FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BE/OCE/2020/0025,28,29,30,31&109**
HMCTS code (paper, video, audio)	**:**	**CVP Video**
Property	**:**	**Six blocks of flats at Lawrence Wharf, Rotherhithe Street, London SE16**
Applicant	**:**	**Lawrence Wharf Limited**
Representative	**:**	**Mr Gary Cowen QC of Counsel instructed by Forsters LLP**
Respondents	**:**	**Ayyub Vali Bux, Yousuf Bux, Fatima Ismail And Hasina Bux as the Trustees of The Matliwala Family Charitable Trust**
Representative	**:**	**Mr Christopher Heather QC of Counsel instructed by Charles Russell Speechlys LLP**
Type of application	**:**	**A collective enfranchisement claim made under the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	**:**	**Judge N Hawkes** **Duncan Jagger MRICS** **Kevin Ridgeway MRICS**
Date of determination and venue	**:**	**1, 2, 3, 4, 5, 8 and 9 March 2021 10 Alfred Place, London WC1E 7LR (remote hearing)**
Date of decision	**:**	**14 April 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVP VIDEO HEARING REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 1677 pages, together with additional documents introduced during the hearing with the Tribunal's permission. The order made is described below.

Summary of the Tribunal's decisions

(1) The Tribunal determines that the price payable on the collective enfranchisement of Christian Court, Lawrence Wharf, Rotherhithe Street, London SE16 5UA in application reference LON/00BE/OCE/2020/0025 is £419,105.

(2) The Tribunal determines that the price payable on the collective enfranchisement of Mermaid Court, Lawrence Wharf, Rotherhithe Street, London SE16 5UB in application reference LON/00BE/OCE/2020/0028 is £558,226.

(3) The Tribunal determines that the price payable on the collective enfranchisement of 273-287A Rotherhithe Street, Lawrence Wharf, London SE16 5EY in application reference LON/00BE/OCE/2020/0029 is £268,564.

(4) The Tribunal determines that the price payable on the collective enfranchisement of 289-301A Rotherhithe Street, Lawrence Wharf, London SE16 5EY in application reference LON/00BE/OCE/2020/0030 is £237,856.

(5) The Tribunal determines that the price payable on the collective enfranchisement of 303-303B Rotherhithe Street, Lawrence Wharf, London SE16 5EU in application reference LON/00BE/OCE/2020/0031 is £45,891.

(6) The Tribunal determines that the price payable on the collective enfranchisement of Tivoli Court, Lawrence Wharf, Rotherhithe Street, London SE16 5UD in application reference LON/00BE/OCE/2020/0109 is £501,715.

Background

1. The six applications which are before the Tribunal concern claims for collective enfranchisement of six blocks of flats together with appurtenant property and common parts at a development known as Lawrence Wharf, Rotherhithe Street, London SE16 ("Lawrence Wharf").

2. The claims were initiated by six separate initial notices given pursuant to section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") on 30 August 2019, which is the agreed valuation date.

3. The Applicant is the nominee purchaser and the Respondents are the reversioner and the registered proprietor of three freehold titles which comprise the land and buildings known as Lawrence Wharf.

4. The Respondents are trustees of the Matliwala Family Charitable Trust, a registered charity. The Tribunal was informed that its objects are to provide financial assistance to advance the education of pupils at the Matliwala Public School in India (including providing equipment and facilities for the school), the advancement of Islamic faith, the relief of sickness and poverty and to advance education.

5. Lawrence Wharf was constructed in around 1987 and the six blocks of flats are situated on a podium surrounding and above an underground car park. The blocks of flats at Lawrence Wharf are known as Mermaid Court, Christian Court, Tivoli Court, 273-287A Rotherhithe Street, 289-301A Rotherhithe Street and 303-303B Rotherhithe Street. Mermaid Court and Christian Court are both adjacent to the River Thames.

6. The Lawrence Wharf development includes certain walkways at ground floor level which are the subject of long leases. By a lease dated 6 September 1991, the walkways were demised to the London Docklands Development Corporation for a term of 125 years from 6 September 1991. They were then immediately leased back with a one day reversion to the freehold owner of the development. The Respondents' leasehold title in the walkways is registered under Title No. TGL69148.

7. The following three areas of freehold land are to be excluded from the transfer:

    (i) the central reception building registered under Title No. TGL195545;

    (ii) a maintenance and security office registered under Title No. TGL230312; and

    (iii) an electricity sub-station registered under Title No. TGL36137.

8. The price payable for the freehold on an acquisition pursuant to a notice served under section 13 of the 1993 Act is governed by Schedule 6 to the 1993 Act, applied by section 32.

9. Due to the ongoing coronavirus pandemic, the Tribunal did not carry out an inspection. However, we were provided with an agreed set of colour photographs of the development and we are of the view that an inspection would have been unnecessary in any event.

The hearing

10. The Applicant was represented at the hearing by Mr Gary Cowen QC of Counsel, instructed by Forsters LLP, and the Respondent was represented by Mr Christopher Heather QC of Counsel, instructed by Charles Russell Speechlys LLP.

11. Following a designated reading day on 1 March 2021, the hearing of this application took place from 2 to 9 March 2021.

12. The Tribunal heard oral expert planning evidence from:

    (i) Mr Peter Dines MRICS, a partner in Gerald Eve LLP and a Chartered Town Planner who gave evidence on behalf of the Applicant; and

    (ii) Mr Jon Roshier, Professional Member of the Royal Town Planning Institute (MRTPI) and Director of Rolfe Judd Planning Limited, who gave evidence on behalf of the Respondents.

13. The Tribunal heard oral expert valuation evidence from:

    (i) Mr Gregory Darby BSc MRICS of Darby Mountbank, who gave evidence on behalf of the Applicant; and

    (ii) Ms Henrietta Hammonds FRICS FCIArb of Beckett and Kay LLP, who gave evidence on behalf of the Respondents.

14. The Tribunal also heard oral evidence of fact on behalf of the Respondents from Mr Alban Cassidy, a Planning Consultant and Director of Cassidy and Ashton Group Limited ("Cassidy and Ashton"). Mr Cassidy has been instructed by the Respondents in respect of the Lawrence Wharf development since approximately 2010.

15. Two procedural issues arose during the course of the hearing. The first concerned the admissibility of a letter dated 22 February 2021 from Mr

Blythe of Core5 Quantity Surveyors and the second concerned whether the parties should be required to complete their closing submissions on 8 March 2021.

The admissibility of the letter of 22 February 2021

16. A letter dated 22 February 2021 from Mr Blythe of Core5 Quantity Surveyors was appended to Mr Darby's expert report. The Respondents contended that the Applicant should not be permitted to rely upon this letter because it contains detailed expert evidence in a field for which the Tribunal's directions made no provision; it was not apparent that Mr Blythe knew that the letter was to be used at the hearing or, if he did, of his obligations to the Tribunal; the instructions to Mr Blythe are not set out in the letter; the Respondents only became aware of Mr Darby's intention to rely upon evidence from a Quantity Surveyor on receipt of his report on 25 February 2021; providing building costs for a development falls outside Miss Hammonds' expertise; the use of evidence from a Quantity Surveyor goes behind the spirit and the letter of the agreement between Miss Hammonds and Mr Darby that the valuation approach is the site value method; Mr Blythe's views would not be tested either in cross-examination, or by questions from the Tribunal; and, as deployed by Mr Darby, the letter would reduce the total gross development value of a site by over £2 million before any planning risk deduction.

17. Mr Heather QC submitted that, if the Applicant wished to rely upon such evidence, it should be incorporated within an expert report and the writer should attend the hearing for cross-examination. The Respondent should also be allowed to adduce expert evidence in a like field. That would have required an adjournment, which it was submitted should be conditional upon the Applicant accepting responsibility for the costs wasted by that adjournment. It was submitted that the Tribunal should not allow the letter in "as untested expert evidence via the back door".

18. In response, Mr Cowen QC stated that it was agreed that the basic site value would be taken as 40% of the gross development value, assuming typical build costs. This agreement did not take account of exceptional costs and other risks. Miss Hammonds knew that Mr Darby was going to say that the cost of development in the present case would be higher than usual. It had been open to her and to the Respondents to go to someone who did have the expertise to show that the approach she knew Mr Darby would take was wrong. The Respondents chose not to do this.

19. Mr Cowen QC also referred the Tribunal to a statement in the letter of 22 February 2021 to the effect that the construction costs provided are "indicative". He stated that the letter was simply intended to assist Mr Darby in giving his evidence to the Tribunal.

20. Mr Cowen QC referred the Tribunal to a letter which is relied upon by the Respondents dated 13 February 2018 from Partington Associates concerning the structural implications of a planning appraisal issued by Cassidy and Ashton. He stated that the Applicant seeks to rely upon Mr Blythe's letter in a similar manner. In reply, Mr Heather QC stated that the letter from Partington Associates predates the valuation date and is therefore available as part of the factual background; it is not relied upon as expert opinion evidence.

21. Mr Cowen QC urged the Tribunal not to adjourn the proceedings. He stated that these proceedings are neither straightforward nor inexpensive and that the documentation before the Tribunal is extensive. He added that the lessees at Lawrence Wharf are numerous but not wealthy and he noted the charitable status of the Matliwala Family Charitable Trust.

22. The Tribunal determined that the letter of 22 February 2021 would not be excluded from the hearing bundle but that it would be given very limited weight.

23. In a Statement of Agreed Facts and Disputed Issues prepared by Mr Darby and Miss Hammonds dated 16 February 2021, the valuers state in respect of development value (emphasis supplied):

"At the date of this statement, the terms of the transfer have not been agreed. As such, the parties have been unable to agree whether or not development hope value arises.

If development hope value does arise, we agree the following:

- The valuation approach is the site value method.

- The basic site value will be taken as 40% of gross development value. ***This assumes typical usual: build costs****; professional fees; finance costs; profit (both contractor's and developer's).* ***It does not take account of: exceptional costs; planning risks; other risks****."*

24. At paragraph 3.4.4 of her expert report dated 23 February 2021, Miss Hammonds states:

"I believe Mr Darby will say the costs of these developments would be higher than for a 'usual' development."

25. She then considers a number of factors and concludes at paragraph 3.4.9 that she does not see a reason why there would be any exceptional costs.

She therefore makes no adjustment to the agreed 40% site value percentage.

26. At paragraph 6.3 of his expert report dated 24 February 2021, Mr Darby states:

"As set out in the Statement of Agreed Facts, the valuers have also agreed a 'basic site value' which will be taken as 40% of GDV. This basic site value assumes typical usual build costs, professional fees, finance cost, profit (developers and contractor's). It does not take account of exceptional costs, planning risk, other risks."

27. At paragraph 6.4 of his report, Mr Darby expresses the view that the hypothetical purchaser would have taken advice about market prices, planning, legal matters, indicative build costs and any other construction uncertainties. At paragraph 6.7, he introduces the letter of 22 February 2021 and at paragraph 6.8 he says:

"I have not attempted to provide detailed analysis of the QS build costs. There is insufficient construction detail in the plans submitted to the LPA and Core 5's cost estimates are indicative. However, I reasonably assume that a similar indicative cost estimate would be available to a well-informed hypothetical purchaser at the valuation date to help assess uncertainties in the proposed schemes."

28. Mr Darby concludes that an adjustment falls to be made for "construction cost/uncertainty".

29. It is apparent from the valuers' Statement of Agreed Facts and Disputed Issues that whether or not there are unusual costs is not agreed. Both valuers have considered this issue. Mr Darby has made an adjustment and Miss Hammonds is of the opinion that no adjustment is required.

30. The Tribunal expressed a preliminary view, with which the parties agreed, that a valuer would be capable of giving evidence in general terms concerning whether or not there are likely to be unusual build costs and that, as an expert Tribunal, we could bring some expert knowledge to bear on this issue.

31. The Tribunal concluded that the letter of 22 February 2021 should not be excluded from the trial bundle but that it would carry very little weight because it is not in the form of an expert report; the contents of the letter would not be tested through cross-examining or questions from the Tribunal; the Tribunal has not seen Mr Blythe's instructions; the construction costs provided in the letter are expressed to be "indicative" only; and it is unclear from the letter whether Mr Blythe has visited the site.

32. In light of the very limited weight which would be given to the letter of 22 February 2021, the Tribunal was of the view that it was neither necessary nor proportionate to adjourn the proceedings, which at the start of the hearing had an eight-day time estimate, in order for further expert evidence to be obtained.

The trial timetable

33. On the afternoon of 5 March 2021, Mr Cowen QC invited the Tribunal to limit the length of the parties' closing submissions by imposing "a guillotine" in order to ensure that the hearing ended by close of business on 8 March 2021. He noted that such a restriction would save both time and costs.

34. Mr Heather QC opposed this proposal. He explained that he had initially estimated that each party would take a day in closing and, although a number of issues which were originally in dispute had since been agreed, he was of the view that each party would still require the best part of a day to make its closing submissions. He submitted that it would be proportionate to allow each party in excess of half a day having regard to the nature of these proceedings, particularly when three full hearing days remained. As originally listed, the hearing was not due to conclude until 10 March 2021.

35. The Tribunal accepted Mr Heather's submissions and declined to impose a "guillotine" on the parties' closing submissions, whilst noting that the hearing might nonetheless end by close of business on 8 March 2021 if further time was not needed. Having regard to the complexity and value of the proceedings and to the technical nature of the evidence which we had heard, we were of the view that the parties could potentially reasonably require longer than half a day each in closing.

The issues

36. The following issues remain in dispute:

    (i) the capitalisation rate for the ground rents, the Applicant contends for a capitalisation rate of 6.35% and the Respondents contend for a capitalisation rate of 4.25%; and

    (ii) the amount of development hope value.

The capitalisation rate for the ground rents

37. There are 159 flats at Lawrence Wharf with passing ground rents for the flats together with any car parking spaces which start at £300 per

annum, rising by £100 every 25 years to a maximum of £725 per annum in years 102 to 125. The current passing rent is in the region of £55,000 per annum.

38. Mr Darby contends for a capitalisation rate of 6.35% which is derived from auction sales between September 2016 and February 2019. Miss Hammonds contends for a capitalisation rate of 4.25% which is derived from the decisions of the First-tier Tribunal in *St Emmanuel House (Freehold) Ltd v Berkeley Seventy-Six Ltd* CHI/21UC/OCE/2017/0025 ("the All Saints case") and *The Cedars (Belmont Hill) Limited v Anthony David Shamash & David Shamas* LON/00AZ/OCE/2018/0120 ("The Cedars"). In giving oral evidence, Miss Hammonds stressed that she has only considered the Tribunal decisions because, in her view, it is not possible to obtain relevant and reliable market evidence in this case.

39. As regards the capitalisation rate, the issues for the Tribunal are as follows:

    (i) whether or not Mr Darby has considered the wrong market;

    (ii) if not, whether Mr Darby's market evidence is reliable; and

    (iii) if Mr Darby's market evidence is not reliable, whether it is right to adopt Miss Hammonds' approach.

Whether Mr Darby has considered the wrong market

40. Miss Hammonds is of the view that, with a total passing rent of over £55,000 per annum, the Lawrence Wharf ground rents would not be sold at auction.

41. At paragraph 2.4.1 of her report dated 23 February 2021, she states:

"Where larger scale ground rent investments are sold, they are often bought by private pension funds, for example. The details of the transaction are kept private and so it is difficult to verify the details of the sale. This leaves analysis open to inherent uncertainty.

Pure 'ground rent' transactions are extremely rare. Inevitably, there is some element of reversionary value, hope of marriage value, possible development value, or perhaps even value of commercial premises wrapped up in the price paid for the freehold. In analysing the yield, a valuer would try to strip out the elements not relevant (here, everything other than ground rent) but in doing so would inevitably introduce an element of subjectivity."

42. In the case of *Nicholson v Goff* [2007] 1 EGLR 153, which was referred to by both parties, the Lands Tribunal accepted a submission that the following factors are relevant to the capitalisation rate:

(i) the length of the lease term;

(ii) the security of recovery;

(iii) the size of the ground rent (a larger rent being more attractive);

(iv) whether there was provision for review of the ground rent; and

(v) if there were such provision, the nature of it.

43. In response to Miss Hammonds' contention that Mr Darby has considered the wrong market, Mr Cowen QC made five points on behalf of the Applicant.

44. Firstly, he stated that there is no reason of valuation principle why a higher quantum of rent should result in a different capitalisation rate. He submitted that the statement in *Nicholson v Goff* to the effect that a larger ground rent will be "more attractive" is likely to be a reference to the size of the ground rent per flat. Mr Cowen QC compared the attractiveness of a ground rent of £1,000 per annum with ground rent of £25 per annum for the same flat. He submitted that the hypothetical purchaser would be likely to be more attracted to the flat with the higher ground rent but that there is no reason why an overall higher quantum should result in a lower capitalisation rate.

45. Secondly, Mr Cowen QC relied upon Mr Darby's expert evidence. Mr Darby gave evidence that it is the rent growth pattern that is key for investors. In his experience, "A1 investors" are looking for long term index linked income streams, preferably on newly built blocks. In his opinion, ground rents with fixed review patterns such as the Lawrence Wharf ground rents are likely to be sold at auction. They are not so attractive as to be routinely purchased by way of a private sale by larger investors.

46. In Mr Darby's view, any potential benefits deriving from the scale of the larger blocks' ground rents might, at the valuation date, have been off-set by an emerging caution for tall blocks arising from the Grenfell disaster. While the Phase 1 Grenfell report did not appear until October 2019, there had been much speculation in the press about potential impact on freeholders.

47. Thirdly, Mr Cowen QC submitted that Miss Hammonds' assertion that the Lawrence Wharf ground rents are an "A1 investment" and not within the market which Mr Darby has looked at was insufficiently supported by evidence.

48. Her oral evidence on this point concerned one single investor, the Ground Rents Income Fund Plc Real Estate Investment Trust ("the GRIF REIT"). Miss Hammonds gave evidence that 6% of investments in the GRIF REIT portfolio are not index linked. She was unable to state when these investments were acquired or whether they might have formed part of a portfolio sale. Mr Cowen QC pointed out that, on Miss Hammonds' evidence, 94% of the property owned by the GRIF REIT does not fit the profile of the Lawrence Wharf ground rents.

49. The Tribunal heard evidence from both experts concerning the growth rate of the Lawrence Wharf ground rents. Mr Darby stated that the growth rate was 0.8% and Miss Hammonds stated that it was 1.15 %. Mr Cowen QC submitted that, whichever expert is correct, it is material that the growth rate fails to keep up with the inflation over last 20 years.

50. Fourthly, Mr Cowen QC relied upon evidence given by Mr Darby that the Lawrence Wharf ground rents would be likely to be sold on a block by block basis in order to maximise the size of market prepared to bid.

51. In respect of one of Mr Darby's comparables at Merrington Place, Cambridgeshire, documents obtained by Miss Hammonds demonstrated that 15 to 29 Merrington Place and 34 to 56 Marrington Place were sold as separate lots. One of these properties had not been identified in Mr Darby's search because the ground rent fell below a minimum threshold of £3,000 per lot which Mr Darby had applied.

52. Mr Cowen QC submitted that it is likely that the Merrington Place properties comprised one potential lot which had been divided to maximise the number of investors prepared to bid because they were both sold by the same administrator and by the same solicitors. He stated that this sales evidence gives some comfort to Mr Darby's more general evidence that this is what a seller in market place would do.

53. Finally, Mr Cowen QC submitted that there is a legal objection to the Respondents' case that the size of total passing rent places the Lawrence Wharf ground rents into a category which falls outside the market which has been considered by Mr Darby.

54. There are six blocks of flats at Lawrence Wharf, there are six initial notices, and there are six separate applications under section 24(1) of the 1993 Act. The six blocks of flats are being sold using one transfer but this is by agreement between parties for sake of convenience.

55. Mr Cowen QC stated that the job of the Tribunal is to determine the price to be to paid for each block and part of this task is to ascertain a capitalisation rate for each block. Mr Heather QC did not accept Mr Cowen QC's analysis. He submitted that it would be wrong from a valuation perspective to disregard the proposed conveyance and that the Tribunal must have regard to the actual terms of the transfer. For reasons which will be set out below, it is not necessary for the Tribunal to determine whether or not the legal objection to the Respondents' case is valid.

56. Mr Heather QC submitted that Miss Hammonds was an impressive witness who had clearly explained why she could see no alternative in the present case but to adopt the approach which she had adopted. She had accepted that some of Mr Darby's comparables might be found to be reliable on further investigation and this demonstrates that her evidence was fair. Her evidence was not that the Lawrence Wharf ground rent would only be attractive to "A1 investors" but rather she had stated that this investment also would attract the top of the middle range of investors.

57. Mr Heather QC submitted that support for Miss Hammonds' expert opinion is to be found in Mr Darby's comparable sales evidence. Mr Darby did not find any properties with total passing ground rents at the £55,000 per annum level and he did not find more than one at the £16,000 per annum level. On average, his comparables have total passing ground rents of around £5,600 per annum and nine are at the level of £5,000 or below.

58. As regards the Applicant's case that a prudent seller would split the Lawrence Wharf ground rents into smaller lots, Mr Heather QC relied upon oral evidence given by Miss Hammonds. In her opinion, such an approach would be unlikely because, if the six blocks were considered as a whole, there would be economies of scale when it came to the set-up costs and the costs of recovering the ground rents.

59. The Tribunal accepts that Miss Hammonds stated that the Lawrence Wharf ground rents would be attractive to the top of the middle range of investors. However, we are of the view that the key issue is whether the Lawrence Wharf ground rents are sufficiently attractive to appeal to any larger investors who purchase ground rents by way of confidential private sales with the consequence that, in looking at auction sales, Mr Darby has considered the wrong market.

60. We accept Mr Cowen QC's submission that there is no reason of valuation principle why a higher overall quantum of rent should result in a different capitalisation rate. An investment with a moderate return is unlikely to become more attractive relative to an investment with a higher return as the overall size of the sum invested increases. Accordingly, we accept Mr Cowen's submission that the reference to the

size of the ground rent in *Nicholson v Goff* is likely to be directed at the size of the ground rent per flat.

61. We accept Mr Darby's expert opinion that it is the growth pattern which is key for investors. The hypothetical purchaser is likely to be most interested in the level of the return on their investment. We are not satisfied on the basis of the evidence before us that economies of scale when it comes to any set up costs and costs of recovering the ground rents which are not paid by the lessees would be a significant factor. No specific figures or examples were provided and we consider it likely that, at the valuation date, there was an emerging caution for tall blocks arising from the Grenfell disaster which would off-set any potential benefits deriving from the scale of the larger blocks' ground rents.

62. We have not seen persuasive evidence that investments such as the Lawrence Wharf ground rents are routinely sold in isolation outside auction. As stated by Mr Cowen QC, 94% of the property owned by the GRIF REIT does not fit the profile of the Lawrence Wharf ground rents. We accept a point made by Miss Hammonds in oral evidence that the remaining 6% were not immediately sold on by the GRIF REIT. However, it is not known whether this 6% was considered attractive enough to be purchased in isolation or whether these ground rents were purchased as a part of a portfolio which included more attractive ground rents with dynamic growth rates.

63. We accept that Mr Darby's search did not produce investments with a high overall quantum of ground rent. This may be because such investments are divided into smaller lots to maximise the number of potential bidders, which we accept appears to have occurred in the case of the Merrington Place properties. Alternatively, it may be the case that blocks of flats with fixed review patterns rather than dynamic review patterns and a total passing rent of in the region of £55,000 are rare. However, having considered the evidence, we are not satisfied that it is likely that large ground rent investments with fixed review patterns are routinely sold on a private basis to upper midrange or large investors.

64. Accordingly, having considered and weighed up all of the evidence, we prefer the expert opinion of Mr Darby on this issue and find that he has considered the correct market. It is therefore not necessary for the Tribunal to determine whether the legal objection to the Respondents' case that the size of passing rent places the Lawrence Wharf ground rents into a category which falls outside the market which has been considered by Mr Darby is valid.

Whether Mr Darby's market evidence is reliable

65. Mr Darby carried out a search of the Essential Information Group auction database. This search identified United Kingdom freehold ground rents in the period of up to three years before the valuation date

with a minimum income of £3,000 per annum and a minimum unexpired term of 100 years.

66. Mr Darby explained that he set the ground rent minimum at £3,000 in order to filter out small lots comprising period conversions, flats above shops, and other small and complicated lots which are not comparable to blocks of flats. He set the minimum unexpired term at 100 years in order to (i) filter out investments where the buyer might have some hope of windfall gains from future lease extensions and (ii) filter out investments where the buyer might attach significant value to the reversion.

67. Mr Darby's search produced 41 results, 22 of which he considered to be potentially relevant. Of these 22, he confirmed the lease terms and actual ground rent patterns. He then chose the 12 which had fixed increases on review (the remaining ones all had index linked reviews). He analysed these on the basis both that the reversion is of negligible value, and also that the reversion is deferred at the capitalisation rate.

68. Mr Darby put forward these 12 comparables as providing good evidence as to the market value at the valuation date of the ground rents for any one of the Lawrence Wharf blocks, whose individual passing rents range from a total of £1,200 per annum to £16,800 per annum. Mr Darby took an arithmetic mean of the 12 capitalisation rates which he derived from his analysis to arrive at a rate of 6.35%.

69. Mr Darby is of the opinion that the capitalisation rate derived from this market evidence is not strongly influenced by location or lot size and that the growth over time of the Lawrence Wharf ground rents is significantly poorer than that of any of his comparables. On this basis, he contends for a capitalisation rate of 6.35%.

70. The Respondents sought to challenge seven of Mr Darby's comparables on the basis of research carried out by Miss Hammonds. It was agreed that a bundle of documents produced by Miss Hammonds in response to Mr Darby's expert report would be admitted in evidence. Mr Heather QC pointed to the fact that Miss Hammonds only had two working days (Friday 25 February 2021 and Monday 1 March 2021) in which to carry out her research following receipt of Mr Darby's report. Mr Cowen QC stated that it was at all times open to Miss Hammonds to carry out the same exercise as Mr Darby.

71. In addition to raising specific points of challenge, Mr Heather QC made the wider submission that the research carried out by Miss Hammonds in the space of two working days demonstrates that Mr Darby's research is insufficiently thorough and detailed. Mr Heather QC noted that, if she had had further time, Miss Hammonds may have identified further issues and that the Tribunal is faced with the possibility of "unknown unknowns". He submitted that the primary issue is not whether what

Miss Hammonds says about Mr Darby's comparables is correct but rather it is whether sufficient evidence has been provided by Mr Darby. The purpose of raising these points of challenge was to demonstrate that there is a question mark concerning the entire process which Mr Darby adopted.

72. The Respondents' specific points of challenge are as follows.

130-140 North Street, Bedminster Bristol BS3 1EY

73. Sales particulars obtained by Miss Hammonds showed that flat 16 at 130 North Street sold for £160,000 on 1 October 2019 and for £150,000 on 26 May 2017 whereas Mr Darby has assumed a value of £250,000 per flat. Mr Heather QC noted that Mr Darby's broad-brush approach of assuming a value of £250,000 per flat was not supported by any specific evidence.

74. In cross-examination, Mr Darby explained that he chose to strip out the reversionary interest when carrying out his calculation because he could have spent *"a huge amount of time out of all scale to the result"* in trying to work out an exact value of the reversions when this would have very little impact on his final figure. Accordingly, he has assumed in each case, to the benefit of the Respondents, that the reversion is not a significant consideration in terms of valuation. We consider that this was a reasonable and proportionate approach to adopt.

75. It was suggested on the basis of Miss Hammonds' research that the price paid at auction for this property may have included development value and that a property with development value may appeal to a different category of purchaser. Accordingly, the existence of development value renders this sales evidence unreliable.

76. Mr Darby gave evidence that, if there had been development value, the price paid for the income stream element would have been lower. Accordingly, if an adjustment were made to reflect development value, the capitalisation rate would be higher to the benefit of the Respondents. We accept this contention.

77. We were shown a copy of a decision dated 10 June 2020 in which a First-tier Tribunal granted dispensation from the consultation requirements contained in section 20 of the Landlord and Tenant Act 1985 in respect of proposed work to repair the roof of 130-140 North Street. The Respondents suggested that the price paid for the ground rents might have reflected the need to repair the roof.

78. The date of sale of 130-140 North Street is 14 February 2019. The application for dispensation was made before 20 March 2020 (20 March 2020 is the date on which directions were given). It is stated at

paragraph 2 of the decision that a flat was suffering from water ingress and, at paragraph 13:

"It is clear that the works to repair a defective roof should be carried out without the delay that Section 20 consultation inevitably involves".

79. Accordingly, the nature of the defect was such that there was an element of urgency and we therefore find that it is unlikely that the defect to the roof had been in existence since the date of sale in February 2019.

34-56 (even numbers) Merrington Place, Impington, Cambridgshire CB24 9AL

80. It is apparent from the auction particulars that 15-29 (odd numbers) Merrington Place was sold in a separate lot from 34-56 (even numbers) Merrington Place. Mr Cowen QC submitted that nothing turns on this other than that it supports Mr Darby's contention that larger lots are likely to be divided. Mr Heather QC submitted that matters such as this go to the issue of whether Mr Darby's research was sufficiently thorough.

81. The Respondents questioned the relevance of this sales evidence on the grounds that the property was sold by administrators. However, no reason was put forward as to why potential bidders would be likely to be influenced by the identity of the seller and we have considered the Red Book Valuation Practice Statement 4, to which we were referred. There is no evidence that the marketing and sale of this property was different in nature from that of any of the other properties sold at auction. Accordingly, notwithstanding that the property was sold by administrators, we are satisfied that this auction sale constitutes reliable evidence of market value.

82. The Tribunal was also referred to a copy of a report to a Planning Committee dated 13 February 2019 which was prepared by Rebecca Ward, a Principal Planning Officer. This report concerned a proposal to erect 26 dwellings on a site bounded to the west by the Merrington Place properties and their garden areas.

83. If the lot itself had included development value, we would expect this to be set out in the auction particulars with a view to achieving the best possible price. Mr Darby gave evidence that he had investigated this matter and that the owners of 34-56 Merrington Place were not selling the land with planning permission but rather it was an adjoining plot which was to be developed. We accept this evidence. We also accept evidence given by Mr Darby that the hypothetical purchaser of a ground rent investment is unlikely to place weight on whether or not an adjoining plot will be developed because this is unlikely to have any bearing on the income stream.

Flats 1-9 27/29 John Adam Street, Covent Garden WC2N 6AS

84. As regards this property, Mr Darby accepted in cross-examination that there might be an issue because the lessees have taken up their right of first refusal under the Landlord and Tenant Act 1987 ("1987 Act"). He accepted that, when potential purchasers believe that 1987 Act rights are likely to be taken up, this will depress the price paid at auction because fewer people will bid. He accepted that this could have occurred in the case of the John Adam Street Property.

85. If this property is removed from Mr Darby's list of comparables, the capitalisation rate which is derived by analysing them increases. Mr Cowen QC was content for the Tribunal to keep the number of comparables at 12 and we would have been minded to do so in any event, the Respondents having not been put on notice that a capitalisation rate higher than 6.35% might be contended for.

1-6 Armoury House, 1-3 Gate House, 1-23 Albany Works, Gunmakers Lane, Bow E3 5QA

86. The sale of this property took place on 13 February 2018. The Tribunal was referred to a report of the Tower Hamlets Development Committee dated 14 January 2021 recommending the grant of planning permission with conditions for a two-storey extension above the existing building.

87. Mr Darby gave evidence that this recommendation flowed from planning policies which had not been adopted at the date of sale. In his view, the development value is therefore unlikely to have been included in the purchase price. We accept this evidence. Mr Darby also repeated his opinion that were development value to be included in the price, the sum paid for the ground rents would be lower resulting in a higher capitalisation rate, to the detriment of the Respondents. We also accept this contention.

Flat 1-14 Insignia Court, 91-93 Church Road, Ashford, Middlesex TW15 2AX

88. It was put to Mr Darby that it is relevant that the sales particulars in respect of this property state that landlord has the right to insure the building because there may therefore be the possibility of an additional income stream.

89. Mr Darby gave evidence that having the right to insure the building is unlikely to affect the price paid at auction because it is usual for the landlord to have the right to insure the building. Further, it is unlikely to be possible for a landlord to legitimately make a profit from insuring a building.

90. We accept this evidence. We also are satisfied that if, contrary to Mr Darby's evidence, the hypothetical purchaser would be willing to pay a higher purchase price because they considered that there was the possibility that they would receive an additional income stream, any adjustment made to reflect this additional benefit would increase rather than decrease the capitalisation rate.

Freehold Ground rents, Clarendon Court, 256 Harrow, View, North Harrow HA2 6QJ

91. It was suggested to Mr Darby that this site might have had development potential at the date of sale. Mr Darby gave evidence that he had looked at the Land Registry documents and had ascertained that there was no development potential but simply a parking area and communal amenity space over which the lessees had rights. We accept this evidence.

Ground rents, The Landmarks, 66-68 Sackville Road, Bexhill on Sea, East Sussex TN39 3HH

92. This was a sale on the instructions of receivers but, for the reasons set out above in the context of a sale by administrators, we are satisfied that a sale at auction is nonetheless reliable evidence of market value.

93. In the case of this property, the lessees reserved their right of first refusal under the 1987 Act but did not take it up. This block contains 66 residential flats and the sale price was £395,000. Mr Darby gave evidence that, having regard to the nature of the building and to its location, the lessees as well as being numerous are likely to be of relatively modest means. Accordingly, in all the circumstances, potential bidders would have considered it unlikely that the right of first refusal would be taken up and the sale price is unlikely to be depressed on account of this possibility. We accept this evidence.

94. Mr Heather QC submitted that the fact that Mr Darby has only identified 12 comparables which he considers to be relevant over a three year period is in itself indicative of the scarcity of appropriate market evidence. He noted that, when assessing the value of a freehold with vacant possession, all of the transactions relied upon are likely to be within a year of the valuation date. We agree with this proposition but we are of the view that ground rent sales take place in a different type of market and that, in the case of ground rents, it is appropriate to consider sales over a longer period of time unless there have been significant changes in the economic conditions.

95. Mr Heather QC stated that Mr Darby has failed to present the Tribunal with sufficiently detailed evidence. He provided only "thumbnails" in respect of each of his comparables despite the fact that he had in his possession the full auction particulars. He did not include the auction

packs in his report and he did not ask the auctioneers themselves for information. His research into planning issues was limited.

96. It was submitted that Mr Darby appears to have assembled his list of comparables at speed over a short period of time, possibly in a rush. It became apparent during cross-examination that relevant information of which Mr Darby was aware had not been incorporated into his written evidence. For example, in respect of the John Adam Street property, Mr Darby was aware that the lessees had reserved their right of first refusal under the 1987 Act. This is information which could affect the price paid but which did not appear in Mr Darby's report.

97. Mr Darby only looked at one or two leases per block and he did not append copies of these leases or of the freehold titles to his report. Miss Hammonds gave evidence that to render auction sales evidence reliable a "deep dive" is necessary. Comparisons were drawn with the nature of the evidence given by Mr Mellor in the *All Saints case*. Mr Mellor had provided the Tribunal with 89 pages of documents per transaction.

98. Further, neither Miss Hammonds nor Mr Darby himself was able to replicate Mr Darby's initial search. Mr Darby's initial search produced 41 properties but, on seeking to replicate it, he obtained only 39. Mr Darby's ground rent minimum of £3,000 is set at a level which excludes the total passing ground rent of the smallest block at Lawrence Wharf.

99. Mr Heather QC also submitted that Mr Darby did not sufficiently explain his workings. For example, a decision to exclude properties with 999-year leases was not explained in Mr Darby's expert report and only became apparent during cross-examination. Further, a building in Bristol did not get through Mr Darby's initial sift on account of having 999-year leases but a number of other properties with 999-year leases did.

100. We agree with Mr Heather QC that it would have assisted us to have had sight of the individual auction packs for each comparable. We consider that the hypothetical purchaser would be likely to have obtained these documents. We also agree that it would have been of assistance if some of the detail which was provided by Mr Darby only during cross-examination had been set out in his expert report. However, we note that Mr Darby was generally able to provide either further detail or an explanation when he was challenged.

101. As regards the suggestion that Mr Darby should have consulted the auctioneers, we consider it likely that many would state that they could no longer recollect the details of the sales or would simply have declined to speak to him. Accordingly, we think it unlikely that the hypothetical purchaser would have pursued this line of enquiry. Further, in our view, the failure of Mr Darby and Miss Hammonds to replicate Mr Darby's

initial search is likely to be due to the nature of the software rather than the result of any failing on the part of Mr Darby.

102. We accept that Mr Darby's minimum threshold total passing rent of £3,000 per annum excludes the smallest of the Lawrence Wharf blocks. However, we are satisfied that it was reasonable for him to set the threshold at this level in order to exclude period conversions, flats above shops, and other small and complicated lots which are not comparable to blocks of flats. It is unlikely that a significant number of relevant blocks of flats will have been excluded.

103. We accept that a building in Bristol did not get through Mr Darby's initial sift on account of having 999-year leases when a number of other properties with 999-year leases did. However, we accept Mr Darby's explanation that this is because he did not initially appreciate that the other properties had 999-year leases.

104. We note that, in a number of instances when Mr Darby did not consider it proportionate to follow up possible lines of enquiry, the probable outcome of proceeding further would have been an increase in the capitalisation rate. Mr Darby took into account both proportionality and the fact that it was unlikely that there would be any detriment to the Respondents in declining to carry out further research.

105. We accept Mr Heather QC's submission that the hypothetical purchaser would look in detail at what they were potentially buying. However, we consider it unlikely that they would carry out research as detailed as the "deep dive" which was advocated by Miss Hammonds, which covered all of the matters which were put to Mr Darby in cross-examination.

106. We have carefully considered the entirety of the evidence given by Mr Darby, both written and oral. Mr Darby gave oral evidence from approximately 3.40 pm until around 4.30 pm on 3 March 2021 and then from around 10.10 am until around 4.40 pm on 4 March 2021 (with the usual breaks). We find that, whilst some further detail in his written report would have assisted us, Mr Darby's evidence as a whole is sufficiently detailed, relevant and consistent to be reliable. In our view, it reflects the level of detail of the investigations which are likely to be carried out by the hypothetical purchaser on the facts of this case.

107. Accordingly, we accept Mr Darby's evidence on this issue and find that the applicable capitalisation rate is 6.35%.

Miss Hammonds' approach

108. Miss Hammonds relied upon two First-tier Tribunal decisions on the grounds that no relevant, reliable market evidence is available in the present case. Accordingly, having determined that Mr Darby's market

evidence is relevant and reliable, it is not necessary for the Tribunal to go on to consider Ms Hammond's approach. However, it was suggested that the cases relied upon by Miss Hammonds could potentially be used as a cross-check if we preferred Mr Darby's evidence and we make the following observations.

109. The Respondents point to the fact that both of the decisions relied upon by Miss Hammonds pre-date the valuation date in these applications: by 19 months in the case of *All Saints* and by 10 months in the case of *The Cedars*.

110. In *Trustees of the Sloane Stanley Estate v Mundy* [2016] UKUT 226 (LC) Morgan J said (in relation to the use of graphs of relativity) at [167]:

"It is conceivable that decisions of the tribunals might also influence valuers and in turn influence parties in the market. If that were to occur, then the changed market circumstances before a relevant valuation date must be taken into account when considering market value at that date."

111. In the *All Saints* case, the capitalisation rate determined for 52 flats was 3.35%. In that case, the initial ground rents were £250 or £300 per annum, with reviews every 15 years by reference to the retail price index ("RPI").

112. At paragraph 2.3.4 of her report of 23 February 2021, Miss Hammonds mistakenly referred to the ground rent in *The Cedars* as having a fixed ground rent review pattern. This error was swiftly corrected in a supplemental report dated 25 February 2021.

113. In her supplemental report, Miss Hammonds states that in *The Cedars*, the passing ground rents for 10 flats were between £175 and £225 per annum, but did not rise in fixed increases. The rent review pattern was dynamic, linked to the increase in value of the building as a whole.

114. In *The Cedars,* the parties had agreed that, at the rent review falling a year after the valuation date, the ground rents would rise to between £600.67 and £772.28 per annum. The hypothetical purchaser's view of the likelihood and size of future increases was accounted for in the choice of capitalisation rate. Miss Hammonds is of the opinion that this is a markedly different interest to either an RPI-linked rent review, as in *All Saints*, or a fixed review pattern as in the present case.

115. Miss Hammonds states that all three of the investments which she has considered (*The Cedars*, *All Saints*, and Lawrence Wharf) are secure ground rent investments. The threat of forfeiture for non-payment of rent means the rents are very likely to be paid; they are low sums to pay when compared to the value of the lessee's interest, which could be lost

in the case of non-payment. From the hypothetical purchaser's perspective, therefore, they are very secure by contrast with, for example, a ground rent that doubles every five years which would become unaffordable, raising the prospect of forfeiture.

116. Miss Hammonds notes that there is also no inflation risk with a fixed review pattern; the hypothetical purchaser knows exactly what income they are buying. In the case of *The Cedars*, she states that the risk profile is different. The investor takes a gamble that property values will rise and therefore the rent will rise; the purchaser is gambling on property prices rising throughout the term.

117. In the *All Saints* case, the reviews were every 15 years and linked to the RPI. Miss Hammonds accepts that RPI does have some link to property values; around 8% of the RPI "basket". However, she states that, nonetheless, if there is a fall in property value, an RPI-linked rent review is much better protected than a rent review linked solely to property value as the "basket" is diverse. Further, the government has set an inflation target of 2.00%. Although there is no guarantee that inflation will be on target, the hypothetical purchaser can draw comfort from this. In real terms, the income stream they buy at the valuation date will be equally as valuable in the future.

118. On the basis of her analysis that the investment in the *All Saints* case is more attractive than the investment in the present case and the investment in *The Cedars* is less attractive, Miss Hammonds concludes that the capitalisation rate should fall between those adopted in these two cases. She has therefore applied a capitalisation rate of 4.25% in the present case.

119. In cross-examination, Mr Darby gave evidence that the two cases relied upon by Miss Hammonds are not of assistance in the present case because it is like comparing *"apples, pears and oranges"*. He did not accept that the market for the Lawrence Wharf ground rents would be affected by the cases relied upon by Miss Hammonds because the types of rent review in those cases are different.

120. Mr Darby also stated that he could see no reason why purchasers of ground rents would be influenced by two cases specific to the properties involved and that the hypothetical purchaser would be likely to know that first instance Tribunal decisions are not binding on other Tribunals. However, Mr Darby did carry out his own analysis of these two cases based upon EYF (equated yield of future growth/rent) as a potential cross-check. He made adjustments in order to, on his evidence, compare like with like and he reached the conclusion that these cases in fact support his proposed capitalisation rate of 6.35%.

121. We are of the view that it is unlikely that the market for the Lawrence Wharf ground rents, which have fixed review patterns, would be

influenced by first instance Tribunal decisions concerning dynamic ground rents, which are very different in nature. Further, we are not satisfied on the evidence that the market for ground rents with fixed review patterns was in fact influenced by these cases; no examples of such influence have been given.

122. Further, we do not have first-hand knowledge of the evidence and argument which was presented to the Tribunals in the cases of *All Saints* and *The Cedars*.

123. As stated by the Lands Tribunal in *Arrowdell v Coniston Court (North) Hove Limited* [2007] RVR 39(2) at [37]:

> *"…each tribunal decision is dependent on the evidence before it, and thus, in order to determine how much weight should be attached to the figure adopted in a decision, it would be necessary to investigate what evidence the leasehold valuation tribunal had before it and how it had treated it. Such a process of investigation is potentially lengthy, and it is inherently undesirable that leasehold valuation tribunal hearings should resolve themselves into rehearings of earlier determinations."*

124. We did not find the cases of *All Saints* and *The Cedars* of assistance as a cross-check because (i) to have used them as a cross-check would have involved an analysis of evidence and argument in respect of which we do not have any first-hand knowledge; and (ii) because the ground rents which were considered in those cases are very different in nature from the Lawrence Wharf ground rents. We are of the view that we must determine this case on the basis of the evidence which was presented to us.

The amount of development hope value

125. At the commencement of the hearing, the terms of the transfer had not been agreed and the development hope value of six potential development sites at Lawrence Wharf was in issue. The terms of the transfer have since been agreed and, as a consequence of this agreement, the Respondents claim development hope value in respect of one of these six sites. The other five potential developments concern land which the Respondents will retain and which they can seek to develop themselves.

126. Before the terms of the transfer were agreed, the Tribunal heard expert evidence concerning the development hope value of the five sites which are no longer under consideration. Some of this evidence was referred to in closing submissions on the issue of the weight to be given to the evidence of the parties' respective experts.

127. The potential development in respect of which the amount of development hope value remains in issue ("the Rooftop Development")

concerns the proposed addition of a third-floor above 273-287A Rotherhithe Street and 289-301A Rotherhithe Street to create a revised plan for eight flats accessible from a newly formed central stair core infilling between the two blocks. A planning application was made in respect of the Rooftop Development in May 2020, that is after the valuation date of August 2019. Planning consent was refused on 26 June 2020 and an appeal against this refusal is yet to be determined.

128. Miss Hammonds and Mr Darby have agreed that the gross development value of the Rooftop Development is £3,848,000. As indicated above, the experts also agree that the basic site value will be taken as 40% of gross development value, assuming usual costs and risks. The agreed basic site value is therefore £1,539,200.

129. Each valuer has applied a discount to the basic site value to take account of planning risk. This discount is derived from the evidence of the parties' respective planning experts. On behalf of the Applicant, Mr Dines assesses the prospects of obtaining planning consent for the Rooftop Development at 10% and, on behalf of the Respondents, Mr Roshier assesses the prospects of obtaining planning consent at 90%. Both valuers have applied the planning risk as a percentage deduction to the agreed basic site value.

130. Mr Darby is of the view that there are unusual costs and risks associated with the Rooftop Development. In his opinion, the price would be reduced 40% on account of unusual build costs, 10% for construction risk, and 40% on account of the fact that the properties immediately below the proposed development are occupied. Accordingly, he makes a further 90% adjustment on account of unusual costs and risks.

131. Applying both an adjustment of 90% on account of planning risk and an adjustment of 90% on account of construction costs and uncertainty, Mr Darby is of the view that a developer would add no more than around £15,000 to the purchase price of the specified premises. This was described as "a gambling chip" during the hearing.

132. Miss Hammonds halves Mr Roshier's planning risk figure of 90% to make the risk "palatable" to a potential investor. She applied an adjustment of 50% in the case of all developments where there was planning risk. She is of the view that there are no unusual additional costs or risks and she therefore makes no further adjustment. On Miss Hammonds' evidence, the development hope value of the Rooftop Development is £692,640.

Planning risk

133. At paragraphs 4.31 and 4.38 to 4.40 of his expert report dated 10 February 2021, Mr Dines says of the Rooftop Development:

"4.31 Considering the prospect of getting planning permission for an additional storey on this site I would have two primary concerns: the means of accessing the extension; and the design of the extension, given the character of Lawrence Wharf.

4.38 … I consider the existing apartment buildings to be designed to a high quality. They are pleasing to the eye and the composition of the facades has a rhythm and integrity which is attractive. It is an integral part of the Lawrence Wharf development.

4.39 Limited development is acceptable (18/AP/1253 and 14/AP/3540). It is for this reason I do not consider the site to be capable of accepting a significant number of additional residential units without harm to the quality of the buildings resulting. This view is shared by officer of the Council as it was refused planning permission.

4.40 In my view the proposal would not accord with Policies 7.4 and 7.6 of the London Plan 2016, Strategic Policy 12 of the Southwark Core Strategy 2011 and Saved Policies 3.12 and 3.13 of the Southwark Plan 2007 and therefore there is a 10% prospect of the proposal set out in the current application being granted planning permission. For the reason relating to the infilling of the majority of the gap between the apartment buildings above I also consider that the development cannot be amended to render it acceptable."

134. Mr Dines assessed the planning risk at 10% in respect of four of the six potential developments which were originally under consideration.

135. At paragraphs 80 and 81 of his expert report dated 21 December 2020, Mr Roshier states:

"80. Based on the assessment set out in the officer's report, LB Southwark determined to refuse planning permission (under delegated powers) for the application on 26th June 2020. The reasons for refusal are set out on the Council's decision notice and are as follows:

'1.The proposed development would adversely impact on the existing well proportioned and straightforward coherency of the architectural style of the host buildings, as well as the rhythm of the host buildings with the adjacent terrace in the street scene, and would therefore be contrary to NPPF Chapter 12 Achieving Well Designed Places, Strategic Policy 12 (Design and Conservation) of the Core Strategy 2011 and Saved Policies 3.12 (Quality in Design) and 3.13 (Urban Design) of the Southwark Plan 2007.

2. In the absence of a daylight and sunlight assessment, insufficient information has been provided as to whether the proposed development would adversely impact on the amenity of adjoining occupiers in terms

of daylight, sunlight and overshadowing, contrary to the NPPF (2019), Policy 7.6 (Architecture) of the London Plan 2016, Saved Policy 3.2 (Protection of amenity) of the Southwark Plan 2007 and the 2015 Technical Update to the Residential Design Standards SPD 2011.'"

81. In my view, had the application been submitted and determined prior to 20th August 2019, LB Southwark would have taken a similar approach and would have, in all likelihood, reached the same conclusion."

136. A Daylight and Sunlight Assessment was subsequently prepared on behalf the Respondents and submitted to the London Borough of Southwark ("the Council"). The Council then agreed that the second reason given for the refusal of planning consent is no longer applicable.

137. As regards the Council's first reason for refusing planning consent, Mr Roshier states at paragraph 89 of his report that he does not agree with the Council that the proposed development will give rise to an unacceptable impact upon the coherency of the architecture of the three terraces or the wider street scene and he sets out his reasons. In his opinion, there are high prospects of obtaining planning consent on appeal.

138. In giving oral evidence, Mr Roshier confirmed that he did not consider that the refusal of planning permission by the Council in the present case, after the valuation date, was unexpected. His position was that, at the valuation date, the hypothetical purchaser would expect planning permission to be refused initially but to be granted on appeal. He accepted that the Planning Inspector on appeal would apply exactly the same policies as the Council and he did not put forward any evidence that the first instance decisions of the London Borough of Southwark are routinely reversed on appeal.

139. As regards Mr Dines' evidence, we accept a submission made by Mr Heather QC that there are distinctions which can be made between the four potential developments which Mr Dines has assessed as having a planning risk of 10%. We agree that the planning risk in respect of each of these potential developments is unlikely to be precisely the same. We also accept a point made by Mr Heather QC that it cannot simply be the case that Mr Dines assesses the planning risk in respect of all schemes which he considers to have low prospects at 10% because, in respect of one of the potential developments, he moved from 5% to 10%.

140. However, having seen and heard Mr Dines give evidence, we are of the view that he adopts a broad approach where the planning risk is very high, applying 10% when he considers that the prospects of obtaining consent are very low and 5% when he considers that the prospects of obtaining consent are so extremely low as to be practically hopeless.

141. Whilst we consider that Mr Dines could have made further distinctions within these categories, we are not satisfied that his policy of adopting a broad approach where the planning risk is very high is evidence of a lack of objectivity so as to render his expert evidence unreliable. In our view, Mr Dines has simply adopted an approach where the risks are very high with which other experts may or may not disagree.

142. Having considered the evidence of Mr Dines and Mr Roshier and all of the documents and photographs to which we were referred, we are of the view that there are low to moderate prospects of obtaining planning permission in respect of the Rooftop Development on appeal.

143. However, on the basis of both experts' evidence, the hypothetical purchaser will conclude at the valuation date that planning consent is likely to be refused initially. In our view, the expected initial refusal of planning consent is likely to be the hypothetical purchaser's primary consideration. The prospect of an initial refusal of planning consent is likely to cause alarm to a developer, particularly in the absence of any specific evidence demonstrating that the Council's decisions are routinely overturned on appeal and when the Planning Inspector on appeal will apply the exactly same policies as were applied by the Council at first instance.

144. In our view, this scenario is very different from the type of case in which, at the valuation date, there has already been a refusal of planning consent and there are specific reasons why the decision already in existence is considered to be wrong and likely to be reversed on appeal. There is no clear reason in the present case why the prospects at first instance and on appeal should vary significantly. In all the circumstances, we are of the view that the planning risk falls to be assessed at 15%.

Development costs and risks

145. Comparisons were drawn during the hearing between the Rooftop Development and a residential loft conversion. In support of his contention that there are likely to be unusual build costs and risks, Mr Darby gave evidence that the Rooftop Development is very different from a loft conversion because the proposal is for new flats with different occupiers. He stated that it will be necessary to put in place a separation which is both sound proof and fire resistant. He also gave evidence that it is likely that a new floor slab would have to be put down to in order provide the basis for the new flats.

146. In Mr Darby's opinion, it is unlikely to be possible to carry out a project of this type with people living immediately below whilst the work takes place. He referred to the possibility of a crane falling over or of scaffolding collapsing. He stated that carrying out a household loft conversion involves a "totally different scale of construction" and that

any residents would be likely to complain of noise, dust and dirt on a frequent basis.

147. Mr Darby accepted that it is common for flats to be built on top of existing blocks but gave evidence that, in many cases, the new flats are built on top of an existing flat concrete roof. By contrast, in the present case, the blocks in question have pitched roofs which would have to be completely reconstructed. Mr Darby did not accept that it is common to put down a new slab when the top storey of the block immediately below is occupied. Whilst he agreed that flats have been built on top of a similar nearby block, Dockside Terrace, he gave evidence that Dockside Terrace was in fact vacant when this development work took place.

148. In giving oral evidence, Miss Hammonds was consistent in her view that there are no unusual build costs or risks and she concluded *"I do not see anything in the round that is unusual"*.

149. Miss Hammonds pointed out that, at any one time, buildings are developed all over London and often this work is inconvenient and carried out in close proximity to neighbours. She was of the view that a temporary roof could be put in place whilst the development work was carried out and, in her opinion, the risks were likely to be similar to those of carrying out a residential loft extension. She pointed out that lorries would not be on site for 24 hours a day and that site management is an issue in any London location.

150. The Tribunal was referred to photographs in the trial bundle as demonstrating that this is a simple site overall, with onsite parking and storage space. Lawrence Wharf was not within either the Congestion Zone or the Ultra Low Emission Zone at the valuation date and it was submitted that Lawrence Wharf is an easier site than city centre locations in Southwark. Comparisons were also made between the site under consideration and other potential development sites at Lawrence Wharf.

151. As stated above, the current proposal is to provide eight self-contained flats over existing occupied properties. Having carefully considered the evidence which we heard from Mr Darby and Miss Hammonds and the photographs and documents to which we were referred, the Tribunal is of the view that it is likely to be necessary to instruct a specialist roof top contractor to carry out the Rooftop Development.

152. We find that it is also likely that a new structure, a new floating floor on top of the existing plasterboard ceilings of the town houses below, and the provision of new communal staircase and walkway will be needed. Work of this nature will probably will require the use at least one crane.

153. We accept that there will be the potential risk of causing damage to the existing structure and health and safety considerations. We also accept

that there is certainly the possibility that the residents of the maisonettes below will have to be relocated during the construction works.

154. We find that, in all the circumstances, an adjustment of 10% falls to be made to take into account of unusual costs and risks.

Whether any further adjustment falls to be made.

155. In giving oral evidence, Mr Darby said that:

"Tribunals have a difficult job trying to come up with a market figure that represents something real. They are forced to do it in an artificial way. Developers are not saloon bar gamblers. They use vision and drive to make profit. They usually use someone else's money … and are possibly putting into the whole thing 25% of the total development costs. They are not going to risk that money on something less than very certain. They do not pay out large sums of money in the real world in the hope that they can make a development work. In the real world there would be an option, a conditional contract, or joint venture with the lessees so here the developer would do little more than top up what they would pay otherwise. Very rarely do they risk cold hard cash to buy a site at significant value unless there is near certainty that they can start and complete the development and make a profit."

156. As stated above, after applying his adjustments Mr Darby was of the view that the hypothetical purchaser would pay no more than a "gambling chip" price of £15,000 in respect of the development hope value of the Rooftop Development.

157. It was submitted that if the Tribunal believes that there is a small chance of the Rooftop Development taking place, we should either adopt Mr Darby's figure of £15,000 or apply our own "gambling chip" sum, which would be no more than a nominal amount.

158. As stated above, Miss Hammonds halved the chance of planning success in order to make the risk "palatable" to a potential investor. She was of the opinion that a hypothetical purchaser would be cautious and would require a higher degree of profit from the development to balance the potential losses.

159. In giving oral evidence, Miss Hammonds stated that:

"The seller will sell at the best price but the hypothetical purchaser will not purchase at [the planning risk multiplied by the basic site value] because, at this level, the risk is unpalatable."

160. When asked why the sum to be paid becomes palatable at 50% of the planning risk, Miss Hammonds explained that she had stood back and considered the proposed development in the round, applying her expert knowledge and experience in order to reach the level at which the numbers "made sense."

161. During cross-examination, Miss Hammonds explained that it may not be correct to say that she would reduce the likelihood of obtaining planning consent by half and that the practical effect of what she has done is simply to reduce the hypothetical purchaser's bid. She accepted that 50% would not be the level of the adjustment to be applied in all cases and stressed that she had considered the potential development as a whole.

162. The agreed basic site value is £1,539,200. Applying the Tribunal's adjustment of 10% on account of unusual build costs, the adjusted site value is £1,385,280. Taking 15% of this figure on account of the Tribunal's assessment of planning risk results in a potential site value of £207,792. However, we are not satisfied that the hypothetical purchaser would pay a sum as high as £207,792 when, if planning consent is not obtained, the proposed development simply cannot go ahead.

163. In our view, after applying these adjustments, the hypothetical purchaser would pay more than a "gambling chip" sum of a few thousand pounds in respect of the development hope value of the Rooftop Development. We accept Miss Hammonds' expert opinion that the hypothetical purchaser would stand back, consider all the circumstances, and make a further adjustment in order to make the investment palatable.

164. Standing back and considering the matter in the round, we are of the view that a hypothetical purchaser would make a further adjustment of around a third. We therefore assess the development hope value of the Rooftop Development in the sum of £140,000 on this basis.

Conclusion

165. Six valuations carried out by the Tribunal, which reflect the Tribunal's determinations and the matters which have been agreed by the parties, are appended to this decision.

Name: Judge N Hawkes **Date:** 14 April 2014

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix A. Valuations

LON/00BE/OCE/2020/0025 - Mermaid Court		
Agreed Ground Rent Capitalised @ 6.35%	£303,759	
Agreed Reversion	£254,467	£558,226
LON/00BE/OCE/2020/0028 - Christian Court	£227,819	
Agreed Ground Rent Capitalised @ 6.35%	£191,286	£419,105
Agreed Reversion		
LON/00BE/OCE/2020/0029 - Tivoli Court		
Agreed Ground Rent Capitalised @ 6.35%	£265,209	
Agreed Reversion	£236,506	£501,715
LON/00BE/OCE/2020/0030 - 273-287A Rotherhithe Street		
Agreed Ground Rent Capitalised @ 6.35%	£101,253	
Agreed Reversion	£97,311	£198,564
LON/00BE/OCE/2020/0031 - 289-301 Rotherhithe Street		
Agreed Ground Rent Capitalised @ 6.35%	£82,886	
Agreed Reversion	£84,970	£167856
LON/00BE/OCE/2020/0032 - 303-303B Rotherhithe Street		
Agreed Ground Rent Capitalised @ 6.35%	£21,840	
Agreed Reversion	£24,051	£45,891
		£1,891,357
Development Hope Value		
LON/00BE/OCE/2020/0030 - 273-287A Rotherhithe Street		£70,000
LON/00BE/OCE/2020/0031 - 289-301 Rotherhithe Street		£70,000
		£2,031,357