LRA/91/2007

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – whether price enhanced by value potentially available from a redevelopment of the building into a single house – extent of risks regarding ability to obtain vacant possession and carry out such redevelopment – how such risks would affect properly advised hypothetical purchaser – Leasehold Reform, Housing and Urban Development Act 1993 section 61 and Schedule 14 – Local Government and Housing Act 1989 section 186 and Schedule 10

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT AREA

BETWEEN **THE EARL CADOGAN** **Appellant**

and

2 HERBERT CRESCENT FREEHOLD LIMITED **Respondent**

Re: 2 Herbert Crescent
London SW1X 0HA

Before: His Honour Judge Huskinson and
A J Trott FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 16, 17, 18 and 19 February 2009

Anthony Radevsky instructed by Messrs Pemberton Greenish for the Appellant
Thomas Jefferies instructed by Maxwell Winward for the Respondent

The following cases are referred to in this decision:

Horford Investments v Lambert [1976] 1 Ch 39
Marks v British Waterways Board [1963] 1 WLR 1008
Cadogan v Sportelli [2008] UK HL 71
Family Management v Gray (1979) 253 EG 369
Office of Telecommunications v Floe Telecom Limited [2009] EWCA Civ 47
Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39

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 19 April 2007 whereby it decided that the price payable by the Respondent to the Appellant for the enfranchisement under Part I of the Leasehold Reform Housing and Urban Development Act 1993 for the collective enfranchisement of 2 Herbert Crescent ("the Building") was £2,164,946 as set out in the schedule to its decision.

2. The Building is a substantial terraced building comprising a basement flat ("the Basement Flat"), a ground floor flat ("Flat 1") and two upper maisonettes one on the first and second floors and the other on two upper floors. The entire building is the subject of a headlease dated 29 September 1949 for a term of 60¼ from 24 June 1949 – thus the term date is 29 September 2009. This headlease is at present vested in Mrs Marks. As regards Flat 1 this is held by a lessee whose predecessor exercised the right to acquire a new lease under Chapter II of Part I of the 1993 Act. This lease is dated 7 April 2003 and demises Flat 1 for a term expiring on 25 September 2099. As regards the upper maisonettes these are held by their respective lessees under underleases (their immediate landlord being Mrs Marks) for a term expiring on 26 September 2009. It is the two lessees of the maisonettes who constitute the participating tenants for the purposes of the collective enfranchisement. The Respondent is the nominee purchaser. The Appellant is the freehold owner of the Building. Mrs Marks holds her headlease direct from the Appellant.

3. As regards the Basement Flat the headlease of the building includes a user covenant by the lessee not to use or permit the Basement Flat to be used otherwise than as a caretaker's flat and storerooms for the tenants of the other parts of the Building. The evidence before the LVT led it to conclude that the Basement Flat probably was Mrs Marks' principal residence (LVT decision paragraph 34). A question arose before the LVT and arises before the Lands Tribunal as to the prospect (considering the question as at the valuation date) that at the term date of the headlease the headlessee (be it Mrs Marks or some assignee) will enjoy security of tenure under the provisions of the Local Government and Housing Act 1989 section 186 and Schedule 10 (replacing the former protection provided by the Landlord and Tenant Act 1954 Part I). A concession was made before the LVT on behalf of the Appellant that any purchaser of the Building would run the risk that the headlessee would establish rights of occupancy, it being conceded that the landlord did not have a right to possession under the 1989 Act. Thus the concession was that the protection of Schedule 10 of the 1989 Act will be available to Mrs Marks provided only that she satisfies the requirement of occupying the Basement Flat as her only or principal home. It was not argued before the LVT, having regard to the nature of the headlease and Building which was thereby demised, that Mrs Marks did not hold a dwellinghouse let as a separate dwelling such that she was unable to enjoy an assured tenancy under the Housing Act 1988 and could in consequence enjoy no protection under Schedule 10 of the 1989 Act. This point having been conceded in the LVT the Appellant, when applying for permission to appeal to the Lands Tribunal, sought permission to withdraw this concession and to argue that having regard to the facts surrounding the headlease and the principles of law in *Horford Investments v Lambert* [1976] 1 Ch 39 Mrs Marks could not claim to enjoy a tenancy whereby a dwellinghouse was let as a separate dwelling and accordingly could enjoy no security of tenure under the 1989 Act Schedule 10 or the Housing Act 1988. Permission to raise this argument was refused. The appeal before us proceeded upon the basis that this concession remained in place – there was no attempt to reopen this argument. We have proceeded accordingly, but in

doing so we are not to be taken as making any finding that Mrs Marks can indeed claim the aforesaid security of tenure.

4. The LVT recorded the matters which were agreed before it and the matters which fell to be decided by it in paragraphs 4, 5 and 6 of its decision which are in the following terms:

> "4. A number of issues have been agreed between the parties and a number also remain to be determined. The following matters have been agreed:-
>
> - The valuation date is the 16 August 2005.
> - At the valuation date the unexpired term of the headlease was 4.12 years.
> - The head-rent payable under the headlease is £10 per annum for which the capital value to the freeholder has been agreed at £37.
> - In respect of the head leasehold interest the profit rent has been agreed at a capital value of £483.
> - The extended lease value of the four properties has been agreed as follows:-
>
> 1) The basement caretaker's flat £525,000
> 2) Flat 1 on the ground floor at £695,000
> 3) Flat 2 disregarding improvements £1,100,000
> 4) Flat 3 (no improvements to disregard) £1,000,000,
>
> giving a total value for the extended lease of £3,320,000.
>
> 5. The following matters required determination:-
>
> - The value of the existing leases for the participating tenants in the maisonettes, disregarding any improvements.
> - The deferment rate to be applied.
> - Whether the present freehold value in the premises at the date of valuation would be higher if restored to a single family house as opposed to the continued existing use.
>
> 6. The question of the conversion to a single family house raised some sub-issues which are as follows:-
>
> - The security of tenure of the person occupying the Caretaker's flat.
> - The provisions of Section 61 of the Act.
> - The likelihood of planning permission being required and if required, granted."

5. The LVT decided the existing lease values of Flats 2 and 3 and also made a finding as to deferment rate. There is no challenge to these findings. The LVT further decided:

1. The value of the Building as at the valuation date as a house with full vacant possession was £4.2m (LVT decision paragraph 30).
2. The value of the Building redeveloped as a single house was £7.6m
3. Planning permission would in all probability be granted for the conversion of the Building into one house (if planning permission was indeed required).

4. There were problems facing any purchaser of the Building in respect of getting vacant possession bearing in mind (a) the prospect of that Mrs Marks would enjoy security of tenure in the Basement Flat, (b) the potential problems of obtaining vacant possession of Flat 1 and the associated problems of the potential compensation claim by the lessee of Flat 1, and (c) the prospective costs of the development.

5. The LVT concluded that the difference between the value of the freehold reversion in the Building on the basis that the Building remained as four units of accommodation and the value of the freehold of the Building on the basis that full vacant possession was available was insufficiently great to persuade any prospective purchaser to increase its bid for the Building to reflect the prospects of developing the Building back into a single house. The LVT concluded at the end of its decision:

> "We therefore conclude that it is appropriate to value the property on the basis that it would continue to be utilised as four flats and that the potential to convert to a house does not have sufficient 'profit' to persuade us that is the valuation that we should attribute to this property."

6. It is accepted between the Appellant and the Respondent that the LVT was in error in assessing the developed value of the house at £7.6m – the agreed figure is £8.3m. The nature of the error made by the LVT is reflected in the President's observations when granting permission to appeal:

> "Development value. In paragraph 30 of the LVT's decision it concluded that the value of the property as a single house at the valuation date was "around £4.2m". This figure was derived by applying a rate of £760 psf to a floor area of 5527 sq ft. This floor area included the area of the vaults because, the tribunal said, they were of value. In paragraph 31 it concluded that the value of the property as a single house after development would be in the region of £7.6m. It reached this figure by applying a rate of £1500. Using a floor area of 5527 sq ft this would produce £8.3m, but in refusing permission to appeal the LVT said that it had used a floor area exclusive of the vaults. The lack of any explanation as to why it did this, having previously concluded that the vaults were of value and should be included in assessing the undeveloped value, is potentially prejudicial to the applicant. Its conclusion in paragraph 37 that a potential profit of £1m would be insufficient for a developer to acquire the property for the purposes of conversion could well have been different if the potential profit to be considered was £1.7m. It is appropriate in my view that permission to appeal should be given to enable the determination of the appropriate value to take for the developed house and the effect, if any, that this would have on the price. Permission is confined to this issue."

As noted, permission was refused to withdraw the concession made in the course of the LVT hearing regarding the ability of Mrs Marks to claim security of tenure in relation to the Basement Flat. The President ordered that the appeal would be by way of rehearing. There has been no cross appeal by the Respondent.

7. After the Respondent served its statement of case in this appeal the Appellant took objection to certain strands of argument apparently advanced therein and wrote a detailed letter of objection dated 7 April 2008. The Respondent's solicitors replied by letter of 21 April 2008. The only point that needs be noticed at the moment is that in this letter of reply the Respondent, through its solicitors, referred to the decision in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 30 and stated:

"That case was concerned with the question of whether a Respondent could seek a more favourable price than that determined by the LVT. **Our client is not seeking to do that**, although in *Arrowdell* the Tribunal decided that it had a discretion to entertain submissions to that effect."

(Our emphasis)

We mention this because at the hearing before us the Respondent sought to contend that the price fixed by the LVT should in fact be decreased. The Appellant objected to this proposed argument, contending that having regard to this exchange of correspondence it was not open to the Respondent to do so.

8. For the purposes of the appeal before the Lands Tribunal the parties have helpfully produced a document entitled Statement of Facts and Issues. So far as concerns the matters in dispute before us the following may be noted:

(1) There is a dispute as to the true value of the Building at the valuation date on the basis it is valued as a freehold with vacant possession (and thus available for redevelopment into a house). The Appellant says £4.2m while the Respondent says £3.9m. Whether one or other of these figures (or some figure in between) is correct it is common ground that the value of the Building with vacant possession (and without any problems in the way of a development, either in the nature of problems in obtaining possession or in obtaining planning permission) is substantially more than the value of the freehold of the Building on the basis that the Building continues to be configured as flats.

(2) It is common ground that the hypothetical purchaser of the Building (ie for the purpose of assessing the price payable for the freehold in accordance with the Sixth Schedule paragraph 3 to the 1993 Act) would consider that there was a risk involved that planning permission might be required and might not be obtained for a conversion into a single house. However there is a dispute between the parties as to the extent of this risk and as to what allowance should be made to reflect it.

(3) There is a dispute between the parties as to the extent to which the hypothetical purchaser of the Building would be deterred from purchasing the Building with a view to redeveloping it back to a house by the risks involved arising from doubts as to whether the purchaser would be able to obtain vacant possession of the Basement Flat and Flat 1 and as to the time scale and payments, by way of compensation or otherwise, that would be required in order to secure vacant possession.

(4) As a result of the foregoing there is a dispute between the parties as to whether there is a sufficient difference between the freehold value of the Building configured as flats (ie as at present) and the freehold value of the Building with vacant possession (and with the ability to convert to a single house) to justify a purchaser in making any additional bid for the Building over and above the price which the purchaser would pay for the Building in its existing configuration as flats and on the basis that it would continue to be so configured. The Respondent contends that having regard to the amount of the potential profit available and the extent of the difficulties (which the Respondent contends are substantial and off-putting) no additional bid would be made such that the price to be paid for the enfranchisement should be assessed by reference to the value of the freehold of the Building on the basis that the Building remained

configured as flats (this is the basis on which the LVT assessed the price payable). The Appellant contends that the potential difficulties of obtaining possession are comparatively minor and that a price should be fixed by reference to the value of the Building with vacant possession and with the ability to develop it into a single house (but with certain modest deductions therefrom).

9. We heard oral evidence from the following witnesses:

(1) Mr Gary Martin French FRICS of Friend & Falcke, Surveyors and Valuers, on behalf of the Appellant. He gave evidence to the effect that the value of the Building with vacant possession and the potential to reinstate it to a single dwellinghouse was £4.3m. However he adopted the value which the LVT had found, namely £4.2m, because he recognised that the Appellant did not seek to challenge this figure of £4.2m.

(2) Mr Julian Clark MRICS of GeraldEve on behalf of the Appellant. He produced a valuation showing the price to be paid by the Respondent for the enfranchisement and he dealt with the extent to which the vacant possession value of £4.2m (as provided to him by Mr French) should be adjusted to reflect any risks regarding any planning difficulties or delays or problems in obtaining vacant possession.

(3) Mr Michael Lee MRICS of Shaw & Co (Surveyors) Limited for the Respondent. He gave evidence that the freehold value of the Building was £3.9m supposing there was vacant possession and it was available for conversion into a single dwellinghouse. He also assessed the extent of the problems for a prospective purchaser in obtaining planning permission and vacant possession of the Basement Flat and of Flat 1 and he analysed how these matters impacted upon the amount a hypothetical purchaser of the freehold of the Building would pay.

(4) Mr Geoffrey Tyler FRICS on behalf of the Respondent. He gave evidence as to the likely extent of the works which would be involved in converting the Building into a single house and as to the likely level of costs per square metre which would be incurred.

Statutory provisions

10. A crucial ingredient in the calculation of the price to be paid by the Respondent is the value of the freeholder's interest. In relation to this it is provided by Schedule 6 paragraph 3 as amended to the 1993 Act as follows:

> "3. (1) Subject to the provisions of this paragraph, the value of the freeholder's interest in the specified premises is the amount which at the valuation date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls within sub-paragraph (1A) buying or seeking to buy) on the following assumptions –
>
> (a) on the assumption that the vendor is selling for an estate in fee simple –
>
> (i) subject to any leases subject to which the freeholder's interest in the premises is to be acquired by the nominee purchaser, but
>
> (ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the nominee purchaser;

(b) on the assumption that this Chapter and Chapter II confer no right to acquire any interest in the specified premises or to acquire any new lease (except that this shall not preclude the taking into account of a notice given under section 42 with respect to a flat contained in the specified premises where it is given by a person other than a participating tenant);

(c) on the assumption that any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and

(d) on the assumption that (subject to paragraphs (a) and (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the conveyance to the nominee purchaser of the freeholder's interest is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to Schedule 7.

(1A) A person falls within this sub-paragraph if he is –

(a) the nominee purchaser, or

(b) a tenant of premises contained in the specified premises, or

(ba) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 1(2)(a), or

(c) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 2(1)(b)."

11. So far as concerns the ability for the freeholder to obtain possession of Flat 1 (which is held for a lease expiring in 2099) so as to enable a development to take place at or soon after the term date of the headlease (ie September 2009) section 61 of the 1993 provides as follows:

"(1) Where a lease of a flat ("the new lease") has been granted under section 56 but the court is satisfied, on an application made by the landlord –

(a) that for the purposes of redevelopment the landlord intends –

(i) to demolish or reconstruct, or

(ii) to carry out substantial works of construction on,

the whole or a substantial part of any premises in which the flat is contained, and

(b) that he could not reasonably do so without obtaining possession of the flat,

the court shall by order declare that the landlord is entitled as against the tenant to obtain possession of the flat and the tenant is entitled to be paid compensation by the landlord for the loss of the flat.

(2) An application for an order under this section may be made –

(a) at any time during the period of 12 months ending with the term date of the lease in relation to which the right to acquire a new lease was exercised; and

(b) at any time during the period of five years ending with the term date of the new lease.

(3) ....

(4) Where an order is made under this section, the new lease shall determine, and compensation shall become payable, in accordance with Schedule 14 to this Act; and the provisions of that Schedule shall have effect as regards the measure of compensation payable by virtue of any such order and the effects of any such order where there are sub-leases, and as regards other matters relating to orders and applications under this section.

(5) ...."

12. Schedule 14 to the 1993 Act makes detailed provision regarding the operation of section 61. In summary the scheme is as follows. The landlord applies to the county court for a declaration of entitlement to obtain possession. If such a declaration is made, then it is necessary for the amount of compensation to be determined either by agreement between the landlord and the tenant or by the leasehold valuation tribunal. Once the amount of compensation has been determined then an application can be made to the county court to make an order fixing the date on which the lease is to determine and the compensation is to be payable. Provision is made that on the termination of the lease under an order for possession there shall terminate also any immediate or derivative sublease and the tenant is bound to give up possession of the flat in question to the landlord. There are provisions contemplating that the landlord is entitled to deduct from the amount of compensation payable the amount of any rent arrears or other sums due and payable by the tenant to the landlord.

13. Paragraph 5 of Schedule 14 deals with the assessment of the compensation payable to the tenant for the loss of his flat and provides as follows:

"5. (1) The amount payable to a tenant, by virtue of an order for possession, by way of compensation for loss of his flat shall be the amount which at the valuation date the new lease, if sold on the open market by a willing seller, might be expected to realise on the following assumptions –

(a) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;

(b) on the assumption that the vendor is selling –

(i) subject to the rights of any person who will on the termination of the lease be entitled to retain possession as against the landlord, but otherwise with vacant possession, and

(ii) subject to any restriction that would be required (in addition to any imposed by the terms of the lease) to limit the uses of the flat to those to which it has been put since the commencement of the lease and to preclude the erection of any new dwelling or any other building not ancillary to the flat as a dwelling; and

(c) on the assumption that (subject to paragraphs (a) and (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the flat will be held by the landlord on the termination of the lease.

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made as to the matters specified in paragraphs (a) to (c) of that sub-paragraph does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the valuation date the new lease might be expected to realise if sold as mentioned in that sub-paragraph.

(3) In determining any such amount there shall be made such deduction (if any) in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer.

(4) In this paragraph "the valuation date" means the date when the amount of the compensation payable to the tenant is determined as mentioned in paragraph 2(1)."

14. Section 61 forms part of Chapter II of Part I to the 1993 Act. Section 40 provides as follows:

"(1) In this Chapter "the landlord", in relation to the lease held by a qualifying tenant of a flat, means the person who is the owner of that interest in the flat which for the time being fulfils the following conditions, namely –

(a) it is an interest in reversion expectant (whether immediately or not) on the termination of the tenant's lease, and

(b) it is either a freehold interest or a leasehold interest whose duration is such as to enable that person to grant a new lease of that flat in accordance with this Chapter,

and is not itself expectant (whether immediately or not) on an interest which fulfils those conditions.

(2) Where in accordance with subsection (1) the immediate landlord under the lease of a qualifying tenant of a flat is not the landlord in relation to that lease for the purposes of this Chapter, the person who for those purposes is the landlord in relation to it shall conduct on behalf of all the other landlords all proceedings arising out of any notice given by the tenant with respect to the flat under section 42 (whether the proceedings are for resisting or giving effect to the claim in question).

(3) Subsection (2) has effect subject to the provisions of Schedule 11 to this Act (which makes provision in relation to the operation of this Chapter in cases to which that subsection applies).

(4) In this section and that Schedule –

(a) "the tenant" means any such qualifying tenant as is referred to in subsection (2) and "the tenant's lease" means the lease by virtue of which he is a qualifying tenant;

(b) "the competent landlord" means the person who, in relation to the tenant's lease, is the landlord (as defined by subsection (1)) for the purposes of this Chapter;

(c) "other landlord" means any person (other than the tenant or a trustee for him) in whom there is vested a concurrent tenancy intermediate between the interest of the competent landlord and the tenant's lease.

(5) ...."

15. The opening words of section 61 refer to the new lease having been "granted under section 56". Section 56 is the section containing an obligation, once certain requirements are satisfied, for the new lease to be granted. Section 56(1) provides:-

"(1) Where a qualifying tenant of a flat has under this Chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42, then except as provided by this Chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept –

(a) in substitution for the existing lease, and

(b) on payment of the premium payable under Schedule 13 in respect of the grant,

a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease."

Section 57 makes provision as to the terms on which the new lease is to be granted. Subsection (7) provides that the terms of the new lease shall (inter alia) –

"... reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with secton 61."

16. The 1993 Act contains separate provisions to deal with the situation where at the date that a tenant seeks an extended lease the landlord has an intention to redevelop the premises once the lease has terminated and wishes to oppose the grant of a new lease. It is not necessary to set these provisions out in detail but the following may be noted. A landlord's counter notice under section 45 is required to state (if this is the case) that the landlord intends to make an application for an order under section 47(1) on the grounds that he intends to redevelop any premises in which the Flat is contained. Schedule 11 to the Act makes detailed provision for the situation where the competent landlord is not the tenant's immediate landlord and requires the competent landlord to be responsible for the service of the relevant notices and makes provision for certain acts by the competent landlord to be binding on other landlords. Provision is made to allow other landlords to act independently and as regards the obligation of other landlords to the competent landlord. Paragraph 9(1) of Schedule 11 makes a special provision in respect of applications made by other landlords under section 47(1):

"(1) The authority given to the competent landlord by section 40(2) shall not extend to the bringing of proceedings under section 47(1) on behalf of any of the other landlords, or preclude any of those landlords from bringing proceedings under that provision on his own behalf as if he were the competent landlord.

(2) In section 45(2)(c) any reference to the competent landlord shall include a reference –

(a) to any of the other landlords, or

(b) to any two or more of the following, namely the competent landlord and the other landlords, acting together;

and in section 47(1) and (2) references to the landlord shall be construed accordingly; but if any of the other landlords intends to make such an application as is mentioned in section 45(2)(c), whether alone or together with any other person or persons, his name shall be stated in the counter-notice."

17. So far as concerns the Basement Flat it is provided by the Local Government and Housing Act 1989 section 186 and Schedule 10 thereto that the protection conferred by the schedule applies to a long tenancy of a dwellinghouse at a low rent in respect of which for the time being the qualifying condition is fulfilled, that is to say that the circumstances (as respects the property let under the tenancy, the use of that property and all other relevant matters) are such that, if the tenancy were not at a low rent, it would at that time be an assured tenancy with the meaning of Part I of the Housing Act 1988.

18. The only qualifying condition which it was suggested by the Appellant might not be satisfied by Mrs Marks as at the term date of the headlease was the condition that she occupied the Basement Flat as her only or principal home.

19. If Schedule 10 to the 1989 Act does apply to a tenancy, then it does not come to an end on the term date but instead will continue until brought to an end in accordance with the provisions of Schedule 10. This can be accomplished by the landlord serving a notice on the tenant specifying the date at which the tenancy is to come to an end (being either the term date or a later date) and either proposing an assured monthly periodic tenancy or giving notice that, if the tenant is not willing to give up possession at the term date, the landlord proposes to apply to the court on one or more of the specified grounds for possession of the property and states the ground or grounds on which he proposes to apply. The only potentially available ground for possession in the present case is that set forth in Ground 9 of Schedule 2 to the Housing Act 1988, namely on the ground that suitable alternative accommodation is available for the tenant or will be available when the order for possession takes effect.

20. The existing long tenancy will continue in accordance with the interim continuation provisions set out in paragraph 4 of Schedule 10.

Evidence

21. Both parties relied upon an analysis of comparables as their primary valuation method, although Mr French for the Appellant and Mr Lee for the Respondent also prepared residual valuations. They did so in response to the LVT's decision which was partly based upon a consideration of the costs of development. However, neither expert produced a residual valuation or cost evidence before the LVT and it was at the LVT's initiative that costs were examined. Neither expert before us relied upon their residual valuation. Mr French said that he had submitted his residual in response to that of Mr Lee and that he had been asked to highlight his concerns. He did not support the use of the method. Mr Lee said that his residual valuation did not change his opinion of value that was based upon the comparable evidence. He said that such evidence should take precedence. Since neither expert favours the residual valuation method, and given this Tribunal's well-documented reluctance to use it, we do not consider the parties' residual valuations in detail.

22. As we stated in paragraph 6 above the parties agreed that the LVT incorrectly calculated the freehold value of the redeveloped Building as a single house at £7.6m. The correct figure, including the area of the vaults, is £8.3m. There is no such consensus between the valuers about the freehold value of the Building at the valuation date with vacant possession and available for conversion into a single house.

23. For the Appellant Mr French said that an analysis of comparable sales supported his original valuation before the LVT of over £4.3m for the freehold value of the Building with vacant possession (FHVP) for restoration to a single house. This figure was obtained by multiplying the area (including vaults) of 5,527 sq ft by a capital value of £785 per sq ft. It assumed vacant possession and did not reflect any allowance for planning risk or the risk of obtaining possession of the Basement Flat or Flat 1. The Appellant had not appealed the LVT's decision on this point and had accepted its valuation of £4.2m.

24. Mr French cited eight comparable transactions but only relied upon five of them. The evidence was restricted to freehold houses with vacant possession, which were sold in the market as properties for refurbishment. He made adjustments to the sales figures for time, size and location. Only the time adjustments were agreed with Mr Lee.

25. In describing the market at the valuation date Mr French said that there were a number of houses being refurbished at that time of which 3 Herbert Crescent was the first to be sold in November 2005. Mr French described the sale price as an "extraordinarily high figure" of £1,540 per sq ft. He said that this sale established that there was by then a significant demand for very large houses that had been refurbished to a high standard. It was not an isolated sale but reflected a trend that local developers had already recognised but which was not picked up in the published price indices due to the inherent time lag in the way they were constructed.

26. 47 Hans Place was sold in October 2004 for an adjusted rate of £751 per sq ft, a figure that was agreed by the parties. 53 Hans Place sold in September 2005 at a capital value of £761 per sq ft which reflected a minus 5% adjustment for its superior location compared with the Building. Mr French denied that No.53 had extra value due to its potential to add another floor, arguing that this would involve the loss of a valuable roof terrace which would balance out any development value. 25 Lennox Gardens (including Clabon Mews) sold in November 2005 for £789 per sq ft. This included a plus 10% adjustment to reflect the property's much larger area (10,846 sq ft) and a minus 5% adjustment to reflect its superior location. 10 Herbert Crescent sold in April 2006 for £774 per sq ft, reflecting only a time adjustment. Mr French did not accept that this property was worth more because it was double fronted. He pointed out that there were no windows facing Pavilion Road and that the irregular (triangular) floor plan was a deterrent. On balance he thought that no other adjustments were justified. 11 Herbert Crescent was a leasehold sale at £2.7m in April 2006 followed by an enfranchisement of the freehold at £1.7m, giving a total of £4.4m which devalued, adjusting for time, to £852 per sq ft. Mr French accepted that this comparable was not an open market freehold sale and his analysis was based upon presumptions about the parties, for instance that the purchaser of the freehold was acting with professional advice. When asked by the Tribunal whether he thought that this comparable should be given the same weight as the others he replied that he was "just trying to show what was paid at that time."

27. The average capital value of the five comparables was £785 per sq ft. Mr French accepted in cross-examination that his devaluation of the comparables excluded the vaults from the floor space area (with the exception of 53 Hans Place) whereas his valuation of the appeal property at £4.3m had included the area of the vaults.

28. Mr Clark used Mr French's evidence to inform his valuations under Schedule 6 of the 1993 Act. He considered whether the appeal property would be worth more for continued use as flats or as a single house. In both alternatives he allowed 5% of the FHVP value of the Basement Flat to reflect the risk of the tenant holding over as an assured tenant at a market rent. In his primary valuation of the Building as a house he added a year to the deferment period to allow for court proceedings in respect of the section 61 notice at Flat 1 and assessed the compensation payable to the tenant of that flat at £674,000. Mr Clark calculated that the present value of the reversion to a single house, based upon its FHVP of £4.2million, was £2,726,305, which was £593,746 above the present value of the reversion for continued use as flats (£2,132,559). He then deducted 5% of this difference (£29,687) from the house value to allow for the planning risk associated with the conversion of flats to a single house. This produced a revised present value of the reversion to a

single house of £2,696,618. Using this figure Mr Clark went on to calculate the enfranchisement price at £2,707,550.

29. Mr Clark accepted that in the real world a purchaser would take legal advice about the prospects of obtaining vacant possession of the Basement Flat and Flat 1 and would price his bid in the light of it. If he could not get such vacant possession then he would value the property as flats. He acknowledged that he had not allowed anything for the principle of whether a ransom value might be payable to obtain possession and had not allowed for costs. He said that in his alternative valuation JMC4 he had looked at the possibility of the tenant of Flat 1 demanding a ransom and had concluded that realistically this would be 10% of the difference between the FHVP value for a house (£4.2m) and the FHVP for flats (£3.32m), making a ransom payment of £88,000. He also accepted that the tenant of Flat 1 would ask for his transfer costs to be paid and he estimated these at £56,000. He agreed that the developer would pay up to half of the uplifted value created by converting the Building to a single house and that the developer would proceed as long as he could obtain his 10% developer's profit on the cost of the conversion works (a percentage that was agreed between the parties). Mr Clark had not specifically considered the possibility that the basement tenant's rent would be some two-thirds of the market rent in the event that the caretaker provision in the lease were to be retained and he acknowledged that the tenant might be more likely to stay on as a consequence. He accepted that the tenants of the Basement Flat and Flat 1 might both seek to hold a developer to ransom but he doubted that the developer would be prepared to pay all of the uplift to them.

30. Mr Clark was asked to comment on the evidence of the Respondent's planning witness, Mr Jonathan Wright, before the LVT. He said that the local planning authority (the Royal Borough of Kensington and Chelsea) were not wholly consistent in their approach to proposals to change flats into single houses. He did not accept Mr Wright's view that a prospective purchaser would telephone the local planning authority, be told the council's position (which, Mr Wright said, was one of opposition) and leave it at that. The purchaser would write to the council. He gave an example of such correspondence contained in the trial bundle where a prospective purchaser of 11 Egerton Place (a similar property to the Building) had written to RBKC in November 2005 about a proposal to convert four units into a single residence. The council had replied that no planning permission was required. Mr Clark said that a purchaser would need to act lawfully and would have to obtain either confirmation that planning permission was not required or planning permission. He concluded that there was a good chance that planning permission was not required, but if it was then it was likely to be granted. He supported this view with a schedule of nine planning decisions that he had obtained from the RBKC website. All but one of these, ranging in time from January 2004 to January 2007, had approved proposals to convert from flats into a single house (whether by formal application, issuing a certificate of lawful existing use or by letter in response to an inquiry). He noted that the council's policy H17 was to resist the loss of small units, but none of the flats under consideration in this appeal fell into that category. He allowed 5% for planning risk, but the comparables upon which he relied had been sold without planning permission so that any planning risk was already reflected in the price. He had therefore made a double allowance for such risk.

31. Mr Tyler for the Respondent said that he had been instructed to advise on the cost of converting the Building from four flats into a single occupancy house. He described the specification of the new house and explained that this had been produced following discussions with Mr Lee. It included a home cinema, a gymnasium, a new main staircase, lift, air conditioning and a swimming pool. The purpose of these assumptions was to identify the level of finishes and equipment that his comparables had been converted to. These comparables were at 28 Stafford

Terrace (which cost £333 per sq ft) and at 18 Philimore Place (£313 per sq ft). He said that the cost of converting the Building to a similar standard was £325 per sq ft excluding the lift (£80,000), air conditioning (£50,000) and swimming pool (not costed). Mr Tyler explained that his figure of £325 per sq ft was the cost of converting flats to a house or of refurbishing an existing house. There was only a nominal difference between the two. However, if the proposed works were the refurbishment of the existing flats rather than their conversion into a house then it would be possible to make a cost saving estimated by Mr Tyler at £115,000. In cross-examination Mr Tyler agreed that as his comparables involved the conversion of flats to houses the cost saving that he had identified would not arise.

32. Mr Lee also considered whether the appeal property would be worth more for continued use as flats or as a single house. In looking at the former he differed from Mr Clark only in respect of the valuation of the Basement Flat. Mr Lee applied a reduction of 25% to the vacant possession value of this flat to reflect the risk of not being able to obtain possession combined with the "significant chance" that the rent would be below market level due to the existence of the caretaker's restriction. (He estimated the rent payable under an assured periodic tenancy as between £15,600 and £18,200 per annum without the restriction and £11,700 per annum with it.) Secondly, he deferred the receipt of the adjusted vacant possession value by an extra year to 5.12 years to reflect the likely rent void. The present value of the reversion for continued use as flats was £2,031,343.

33. He did not agree with Mr French's estimate of £4.2 million as the FHVP value of the Building. He estimated it to be £3.9 million. In reaching this figure he used the same comparables as Mr French except for the settlement at 11 Herbert Crescent. He said that the addition of the leasehold sale price and the subsequent enfranchisement price for the freehold did not necessarily equate to the freehold value with vacant possession. Nothing was known about the purchaser's thoughts or intentions with regard to the transaction and it was not a reliable comparable.

34. Mr Lee therefore relied upon four comparables. The parties agreed upon the analysis of 47 Hans Place at a capital value of £751 per sq ft. They also agreed upon the floor areas of the remaining three comparables but disagreed upon the appropriate adjustments (other than for time). At 53 Hans Place both parties deducted an allowance of £100,000 in respect of a lock-up garage. Mr Lee considered that a further £250,000 should be deducted to reflect the potential of this property to add a further floor. He acknowledged that the existing roof terrace would normally have value but said that the height of the building was noticeably different to that of its neighbours. This had an adverse impact on the attractiveness of the building which would offset any benefit from the roof terrace. In his opinion there was greater demand for additional living accommodation and an adjustment to the price was required. He estimated the capital value at £755 per sq ft. He considered that the presence of a mews property at 25 Lennox Gardens would offset any adjustment for its larger size and superior location when compared with the Building. He therefore made no net adjustment to the sales price which he analysed at £754 per sq ft. Mr Lee thought that 10 Herbert Crescent was a more prestigious property than the Building since it was a prominent, double fronted corner house with a central entrance and an impressive hallway on the ground and first floors. It had a grander feel about it than the Building. He had therefore reduced the sale price by 7.5% to reflect this advantage, giving a capital value of £716 per sq ft.

35. The average of Mr Lee's four comparables was £744 per sq ft which he then multiplied by 5,376 sq ft, which he said was the floor area of the Building excluding the area of the vaults. This gave a (rounded) capital value of £4m. Mr Lee said that where a property was being sold for conversion to a single house the marketing details excluded the vaults from the measurement of the

floor area. As it was necessary to capitalise as you analyse, if the vaults were excluded from the measurement of the comparables they should also be excluded from the measurement of the Building when calculating its value for conversion to a house. When the converted property was subsequently sold the marketing particulars would then include the area of any vaults that had been incorporated into the redevelopment.

36. Mr Lee considered that the cost refurbishing a property as a single house would be greater where it was being converted from flats (as in this appeal) rather than an existing house. The comparable evidence was of refurbishments of existing houses and so, applying his experience, he made an extra cost allowance of £100,000, an amount which he said in his report was supported by Mr Tyler's evidence. This reduced the FHVP value to £3.9m. Mr Lee was invited to revise his opinion in the light of the Mr Tyler's oral evidence. He declined to do so saying that the decision to deduct the £100,000 had been his and that he had made it in his expert report to the LVT. He disagreed with what Mr Tyler had said in his evidence before this Tribunal.

37. Mr Lee adjusted his figure of £3.9 million for three factors and considered a fourth. He made an adjustment in respect of the Basement Flat to reflect the risk of the tenant holding over as an assured tenant at a market rent. Like Mr Clark he used the same figure that he had used in the valuation of the Building for continued use as flats, namely 25% of the vacant possession value of the flat. Then he deducted the compensation payable to the tenant of Flat 1 under section 61 of the 1993 Act, which he took at £675,000. Finally, he made a deduction to reflect the practical ability of the tenants of the Basement Flat and Flat 1 to hold the developer to ransom. The purchaser of the appeal property would have to take into account the risk, delay and cost of seeking possession of the flats and dealing with the compensation. Those delays and costs could be considerable. He said that in his experience finding a suitable alternative accommodation was extremely difficult, time consuming and full of uncertainty. It was expensive for the freeholder to acquire and hold such an alternative property, which would be reduced in value due to the creation of an assured tenancy. Because of these problems and their desire to use their capital to build and redevelop, developers were reluctant to become involved with re-housing tenants. Mr Lee acknowledged that the landlord could not ultimately be held to ransom by the tenant of the Basement Flat but he considered that obtaining possession had cost implications and that the landlord would take a view on reaching a financial settlement. He also accepted that the head lessee would be concerned about a potential dilapidations claim at the end of the lease. However, he said that the general condition of the Building was reasonable and that if the tenant remained in occupation the remainder of the building would be refurbished as flats in any event. There would thus be no diminution in value leading to a dilapidations claim.

38. Ultimately the amount of money that would be required to obtain vacant possession would depend upon the parties' judgment of their own negotiating strength. Mr Lee said that the developer should be prepared to pay all of the difference between the FHVP value of the Building as a single house and its FHVP value for continued use as flats and should expect to pay at least half of it. This difference amounted to £580,000 (£3.9 million less £3.32 million).

39. The fourth factor to take into account was planning risk and Mr Lee said that he had relied upon Mr Wright's planning evidence before the LVT that at the valuation date the chances of obtaining planning permission were poor. Even in the light of Mr Clark's more encouraging evidence Mr Lee felt that there was still an element of uncertainty and a risk of failure. He thought that Mr Clark's 5% allowance for planning risk was too little and that, in the light of Mr Clark's

evidence, 10% was more appropriate. However, Mr Lee made no explicit allowance for such planning risk in his valuation.

40. Taking these risks into account Mr Lee said that the present value of the reversion to a single house, based upon its FHVP of £3.9 million, was £1,958,091. This compared with the present value of the reversion for continued use as flats of £2,031,343. He concluded that the cumulative effect of all the risks would be to stop a purchaser from attributing any additional value to the hope of converting the property to a house. He therefore assumed the continued use of the Building as flats and estimated the total premium payable on that basis as £2,042,249.

Appellant's submissions

41. On behalf of the Appellant Mr Radevsky advanced the following arguments.

42. As regards the Respondent's contention that the Lands Tribunal should not merely dismiss the Appellant's appeal but should actually reduce the sum fixed by the LVT as the price payable, Mr Radevsky pointed to the correspondence in April 2008 where the Respondent had indicated that it did not seek to reduce the price payable. He contended that they should not be allowed to do so now, bearing in mind (a) this correspondence, (b) the fact that the Respondent had never sought to cross appeal, and (c) the fact that the only matter which is the subject of the present rehearing, in accordance with the grant of permission to appeal given by the President, is the question of the determination of the appropriate value to take for the developed house and the effect, if any, that that would have on the price payable – permission was not granted to reconsider the price payable based not upon any possible development value but based on the value of the freehold of the Building on the basis that the Building continued to be configured as flats.

43. In the course of his initial submissions to us Mr Radevsky indicated that he would argue that any disputed points of law, including in particular whether in the present case a purchaser of the freehold of the Building would have the right within section 61 to make an application for possession and whether, if such an application could be made and succeeded, the compensation payable should be assessed on the basis that the owner of Flat 1 enjoyed some form of ransom value, should be determined by this Tribunal and that, having so determined the points, the price payable by the Respondent to the Appellant should be assessed on the basis (if Mr Radevsky's contentions on these points were correct) that no reduction of any kind should be made for any alleged adverse effect that these points might otherwise make upon the mind of a hypothetical purchaser of the freehold reversion. He was thus minded to argue for, in effect, an all or nothing position. In relation to Flat 1 either the Appellant's submissions on entitlement to serve a section 61 notice and on absence of any ransom position (ie under paragraph 5 of Schedule 14) were correct, in which case the hypothetical purchaser of the freehold in accordance with the assessment in Schedule 6 paragraph 3 would not discount his bid at all to reflect the possible hazard of these points, or the Appellant's submissions on the points were wrong (or were wrong on one or other of them) in which case the value of the reversion should be assessed under Schedule 6 paragraph 3 on the basis that the hypothetical purchaser would assume that he would definitely lose against the tenant of Flat 1 on these point(s), rather than having some form of bargaining position on the basis that the point(s) were arguable.

44. Mr Radevsky retreated from this initial position after hearing Mr Jefferies' submission. He accepted that, while the Lands Tribunal must of course actually decide any point which arises for the

purpose of resolving the dispute between two parties (which would be the case if there was before the Lands Tribunal a tenant claiming compensation under Schedule 14 paragraph 5), the exercise in the present case is at one remove. The Tribunal does not have to resolve the dispute between a freeholder and the tenant of Flat 1 as to whether the freeholder has the right to claim possession under section 61 nor does it have to resolve, on a claim for compensation by a tenant under Schedule 14 paragraph 5, whether that tenant is entitled to a ransom position. Instead the Tribunal is concerned with the assessment of the value of the freeholder's interest in accordance with paragraph 3 of Schedule 6, which involves the valuation exercise there set forth. A person minded to bid for the freeholder's interest as at the valuation date must be assumed to be properly advised, but would not have had the benefit of any court or tribunal decision on the points at issue. Instead, assuming proper advice, the prospective purchaser would have been advised that there was a problem which (depending upon the merits of Mr Radevsky's argument as compared with Mr Jefferies' argument) was properly to be assessed as a minor problem which would little affect the hypothetical purchaser's bid or a major problem which would greatly affect it. In other words Mr Radevsky accepted it is not an all or nothing analysis, but an appraisal as to the reasonably assessed extent of the problems which a hypothetical purchaser would recognise might face him before he could obtain vacant possession and an assessment of how this would in consequence affect the value of the freeholder's interest.

45. Mr Radevsky then advanced submissions regarding the following topics:

(1) The value of the freehold of the building with vacant possession.

(2) The extent of any problems posed by the lease of Flat 1 to the prospective redevelopment to a single house.

(3) The extent of any problems posed by the headlease and the occupancy of the Basement Flat to a proposal to redevelop the building into a single house.

(4) The extent of any problems posed by any doubts regarding whether planning permission was needed and would be obtained.

46. As a preliminary submission Mr Radevsky invited the Tribunal to find Mr Lee's evidence less persuasive than that given by the experts on behalf of the Appellant. He submitted that Mr Lee was grudging in conceding what he submitted had become an obvious point, in that Mr Lee had refused to retreat from his deduction of £100,000 from the value which he would otherwise have obtained for the freehold of £4m (see paragraph 10.2.12 of his statement) despite the fact that the evidence of Mr Tyler, in reliance on which he appeared to have based this deduction, had come out quite differently before the Tribunal. In summary Mr Tyler had indicated that the potential savings which he had mentioned in paragraph 4.0 of his statement were savings in development costs which would be achieved if a building configured as flats was to be redeveloped but was to remain a building configured as flats – Mr Tyler accepted in evidence that the saving would not be available if a building configured as a house was to be redeveloped as a house or a building configured as flats was to be redeveloped as a house.

47. As regards the freehold value with vacant possession Mr Radevsky submitted that the starting point must be the LVT's decision on this point, which was in the sum of £4.2m. The Appellant had not challenged this figure and there was no cross appeal by the Respondent against it. He submitted that the Lands Tribunal should not interfere with this figure unless satisfied that the figure was wrong. He submitted that the assessment of freehold value must always be the subject of some

tolerance rather than being a mathematically precise figure and that, even if the Tribunal concluded that the proper freehold value was only £4m (he submitted that no lower figure could be adopted bearing in mind the inability of the Respondent to rely on Mr Lee's £100,000 further deduction), this figure of £4m was less than 5% smaller than the figure adopted by the LVT and that the Lands Tribunal could not properly conclude that its figure (even supposing it was as low as £4m) was the correct figure and that the LVT's figure of £4.2m was wrong. Accordingly the £4.2m should stand. Mr Radevsky also submitted that the LVT's analysis in paragraph 31 which led it to its figure of £4.2m was sound and demonstrated a proper respect for the question of whether there were or were not vaults in the Building and in the comparable which the LVT found most helpful, namely 53 Hans Place.

48. Upon the merits Mr Radevsky submitted that Mr French's analysis of the comparables was sound and that 11 Herbert Crescent provided a comparable of some value (despite the fact that it was not a sale of a freehold but was a sale of the leasehold and then a settlement of the enfranchisement value).

49. As regards Mr Lee's suggested deduction of £100,000, not only were there the points against this as mentioned above but also the comparables referred to by Mr French involved a mixture of buildings some of which were in the form of flats and some of which were in the form of houses and there had been no attempt by either valuer to adjust these to reflect the question of whether or not there was a conversion from a building in the form of flats into a single dwelling.

50. As regards Flat 1 and the entitlement to serve a notice under section 61 Mr Radevsky advanced the following arguments:

(1) The right to claim possession under section 61(1) is granted to "the landlord". Section 40 contains a definition in perfectly general terms and provides that for the purpose of the relevant Chapter the expression "the landlord" means the person as defined in section 40, namely the competent landlord. This definition applies "in relation to the lease held by a qualifying tenant of a flat". The mere fact that Flat 1 had already been the subject of a new lease did not prevent Flat 1 continuing to be the subject of a lease held by a qualifying tenant. Accordingly section 40 required that the expression "the landlord" in section 61 be interpreted as meaning the competent landlord. The competent landlord is, of course, the freeholder in the present case bearing in mind that the headlease has a very short reversion – indeed in order for a headlease to be sufficiently long for its holder to constitute the competent landlord the headlease would have to be long enough to enable the grant of a new lease in accordance with the Act, ie the headlease would have to enjoy a reversion of 90 years or more.

(2) Although there is no authority on this point, Woodfall's Law of Landlord and Tenant paragraph 29.166 contains a footnote when dealing with section 61 in the following terms:

> "It is considered that this means the competent landlord as defined by section 40(1), even though the application is made after the tenant's new lease has been granted."

Mr Radevsky also pointed out that the notes in Halsbury's Statutes and also in Hill and Redman suggested (but without any commentary) that the section 40 definition of the landlord was relevant in relation to section 61.

(3) The opening words of section 61 make reference to section 56:

> "Where a lease ... has been granted under section 56 but the court is satisfied, on an application made by the landlord ..."

Mr Radevsky submitted therefore that it was permissible when construing section 61(1) to have section 56 open at the same time. Section 56 makes provision for the grant of the new lease

> "... the landlord shall be bound to grant to the tenant and the tenant shall be bound to accept ..."

Mr Radevsky submitted that the landlord in section 56 is clearly the competent landlord as defined by section 40 and that it would be remarkable if the expression "the landlord" as used in section 56 meant something different from the expression "the landlord" when used in section 61(1) especially bearing in mind this express reference back in section 61(1) to section 56.

(4) Mr Radevsky pointed out that if the expression the landlord in section 61(1) meant only the immediate landlord (as contended for by Mr Jefferies) then the section 61 right could not be exercised where, as here, there is an intermediate lease expiring a few days after the original term date of the qualifying tenant's lease. He pointed out that the present head lease arrangements are commonplace and it would be most surprising if a freeholder were deprived of the ability to exercise the right to redevelop in these circumstances.

(5) Mr Radevsky submitted that the provision in section 57(7)(b) appears to operate to grant the right to redevelop also to an immediate landlord (provided that the immediate landlord had the relevant intention to redevelop in accordance with section 61) where the immediate landlord was not the competent landlord, eg a person with a reversion of say 70 years.

(6) Mr Radevsky advanced an alternative argument, namely that an analogy can be drawn with a landlord's section 30 notice under the Landlord and Tenant Act 1954 Part II containing the reconstruction ground of opposition. He pointed out that in *Marks v British Waterways Board* [1963] 1 WLR 1008 the Court of Appeal held that it is only necessary for the relevant intention to be established at the date of the hearing and that there could be a change of landlord between the date on which the relevant notice was served and the date at which the landlord has to show the intention to redevelop – it was held that the statement in the notice citing the reconstruction ground of opposition could be treated as a pleading as to the case which the tenant would have to meet, rather than it being necessary for it to be shown that the person who was the landlord at the date of giving the notice had the relevant intention at the date of giving the notice.

51. On the question of how Flat 1 should be valued under paragraph 5 of Schedule 14 for the purposes of calculating compensation, Mr Radevsky accepted a proposition advanced by Mr Jefferies, namely that having regard to the wording of paragraph 5 there is no direction to assume that the freeholder is not buying or seeking to buy, which can be contrasted with the situation in Schedule 6 paragraph 3 and Schedule 13 paragraph 3(2) – and the effect of this is that the price would reflect any additional price the freeholder would pay as a special purchaser, see *Cadogan v Sportelli* [2008] UK HL 71 at paragraphs 53 and 81. However Mr Radevsky submitted that, despite

the foregoing starting point, the compensation under paragraph 5 of Schedule 14 must be assessed without regard to there being any ransom value. This is because the compensation payable is assessed at "the valuation date" which is the date when the amount of compensation is determined as provided for in paragraph 2(1) of Schedule 14. The compensation is therefore determined once a declaration of entitlement to possession has already been made under section 61(1). Accordingly by the date of assessing compensation it is already known that the tenant must leave the flat. The intention of the Act is merely to compensate a tenant (of whom it is known that this tenant is compelled to leave the flat) for the loss of his lease. The tenant should therefore be paid for the value of the new lease but with no ransom, because the whole purpose of section 61 is to remove the tenant and to allow the development to proceed. The tenant should not be compensated as though there was no power to remove the tenant.

52. As regards the Basement Flat Mr Radevsky accepted that the LVT found Mrs Marks was probably residing there and operating as the caretaker. He submitted that a prospective purchaser of the freehold would not view Mrs Marks as being likely to be a substantial impediment to obtaining full vacant possession of the building because:

(1) There were certain pressures that could be brought to bear upon Mrs Marks if she was not willing to come to some early and sensible settlement which required her to vacate, namely she would be aware of her potential liability under the repairing covenant in respect of the whole building (which could be burdensome for her if there was not to be a redevelopment) and also she must be assumed to be advised (or she could be advised by the freeholder) that there was always the possibility for the freeholder of resisting any assured tenancy on the grounds that the freeholder would make available suitable alternative accommodation.

(2) There was also the question of whether Mrs Marks would be occupying the flat as her only or principal home when the headlease expires – if she was not doing so she would not enjoy any security.

(3) Even if she was to be entitled to an assured tenancy, this would be at a full market rent which might not be attractive to her. Mr Radevsky submitted that it was unlikely, in the event of a dispute as to the terms of any assured tenancy, that the rent assessment committee would consider it appropriate to continue the user covenant requiring the Basement Flat to be occupied by a caretaker for the building (that might have been appropriate in 1948 but not so now) and in that event the rent would not be depressed by the user clause.

(4) In summary Mr Radevsky submitted that Mr Clark's view was sound and that the diminution in value of the freehold reversion by virtue of the possible holding over by Mrs Marks in the Basement Flat was small and was properly reflected in Mr Clark's allowance of 5% on the value of the Basement Flat.

53. As regards the question of planning permission and whether a purchaser of the freehold of the Building, who had a view to redeveloping as a single house, would diminish his bid because of the risk of not obtaining permission Mr Radevsky submitted as follows. He pointed out that the only planning evidence before the Lands Tribunal is that given by Mr Clark. Before the LVT the Respondent called a planning expert, Mr Wright. However having heard the planning evidence including that of Mr Wright the LVT concluded as it did in paragraph 33, namely that in all probability planning permission would be granted if required. He submitted that before the Lands Tribunal the Respondent's position is weaker rather than stronger on this point, because before us

there is no planning evidence on behalf of the Respondent (it should be noted that Mr Lee accepted that he was not a planning expert and had no real planning experience). Mr Radevsky also drew attention to the enquiry made of the planning authority in respect of 11 Egerton Place in November 2005 involving a proposed conversion of that building from four residential units to one and to the reply from the Royal Borough of Kensington and Chelsea confirming that this conversion would not require planning permission. He submitted there was no reason to believe that a purchaser, interested in buying the Building with a view to redevelopment, would not have made a similar enquiry of the local planning authority and would not have received a similarly encouraging response. Mr Radevsky also pointed out that the comparables referred to by the valuers for the purpose of assessing the value of the Building with vacant possession and with a view to redevelopment into a single house were comparables which related to other buildings in respect of which there was not in existence at the time of the relevant purchase and sale any planning permission authorising the proposed conversion in those particular cases. Accordingly insofar as there was some risk of not obtaining planning permission, this risk was already reflected in the comparables because they had been sold on the same basis as the basis for the hypothetical sale of the freehold reversion of the Building on the valuation date for the purpose of the Sixth Schedule calculation, namely in no case was there actually a granted planning permission for the proposed conversions. Mr Radevsky submitted that the 5% allowance made by Mr Clark was ample.

Respondent's submissions

54. In relation to the assessment of the value of the freehold of the building with vacant possession Mr Jefferies referred to the following points:

(1) The question regarding the vaults

(2) Whether 11 Herbert Crescent should be taken into consideration as a comparable

(3) What adjustment should be made to the comparables

(4) The question of whether there should be a £100,000 deduction as contended for by Mr Lee.

55. As regards the vaults Mr Jefferies submitted the only proper approach was to exclude the vaults throughout, both in obtaining a value per square foot when analysing the comparables and when applying the rate per square foot, so obtained, to the Building. This was the only way that consistency and fairness could be achieved. He submitted that the vaults, although having some value, would have minimal value compared with the rest of the Building, but that the LVT's approach and the Appellant's approach was to attribute very substantial value to them.

56. As regards 11 Herbert Crescent he submitted that the only actual transaction was the sale of a lease at £2.7m and that an application of Savill's index/graph to this figure gives a figure way below £4.4m as adopted by Mr French from adding the premium paid for the lease with the enfranchisement price. He pointed out that it was not known what the tenant, when paying £2.7m for the property thought he would have to pay for the freehold. Also the settlement was after the valuation date. Also the email produced by the Appellant regarding the analysis of the settlement at £1.7m for the price for the extension showed that there was scope for substantial variation in the assessment of how much should be paid for the extension. This all went to show the unreliability of a comparable based partly on money paid for a lease and partly on a settlement figure for an extended lease.

57. As regards the adjustment for the comparables Mr Jefferies submitted that the valuers were close in their analysis of 47 and 53 Hans Crescent and that these were the best comparables. 25 Lennox Gardens was of less weight being considerably larger and in a different location and with a mews. If merely Nos 47 and 53 were used then the valuers agreed that No.47 gave £751 per sq ft and No.53 gave either £761 or £755 per sq ft (the average being £758). Taking an average of £751 and £758 the result was £755, which gave a value of £4,058,886 for the building assessed at 5376 sq ft (ie excluding the vaults). He submitted this was a sound approach and showed that the Appellant's figure of £4.2m was substantially too high.

58. As regards the £100,000 deduction Mr Jefferies accepted that there appears to have been some misunderstanding between Mr Lee and Mr Tyler, having regard to the nature of the evidence Mr Tyler gave to the Tribunal. However, Mr Jefferies pointed out that Mr Lee had always contended for a deduction of £100,000 to reflect the additional costs of converting from a building in several flats into a single dwellinghouse and that he was entitled to adhere to this view, despite Mr Tyler's evidence, and that his view should be given weight.

59. Mr Jefferies resisted Mr Radevsky's argument that the Lands Tribunal should decide all disputed points of law and then should assess the price payable under Schedule 6 on the basis of an all or nothing approach, namely that the law was certain and was as decided by the Lands Tribunal. Instead he submitted the proper approach was to form a view as to what the hypothetical purchaser of the freehold under Schedule 6 would have been advised when contemplating his purchase. As noted above, Mr Radevsky ultimately agreed with this approach. It is right that we should here record that we are ourselves satisfied that this is indeed the correct approach.

60. Mr Jefferies submitted that the hypothetical purchaser would have been advised that he probably would not get possession of Flat 1 on the basis that he would not be "the landlord" within section 61 and would not be entitled to apply for possession. Even if he were not advised as pessimistically as that, Mr Jefferies submitted that the hypothetical purchaser would in any event be advised that there was a potentially difficult point of law on which there was no decision as at the valuation date and that therefore there was uncertainty and there could be a test case to the Court of Appeal or even beyond, which could take a very substantial time just to resolve this preliminary question of entitlement to rely upon section 61. Mr Jefferies submitted that, assuming the hypothetical purchaser was given sensible advice, he would decide that the risk and costs would be too great and would dissuade the purchaser from adding anything extra to his bid to reflect a possible redevelopment into a house.

61. As regards the merits of the legal argument as to the entitlement to rely upon section 61, Mr Jefferies advanced the following arguments:

(1) He drew attention to the fact that the application under section 61(1) is to be made by the landlord and that the nature of the application is to seek an order declaring that "the landlord is entitled as against the tenant to obtain possession of the flat". Mr Jefferies pointed out that, as a matter of basic common law, the only person entitled to possession of the flat as against the tenant is the tenant's immediate landlord.

(2) Section 61(1) contemplated that only one person was entitled to make the application. This was the immediate landlord and therefore could not include any other landlord.

(3) Mr Jefferies drew attention to the distinction in language between section 61 on the one hand and section 23 of the 1993 Act which refers in section 23(10) to an "appropriate landlord". He also referred to the different categories of landlord referred to in section 40 and to the provisions of Schedule 11 regarding the interrelation of various landlords and the ability of the competent landlord in many (but not all) cases to act on behalf of intermediate landlords. It was notable that there was no equivalent provision in relation to section 61 to reflect the provisions of Schedule 11 and especially paragraph 9.

(4) He submitted that the answer to the question as to who is "the landlord" in section 61 is answered by section 57(7), which expressly refers to the immediate landlord as having the right to obtain possession of the flat in question in accordance with section 61.

(5) The fact that a declaration of entitlement to possession and an order for possession can only sensibly be made in favour of the immediate landlord, who is entitled to possession at common law, is emphasised by other provisions of Schedule 14 which contemplate the giving up of possession by the tenant to "the landlord" and which make provision as to what is to happen to interests inferior to the tenant's new lease but which make no provision for any intermediate superior interests – he submitted that no such provision was needed because the landlord would be the immediate landlord.

(6) He posed by way of example a case where the competent landlord was the freeholder and there was an intermediate headlease with a 70-year reversion. In such a case it would be strange if section 61 only allowed the competent landlord (ie the freeholder) to operate the provision, because the freeholder would not be able to show the relevant intention (because of the intervening presence of the headlease), whereas the headlessee would not be entitled to operate section 61 because he was not the competent landlord.

(7) As regards section 57(7) he submitted that this provision was made so as to ensure that there was included on the face of the lease a clear notice (so as to protect any purchaser of the lease) of the existence of the section 61 right.

(8) He submitted that the landlord under section 61 could be a different person from the landlord who had granted the new lease under section 56.

(9) He submitted that the comparison with the Landlord and Tenant Act 1954 Part II (relating to business tenants) was not helpful. There was a distinction between service of a notice, in the form of a pleading, indicating an intention if the tenant applied for a new tenancy to oppose such a grant on a specified ground on the one hand and on the other hand the scheme of section 61 where the procedure falls to be commenced by an application by the landlord on the basis the landlord has a certain intention.

62. Mr Jefferies summarised the considerations regarding the difficulties surrounding Flat 1 as follows:

(1) There was the question of whether the freeholder would be entitled to serve a section 61 notice at all. This was clearly susceptible of being the subject of a preliminary point of law which could in itself go to the Court of Appeal or beyond. The outcome

was uncertain, but Mr Jefferies submitted that the better view was that the freeholder would not be entitled to serve a section 61 notice for the reasons noted above.

(2) There was the prospect of delay. Mr Clark's valuation only allows for one year of delay (ie a two year period in all with the section 61 application being made 12 months before the term date and with an allowance for one year beyond the term date until possession was obtained). This was insufficient. Step (1) above could of itself take up all of this time. Even if the freeholder succeeded in establishing that it was entitled to serve the section 61 notice, there would then be the necessity of returning to the County Court and proving the section 61 intention. Even assuming the freeholder succeeded on this, there would then be the necessity of proceedings before a leasehold valuation tribunal to assess the compensation, which in itself gave rise to the potential risk of having to pay a ransom value. Once compensation had been assessed (which in itself could be a step which went to appeal on the question of ransom value) it was then necessary to go back to the county court to fix a date for possession. The whole process, if the lessee of Flat 1 cannot be bought out at an early date, could easily take two additional years beyond the one year allowed for by Mr Clark.

(3) There was then the substantive question of whether the freeholder would have to pay the tenant of Flat 1 a ransom value.

(4) There was the prospect of irrecoverable costs which might be substantial. The well advised freeholder would realise there might be a difficulty in obtaining an order for costs against the tenant of Flat 1 under the section 61 procedures (anyhow at county court level). Also the freeholder would know that in order to be in a position to prove the section 61 intention it would be necessary for the freeholder to have done substantial preparatory work, which might in the event be wasted (ie wasted supposing that it was ultimately held that the freeholder was not entitled to serve the section 61 notice).

(5) There is also the separate need to show to the court (for the purpose of proving a realistic intention under section 61) that the freeholder has reasonable prospects of obtaining possession from the tenant of the Basement Flat, because otherwise the freeholder will be unable to carry out the proposed development.

(6) Bearing all the foregoing in mind a well advised hypothetical purchaser of the freehold would conclude that it faced difficult and uncertain litigation which could be expensive and long drawn out. Such a purchaser would realise that it was very much in its interest to come to an early settlement with the tenant of Flat 1 so as to avoid all the foregoing problems. The purchaser would realise that, assuming the tenant of Flat 1 was also properly advised, such tenant would know how important it was for the freeholder to do a deal with him. Accordingly the tenant of Flat 1 would be in a position to drive a very hard bargain. Mr Jefferies submitted that in the light of the all the foregoing, and having regard also to the additional difficulties of obtaining possession of the Basement Flat and having regard to the yet further potential problem regarding planning permission, the hypothetical purchaser for the freehold of the Building would be prepared to pay the proper price for the Building on the basis that it remained configured as flats but would not be prepared to pay anything extra.

63. As regards the Basement Flat Mr Jefferies noted that it was now common ground that there should be some discount for the value of the Basement Flat to reflect the risk of Mrs Marks holding over under the 1989 Act (Mr Clark says a 5% allowance Mr Lee a 25% allowance). This discount in value should also be applied when calculating the value of the freehold of the Building on the assumption the building remains configured as flats. The result of this, submitted Mr Jefferies, is that the LVT's decision, which fixed the price on the assumption that the Building would remain configured as flats, should be reduced. Mr Jefferies recognised that there was no cross appeal but submitted that there was no unfairness to the Appellant in the respondent arguing this point.

64. Mr Jefferies recognised that there was a limit to how hard a bargain Mrs Marks (or any other holder of the headlease) could drive when negotiating the yielding up of vacant possession of the Basement Flat, because there was always the prospect for the freeholder to seek to oppose the granting of an assured tenancy on the basis that suitable alternative accommodation was offered under ground 9 of Schedule 2 to the Housing Act 1988. However Mr Jefferies drew attention to the fact that this possibility (namely the offering of suitable alternative accommodation) had not been considered by either Mr Clark or Mr Lee until the Tribunal raised the possibility during the course of their evidence. He submitted that the fact that neither of them had considered this point suggested that it was not a practical solution which was likely to be given any weight by the hypothetical purchaser. Mr Jefferies also pointed out the costs that would be involved to the freeholder in purchasing alternative accommodation and then conferring an assured tenancy thereof and in paying what he described as the "round trip" costs, ie conveyancing and stamp duty and removal costs. Mr Jefferies submitted that having regard to what was known about Mrs Marks, which was little but which indicated she had lived at the flat for a long time, she was likely to want to stay. The freeholder would be aware that Mrs Marks had the capacity for delaying matters substantially if a settlement could not be reached with her. Also if an assured tenancy was granted to her then not only would her continued occupation prevent the redevelopment of the Building into a single house but also there was the prospect that a low rent under the assured tenancy might be fixed having regard in particular to the fact that the rent assessment committee might decide that the user covenant restricting the use of the Basement Flat to a caretaker's flat should be continued, with its consequent depressing effect upon rent.

65. As regards the possible pressure that might be put upon Mrs Marks by reminding her of her repairing obligations under the head lease and by indicating that there would be a terminal schedule of dilapidations if the freeholder was unable to get early possession and carry out its redevelopment scheme, Mr Jefferies drew attention to the fact that there was the ability to claim through the service charge from the other tenants in respect of a proportion of the costs and that so far as concerns any dilapidations in the Basement Flat this would not be allowed to depress the rent under an assured tenancy, see *Family Management v Gray* (1979) 253 EG 369. Accordingly the threat of a schedule of dilapidations would not concern Mrs Marks unduly if she were properly advised.

66. In summary Mrs Marks could stand in the way of the redevelopment and cause substantial delay and expense to the freeholder if she was to be removed, which could only be done through the offer of suitable alternative accommodation. Mr Jefferies submitted that an allowance of only £26,000, as suggested by Mr Clark, was wholly inadequate.

67. As regards the risk of not obtaining planning permission Mr Jefferies submitted that the 5% allowance made by Mr Clark was insufficient. He drew attention to the refusal of planning permission in the appeal decision relating to the Sloane Avenue property and he referred to the fact that the Respondent's planning expert Mr Wright (who gave evidence before the LVT) had made an

inquiry of an officer of the local planning authority and had received an answer suggesting that planning permission would not be granted. Mr Jefferies accepted that the risk of not obtaining planning permission would not be at the forefront of the risks considered by a prospective hypothetical purchaser of the freehold reversion, but that was because of the extent of these other risks. This planning risk merely served to confirm that a hypothetical purchaser would limit its bid to the proper value of the freehold of the Building on the basis it remained configured as flats. In summary Mr Jefferies asked the Tribunal to dismiss the Appellant's appeal and to decrease the LVT's price so as to reflect the risk of a continuing assured tenancy of the Basement Flat.

Conclusions

68. So far as concerns the freehold value of the Building with vacant possession we conclude that this should be taken as £4.085m. Our reasons for this conclusion are set out in paragraph 79 and following below. So far as concerns Mr Radevsky's argument that we must start from the LVT's figure of £4.2m and can only depart therefrom if our figure is sufficiently different from £4.2m for us to be able to say that £4.2m is actually wrong, we do not accept that this is the appropriate approach in the present case. In this case the Tribunal has given permission to appeal by way of re-hearing in accordance with the terms of the permission set out above. The Tribunal has done so because of an error (agreed by both parties to be an error) which the LVT made in the course of its valuation. In circumstances such as these it is the task of the Lands Tribunal to rehear the case upon the issue in respect of which permission was granted and to come to its own conclusion upon all matters relevant for the purpose of assessing the appropriate value to take for the Building with vacant possession (and thus available to redevelop) and the effect, if any, that this would have on the price to be paid for the enfranchisement. It is not appropriate for the Lands Tribunal, having reached its own conclusion on this point then to lay that conclusion on one side and to advise itself that it must adopt the LVT's decision on this point rather than its own conclusion unless it is satisfied that its own conclusion is sufficiently different from the LVT's for the latter to be said to be "wrong". Our duty is to reach our own conclusions and this is what we have done.

69. We have already indicated (see paragraphs 44 and 59 above) that it is not appropriate for this Tribunal to reach final conclusions upon all the points of law which the parties contend may have weighed in the minds of the hypothetical purchasers as being potential difficulties which might arise if the successful hypothetical purchaser sought to obtain vacant possession at the end of the head lease. These points do not arise for decision – for instance this is not a case where a landlord is seeking to exercise section 61 against a lessee. It would be inappropriate for us to purport to decide the disputed points of law. Instead it is necessary for us to consider the extent to which the alleged (but disputed) difficulties in the way of a hypothetical purchaser would affect the mind of the hypothetical purchaser when deciding how much to bid for the freeholder's interest in the Building. We are fortified in our conclusion that it is inappropriate for us to purport to decide (or indeed to give some form of advisory opinion upon) the legal difficulties which could face the hypothetical purchaser at the end of the head lease having regard to the decision of the Court of Appeal in *Office of Telecommunications v Floe Telecom Limited* [2009] EWCA Civ 47 where it was stated at paragraphs 20 and 21:

> "20. It is the unnecessary nature of the Tribunal's legal rulings in its judgment that is most troubling. The court itself drew the attention of the parties at the hearing to *R (Burke) v GMC* [2006] QB 27. There are sound reasons why courts and tribunals at all levels generally confine themselves to deciding what is necessary for the adjudication of the actual disputes between the parties. Deciding no more than is necessary may be described as an unimaginative, unadventurous, inactive, conservative or restrictive

approach to the judicial function, but the lessons of practical experience are that unnecessary opinions and findings of courts are fraught with danger.

21. Specialist tribunals seem to be more prone than ordinary courts to yield to the temptation of generous general advice and guidance. The wish to be helpful to users is understandable. It may even be commendable. But bodies established to adjudicate on disputes are not in the business of giving advisory opinions to litigants or potential litigants. They should take care not to be, or to feel, pressured by the parties or by interveners or by critics to do things which they are not intended, qualified or equipped to do. In general, more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute."

70. We are concerned with the value of the freeholder's interest assessed in accordance with Schedule 6 paragraph 3 to the 1993 Act. The hypothetical purchasers will recognise that the following (inter alia) are relevant matters in the calculation of how much should properly be bid for the freeholder's interest, namely:

(1) the value of the freehold of the Building with vacant possession and after redevelopment into a single house is the agreed sum of £8.3m;

(2) the value of the freehold of the Building with vacant possession on the basis that the Building can be redeveloped into a single house is £4.085m (as determined by us);

(3) there is on the face of it an opportunity for the hypothetical purchasers to make a substantial developer's profit supposing that they are able to recover vacant possession at the termination of the headlease and obtain any necessary planning permission; and

(4) the value of the freehold of the Building with vacant possession on the basis that the Building continues as flats is £3.32m (this being a figure decided by the LVT against which there is no appeal and being made up by totalling what the LVT described as the value of the extended leases for each of the four units, see paragraph 4 above).

71. Such hypothetical purchasers will accordingly recognise, when deciding how much to bid for the freeholder's interest, that there may be a justification to bid more for the freeholder's interest than the sum which represents the value of the freeholder's interest calculated on the basis that the Building will remain as flats. In deciding whether in fact to bid more in this manner a hypothetical purchaser would be likely to seek advice as to the risks that the hypothetical purchaser might not be able to carry out the proposed redevelopment at the end of the headlease because of identifiable potential problems, these here being the risk of being unable to obtain vacant possession of one (or both) of the Basement Flat and Flat 1 at the end of the headlease or within a reasonable time thereafter and the risk of having to pay to the lessee of Flat 1 compensation which included a ransom value, and also the risk of being unable to obtain any necessary planning permission.

72. On taking such advice as at the valuation date hypothetical purchasers of the freeholder's interest could be given a range of advice upon the potential legal problems from the ultra cautious to the over optimistic. Clearly a hypothetical purchaser who received ultra cautious advice and acted upon it would be unlikely to be the person who made the highest bid for the freeholder's interest and

therefore would not be the successful purchaser. We conclude therefore that we should not assess the value of the freeholder's interest under Schedule 6 paragraph 3 on the basis that the successful hypothetical purchaser would receive ultra cautious advice. However we conclude that we must assume that this successful hypothetical purchaser would receive sound and responsible advice rather than over optimistic advice.

73. Considering the matter broadly (and in our judgment this is the manner in which the Lands Tribunal should consider the matter) we conclude that the hypothetical purchaser would be advised to the following effect:

(1) There was a substantial extra value in the Building with vacant possession and with the prospect of redevelopment to a single house as compared with the value of the Building with vacant possession on the basis that it remained as flats, this difference being £765,000, ie £4.085m - £3.32m.

(2) If the hypothetical purchaser litigated against the lessee of Flat 1, rather than reaching some early compromise agreement for the yielding up of vacant possession at the term date by such lessee, then there would be a substantial risk that the hypothetical purchaser might be unable to recover vacant possession of Flat 1 or might be unable to do so without paying compensation which included a ransom value. This is because we consider that the points raised under section 61 and under Schedule 14 are difficult and that there are serious arguments on both sides with no authorities thereon. The hypothetical purchaser would be advised to that effect. Also if litigation rather than compromise was pursued there was the virtual inevitability that the recovery of possession (if ultimately achieved) would be greatly delayed beyond the term date. The cost of any such delay would be large.

(3) There would accordingly be a great incentive for the hypothetical purchaser to come to the earliest possible agreement with the lessee of Flat 1 to secure the voluntary giving up of possession at the term date. The lessee of Flat 1 would expect a generous payment for this.

(4) As regards the Basement Flat the hypothetical purchaser could ensure obtaining vacant possession by providing suitable alternative accommodation and by serving appropriate notice under Schedule 10 of the 1989 Act to the effect that the landlord proposed to apply to the court for possession on the ground that suitable alternative accommodation is available for the tenant or will be available when the order for possession takes effect. This however would be expensive and could also give rise to delays.

(5) There would be a great incentive for the hypothetical purchaser to come to terms with Mrs Marks (or whoever was the head lessee and occupier of the Basement Flat) for her to vacate the Basement Flat at an early date – indeed the incentive would be to secure the surrender of the head lease say 12 months before the term date so as to clothe the hypothetical purchaser with the status of both competent landlord and immediate landlord so as to remove any difficulty of an argument with the lessee of Flat 1 as to whether the hypothetical purchaser was entitled to rely upon section 61 of the 1993 Act. Mrs Marks would expect a generous payment to secure this result.

(6) If vacant possession of the building could be obtained it was unlikely that there would be any difficulty in obtaining any necessary planning permission for redevelopment of

the building into a single house. (Our reasons for this conclusion are set out in paragraph 88 below).

74. Having received the foregoing advice the hypothetical purchaser would recognise that there was always the possibility that either or both lessees of Flat 1 and the Basement Flat would refuse to vacate even if offered generous terms. However we consider it unlikely that this prospect would wholly deter the hypothetical purchaser from making any additional bid for the freeholder's interest over and above the value attributable to the Building continuing as flats. This is because the value for the Building with vacant possession and available for redevelopment (ie £4.085m) is substantially larger than the vacant possession value of the Building on the basis it continues as flats (£3.32m) and the hypothetical purchaser would conclude it was unlikely that if offered a substantial share of this extra value (ie of this £765,000) the lessees of the Basement Flat or Flat 1 would hold out for yet more to the point where the proposed redevelopment had to be abandoned and neither lessee in the end got anything. The hypothetical purchaser would have in mind that the bringing of section 61 proceedings (against the lessee of Flat 1) or the seeking of possession on the basis of an offer of suitable alternative accommodation (as regards the Basement Flat) would be possibilities which the lessees of Flat 1 and of the Basement Flat would have in their minds as unattractive routes to be taken down, especially as regards the lessee of Flat 1 who would realise that if the section 61 arguments were pressed they could, anyhow if taken to the Court of Appeal and lost, result in substantial adverse costs orders against that lessee. Thus the hypothetical purchaser would realise that there was a substantial advantage to the lessee of the Basement Flat and Flat 1 in reaching an attractive early settlement rather than pressing on in hostile litigation. Clearly the hypothetical purchaser would recognise it was a possibility that either or both the lessees would refuse to move and that the delays, risk and costs of the prospective litigation ultimately led to the hypothetical purchaser deciding it must abandon the proposed redevelopment, but we do not consider that this possibility would deter the sensibly advised hypothetical purchaser from making any extra bid at all for the freeholder's interest over and above a figure calculated by reference to the £3.32m which represents the vacant possession value with the Building remaining as flats.

75. We conclude that the successful hypothetical purchaser would be likely to decide that the risk of not obtaining the appropriate planning permission was small and that an allowance of two-thirds of £765,000 (or £510,000) would be an appropriate sum to allow to cover all risks, namely the planning risk and also to provide a sufficient fund out of which to achieve an early compromise with the lessee of both the Basement Flat and Flat 1 so as to obtain vacant possession no later than the term date of the head lease. Bearing in mind that the planning risk is small, the hypothetical purchaser would have in mind that such an allowance would permit, if necessary, the payment of a sum approaching £255,000 both to the lessee of the Basement Flat and also to the lessee Flat 1. If the hypothetical purchaser notionally allocated £510,000 in this manner to cover the risks, this would leave £255,000 as additional value to the hypothetical purchaser, who would be prepared to increase its bid for the freeholder's interest accordingly in order to secure the opportunity of redeveloping the building into a single house.

76. In calculating the value of the freeholder's interest we consider first the valuation of the Building assuming its continued use as flats. Most of the variables associated with this valuation have been agreed between the parties, the main exceptions being, firstly, the allowance for the risk that the tenant of the Basement Flat will be able to hold over as an assured tenant at a market rent reflecting the caretaker's covenant and, secondly, the deferment period. Mr Clark says that the appropriate risk allowance is 5% of the FHVP value of the Basement Flat whilst Mr Lee says that it is 25%. We consider that the risk of the tenant holding over would be seen by the purchaser as a

potential problem and not one which could be dismissed lightly and for as little as 5% of the FHVP value of the flat, especially since the Appellant does not contest before us that the Basement Flat is the main residence of Mrs Marks. On the other hand we consider Mr Lee's figure to be overly cautious. We think that an allowance of £80,000, or just over 15%, is appropriate. We do not accept Mr Lee's argument that the deferment period for this element of the reversionary value should be extended by one year to 5.12 years "to reflect the likely rent void", believing instead that any such risk is adequately covered by the allowance that we have made. We therefore estimate the value of the reversion to the freehold in possession in September 2009 of the Basement Flat to be £363,965. We add to this the agreed figures for the present value of the participating tenants' flats (£1,717,590) and the reversionary value of Flat 1 in 2099 (£7,041) to give a total of £2,088,596.

77. We then compare this figure with the present value of the reversion to the freehold in possession in September 2009 on the assumption that the Building will be converted to a single house. In our opinion the allowance we have made of £510,000, being two thirds of the uplift in FHVP value from flats to a house is sufficient to satisfy the anticipated demands of the tenants of both the Basement Flat and Flat 1 for a share in the benefits of the conversion. In our opinion it is not necessary to add to that amount the figure of £80,000 as previously determined as the diminution in the vacant possession value of the Basement Flat were the Building to remain as flats and the tenant succeeded in holding over (although we consider that this is the minimum that the tenant of the Basement Flat would accept). Nor is it necessary to apportion the £510,000 between the tenants of the Basement Flat and Flat 1. We have taken a robust view of the total amount that would be required to effect the vacation of both flats as well as cover any planning risk. On this basis, and assuming that it would be a pre-condition of the tenants receiving any share of the uplift that vacant possession would be given in September 2009, we calculate the capital value of the reversion to the freehold in possession of the Building, assuming conversion to a house and including the open market value of Flat 1, to be £2,372,728.

78. Having regard to our conclusion that the value of the freeholder's interest should be taken at a value higher than that calculated on the assumption the Building remains configured as flats, the point which Mr Jefferies sought to raise on behalf of the Respondent, ie that the price as fixed by the LVT should actually be reduced (see paragraphs 42 and 63 above) must fail and the question of whether the Respondent was entitled to raise this argument at all does not need to be considered.

79. We now turn to our reasons for concluding that the value of the freeholder's interest in the Building with full vacant possession is £4.085m and to our reasons for concluding that it is unlikely there would be any difficulty in obtaining any necessary planning permission.

80. The parties have four comparables sales in common, at 47 and 53 Hans Place, 25 Lennox Gardens and 10 Herbert Crescent. Mr French relies upon a fifth comparable, at 11 Herbert Crescent. We made an external inspection of these properties together with an external inspection of the Building (and an internal inspection of its vaults) on 19 February 2009.

81. Unlike the other comparables, 11 Herbert Crescent was not an open market sale of a freehold interest. We accept the Respondent's criticisms of this comparable which we have summarised at paragraph 56 above. Its analysis produces a capital value that is significantly higher than the average of the other four comparables and we note that Mr French was not prepared to say in terms that he gave it equal weight, commenting in answer to our question on the point that he was "just trying to

show what was paid at that time." We do not consider the comparable at 11 Herbert Crescent to be reliable and we give it no weight.

82. Of the remaining comparables the experts are agreed on the analysis of the sale of 47 Hans Crescent at £751 per sq ft. There is little between them on the analysis of 53 Hans Place, despite their difference about the benefit or otherwise of a roof terrace and its potential replacement by an additional floor of accommodation. We prefer Mr French's argument that the two factors counter balance and that the only requisite adjustments are for time and location. We accept his adjusted capital value of £761 per sq ft.

83. There are larger differences between the experts on the other two comparables. The difference at 25 Lennox Gardens is in the treatment of its size, location and the inclusion of a mews house on Clabon Mews. Mr French allows for the latter by adjusting his allowance for size from 12.5% to 10%. In our opinion that is an inadequate adjustment for the benefit of the mews house and we prefer Mr Lee's evidence on the point, namely that the discount due to size and the benefit of the mews house balance each other out. We therefore adopt a capital value of £755 per sq ft.

84. The final comparable is at 10 Herbert Crescent and here we agree with Mr French that there are no practical benefits from the double frontage that outweigh the irregularities of its shape. We do not accept that it is an especially prestigious property that would justify a reduction in its value in order to compare it with the Building. We consider that the only appropriate adjustment is for time and that the capital value of £774 per sq ft as calculated by Mr French is correct.

85. We note that the LVT placed particular weight on the evidence from 53 Hans Place. We do not express a similar preference but instead we consider that the four comparables described above may usefully be averaged to produce the appropriate capital value, this being the approach adopted by both experts. This gives a capital value for the building of £760 per sq ft.

86. It is now necessary to consider the area to which the capital value should be applied. We agree with Mr Lee that you should value as you devalue and since the comparables were generally measured net of vaults (except for 53 Hans Place which the LVT noted only had quite small vaults) we consider it appropriate that the Building should be capitalised by reference to the area excluding the vaults and not including them as Mr French has done. The only evidence before us, which was not agreed between the parties, was Mr Lee's statement that the vaults extended to 151 sq ft leaving a net area of 5,376 sq ft. The Appellant did not challenge this and the allowance seems reasonable in the light of our inspection. We therefore multiply 5,376 sq ft by £760 per sq ft to give £4,085,000 (rounded) as the FHVP value of the Building for restoration to a single house.

87. Mr Lee says that this figure should be reduced by £100,000 to reflect what he says would be the extra cost of converting flats to a house compared with that of refurbishing an existing house. We reject this opinion which Mr Lee has based upon his (non-specific) experience. His conclusion is contrary to the evidence of Mr Tyler who appeared on behalf of the Respondent as an expert Quantity Surveyor. We accept that there was confusion between Mr Tyler's written and oral evidence but this was clarified in cross-examination and in our own questioning of the witness. Mr Tyler made no such further cost adjustment and neither do we.

88. Finally we turn to planning risk, which was discussed by the Respondent's planning expert, Mr Jonathan Wright, in his evidence before the LVT. Mr Lee relied upon Mr Wright's report in his evidence before us but Mr Wright himself was not called to give evidence nor was his report made available to us. It was said that Mr Wright had (at least in part) formed his pessimistic opinion about the chances of obtaining planning permission based upon a single telephone call that he had made to the local planning authority. Mr Clark considered this to be an inadequate investigation and not representative of the type of diligent enquiry that a prospective developer of the Building would have made. He produced both correspondence and a schedule containing a summary planning history of several local sites which suggested that the need for, or the obtaining of, planning permission was unlikely to have been contentious. We prefer Mr Clark's evidence on this point which was balanced and thorough. We consider that a prospective purchaser of the Building would have undertaken the type of research described by Mr Clark and would have concluded, as he does, that planning would not have been a material risk in this instance. Furthermore, as Mr Clark rightly points out, the comparables that the parties have relied upon did not have planning permission for conversion into houses and therefore such planning risk as there may have been was already discounted in their price. We are satisfied that our allowance of £510,000 to meet the risks of obtaining vacant possession is sufficient to cover what we believe to be a minimal planning risk.

89. We conclude that the enfranchisement price of £2,164,946 determined by the LVT is too low and we therefore allow the appeal. We determine the enfranchisement price of the Building as £2,383,639, calculated and apportioned as shown in Appendix 1 hereto.

Dated 15 May 2009

His Honour Judge Huskinson

A J Trott FRICS

APPENDIX 1

VALUATION OF THE LANDS TRIBUNAL

2 HERBERT CRESCENT, LONDON SW1

CALCULATION OF PRICE FOR COLLECTIVE ENFRANCHISEMENT

VALUATION DATE: 16 AUGUST 2005

	£	£	£	£	£
Valuation of Freeholder's Existing interest excluding marriage value					
Head lease expires 29 September 2009					
Capital value of rental income					
Annual rent receivable	10				
Years' Purchase 4.12 yrs @ 4%	3.7302				
				37	
Capital value of reversion to freehold in possession					
Alternative A.					
Assuming continued use as flats					
(i) Participating tenants' flats					
Capital value of reversion to F/H in possession on 29 September 2009					
Flat 2	1,100,000				
Flat 3	1,000,000				
	2,100,000				
PV of £1 in 4.12 years @ 5%	0.8179				
			1,717,590		
(ii) Non-participating tenants' flats					
Capital value of reversion to F/H in possession on 29 September 2009					
Basement Flat	525,000				
Less risk of tenant holding over as assured tenant at a market rent	80,000				
	445,000				
PV of £1 in 4.12 years @ 5%	0.8179				
		363,965			
Flat 1	695,000				
PV of £1 in 94.12 years @ 5%	0.01013				
		7041			
			371,006		
Present value of reversion for continued Use as flats				2,088,596	
Value of freehold interest for continued use as flats					2,088.633
Alternative B:					
Assuming conversion to a single house					
Value of freehold in possession on 29 September 2009					
Value of F/H in possession for conversion to a single house	4,085,000				

	£	£	£	£	£
Less (i) for buying out tenants of Basement Flat and Flat 1, and for planning risk	510,000				
(ii) Compensation payable to tenant of Flat 1 under s.61 of 1993 Act					
Value of 999yr lease in Flat 1: £695,000					
Adj to value of 90 yr lease @ 97%, say	674,000				
	2,901,000				
PV of £1 in 4.12 years @ 5%	0.8179				
					2,372,728
Present value of reversion as a house (adopted as alternative B exceeds alternative A)					
Add capital value of rental income (as above)					37
Value of freeholder's existing interest					2,372,765

Valuation of headlessee's existing interest excluding marriage value

Annual rent receivable until 26 September 2009:					
Flat 1:	0				
Flat 2:	100				
Flat 3:	100				
	200				
Less Annual rent payable	10				
Profit rent	190				
Years' purchase 4.12 yrs @ 6%/2.5%/30p Tax	2.5413				
					483
Value of two landlords' combined existing interests					2,373,248

Calculation of marriage value

Sum of proposed interests in participating flats only					
Freeholder			Nil		
Headlessee			Nil		
Nominee purchasers: Value of new leases for 999 years at a peppercorn in participating tenants' flats:					
Flat 2		1,100,000			
Flat 3		1,000,000			
			2,100,000		
				2,100,000	
Less Sum of values of existing interests in participating flats only					
Value of freeholder's existing interest apportioned only to participating tenants' flats					

	£	£	£	£	£
Value of apportioned freehold reversion (Flats 2 & 3) (from above)		1,717,590			
Value of apportioned rental income					
Value of total income (from above)	37				
Apportioned by reference to capital values					
Apportioned by reversionary value:	1,717,590				
Divide by total reversionary value	/2,088,596				
	0.8224				
		30			
			1,717,620		
Value of Headlessee's existing interest apportioned only to participating flats					
Value of apportioned reversion in flats (including Basement Flat)		Nil			
Value of total profit rent (from above)	483				
Apportioned as for freeholder	0.8224				
		397			
			397		
Value of participating tenants' existing interest in their flats (unexpired term of 4.12 years) at agreed relativity of 17.2%					
Flat 2	189,200				
Flat 3	172,000				
			361,200		
				2,079,217	
Marriage value				20,783	
Marriage value share attributed to freeholder @ 50%					10,391
Enfranchisement Price					2,383,639
Apportionment of marriage value and enfranchisement price between freeholder and intermediate leaseholder					
(i) Intermediate leaseholder					
Diminution in value of interest				483	
Share of marriage value 10,391 x 483 / 2,088,596				2	
					485
(ii) Freeholder					
Diminution in value of interest				2,372,765	
Share of marriage value				10,389	
					2,383,154
					2,383,639