The Tribunal's comments upon the significance of its guidance did not distinguish between the PCL area and other parts of London or the country. The Court of Appeal said that there must be an implicit distinction between properties within and outside the PCL area and that it was possible to envisage other evidence being called in respect of different areas.

43. Mr Asbury argued that it was not sufficient for the Appellant to show that Morden was not part of the PCL area; it also had to provide evidence that the guidance given by the Lands Tribunal should not apply. In the case of *Hildron Finance Limited v Greenhill Hampstead Limited,* Lands Tribunal reference LRA/120/2006 (unreported), the Tribunal found that Hampstead was outside the PCL area but nevertheless determined that the 5% guidance given by the Tribunal in *Sportelli* should be followed in respect of a block of flats located there.

44. It was necessary, if a departure from the *Sportelli* guidance was to be sustained, to provide evidence in support of a different deferment rate. Such evidence would need to address the specific factors identified by the Tribunal in *Sportelli*, namely the length of the term, the location of the property and its obsolescence and condition. The remaining length of leases in the current appeal was approximately 69 years and so well within the parameters of the *Sportelli* guidance. The physical factors relating to the property, including its condition, were clearly reflected in its freehold vacant possession value and therefore required no adjustment to the 5% deferment rate. The leases were all subject to full service charge clauses and therefore there was no reason to suppose that the property would deteriorate in condition.

45. He felt that the property would not become obsolete because it was located in central London and the demand for it would continue into the foreseeable future. Mr Asbury considered that obsolescence would only become an issue in extreme circumstances. The risk of obsolescence to the subject property was no different than for a property in the PCL area. In both cases the parties would try and maintain the value of their investment. There was no reason that the appeal property would not still be standing in 200 to 300 years time. He did not accept that because the appeal property was not built to modern environmental standards, was over 80 years old, and was tired and shabby that it would be knocked down and redeveloped at

the end of the lease. There was no greater risk of that happening here than for a PCL property. If the building was to be demolished it would not be because of structural problems but because redevelopment had become more economic. He thought it equally likely that the property would be let out again on a long lease once the reversion had fallen in because the freeholder would be receiving a property in repair. He did not accept that the purchasers of the individual flats only took a short-term view (between 5 to 25 years) and would not care about long-term obsolescence. He felt that they would do so because they were obliged to repair the property during their ownership.

46. Mr Asbury said that any adjustment to the deferment rate would therefore only be justified by evidence that the appeal property had a materially different growth rate to that in *Sportelli.* He considered this question by analysing the growth rate for the London Borough of Merton and comparing this with the figure for the London Borough of Camden; the latter being the borough in which Hampstead is located and which the Tribunal had found in *Hildron* was not distinguishable in terms of the deferment rate from the *Sportelli* PCL area. Mr Asbury used the Halifax Bank of Scotland (HBOS) House Price Index historical data for London boroughs to make the comparison. This showed that between 1992 and 2007 the average house price in Camden increased by 428% and in Merton by 424%. He concluded from this that there was no significant difference in growth rates between the two boroughs and that there was no evidence to justify departure from a deferment rate of 5%. He acknowledged the limitations of statistical information that only went back 15 years compared with a period in the region of 50 years that was identified in *Hildron* as being required to provide a reliable indication of the long term movement in residential values so as to justify a departure from *Sportelli*. However, he pointed out that his analysis had gone back further than that used by the Appellant in *Hildron*.

47. He concluded that there were no factors that would justify a departure from the deferment rate of 5%. Factors such as location, quality, repair, condition, growth and obsolescence were all reflected in the vacant possession value. To adjust the deferment rate as well would be double counting. He said that the properties in Cadogan Square that had been considered in *Sportelli* were very expensive to maintain and that the burden of their repair, and the risk of obsolescence, was greater than it was in the case of the subject property.

48. Mr Asbury said during cross-examination that he did not accept the proposition that if future growth was reflected in the vacant possession value then the growth rates of *all* London boroughs should be the same over the relevant period, which they were not. He said that he would not expect, for instance, the growth rate of flats in Barking to be as high as that in Kensington but he thought that this difference would be reflected in the price paid for the respective properties and would be irrelevant to the deferment rate. The price paid reflected the growth rate. He was unable to comment upon whether parts of the London Borough of Merton, such as Wimbledon, that contain higher quality properties than Morden, were likely to show higher growth rates.

49. He did not accept Mr Maunder-Taylor's argument that the liquidity of prime properties was greater than non-prime. He could not see how the quality of a property had any effect upon its liquidity. In answer to a hypothetical example from the Tribunal Mr Asbury said that

in his opinion it would be as easy to dispose of a portfolio of ten blocks of flats in Barking as one block of flats in Kensington, the value of both being assumed to be £1m. He also drew attention to the potential advantage of the former investment over the latter, namely that of not having all one's eggs in one basket. Mr Asbury also doubted whether, as suggested by Mr Maunder-Taylor, prime properties were less volatile in price than non-prime. He said that whilst the best areas would go up in value first during a strong market they were more susceptible to market shocks than lesser suburban properties.

50. Mr Maunder Taylor produced a schedule which gave details of the sale of six flats at The Holt between October 1976 and September 1977. He took the average value at £8,000 as at the second quarter of 1977. The LVT found that the average long lease value of a flat at The Holt was £165,000 as at the second quarter of 2006. The average value of flats at The Holt therefore rose by 20.625 times between 1977 and 2006. This was the longest period available to Mr Maunder Taylor in which to undertake a meaningful analysis and covered both strong and weak market conditions.

51. He compared this increase with the movement of house prices generally over the same period by using the Nationwide House Price Index for older properties. Looking at the London Region as a whole (which includes all London boroughs, including PCL) this showed that values had increased by 16.897 times. He said that there were two reasons why the growth in values at The Holt was better than the London average. Firstly, when the flats were originally sold on long leases they had previously been occupied by tenants and were likely to have been sold in a condition requiring upgrading and redecoration. Subsequent sales were likely to have been after a period of individual ownership when such upgrading and redecoration had been undertaken shortly before sale. Secondly, the tone of The Holt in 1977 was predominantly one of occupation by Rent Act tenants whereas that in 2006 was one of owner occupation. Mr Maunder Taylor concluded from this analysis that the rise in the value of flats at The Holt between 1977 and 2006 was approximately the same as the London average. However, in cross-examination he acknowledged that he did not have any evidence about the background to the original sale of the long leasehold interests nor as to whether any of the original purchasers were sitting tenants. On reflection he thought that they probably were not and that the flats had been sold as and when they became vacant.

52. Mr Maunder Taylor made a comparative analysis of the growth in house prices in different London boroughs by using the HBOS House Price Index for the period March 1992 to September 2007. This showed a difference in house price growth of between 3.22 times in Bexley to 4.95 times in Wandsworth. PCL boroughs tended to be at the top of the list and low value boroughs at the bottom. The London Borough of Merton came ninth out of thirty-two boroughs with an increase of 4.31 times. He concluded that the differences in growth patterns, and therefore risk factors, reflected differences between prime and non-prime locations. From this he deduced that, were evidence available, such differences would be attributable not just to location but also to the quality of property itself. He drew support for this conclusion from the fact that in *Sportelli* two of the specific risk factors were obsolescence and deterioration.

53. The next analysis Mr Maunder Taylor undertook was of the HBOS house price data by reference to postal districts (towns) in London boroughs (although the published data did not cover the PCL area). This showed that house prices in Morden had grown by 3.48 times between 1992 and 2006 which he said suggested a lower multiple for Morden than for the London Borough of Merton as whole (4.31 times). Following questions from the Tribunal Mr Maunder Taylor accepted that this analysis had not compared like with like since the figure for Morden was taken between 1992 and 2006 whilst the figure for the London Borough of Merton was taken between March 1992 and September 2007. If the latter was analysed between 1992 and 2006 then the increase was 3.43 times, marginally less than the (roughly) equivalent figure for Morden.

54. In his final analysis of growth rates Mr Maunder Taylor again used the HBOS house price data by reference to postal districts. He divided these into four bands by 2006 value and calculated the average house price increase in each band since 1988. The results showed an increase in prices ranging from the lowest band (values less than £210,000) of 2.65 times, to the highest band (values above £300,000) of 2.99 times. He repeated the exercise for the period 1992 (a weak market) to 2006. This showed that properties in the highest band rose by less than those in the lower bands.

55. Mr Maunder Taylor relied on the results of his analyses to show two things. Firstly, that property in prime areas showed the best relative increase in value over the long term. So the more modest the location (such as Morden) the lower the growth rate compared with better locations (such as Wimbledon). He said that such additional growth supported the general principle that prime properties were more liquid than non-prime. Secondly, the figures demonstrated that the volatility of prime properties was less than non-prime when viewed over the long term and across a range of market conditions. Mr Maunder Taylor said that liquidity depended upon the state of the market. In a good market you could sell anything but in a poor market you would struggle to sell poor quality property. It was easier to sell prime properties than non-prime ones and a vendor of a prime property would expect to be able to sell more quickly and more easily.

56. The Tribunal questioned the accuracy of some of Mr Maunder Taylor's calculations and pointed out that the analysis of price changes by bands appeared to be flawed. For example the result for the London Borough of Barnet reported the price increase from 1992 (£99,000) to 2006 (£403,000) as being 3.11 times. Mr Maunder Taylor said that he had not done the calculations himself but had relied upon an assistant. He agreed that the Tribunal could not rely upon this part of his numerical analysis. However he stressed that his primary evidence was his opinion and he did not regard this analysis as the compelling part of his case.

57. Mr Maunder Taylor said that 26 of the 40 flats available on lease at The Holt had been sold since 2000. A 65% turnover in seven years was higher than the results of similar exercises that Mr Maunder Taylor had done on three other blocks of flats. He accepted that this analysis did not establish for how long each flat had been owned before sale and so did not represent the rate of turnover of any individual flat. Under cross-examination he was only able to give limited details of the three other blocks of flats where he had done similar research. He

could not remember the addresses of two of them. He said they were small blocks of converted flats. He concluded that prospective purchasers and mortgagees had a relatively short term outlook (5 to 25 years) for their investment in any particular flat, which was different to the outlook of a residential investor who is considering the vacant possession value in just under 70 years time. Using prices paid by occupiers to value the interest of the freehold reversion did not reflect the risk variability inherent in the value of the reversion at the expiry of the term. To do that one should consider the various risk factors for the long term reversionary investment.

58. Two of those risk factors were deterioration and obsolescence. Mr Maunder Taylor said that character properties in the PCL area such as that found in Cadogan Square were more likely to be conserved, maintained and updated by their owners than properties such as The Holt. For instance, properties in Cadogan Square were likely to have CCTV cameras installed to enhance security. The tenants cherished such property and might contribute towards the cost of such enhancements even though not required to do so under the terms of their leases. The Holt on the other hand was originally built to a non-prime standard probably for letting out and did not meet current environmental standards regarding such matters as heat and energy, fire escapes and staircase width. It had bare concrete staircases, poor facilities and poor services, especially when considered in the context of its assumed unimproved condition. It had no security. Mr Maunder Taylor accepted that the building would be kept in repair in accordance with the terms of the lease but considered nevertheless that the fabric of the building would age no matter how well you repaired it. Deterioration and obsolescence were risk factors that went beyond repair and The Holt had fallen behind modern construction standards and requirements. Obsolescence could be deterred by upgrading but sooner or later a building could not be upgraded any more and it would deteriorate and become obsolete. At the end of the lease in 70 years there would be a balance between site value and existing use value with the balance favouring the former once the building had become obsolete. Over the long term buildings moved towards redevelopment because they did not meet modern standards.

59. He said that the resale value of the flats in The Holt (taken by the LVT at an average of £165,000 as at the second quarter of 2006) was below the average price of flats in the London Borough of Merton (taken from the Nationwide House Price Index). He concluded that the obsolescence and deterioration risk for this type of property was higher than for the typical *Sportelli* type or other prime properties. The market for flats at The Holt only reflected the relatively short term expectation of purchasers and mortgagees who would not assume any significant change in such risk factors during their ownership. Owner-occupiers were primarily concerned about where to live in order to be accessible to work and to be in the right school catchment areas. They did not worry about capital growth. That was more the concern of buy to let investors but even they were not looking 70 years ahead. That market did not reflect the long-term view of the hypothetical investor in a 70 year reversion by which time Mr Maunder Taylor considered the flats in The Holt would be obsolete.

60. Mr Maunder Taylor said that he was asking the Tribunal to adopt the LVT's deferment rate of 7.5% on the basis that the green land was included in the transfer. If that land had been excluded then the deferment rate should have been 8.5%. The figure of 7.5% was supported by his analysis of the data, the difference between prime and non-prime properties, the rate of

sales and from a consideration of the evidence generally. In his expert opinion this was as low a rate as could be justified for a building of this quality in this location.

The deferment rate: submissions

61. Mr Duckworth advanced the arguments upon the burden of proof and the correct approach that we have already considered in paragraph 40 above. He added the following submissions.

62. The Appellant had not shown that the prospect for growth in Morden was substantially the same as for the PCL area. Mr Asbury had compared growth rates in the London Boroughs of Camden and Merton over the period 1992 to 2007. The Tribunal said in *Hildron* that a period in the region of 50 years should be looked at and Mr Asbury's chosen period was too short. Mr Maunder Taylor had shown in his evidence that there was a wide range of growth rates in London boroughs over this period with PCL boroughs typically showing higher growth rates compared with Merton. Furthermore Mr Maunder Taylor had shown that there was a difference in growth rates within the London Borough of Merton, for instance as between Wimbledon and Morden. Although Mr Maunder Taylor's analysis of growth based upon postal districts was of little assistance, Mr Asbury had produced no analysis at all and he should have made the running. Mr Asbury's results and conclusions fell well short of proving any parity between the growth rates of Morden and PCL.

63. Mr Maunder Taylor produced figures which showed that higher value properties had grown by more than lower value ones. There had been problems with his calculations but, although he could not now introduce corrected figures, it stood to reason that this would be so. This was supported by analogy with Mr Asbury's evidence in which differences had been identified between the growth rates for the London and North West regions, with London out performing. If the Tribunal accepted this argument then it followed that there should be an adjustment for the growth rate at The Holt given that the building was tired, shabby and in a less desirable area than PCL. Mr Asbury argued that any such difference was already reflected in the vacant possession value. But that was just an assertion; he had done no research and produced no supporting evidence. Mr Maunder Taylor's evidence by contrast was based upon his experience with other blocks of flats. He said that owner-occupiers were only likely to own their flat for five to 20 years and had different priorities to long-term investors in freehold reversions. The former were concerned about location, schools and transport; the latter were concerned with growth. So the prospect of different growth rates was not solely reflected in vacant possession value.

64. Mr Duckworth submitted that it was also for the Appellant to show that The Holt would not be obsolete when the leases fell in but Mr Asbury presented little or no evidence on this point. He dealt with the issue by saying that the leases contained a service charge and repairing regime that would ensure that the building was continuously maintained and would not become obsolete. This was a suspect approach and *Sportelli* had established that obsolescence could be a factor under these circumstances. Besides Mr Asbury had not inspected the property and his evidence was therefore of limited utility.

65. The LVT had described the common parts of The Holt as being basic and shabby. Mr Maunder Taylor's evidence was that the building did not meet current Building Regulations or environmental standards. It had been built for letting purposes and was outdated in design and layout. It had poor services. It was already 80 years old and would be 150 years old when the leases fell in.

66. Mr Asbury had only offered his opinion that obsolescence was reflected in the vacant possession value; he had produced no corroborating evidence. Mr Maunder Taylor on the other hand had explained why the price paid by an owner-occupier could not be taken as representative of the value to a long-term investor in the freehold reversion. The purchaser of a flat was not concerned about the condition of the property in 70 years time; the flat would have been sold several times by then. The freehold reversioner would be concerned about obsolescence and deterioration and must provide money for refurbishment or rebuilding when the leases expired. The current vacant possession value did not reflect this.

67. Mr Maunder Taylor's evidence was that prime properties were easier to sell and less volatile than non-prime. Mr Asbury disagreed but produced no evidence to support his opinion. He had not sought to compare the average time that a property was on the market in Morden compared with the PCL area. It was not enough for Mr Asbury just to say that the deferment rate should be 5%. Mr Duckworth said that it was open to the Tribunal, if there was evidence to displace a 5% deferment rate and if the Tribunal was against him on his preliminary argument in paragraph 40 above, to find a rate between that and the 7.5% determined by the LVT. However, Mr Maunder Taylor's evidence was that the 7.5% should be upheld and Mr Duckworth could not indicate what any intermediate figure should be.

68. Mr Cowen responded to Mr Duckworth's preliminary point, already considered in paragraph 41 above. He added the following submissions.

69. Mr Cowen reviewed the component parts of the deferment rate as summarised by the Tribunal in *Sportelli* at paragraph 79. He said that the Tribunal's rate of 5% took into account the factors such as growth, deterioration, obsolescence and volatility that Mr Maunder Taylor had spoken about. The Tribunal had then considered a number of specific factors. In doing so it did not restrict itself to PCL but considered questions of more general application. Locational differences of a local nature were, in the absence of clear evidence to the contrary, assumed by the Tribunal to be properly reflected in the freehold vacant possession value. Only exceptionally would obsolescence and deterioration not be fully reflected in such value.

70. Turning to the evidence Mr Cowen said that Mr Asbury had spoken to the 5% deferment rate that the Tribunal had said in *Sportelli* should act as guidance unless compelling evidence to the contrary was adduced. There were no specific factors that were not reflected in the 5% deferment rate or the vacant possession value and none that would justify departure from it. Mr Asbury had shown, using the HBOS House Price Index, that between 1992 and 2007 prices in the London Borough of Merton had performed as well as those in the London Borough of Camden. The block of flats that was the subject of *Hildron* was located in the London Borough of Camden and, being in Hampstead, was considered by the Tribunal to be in a prime

area. The London Borough of Camden was not a random comparator as Mr Duckworth had suggested. The comparison was reasonable and did not mislead. The block of flats in *Hildron* was of a similar age (1930s) to that in the current appeal. In *Hildron* Mr Maunder Taylor argued for a deferment rate of 8% but his evidence was not considered compelling and the Tribunal maintained 5%.

71. Mr Maunder Taylor's evidence was not compelling in this case. Very little of it related specifically to The Holt as opposed to the vast majority of similar blocks of flats in London. His analysis of the increase in the value of flats at The Holt compared with London generally over the period 1977 to 2006 had shown that The Holt had outperformed by 20%. That analysis, whilst not taken over a period of 50 years or so favoured in *Hildron*, was nevertheless taken over a long period of 29 years, the longest period of data that was available. Mr Maunder Taylor had adjusted the data so as to conclude that the rate of growth of the price of flats in The Holt matched, rather than exceeded, the average growth of prices in London as a whole. But his adjustments were speculative and had not been based on research. The fact that The Holt was rundown and shabby did not mean that it was a poor investment. It had good communications, offered affordable accommodation and had performed extremely well.

72. Mr Maunder Taylor's other evidence was flawed not just because of his arithmetical errors (which, significantly, were substantially wrong and called his conclusions into question) but also because it had not dealt with the issue of whether The Holt should be treated differently from the guidance in *Sportelli*. He accepted that the London Borough of Merton had performed reasonably well between 1992 and 2007 – it was in the top third of London Boroughs – and having said that this period began in a weak market subsequently described it as a boom period. Mr Maunder Taylor had undertaken an analysis of growth by reference to postal districts but had failed to make any comparison with PCL properties. In any event his figures were awry and were not particularly helpful. His comparison between growth in Morden and in the London Borough of Merton was shown to be wrong. Mr Maunder Taylor had not produced any evidence that the real rate of growth of flats in The Holt was lower than for PCL properties.

73. Mr Cowen criticised Mr Maunder Taylor's analysis of sales at The Holt from which he had concluded that there was a higher turnover than expected by comparison with three other blocks of flats that he had analysed. He had looked at the volume of sales over the period 2000 to 2007, a timescale that elsewhere he had said was not representative because it was a boom period. His analysis revealed nothing about how long individual flat owners had owned their properties. He had not identified the other three blocks of flats in his report but during cross examination it became clear that they were in different areas (two of them being in Hammersmith and Ladbroke Grove) and were small conversions (into four to six flats) rather than large, purpose built blocks. In percentage terms one would expect there to be less sales over a relatively short period. Mr Maunder Taylor's conclusions had been based upon evidence that did not support them. It would be wrong to say that he had given the Tribunal helpful empirical evidence. At the end of the day Mr Maunder Taylor's evidence about growth was founded upon his opinion and that was neither compelling nor convincing.

74. Mr Maunder Taylor had not been specific about factors that affected the long-term freehold reversionary investment. His report had generalised about prime and non-prime properties but had not focussed upon The Holt, its location or this type of building. This suggested that the deferment rate should be adjusted for any building that was not prime. Mr Maunder Taylor's conclusions about volatility had been undermined by the confusion over the figures he had used when analysing property growth by value band.

75. Mr Cowen submitted that Mr Maunder Taylor's evidence about depreciation and obsolescence was unconvincing. The Holt was a solid, brick built 1930s block of flats situated in a good area with excellent transport links. It was not accepted that the building would be obsolete in 70 years. The fact that it did not meet modern environmental standards did not matter. 99% of London flats were similarly deficient, including those in Cadogan Square. The absence of lifts, services and security was shared by a vast number of properties and there was nothing that took The Holt out of the normal run of such buildings. A long-term investor would take a view now whether the property would be obsolete in 70 years time. Mr Asbury said that such an investor would have capital security because of the demand for the property and the possibility of its refurbishment or redevelopment.

76. Mr Cowen submitted that there was no basis for Mr Maunder Taylor's decision that the deferment rate should be increased by 1% from 7.5% to 8.5% if the green land were to be excluded from the sale. There should be no distinction in the deferment rate depending upon whether or not the green land was included. On a procedural point Mr Cowen said that there had been no cross appeal and that consequently the Tribunal was restricted in its decision to between 5% (*Sportelli*) and 7.5% (the LVT decision). He urged the Tribunal to accept the guidance in *Sportelli* and to determine the deferment rate at 5%.

The deferment rate: conclusions

77. The starting point for the consideration of the deferment rate is the decision of this Tribunal and the judgment of the Court of Appeal in *Sportelli*. The Tribunal determined that the generic deferment rate for flats should be 5%. This conclusion was reached in connection with properties that were in the PCL area but it gave guidance that this rate should be used generally by LVTs "unless compelling evidence to the contrary is adduced" (paragraph 121). The Holt is neither a prime property nor located in central London. The Court of Appeal held that there was an implicit distinction between the PCL area and other parts of London and the country. Carnwath LJ said at paragraph 102:

> "The judgment [of the Tribunal] 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 limitation 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 properties in different areas. That

will be a matter for those advising future parties, and for the Tribunals, to consider as such issues arise."

78. The question for us to determine, therefore, is whether, upon the evidence before this Tribunal, a departure from the 5% deferment rate determined in *Sportelli* is justified. That rate comprises three elements: a risk free rate of 2.25% from which a rate of real growth of 2% is deducted and a risk premium (for flats) of 4.75% is added. The risk free rate is not disputed in this appeal and the evidence is directed at the other two elements.

79. Mr Maunder Taylor argued that prime properties in a prime area showed the best relative increase in value over the long term. In our opinion his evidence did not support that conclusion. His analysis of the change in the value of flats in The Holt compared with the value of older residential property in London generally from 1977 to 2006 showed that The Holt had outperformed by 20%. He sought to rationalise some of this increase and concluded that the rise in the value of The Holt had matched the average of London properties. Such rationalisation was speculative and based upon assumptions that he amended in cross-examination (see paragraph 51 above). The analysis was conducted over a 29 year period which covered both strong and weak markets. Whilst it is less than a period in the region of 50 years that this Tribunal thought in *Hildron* would be required to provide a reliable indication of a long term movement in residential values it is considerably longer than the period used in the other analyses put before us and had the benefit of relating specifically to data about the appeal property itself. We find this analysis useful and we give weight to it.

80. The remainder of Mr Maunder Taylor's evidence on this point was undermined by errors in his arithmetical calculations. He concluded that the postal district of Morden performed less well (3.48 times) than the London Borough of Merton (4.31 times) over the period 1992 to 2007. But the figure he gave for Morden was that for 1992 to 2006. When the two figures were expressed on the same basis it was seen that Morden had performed slightly better than the borough as a whole. The analysis of changes in value by band was shown to be unreliable and Mr Maunder Taylor conceded that we should not rely upon it. We do not do so. He also said that the resale value of flats in The Holt was below the average of flats in the London Borough of Merton as a whole. But no evidence of the latter was given to us. None of the data from published sources contained in Mr Maunder Taylor's report relates specifically to flats and the Nationwide House Price Index, upon which he relies, does not provide such figures broken down by London borough. (The HBOS House Price Index, which does provide such a breakdown, does not do so by house type, eg flats.)

81. Mr Asbury's evidence on the real rate of growth was confined to a comparison between the respective growth rates of the London Boroughs of Merton and Camden, the latter being the Borough in which the appeal property in *Hildron* was located, and which the Tribunal, in respect of its precise location in Hampstead, described as prime. We do not place weight upon this comparison because both boroughs contain a variety of residential areas and no separate data by postal district was available for Hampstead to allow a more refined analysis. The period of the comparison was short (1992 to 2007) and commenced in a weak market. As such

it did not come close to satisfying the criteria identified in *Hildron* as being necessary for a reliable comparison of long term growth rates.

82. The evidence before us does not establish that the long term growth rate of The Holt is likely to be materially different from that determined in *Sportelli* and we therefore adopt the rate of 2% as the real rate of growth applicable in this appeal.

83. The Tribunal in *Sportelli* identified the individual components of the risks of investment in long reversions as volatility, illiquidity, deterioration and obsolescence. Of these the Tribunal said that physical deterioration and obsolescence were factors that were required to be reflected in the generic deferment rate (through the risk premium element) to the extent that the risk related to them is common to all residential property viewed in the long term. However, the Tribunal said that consideration should also be given to whether the generic rate needs to be adjusted in any case for specific factors.

84. Mr Maunder Taylor submitted that The Holt was particularly susceptible to obsolescence for the reasons we have recorded at paragraphs 58 and 59 above and that the risk premium should be adjusted accordingly. He argued that investors in the hypothetical reversion would have a longer-term outlook than purchasers who bought the individual flats for owner occupation or as buy to let opportunities. Consequently, the prices paid by the latter should not be used to value the reversionary interest of the former.

85. The Tribunal in *Sportelli* said:

> "As with location, while we do not rule out the possible need to adjust the deferment rate to take account of such matters as obsolescence and condition, we think that it would only exceptionally be the case that such factors were not fully reflected in the vacant possession value and the risk premium. Evidence would be needed to establish that they were not fully reflected in this way." (Paragraph 91)

We are not persuaded that the age, physical condition, design and construction of The Holt are such as to constitute an exception to the Tribunal's comment that these are factors that will be fully reflected in the vacant possession value and the (generic) risk premium. We accept, following a site visit, that the property is tired and shabby and is not built to modern standards. However, those are factors that are already accounted for in the price and it seems to us that this is not a building that is specially prone to the risk of deterioration and obsolescence. Mr Maunder Taylor's comments about the ability and willingness of tenants in PCL properties such as Cadogan Square to contribute towards improvements to the common parts does not alter our view. Such enhancements are likely to be reflected in the vacant possession value of the individual flats, with tenants paying more for a flat in a building that enjoys these amenities and attracts tenants with an ability and willingness to contribute in this way.

86. Mr Maunder Taylor assumes that the hypothetical investor in the reversion would be investing for the long term and would take a view now about future obsolescence. But that is not the behaviour of the hypothetical investor as described by the Tribunal in *Sportelli*:

> "... We do not, however, accept that in the market that we have to envisage there would be any significant number of investors who would be looking to hold these very long term assets throughout their lives. The attraction of the investment would be its relative security, the prospect of growth and the opportunity for long term retention and earlier sale. Tradability would, we think, be important as one of its components, and it is this that will make the volatility of the housing market and the relative illiquidity of the investment significant factors in the mind of a purchaser." (Paragraph 76)

Under these circumstances it seems to us that the price paid for the flats by owner-occupiers is fairly representative of the reversionary vacant possession value since the investor will not necessarily have a materially different time horizon for holding his investment.

87. If, as suggested by Mr Maunder Taylor, the hypothetical investor holds the investment for the long term then any increase in the risk premium to allow for the investor's exposure to the risk of deterioration and obsolescence would be offset by a reduced exposure to the volatility and illiquidity of the property market – the two factors said by the Tribunal in *Sportelli* to have the major impact on the risk premium. As the Tribunal stated:

> "... If the market was composed, or contained a substantial number, of people who intended to hold the reversion to term the fluctuations in residential property prices and the illiquidity of the investment would have very little influence. The investor would simply lock away the investment, and the passage of time would iron out the fluctuations. The illiquidity would have no influence because the investment would not be sold." (Paragraph 76)

88. We comment briefly upon Mr Maunder Taylor's analysis of what he described as the rate of turnover in the flats at The Holt. Crucially, that analysis did not say anything about how long individual flats were held and it cannot be used to support a view about the length of time that owner-occupiers stay in the property. The comparison with three other blocks of flats was weak. Mr Maunder Taylor's recall of the detail of those properties was slight and, in any event, they appeared to be small conversions rather than purpose built blocks. We attach no weight to this part of his evidence.

89. Mr Maunder Taylor's evidence about volatility rested upon his analysis of value by property band. We have already found, upon his admission, that this is not reliable. Mr Maunder Taylor said that his primary evidence was his opinion rather than his analysis but such opinion needs to be objectively supported and it was not. The same may be said about Mr Maunder Taylor's conclusions about liquidity, which he founded upon an erroneous analysis of the index figures. Without the benefit of reliable empirical data Mr Maunder Taylor's evidence amounted to little more than an assertion. Without wishing to denigrate his acknowledged experience in this field, we consider that Mr Maunder Taylor's opinion does not constitute the type of compelling evidence that is required to warrant a departure from the guidance contained in the *Sportelli* decision.

90. The Tribunal in *Sportelli* said:

> "The application of the deferment rate of 5% for flats ... 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." (Paragraph 123)

We are not satisfied on all the evidence before us that there are any such particular features in this appeal that would justify departure from the deferment rate for flats laid down in *Sportelli* and we therefore determine the deferment rate in this appeal at 5%.

Disposal

91. For the reasons set out above we reach the following conclusions regarding the three issues which were originally before us:

(1) As regards Issue 1 this was withdrawn by the Appellant. As a result the Respondent is to acquire the freehold of the green land as well as the freehold of the specified premises.

(2) As regards Issue 2 we conclude that the LVT did have jurisdiction to make a decision as to the price to be paid for the green land, which it fixed at the nominal figure of £1. We have separately concluded that, even if we were wrong on this point, the Appellant would not in any event have been entitled to a deferment rate of 5% as well as £14,000 on top for the green land. The deferment rate of 5% is only appropriate on the assumption that the enfranchisement includes the green land for which only a nominal £1 extra is payable.

(3) As regards Issue 3 we conclude that the appropriate deferment rate is 5%. To that extent the Appellant's appeal is allowed.

92. Understandably no application for costs was made by either party.

Dated 2 May 2008

His Honour Judge Huskinson

A J Trott FRICS