UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – purchase price on enfranchisement – amendments introduced into s.9(1A) of Leasehold Reform Act 1967 by s.23(1) of Housing and Planning Act 1986 – s.23(3) providing that these amendments do not apply on a case (such as the present) where a s.14 notice of desire to have an extended lease was given before 5 March 1986 – whether s.23(3) continues to apply, after the repeal of the presently relevant amendments made by s.23(1) of the 1986 Act, to the similar wording introduced into s.9(1AA) of the 1967 Act by s.143 of Commonhold and Leasehold Reform Act 2002 – valuation of 3.195 year existing lease

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

LONDON SEPHARDI TRUST

Appellant

AND

JOHN LYON'S CHARITY

Respondent

Re: 3 Vale Close,
London
W9 1RR

Before His Honour Judge Huskinson and A J Trott FRICS

Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
on
5-6 November 2015

Philip Rainey QC, instructed by Forsters LLP, for the appellant
Mark Loveday, instructed by Pemberton Greenish, for the respondent

The following cases are referred to in this decision:

Mosley v Hickman (1986) 52 P&CR 248
Trustees of the Sloane Stanley Estate v Carey-Morgan [2011] UKUT 415 (LC)
DPP v Inegbu [2009] 1 WLR 2327 (DC)
Earl Cadogan v Sportelli [2010] 1 AC 226
Brown v McLachlan (1872) LR 4 PC 543
Stevens v General Steam Navigation Co Ltd [1903] 1 KB 890
Michaels v Harley House (Marylebone) Ltd [1997] 3 All ER 446
Britnell v Secretary of State for Social Security [1991] 2 All ER 726
Arrowdell Limited v Coniston Court (North) Hove Limited [2007] RVR 39
31 Cadogan Square Freehold Limited v Earl Cadogan [2010] UKUT 321 (LC)
The Trustees of John Lyon's Charity v Alamouti [2014] UKUT 0087 (LC)
Earl Cadogan v Cadogan Square Limited [2011] UKUT 154 (LC)

The following further cases were referred to in argument:

L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co. Ltd [1994] 1 AC 486
Earl Cadogan v Sportelli [2010] 1 AC 226

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Property Chamber) ("the F-tT") dated 4 September 2014 whereby the F-tT decided that the price payable by the appellant (as lessee) to the respondent (as lessor) for the freehold of 3 Vale Close, Maida Vale, London W9 1RR ("the property") upon an enfranchisement under the Leasehold Reform Act 1967 as amended was £2,888,258.

2. In summary two issues arise in the present appeal. The first issue is a point of law which turns upon statutory construction and is this: The long lease at a low rent upon which the appellant's predecessor in title held the premises from the respondent was in 1983 the subject of an extension for a period of 50 years pursuant to section 14 of the Leasehold Reform Act 1967 ("the 1967 Act"). As a result the appellant's current tenancy will expire in 2066 rather than 2016. The appellant argues that the purchase price should be calculated upon the assumption that the fee simple at the valuation date was subject to a tenancy expiring in 2066 whereas the respondent argues that the purchase price should be calculated upon the assumption that the fee simple was subject to a tenancy expiring on the original term date in 2016. The F-tT concluded that the respondent was correct and assessed the purchase price on that basis.

3. Separately from the foregoing point of law there is also a disputed valuation issue. If the respondent is correct and if the price is to be calculated upon the assumption that the fee simple at the valuation date was subject to a tenancy expiring in 2016, then as at the valuation date there remained unexpired 3.195 years of the existing tenancy. A point arises in this case as to whether the F-tT was in error in its valuation of this existing tenancy. This point only arises if the F-tT was correct in concluding that the purchase price must be assessed on the basis that the existing tenancy expires in 2016 rather than 2066. The parties are agreed as to the proper purchase price to be payable in the event that the valuation exercise should be performed on the assumption that the existing tenancy expires in 2066. However in case the present matter should be appealed further in relation to the point of law mentioned above, both parties asked us that, whatever our decision might be upon the point of law, we should go on to consider the point of appeal in relation to this valuation issue regarding the proper valuation of an existing 3.195 year unexpired tenancy. The valuation issue is as follows, namely whether the F-tT made an error of law or of valuation principle when valuing this existing tenancy (i.e. expiring in 2016) such that upon a review of the F-tT's decision this Tribunal should quash the F-tT's decision upon this point. In case our conclusion is that the F-tT's decision on this point should be quashed both parties called valuation evidence upon this valuation issue, namely the proper valuation of an existing 3.195 year tenancy.

4. So far as concerns the point of law, both parties told us that there was no authority upon it. We were also told that there is another case where effectively the same point arises which is awaiting the decision in the present case. We understand that in that other case a similarly large amount of money turns upon the correct answer to this point of law. In the present appeal the parties agree that if the appellant is correct in its argument such that the price is to be calculated upon the assumption that the existing tenancy expires in 2066 then the purchase price is £1,748,000, whereas if the respondent is correct and the price is to be calculated upon the basis of an existing tenancy expiring in 2016 then the purchase price will depend upon the outcome of the appeal upon the valuation issue but will be somewhere in the region of £2,800,000.

5. Briefly stated the relevant facts so far as concerns the point of law are as follows:

(1) By a lease dated 12 December 1935 the property was originally demised for a term expiring on 25 December 2016.

(2) On a date unknown (but in any event between 19 September 1980 and 4 March 1983) the appellant's predecessor in title served a notice of claim for a new lease under section 14 of the 1967 Act.

(3) Pursuant to that notice the original lease was extended under the 1967 Act on 4 March 1983. That lease expires on 25 December 2066.

(4) The valuation date in this claim is agreed at 14 October 2013.

6. In order to understand how the point of law arises in the present case it is necessary to consider the history of the legislation so far as concerns section 9 of the 1967 Act which makes provisions regarding the purchase price.

7. The history of the material provisions is as follows:

(1) Section 9(1) is the original provision which appeared in the 1967 Act as enacted. One of the assumptions to be made was that, if the lessee had not already had a lease extension, the price payable for the freehold interest was to be based on the assumption that the lease was to be so extended: see section 9(1)(a). However, the right to acquire the freehold originally only applied to houses with low rateable values.

(2) Section 9(1A) was introduced by section 118(4) of the Housing Act 1974 in consequence of the decision to give rights to the lessees of houses with high rateable values. The new method only applied where the rateable value exceeded £1,000 (London) and £500 (elsewhere). The main difference under such method is that it no longer had to be assumed the existing tenancy was to be extended for 50 years under the Act. Instead it merely had to be assumed the tenant would have a right to remain in possession under Part I of the Landlord and Tenant Act 1954 at the end of the tenancy. The wording of the new section 9(1A)(a) stated the house was to be valued "subject to the tenancy". The wording, so far as presently relevant, of section 9(1A) prior to the amendments noted below made in 1986 was as follows:

> "9(1A) Notwithstanding the foregoing subsection, the price payable for a house and premises, the rateable value of which is above £1,000 in Greater London and £500 elsewhere, on a conveyance under section 8 above, shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions:-
>
> (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that this Part of this Act conferred no right to acquire the freehold;"

(3) In various cases it was perceived by tenants that it would be advantageous to them if they first took a lease extension and then acquired the freehold. By doing this, so the tenants argued, the consequence would be that the freehold would be valued at a lower price because the tenancy (i.e. the tenancy subject to which the estate in fee simple was to be assumed to be) was a longer tenancy as created by the newly extended lease. A number of such applications eventually came before the Court of Appeal in *Mosley v Hickman* (1986) 52 P&CR 248. Despite what Fox LJ described as the "anomaly" of the price advantage to the tenants, the Court of Appeal decided that "subject to the tenancy" in s.9(1A)(a) meant the freehold was to be valued subject to the newly extended tenancy, not the original tenancy. The tenants' argument therefore succeeded.

(4) Section 23(1) of the Housing and Planning Act 1986 ("the 1986 Act") brought further amendments to section 9. The 1986 Act did this by adding additional words (which we have underlined below) to the assumption in section 9(1A)(a) of the 1967 Act. The assumption was now to be that "this Part of this Act conferred no right to acquire the freehold or an extended lease and, where the tenancy has been extended under this part of the Act, that the tenancy will terminate on the original term date." It has been said these additional words dealt with the issues raised by *Mosley v Hickman*: see *Hague Leasehold Enfranchisement (Sixth Edition)* at 9-33. The wording, so far as presently relevant, of section 9(1A) after the making of these amendments by the 1986 Act was as follows:

> "9(1A) Notwithstanding the foregoing subsection, the price payable for a house and premises, the rateable value of which is above £1,000 in Greater London and £500 elsewhere, on a conveyance under section 8 above, shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions:-
>
> (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that this Part of this Act conferred no right to acquire the freehold or an extended lease and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date;"

(5) Section 23(3) of the 1986 Act provided the amendments to section 9(1A) were not to be retroactive in effect. This provision is at the heart of the present appeal and provides:

"The above amendments do not apply –

(a) where the price for enfranchisement has been determined, by agreement or otherwise, before the commencement of this section; or

(b) where the notice under section 8 of the Leasehold Reform Act 1967 (notice of desire to have the freehold) was given before the passing of this Act; or

(c) where notice under section 14 of that Act (notice of desire to have extended lease) was given before 5 March 1986.

(6) Section 9(1A) lasted in that form until 26 July 2002. On that date the relevant provisions of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") came into force. Section 180 provided that the repeals in Schedule 14 should have effect. These repeals included the repeal of the following words in section 9 (1A)(a) of the 1967 Act namely "and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date".

(7) At the same time section 143(4) of the 2002 Act introduced a new sub-section 9(1AA) into the 1967 Act. This laid down valuation assumptions to be applied in a case where the tenancy had been extended under the 1967 Act and it made new provisions to cover the situation where the notice requiring the freehold under section 8 was given after the original term date of the original lease (previously a tenant had not been entitled to enfranchise if the tenant had allowed the original term date to pass without having first served a section 8 notice, but the amendments made by the 2002 Act extended the right to enfranchise to such tenants). The presently relevant provisions of section 9(1A) after this repeal had been made and the provisions of the new section 9(1AA) are in the following terms:

> "9(1A) Notwithstanding the foregoing subsection, the price payable for a house and premises … shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions:-
>
> (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that this Part of this Act conferred no right to acquire the freehold or an extended lease ~~and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date.~~" (repealed words shown crossed through)
>
> "(1AA) Where, in a case in which the price payable for a house and premises is to be determined in accordance with subsection (1A) above, the tenancy has been extended under this Part of this Act-
>
> (a) if the relevant time is on or before the original term date, the assumptions set out in that subsection apply as if the tenancy is to terminate on the original term date; and
>
> (b) if the relevant time is after the original term date, the assumptions set out in paragraphs (a), (c) and (e) of that subsection apply as if the tenancy had terminated on the original term date and the assumption set out in paragraph (b) of that subsection applies as if the words 'at the end of the tenancy' were omitted."

(8) The repeal of the wording in section 9(1A) and the introduction of the new section 9(1AA) were brought into effect by the Commonhold and Leasehold Reform Act 2002 (Commencement No.1 Savings and Transitional Provisions) (England) Order 2002 Article 2(b)(ii). Also the Commencement Order contained transitional

provisions in Schedule 2. Paragraph 5 of this Schedule provided that the relevant 2002 amendments do not apply where a tenant has served a section 8 notice of claim for the freehold before 26 July 2002.

8. It is accepted by the respondent that before 26 July 2002 section 23(3) of the 1986 Act continued to operate and to provide that the amendment introduced into section 9(1A) of the 1967 Act by section 23(1) of the 1986 Act would not apply in the present case, because in the present case a notice under section 14 was given before 5 March 1986 (and an extended lease was in fact granted in consequence of such notice). Accordingly if prior to 26 July 2002 the appellant had served a section 8 notice the appellant would have been entitled to enfranchise and pay a price calculated upon the basis recognised in *Mosley v Hickman*, namely on the basis that the fee simple was subject to the tenancy as it existed at the date of the section 8 notice, namely a tenancy expiring in 2066 rather than in 2016.

9. Section 23(3) of the 1986 Act was not repealed by the 2002 Act. The question which arises is whether section 23(3), which prior to 26 July 2002 operated to enable the appellant to continue to enjoy the more beneficial position as recognised in *Mosley and Hickman* rather than the less beneficial position as introduced by section 23(1) and the amendments made thereby to section 9(1A), continues to operate after 26 July 2002.

10. The F-tT's decision upon this point is contained in paragraphs 53 to 55 of its decision and is in the following terms:

> "53. We accept the applicant's argument in respect of the effect of the 2002 Act amendments on claims to acquire the freehold made after 26 July 2002. The 2002 Commencement Order expressly repealed the substantive provision i.e. the assumption in s.23(1) of the 1986 Act that a freehold was to be valued as if an extended lease expired on the original term date. It was not necessary to repeal s.23(3) because the operative provisions were repealed by Part 3 of Schedule 1 to the 2002 Order.
>
> 54. The s.23(3) statutory disregards now only apply to s.9(1A)(a) and s.23(5) of the 1967 Act. They do not apply to s.9(1AA).
>
> 55. The presumption against implied repeal does not apply because the operative provisions of s.23(3) were expressly repealed by the 2002 Order."

11. Turning now to the valuation point which arises in the present appeal, the position regarding this in summary is as follows. If the F-tT's decision is correct and the price is to be calculated on the basis that the existing tenancy expired in 2016, a relevant element in the calculation of the price to be paid is the value of the existing lease, of which 3.195 years remained unexpired as at the valuation date. The proper determination of this value will in turn lead to the appropriate calculation of the marriage value element to be included within the purchase price.

12. Before the F-tT the parties' respective approaches to the calculation of this existing leasehold value were as follows.

13. On behalf of the respondent Mr Lawrence-Smith made reference to certain comparables; he assessed a net market rent for the property; he adjusted this rent downwards to take into consideration the condition of the property at the valuation date and the terms upon which it would be held (i.e. the terms of the existing lease rather than the terms of an assured shorthold tenancy); he found that the unimproved rental value was in his opinion £52,000 p.a; he then capitalised this rent for the unexpired term of 3.195 years using the figures recorded in paragraph 16 of the F-tT's decision which gave a figure for the value of the existing leasehold of £113,475. He noted this gave a relativity of 3.39% of the unimproved freehold value (which is an agreed figure of £3,175,000). In support of his opinion that a net rental value assessment should be made on the basis that the existing leasehold would be bought by an investor purchaser he relied upon the Upper Tribunal decision in *Trustees of the Sloane Stanley Estate v Carey-Morgan* [2011] UKUT 415 (LC). In summary Mr Lawrence-Smith's approach was to conclude that the existing leasehold would be bought by an investor purchaser who would require a certain return on the investment as derived from the *Trustees of the Sloane Stanley Estate* case.

14. On behalf of the appellant Mr Shapiro also referred to comparables; he concluded that the rental value of the property in its existing condition (but allowing for the lease terms) was £138,000 p.a. Accordingly the total rent to be paid over the entire 3.195 year remainder of the term was £440,910. He contended that if the 3.195 year lease was placed on the market it would be bought by a hypothetical tenant who he described as being a "wealthy American ex-pat" paying the equivalent of the annual rent which he would pay if he took on the tenancy and paying the full rent up front (an arrangement Mr Shapiro said was not unusual for high priced properties of this kind). He observed that such a tenant would seek a discount for the advance payment but that this would be resisted by the landlord by the argument that the tenant was being protected from any annual rent increases and had security of occupation for the full term. Mr Shapiro concluded that the value to an investor purchaser as calculated by Mr Lawrence-Smith was not the appropriate approach. Instead the proper approach was to assess the value to an occupier purchaser of the type he had considered. Rounding up he therefore concluded that the value of the existing short lease of 3.195 years was £450,000.

15. The F-tT considered this matter in paragraphs 26-28 of its decision. In paragraphs 26 and 27 it considered the comparable evidence and concluded that a rent for the property in good condition would be £2,600 p.w. but that a downward adjustment of 20% needed to be made for condition and 10% to reflect "terms". This gave a rental value which the F-tT considered to be correct of £94,640 p.a.

16. The entirety of the F-tT's decision upon which approach should be used, namely Mr Lawrence-Smith's investor purchaser approach or Mr Shapiro's occupier purchaser approach is contained in paragraph 28 of the decision and is in the following terms:

> "28. Mr Lawrence-Smith's figure was £113,475 and Mr Shapiro's figure was £450,000. Mr Shapiro based his figure on the assumption of a 'renter occupier' who would pay the equivalent annual rent of £138,000 for 3.195 years. Mr Lawrence-Smith adopted a traditional valuation approach capitalizing the unimproved rental value for 3.195 years at a rate of 2.27% with sinking fund and tax. This rate (yield) of 2.27% is based upon Clutton's gross yield for houses in Maida Vale less 30% to crystallise a net value. This method was upheld in the Upper Tribunal's decision in the *Trustees of Sloane Stanley Estate*. We were not persuaded that we should depart from the Upper Tribunal approach and the capitalised value we calculate is £206,563."

17. The appellant sought permission to appeal which was refused by the F-tT but granted by the Upper Tribunal. It was ordered that the appeal should proceed by way of review (so far as concerns the point of law) and by way of review with a view to rehearing (so far as concerns the valuation approach adopted by the F-tT to the value of the existing leasehold). The appellant's position is briefly as follows upon the valuation point. The appellant contended that the F-tT gave effectively no reasons for rejecting Mr Shapiro's occupier purchaser approach beyond stating that the F-tT was not persuaded that it should depart from the Upper Tribunal approach in the *Trustees of the Sloane Stanley Estate* decision. The appellant argued that the F-tT erred in following, without analysis, *Trustees of the Sloane Stanley Estate* because the F-tT failed to note a crucial distinction between the situation in *Trustees of the Sloane Stanley Estate*, which was a 1993 Act case where the existing lease was subject to repairing obligations, as compared with the present case, which is a 1967 Act case where there is an express provision in section 9(1A)(c) requiring the assumption to be made that the tenant has no liability to carry out any repairs etc under the terms of the tenancy.

18. We will deal first with the submissions upon and our conclusions upon the legal issue. We will then turn to the valuation issue and the evidence called thereon.

19. Mr Philip Rainey QC appeared for the appellant and called Miss Jennifer Ellis FRICS, Senior Partner at Langley Taylor LLP, as an expert valuation witness. Mr Mark Loveday of counsel appeared for the respondent and called Mr Julian Lawrence-Smith MA, MRICS, a partner in Cluttons LLP, as an expert valuation witness.

The appellant's submissions on the legal point

20. Mr Rainey advanced the following arguments. In summary he contended that the position was precisely covered by section 17 of the Interpretation Act 1978 which is in the following terms:

> "**17.— Repeal and re-enactment.**
>
> (1) Where an Act repeals a previous enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.
>
> (2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears,—
>
> (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;
>
> (b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

21. He submitted that in the present case section 17(2) operates as follows:

(1) It is the 2002 Act which "repeals and re-enacts" with (minor) modification a “previous enactment”.

(2) The "previous enactment" so repealed and re-enacted is the relevant wording which was added into section 9(1A) of the 1967 Act by the 1986 Act section 23(1).

(3) The place where the re-enactment is to be found is in section 9(1AA)(a) of the 1967 Act as added by the 2002 Act.

(4) It is the reference in section 23(3) of the 1986 Act to this "previous enactment" which is to be construed as a reference to the provision as re-enacted.

(5) Accordingly, unless a contrary intention appears, section 23(3) must be construed as providing that section 9(1AA)(a) does not apply where (as laid down in section 23(3)) notice under section 14 of the 1967 Act was given before 5 March 1986.

(6) No such contrary intention appears.

22. There are therefore two questions under the Interpretation Act 1978 section 17. The first is whether the relevant wording added to section 9(1A) by section 23(1) of the 1986 Act can properly be said to have been repealed and to have been re-enacted (with modification) in section 9(1AA)(a). The second is whether any contrary intention appears.

23. Mr Rainey developed his argument on these questions as follows:

(1) Immediately prior to the commencement of the relevant provisions of the 2002 Act on 26 July 2002 the relevant wording in section 9(1A) regarding the assumptions to be made for the purposes of calculating the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise, required the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that the relevant Part of the 1967 Act conferred no right to acquire the freehold or an extended lease:

> "….. and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date"

(2) These words had been repealed. The only issue therefore upon the first question was whether these words, having been repealed, had been re-enacted with or without modification.

(3) Immediately after the commencement of the relevant provisions on 26 July 2002 the relevant wording in section 9(1A) and 9(1AA)(a) regarding the assumptions to be made (in a case where the relevant time is on or before the original term date, i.e. a case such as the present) for the purposes of calculating the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise, required the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that the relevant Part of the 1967 Act conferred no right to acquire the freehold or an extended lease and:

"Where… the tenancy has been extended under this Part of this Act ….. as if the tenancy is to terminate on the original term date"

(4) The words were not absolutely identical, but the sense was identical. This was, so Mr Rainey submitted, a clear example of the repeal of an enactment and its re-enactment with (minor and purely grammatical) modification.

24. In support of his argument Mr Rainey advanced various additional points which he argued showed that there was here a relevant repeal and re-enactment and also that there was here an intention that the exemption in section 23(3), which the appellant had enjoyed up to 26 July 2002, should continue thereafter. These points supported his contention that, far from there being the expression of any contrary intention, there was to be found an indication of an intention that section 23(3) should indeed continue to apply.

25. A question arose as to whether the 2002 Act and its operation upon section 9(1A) by the repeal of certain words and the introduction of subsection (1AA)(a) could properly be said to be a repeal and re-enactment with modification rather than a repeal coupled with the introduction of a new and more extensive provision, which could not properly be said to be a "re-enactment". Mr Rainey drew attention to the extension of the right to enfranchise as introduced under the 2002 Act, namely an extension so as to enable tenants to enfranchise in circumstances where there had been a lease extension previously granted but where the original term date had been passed. Previously such tenants did not enjoy a right to enfranchise. Provision had to be made for the relevant assumptions to be applied for the purpose of assessing the price to be paid where the enfranchisement took place in such a new situation. It was true that subsection (1AA) included a further subparagraph (b) to deal with this new situation. However the provisions could properly be viewed as separate enactments. The enactment in subparagraph (a) constituted the re-enactment (with modification) of the relevant enactment which had been repealed (namely the words shown crossed through in paragraph 7(7) above). The enactment in paragraph (b) constituted a new enactment dealing with a new situation which previously was not within the 1967 Act at all.

26. Mr Rainey pointed out that the exemption provisions in section 23(3) were provisions which were actually contained in the 1986 Act itself, rather than in some statutory instrument dealing with commencement and transitional provisions, and were provisions which remained un-repealed. It was of significance that the 2002 Act operated to repeal various provisions of various previous statutes including a repeal of a provision (not presently relevant) in the Housing and Planning Act 1986. Thus the draftsman of the 2002 Act had considered what provisions in the 1986 Act required to be repealed. Notably however section 23(3) was not repealed. It remained on the statute book. It continued to provide that:

"The above amendments do not apply …… (c) where notice under section 14 of that Act (notice of desire to have extended lease) was given before 5th March 1986."

If it could properly be said that the "above amendments" still existed in some form such that there was material upon which section 23(3) could still operate, then section 23(3) should be held still to operate upon it.

27. There was nothing to be found in the 2002 Act to indicate an intention on the part of Parliament that tenants who, by virtue of section 23(3), still enjoyed the more beneficial basis for the calculation of price in the event of an enfranchisement (as recognised in the case of *Mosley v Hickman*) should lose their beneficial position by virtue of a statute which was intended to enlarge rather than restrict tenants' rights of enfranchisement.

28. If any contrary intention was to be identified so as to disapply section 17(2) of the Interpretation Act 1978 such an intention must be found in the repealing statute itself (i.e. here in the 2002 Act), see *DPP v Inegbu* [2009] 1 WLR 2327 (DC). It does not assist the respondent to speculate what Parliament might have thought, such as that Parliament might have thought section 23(3) was a spent provision or might have thought that it was time for *Mosley v Hickman* to be "put to bed" as suggested in argument by the respondent.

29. Mr Rainey referred to *Earl Cadogan v Sportelli* [2010] 1 AC 226 at paragraph 46 per Lord Walker which he submitted was support for the proposition that a technical amendment to a statute should not be construed as abolishing something valuable (in that case what was being discussed was hope value).

30. Mr Rainey referred to *Bennion on Statutory Interpretation* 6th Ed and the commentary therein upon the Interpretation Act 1978 section 17 where the following passage appears:

> "This provision is intended for consolidation Acts, which may include minor modifications of existing law. If applied to anything else, it should be construed with great caution. This is because of the vagueness of the word "modification" in the parenthesis. If it is held to cover anything more than minor modification it may alter rights and liabilities in unintended ways."

He submitted that the cases cited as giving support for this proposition did not in fact provide any such support and that this passage in *Bennion* was wrong. He pointed out that the earliest case referred to, namely *Brown v McLachlan* (1872) LR 4 PC 543 was earlier in time than the first relevant Interpretation Act; that in *Stevens v General Steam Navigation Co Ltd* [1903] 1 KB 890 the re-enactment contained an addition and this addition made the difference between the plaintiff winning or losing his case; that there was a similar position in *Michaels v Harley House (Marylebone) Ltd* [1997] 3 All ER 446, see at p. 458h; and that *Britnell v Secretary of State for Social Security* [1991] 2 All ER 726 was not concerned with the Interpretation Act itself but was instead concerned with the width of the word "modification" in another context. He also referred to the Law Commission report in June 1978 upon the Interpretation Bill (as it then was) where at paragraph 6 it is observed that the predecessor of section 17(2) was seldom if ever relied upon in Consolidation Acts.

31. The Commonhold and Leasehold Reform Act 2002 (Commencement No.1 Savings and Transitional Provisions) (England) Order 2002 contained commencement provisions and, in paragraph 5 of Schedule 2, provided that the repeals relevant to the present case and the provisions introducing the new subsection (1AA):

> "……. shall not have any effect in relation to an application for enfranchisement or an

extended lease of a house in respect of which —

(a) a notice was given under section 8 or 14 of the 1967 Act, or

(b) an application was made under section 27 of that Act

before the commencement date."

This provision however could not be taken to be a relevant "contrary intention" for the purpose of section 17(2) of the Interpretation Act 1978. Even if any intention at all was expressed it was being expressed in secondary legislation rather than in the statute itself (as is required if a contrary intention is to be found, see paragraph 28 above). Also this was not in the form of an exhaustive statement as to all the circumstances in which these provisions did or did not apply. This paragraph 5 said that the relevant provisions shall not have effect in relation to certain applications. It does not state that the relevant provisions shall have effect in relation to all other applications even if they would otherwise be disapplied by some separate statutory provision coupled with the operation of the Interpretation Act. Mr Rainey submitted that these commencement provisions, bringing into operation the new provisions of the 2002 Act, set up circumstances where section 17(2) did apply and could apply, they did not indicate some intention that section 17(2) was not to apply.

32. Mr Rainey recognised that Hague states in paragraph 9-33:

> "There are now no cases that can benefit from *Mosley v Hickman* unless the desire notice for the freehold was given before July 26, 2002"

However he submitted that this observation in the textbook, for which no authority was cited, was wrong for the reasons he had developed in argument.

The respondent's submissions on the legal point

33. Mr Loveday advanced the following arguments.

34. The respondent's case could not be any simpler. The appellant's tenancy "has been extended under" the 1967 Act. The property therefore fell to be valued under section 9(1AA). This was a stand alone provision introduced in 2002. Subsection (1AA)(a) expressly stated that the assumption to be made was that "the tenancy is to terminate on the original term date". Sub-section (1AA) also referred back to the provisions of sub-section 1(A) which contained other assumptions which were to be made. Reading through each of the assumptions in section 9(1A)(a)-(f), none of them suggests that any different date of termination was to be assumed other than the original term date. Accordingly if the valuation was to be made under sub-section (1AA)(a) the tenancy must be assumed, in the present case, to end in 2016 and not in 2066. In the present case the section 8 notice was served after 26 July 2002 and therefore the transitional provisions in paragraph 5 of schedule 2 to the 2002 Commencement Order do not apply. Therefore the new provisions of sub-section 1AA(a) did apply. The plain meaning of these provisions was that the valuation must be carried out on the assumption that the tenancy expires on 25 December 2016. The foregoing simple analysis

ought to be sufficient to dispose of the present appeal in favour of the respondent.

35. Mr Loveday placed reliance upon the passage in *Hague* set out in paragraph 32 above.

36. Mr Loveday accepted that prior to 26 July 2002 the appellant continued to be entitled to rely upon section 23(3) of the 1986 Act, which disapplied the new wording introduced into section 9(1A) of the 1967 Act by section 23(1) of the 1986 Act. In other words it was accepted that prior to this date the appellant continued to be in a position where, if it served a section 8 notice requiring the freehold, it could require the price to be calculated upon the more beneficial basis as recognised in *Mosley v Hickman*, i.e. on the basis that the tenancy expired in 2066 rather than in 2016. He submitted however that on 26 July 2002 this position changed and the appellant, if it thereafter chose to serve a section 8 notice, would be required to pay a price calculated in accordance with section 9(1AA)(a), i.e. a price calculated on the basis that the tenancy would expire in 2016.

37. Mr Loveday pointed out that in argument before the F-tT the appellant had not relied upon section 17 of the Interpretation Act 1978. The appellant first replied upon the Interpretation Act in Mr Rainey's skeleton argument to the Upper Tribunal. Mr Loveday's skeleton argument had been prepared for the purpose of addressing the arguments which he understood would be raised and did not deal with the Interpretation Act point. However he dealt with the Interpretation Act in oral argument.

38. In summary, Mr Loveday advanced the following arguments:

(1) There had not been a repeal and re-enactment, even a re-enactment with modification. Instead there had been a repeal coupled with the introduction of a wholly new provision. Accordingly section 17 could not operate at all.

(2) Even if there had been a repeal and re-enactment, a contrary intention was to be found i.e. an intention indicating that section 23(3) of the 1986 Act did not operate upon the provisions in section 9(1AA)(a). Such a contrary intention could be found from the manner in which the repeal and re-enactment was affected (if there was such a repeal and re-enactment at all) and also from the terms of the 2002 Act itself coupled with the commencement and transitional provisions made thereunder.

(3) There was nothing surprising in this result even though section 23(3) of the 1986 Act remained unrepealed. Even if the respondent's argument was correct, there remained provisions which were still unrepealed and upon which section 23(3) could still operate. Thus it could not be said that, unless the appellant's arguments were correct, section 23(3) had been left on the statute book in circumstances where it could operate upon nothing.

39. Mr Loveday accepted that, if it were permissible to dissect sub-section (1AA) and to treat subparagraph (a) as some separate provision which could be considered quite apart from sub-

paragraph (b) of that same sub-section, then the relevant wording which previously appeared in subsection 9(1A) had been repealed and re-enacted (with grammatical modifications) in sub-section (1AA)(a). However it was not permissible to dissect sub-section (1AA) in this manner. The 2002 Act introduced a new category of tenants who were to be entitled to enfranchise, namely tenants who were holding over on an extended lease beyond the date on which the original tenancy would have terminated. Parliament decided to make global provision of valuation assumptions to be applied where a tenancy had been extended. This global provision was to be found in subsection (1AA) and applied both to circumstances where the relevant time was on or before the original term date and in circumstances where the relevant time was after the original term date. Sub-section (1AA) was a single detailed provision. Viewed as a whole it could not be said to be a re-enactment of the words which have been repealed out of section 9(1A). The new wording went far beyond what could be described as a modification.

40. Mr Loveday referred to the passage in *Bennion* set out in paragraph 30 above. He submitted that it correctly represented the law. Applying that provision the new sub-section (1AA) could not be said to constitute a re-enactment with modification of the repealed words in section 9 (1A).

41. There was a further point which either went to indicate that the Interpretation Act section 17 could not apply at all, or alternatively went to demonstrate a contrary intention (quite apart from the additional arguments relied on below showing a contrary intention). The further point was as follows. In both of the cases referred to in *Bennion* which involve the application of the Interpretation Act, namely *Stevens v General Steam Navigation Co Ltd* and *Michaels v Harley House (Marylebone) Ltd* there was what Mr Loveday described as a three stage process. At stage 1 in *Stevens* a statute laid down the original definition (in *Stevens* this was the definition of a factory in the Factory Act 1895). At stage 2 a second statute made provision for compensation for certain events occurring within a factory (in *Stevens* that was the Workmen's Compensation Act 1897). At stage 3 there was the repeal and re-enactment which modified the original definition in the 1895 Act of the word "factory" (in *Stevens* this occurred in the Factory and Workshop Act 1901). There was a similar three stage process in *Michaels v Harley House (Marylebone) Ltd*. However in the present case there was only a two stage process because the repeal and the re-enactment (if indeed there was a repeal and re-enactment) both occurred in the 2002 Act. Mr Loveday submitted that if one was looking for a contrary intention, then a repeal coupled simultaneously with the introduction of a new provision amounted to the expression of a contrary intention.

42. Quite apart from the foregoing, a contrary intention could be found in the following material. The 2002 Act made provision for the making of a statutory instrument for the purpose of bringing the 2002 Act into effect and of making transitional provisions. The 2002 Commencement Regulations were made pursuant to that statutory power. Mr Loveday submitted that paragraph 5 of Schedule 2 to the Commencement Order carried the meaning that the provisions therein referred to (which included the new sub-section (1AA)) were to be the subject of (and were to be exhaustively the subject of) the transitional and saving provisions set forth in paragraph 5. Accordingly the new provisions in sub-section (1AA) were not to have effect in relation (so far as presently relevant) to an application for

enfranchisement of a house in respect of which a notice was given under section 8 of the 1967 Act before 26 July 2002. The clear implication was that as regards a section 8 notice given after that date the new provisions of section (1AA) were to apply. He submitted it was of importance to note that paragraph 5 could properly be described as an equivalent to the provisions of section 23(3)(b) of the 1986 Act, but that paragraph 5 made no equivalent provision to that contained in section 23(3)(c), which was the provision the appellant particularly relied upon. The inclusion in paragraph 5 of this equivalent to section 23(3)(b) but the exclusion of any equivalent to section 23(3)(c) demonstrated an intention that a previous disapplication by section 23(3)(c) of the wording introduced by section 23(1) into section 9(1A) of the 1967 Act was no longer to apply.

43. Mr Loveday accepted that section 23(3) of the 1986 Act was not repealed by the 2002 Act, but he pointed out that certain wording introduced by section 23(1) of the 1986 Act (namely the words "or an extended lease") and certain wording introduced into the 1967 Act by section 23(2) of the 1986 Act were not repealed by the 2002 Act. Accordingly there remained on the statute book statutory provisions on which section 23(3) could still operate.

44. In case some presumption against retrospectivity was relied upon by the appellant, Mr Loveday drew attention to the principle described in *Bennion* at section 97 as "Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation." However he submitted that this could be of no relevance in the present case because the presumption was limited to situations where a change in the law alters the legal nature of the past action, not the effect of a past action. Section 9(1AA) did not purport to change the legal effect of any past Act – the lease extension in 1983 continued in full force for all purposes. Instead the new section 9(1AA) simply based new legal consequences upon the fact that there had been a lease extension, namely that if a tenant later claimed the freehold then the freehold would be valued on certain assumptions. Accordingly the law regarding presumption against retrospectivity of statutory provisions did not apply.

45. Mr Loveday submitted there was nothing surprising in the result contended for by the respondent. The material parts of the 1986 Act section 23 were introduced in the immediate aftermath of *Mosley v Hickman* as an obvious (and perhaps hurried) response to the Court of Appeal decision in that case. As at that date, i.e. in 1986, excluding tenants with lease extensions granted only months earlier might well have made sense as a transitional provision. However by 2002 the exclusion in section 23(3)(c) would have applied to lessees whose lease extensions occurred over 16 years before. After 16 years the original transitional provisions made less sense, particularly if (as in this case) a landlord could have suffered very significant loss as a result of a lease extension granted compulsorily many years before. Parliament may well have felt it was finally time to put the last vestiges of *Mosley v Hickman* to bed. The transitional provisions in the 2002 Commencement Order contained no equivalent to section 23(3)(c) of the 1986 Act.

Discussion upon the legal issue

46. Section 23(1) of the 1986 Act introduced certain wording into section 9 (1A) of the 1967 Act. This wording included:

> "… and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date."

47. This wording, thus introduced into section 9(1A) can properly be described as an "enactment". It is a provision introduced into one statute by another statute. We consider that Mr Loveday was correct in not seeking to argue that this new wording, when in place in section 9(1A), was only part of a sentence and was therefore something too small to be properly described as "an enactment".

48. This enactment was repealed by section 180 of the 2002 Act and Schedule 14 thereto and the commencement order made thereunder.

49. The crucial question which next arises is whether this enactment was re-enacted (with or without modification). Mr Loveday submitted that sub-section (1AA)(a) was only an inseparable part of a larger provision, namely sub-section (1AA) as a whole such that it would be wrong to separate it (or dissect as he put it) away from the remainder of sub-section (1AA) and to conclude that this was a re-enactment (with modification) of the previous enactment which had been added into section 9(1A). Mr Loveday accepted (in our view correctly) that if it is permissible to dissect the introductory part of sub-section (1AA) together with sub-paragraph (a) away from the remaining provisions of sub-section (1AA) (b), then the enactment made in sub-section (1AA)(a) is indeed a re-enactment (with grammatical modification) of the earlier enactment namely the relevant words which were added to section 9(1A). We are unable to accept Mr Loveday's argument that it is impermissible to dissect sub-section (1AA) in this manner. The provisions which effectively repeat the repealed enactment (namely the words repealed out of section 9(1A)) are in fact to be found in a separate sub-paragraph (a). However even if they were not in a separate sub- paragraph, what is important is the substance and not the form. In the light of the points made by Mr Rainey as recorded in paragraph 23 above we conclude that the relevant enactment (namely the words repealed out of section 9(1A)) were indeed re-enacted (with minor grammatical modifications) in section 9(1AA)(a). The fact that it was found convenient by the draftsman to make provision in the same sub-section (1AA) for a new category of tenants who were brought within the rights to enfranchise does not alter the substance of the matter, namely that sub-section (1AA) contains a re-enactment with modification of the previous enactment.

50. As regards Mr Loveday's reliance upon there only being a two-stage process in the present case as opposed to a three-stage process as in the cases he referred to (see paragraph 41 above) we found this argument difficult to understand, but it is an argument which in any event we are unable to accept. We put in argument to Mr Loveday by way of example circumstances where the Interpretation Act section 17(2) would clearly be intended to apply

(as recognised in *Bennion* in the passage relied upon by Mr Loveday) namely in circumstances where a consolidation Act operated to repeal and re-enact a provision. This operation would involve the repeal and the re-enactment stage all being in one statute - thus, upon Mr Loveday's analysis, involving what he called a two-stage process. However he did not suggest that the Interpretation Act section 17(2) was unable to apply (or that a contrary intention was demonstrated) in such a two-stage process as that. Separately what is important is the wording of section 17(2) itself. We conclude that each step in the analysis relied upon by Mr Rainey can be attributed to a legitimate step as contemplated by the wording of section 17(2), see the analysis in paragraph 21 above. Immediately before 26 July 2002 there existed a category of persons (the appellant being one of them) who had a particular status, namely they held a tenancy which had been extended long ago such that the wording of section 23(3)(c) of the 1986 Act operated to disapply an enactment, namely the relevant new wording which had been introduced into section 9(1A) of the 1967 Act by section 23(1) of the 1986 Act, and operated to preserve to them the more beneficial position recognised in *Mosley v Hickman*. In these circumstances the Interpretation Act section 17(2) lays down that the reference in section 23(3) to an enactment (namely the relevant new words introduced by section 23(1) into section 9(1A) of the 1967 Act) is to be construed as a reference to section 9 (1AA)(a) "unless the contrary intention appears".

51. We accept Mr Rainey's submission that if a contrary intention is to be expressed it should be found in the repealing Act itself, see *DPP v Inegbu,* rather than in some statutory instrument made under the 2002 Act.

52. The repealing Act, namely the 2002 Act, in section 180 and Schedule 14 did make repeals. One repeal was the repeal of the enactment presently relevant (namely the relevant words which had been added to section 9(1A) of the 1967 Act). Another was a repeal to a provision not presently relevant in Schedule 5 of the 1986 Act. What is relevant is this. The draftsman considered what provisions of the 1986 Act needed to be repealed. The draftsman did not include any part of section 23.

53. Accordingly after 26 July 2002 the position was, and remains, that the whole of section 23 of the 1986 Act remains unamended on the statute book. Section 23(1) and (3)(c) remain in the following terms:

> "23. Determination of price for leasehold enfranchisement
>
> (1) In section 9(1A) of the Leasehold Reform Act 1967 (determination of price payable for enfranchisement of higher value houses), in paragraph (a) (assumption that vendor is selling subject to existing tenancy) after "no right to acquire the freehold" insert "or an extended lease and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date."
>
> (3) The above amendments do not apply –
>
> (c) where notice under section 14 of that Act (notice of desire to have extended

lease) was given before 5 March 1986."

It is true that some of the words inserted into section 9(1A) have subsequently been repealed out of section 9(1A), but section 23 itself remains on the statute book. We conclude that the fact that the 2002 Act made some repeal to the 1986 Act but did not in any way amend section 23 shows an intention consistent with (rather than contrary to) the operation of section 17(2) of the Interpretation Act.

54. So far as concerns Mr Loveday's argument based upon the terms of the Commencement Order, which he submits shows an exhaustive expression of intention as to when section 9(1AA) shall come into operation so as to show an intention to exclude the continued operation of section 23(3)(c) of the 1986 Act, we are unable to accept his argument for the following reasons:-

(1) The wording he relies on is in the Commencement Order and not in the 2002 Act itself, see paragraph 51 above.

(2) Quite apart the foregoing point, we conclude that the Tribunal should be slow to find that a transitional provision in a statutory instrument amounted to a sufficient expression of a contrary intention so as to disapply section 17(2) of the Interpretation Act, in circumstances where section 17(2) would otherwise have applied, so as to bring about a result where tenants who had enjoyed a valuable status for 17 years had that status removed from them.

(3) We conclude that the Commencement Order is not exhaustive regarding the commencement provisions. Paragraph 5 says that the relevant new provisions will not apply in certain circumstances. It does not say that the relevant new provisions will apply in all other circumstances even though, apart from paragraph 5, the Interpretation Act section 17(2) would apply.

(4) We agree with Mr Rainey's submission that the Commencement Order brought into being circumstances in which the Interpretation Act section 17(2) could and did apply – had there been no commencement of the 2002 Act provisions there would have been no need to rely upon section 17(2) at all.

55. For the foregoing reasons we accept Mr Rainey's argument upon the legal issue. We find that, by virtue of the operation of the Interpretation Act 1978 section 17(2), the provisions of section 23(3) of the Housing and Planning Act 1986 apply to the provisions of section 9(1AA)(a) of the Leasehold Reform Act 1967 as amended. In consequence in this case (where it is agreed that notice under section 14 of the 1967 Act of the desire to have an extended lease was given before 5 March 1986) the valuation assumption to be made does not include the assumption that the tenancy will terminate on the original term date in 2016. Instead the assumption to be made is the assumption which was upheld in *Mosley v Hickman*, namely that the tenancy will expire on the date on which the tenancy will in fact expire, i.e. on 25 December 2066. It follows from this finding that the purchase price is £1,748,000 (which is the agreed figure on the basis of this valuation assumption which we have held to be correct).

The valuation issue

56. On the basis of the decision which we have reached upon the legal issue, our decision on the valuation issue becomes of no relevance because it does not affect the calculation of the price to be paid. However, as already explained above, it is right that we should nonetheless consider and give our conclusions upon this valuation issue.

57. The valuation issue first requires, at the review stage, a consideration of the F-tT's decision upon the valuation issue for the purpose of deciding whether the decision was one which it was open to the F-tT to reach upon the evidence and which involved no error of law and for which the F-tT gave sufficient and legally sustainable reasons.

58. We can express our conclusions briefly upon this point. We have summarised in paragraphs 13 and 14 above the expert evidence adduced before the F-tT. It will be seen that on behalf of the appellant Mr Shapiro valued the existing lease on the basis that the hypothetical purchaser would be an occupier purchaser. Mr Shapiro gave reasons for following this course. As pointed out in paragraph 16 above the entirety of the F-tT's conclusion upon which approach should be used is contained in paragraph 28 of its decision which we have set out. The reasoning amounts to this, namely that Mr Lawrence-Smith had adopted a traditional valuation approach which had been upheld in the Upper Tribunal's decision in *Trustees of Sloane Stanley Estate* and that the F-tT was not persuaded that it should depart from that approach.

59. Mr Rainey submitted that either this was an insufficient expression of the reasons for the decision or (as he suggested the passage should be analysed) the F-tT should be taken as expressing the conclusion that the decision in *Trustees of Sloane Stanley Estate* was in effect indistinguishable from the present case and therefore should be followed. However Mr Rainey pointed out that if the F-tT reached this conclusion then the F-tT was in error because in the present case, unlike the situation in *Trustees of Sloane Stanley Estate*, the short existing tenancy to be valued is a tenancy which, by reason of the operation of section 9(1A)(c), is to be valued on the assumption that the tenant has no liability to carry out any repairs, maintenance or redecorations.

60. We agree with Mr Rainey's analysis upon this point. Either the F-tT gave no sufficient reason for rejecting Mr Shapiro's valuation approach or the F-tT gave a reason (namely that the case was indistinguishable from *Trustees of Sloane Stanley Estate*) which upon analysis is incorrect. We did not understand Mr Loveday to advance any significant argument to the contrary.

61. Accordingly it is necessary for us to proceed to the rehearing stage upon the valuation issue and to consider the valuation of evidence and the arguments advanced thereon.

The value of the existing lease: evidence

62. The only valuation dispute is about the value of the existing lease assuming an unexpired term of 3.195 years. For the appellant Miss Ellis says that the value of this interest is £343,500, while for the respondent Mr Lawrence-Smith says its value is £210,000.

63. The rental value of the appeal property was determined by the F-tT at £94,640 p.a. Miss Ellis said that this should be adjusted to reflect the assumption to be made under section 9(1A)(c) of the 1967 Act that the tenant has no liability to carry out repairs, maintenance or redecorations under the terms of the tenancy or Part 1 of the Landlord and Tenant Act 1954.

64. In arriving at its rental value the F-tT determined from comparable evidence that the rent for the appeal property in good condition would be £135,200 p.a. It deducted 20% to adjust for the actual condition of 3 Vale Close and a further 10% "for terms". This gave the adjusted rental value of £94,640 p.a.

65. Miss Ellis noted that the F-tT did not explain what was included in its adjustment "for terms". From reading the Tribunal's decision she considered that the 10% adjustment (£13,520 p.a.) comprised allowances for repairs and buildings insurance. She allowed £13,000 for repairs and £520 for the insurance premium. Miss Ellis put the rental value onto the statutory terms to be assumed under section 9(1A)(c) of the 1967 Act by adding back the deduction for repairs. This gave a corrected annual rent of £107,640 which Miss Ellis rounded to £107,500.

66. The F-tT capitalised the rent of £94,640 by a dual rate, tax adjusted year's purchase. Miss Ellis said that this was an investor's approach to the valuation of the short leasehold interest since it allowed for the return of the investor's capital as well as a return on that capital. But, said Miss Ellis, it was not just investors who would be in the market to purchase this short leasehold; there would also be prospective purchasers who wanted to occupy the property and who were not concerned to recoup their capital outlay over the remaining term.

67. Miss Ellis said that there was a market demand from potential occupiers (such as foreign workers posted to London for a few years) of houses on non-enfranchiseable short leases such as that to be assumed in this appeal. Until the end of 2010 her firm managed blocks of long leasehold flats and Miss Ellis said that she had experience of lessees applying to the landlord for a licence to underlet flats for a period greater than 1 year. She said that about 10% of all such applications were for periods of between 1 and 3 years. The reason that there were not longer lettings was that landlords were frightened by the prospect of the re-introduction of a form of security of tenure.

68. Miss Ellis did not give any specific examples of purchases of short leases by occupiers.

She said that her firm ceased managing the blocks of flats in 2010 at which time all the relevant files had been transferred to other managing agents.

69. Any lack of evidence of a market for this type of short leasehold was not due to a lack of demand from potential occupiers but to a lack of supply. Those short leases of houses that came to market were almost invariably enfranchiseable and so potential occupiers of the sort interested in acquiring the unenfranchiseable short unexpired term to be assumed at 3 Vale Close could not compete with persons who were paying for the benefit of the 1967 Act rights to enfranchise. There was a market for this type of short unenfranchiseable lease but it was hidden, the more so because such a lease with no repairing liability would never be encountered in the real world.

70. There were several advantages to an occupier in purchasing a short unexpired term of a long lease compared to taking an assured shorthold tenancy. For instance they would not have to pay an up front deposit; they could re-paint as they wished; there would be security of rent and tenure for the remainder of the unexpired term of 3.195 years; and there would be no liability for dilapidations at the termination of the lease.

71. Miss Ellis said that the successful hypothetical purchaser of the subject lease would be an occupier who was prepared to pay a premium up front equivalent to the full and undiscounted rental value of 3 Vale Close over the unexpired term of the lease. The demand for such a short unenfranchiseable lease would be such that the landlord would have a strong enough bargaining position to resist any deal which involved discounting the future rental value of the property. This was a similar approach to that adopted by Mr Eric Shapiro who had represented the lessee before the F-tT, although Mr Shapiro made a small deduction from the rental value for repairs.

72. Miss Ellis concluded that the value of the existing short leasehold interest would be:

Full rental value in existing condition	=	£107,500 p.a.
x unexpired term of lease =		3.195 years
Value of unexpired lease =		£343,463
	Say	£343,500

73. She used this figure in the calculation of the landlord's share of the marriage value (£11,730) and added this to the value of the freeholder's existing interest (£69) and the present value of the freeholder's reversion to vacant possession value (£2,807,970) to give an enfranchisement price of £2,819,770 (sic).

74. For the respondent, Mr Lawrence-Smith said there was not a market among occupiers to

purchase a short unexpired lease in an unimproved property such as 3 Vale Close. Any such purchaser, who Mr Lawrence-Smith said would probably be an American expatriate, would require the improvement of the existing property to a high specification and standard before moving in. Mr Lawrence-Smith estimated the cost of such works at £100,000 plus VAT which would include re-plumbing and re-wiring throughout. The cost and delay that these works would involve meant that any potential occupier purchaser would require a substantial discount to the price. Mr Lawrence-Smith's inquiries of the US Embassy had shown that they would not purchase such a lease; rather they would purchase a freehold or take a long term let of a refurbished property with an option to renew and where the landlord was responsible for repairs.

75. Mr Lawrence-Smith had not come across a market transaction where the purchaser had paid all the rental value at the outset. If such transactions existed one would expect to see them in the market. It was not possible to hypothesise the existence of such a market as Miss Ellis had done and Mr Lawrence-Smith rejected this valuation approach.

76. Mr Lawrence-Smith preferred to analyse market transactions in order to obtain a comparable short leasehold relativity that he could then use to value the appeal property. He relied upon the sale of an unenfranchiseable lease with an unexpired term of 3.42 years in a house at Crescent Place, London SW3 2EA (Knightsbridge) that was sold on 20 October 2009 for £200,000. Like the appeal property, 2 Crescent Place was let on a fixed ground rent of £25 p.a. The freehold of 2 Crescent Place was subsequently sold with vacant possession on 20 May 2013 for £4,251,615. The property was apparently sold on both occasions in an unmodernised condition.

77. Mr Lawrence-Smith adjusted these transactions for time in two ways:

(1) By calibrating them to two sales of the freehold interest in 144 Walton Street, London SW3 2JJ (Knightsbridge); the first in July 2009, the second in July 2013. This showed an increase in value of 43.4%. The property was a similar terraced house to 2 Crescent Place and located in an adjoining road. There was apparently no significant change in the condition of the property between the two sales.

(2) By reference to four property indices for the period October 2009 to May 2013: Cluttons Knightsbridge (central south west London) index: +38.6%; Savills (Central London Houses) index: +40.8%; Knight Frank (Prime Central London) index: +43.8%; and the Land Registry index: +43.6%.

78. Mr Lawrence-Smith adopted a figure of +43.4% to reflect the market movement in the value of 2 Crescent Place between October 2009 and May 2013. The time adjusted transactions showed that the short leasehold (3.42 years) interest in 2 Crescent Place had a relativity of 6.74% of the value of its unencumbered freehold interest.

79. Mr Lawrence-Smith said that he understood the purchaser of the short lease at 2 Crescent Place had hoped to reach agreement with the freeholder for the acquisition of the freehold

interest. He therefore assumed that this would enhance the price he was prepared to pay. But he balanced this against the depreciating effect of a possible dilapidations claim being made by the freeholder at the end of the lease.

80. Given that the unexpired term of the lease on the appeal property (3.195 years) was slightly shorter than that on 2 Crescent Place, Mr Lawrence-Smith adopted a relativity of 6.6% which, when applied to the agreed unencumbered freehold value of the appeal property of £3,175,000, gave a value for the existing leasehold interest of £209,550 which Mr Lawrence-Smith rounded to £210,000.

81. Mr Lawrence-Smith also valued the existing freehold interest by using the same approach as that used by this Tribunal in *Trustees of Sloane Stanley Estate* and as adopted by the F-tT. He adopted the F-tT's figures and capitalised the rental value adjusted for condition (20%) and terms (10%) by a dual rate tax adjusted year's purchase (2.27% net remunerative rate, 2.25% annual sinking fund and tax at 30p) for 3.195 years. The resultant figure of £206,000 represented a relativity of 6.48%.

82. Mr Lawrence-Smith concluded that the value of the existing leasehold interest at the appeal property was £210,000, although he did not provide a figure for the enfranchisement price based upon this value.

Discussion of the valuation issue

83. Mr Lawrence-Smith's preferred approach, which relies upon the sale of the leasehold and freehold interests in 2 Crescent Place, has the merit of being market based evidence. In *Arrowdell Limited v Coniston Court (North) Hove Limited* [2007] RVR 39 the Tribunal said at [39] about the sources of evidence for leasehold relativity:

> "In such circumstances, in our view, it is necessary for the Tribunal to do the best it can with any evidence of transactions that can usefully be applied, even though such transactions take place in the real world rather than the no-Act world."

84. There are three advantages to this approach:

(i) It is a matched pair of transactions involving the sale of the same house in apparently the same or similar unimproved condition;

(ii) The leasehold interest was unenfranchiseable and therefore its sale price did not reflect the benefits of the 1967 Act; and

(iii) The unexpired term of the lease (3.42 years) was very similar to that of the subject lease (3.195 years).

85. During cross-examination the following criticisms were made of Mr Lawrence-Smith's reliance on the sales of 2 Crescent Place:

(i) Crescent Place is both much smaller (1,601sq ft) and more valuable (£2,656 per sq ft freehold as at the 20 May 2013) than the appeal property at 3 Vale Close (3,053 sq ft and £1,040 per sq ft freehold as at 14 October 2013);

(ii) The properties are located in different parts of London: 2 Crescent Place is in Knightsbridge, while the appeal property is in St John's Wood;

(iii) There is only a single matched pair of transactions upon which to base the valuation of the appeal property. That is not an adequately robust transactional database;

(iv) The analysis of 2 Crescent Place requires an adjustment for time to be made over a period of three years and seven months. That is too long in a rising market to provide a reliable estimate of relativity; and

(v) The leasehold sale of 2 Crescent Place was made in the real world and it was highly likely that the lessee was responsible for repairs under the lease. The actual condition of the property was unknown and the purchase price was likely to have reflected this repairing obligation and the possibility of a dilapidations claim at the expiry of the lease.

86. The fact that the appeal property and 2 Crescent Place are different in size, value and location does not mean that 2 Crescent Place is not a helpful comparable. Both properties are recognised as being in the prime central London sector of the market. We are not persuaded that these differences would lead to significant, if any, variations in the relativity of the two leasehold interests. We consider that it is more relevant that the unexpired terms of the leases on the two properties are very similar, that they were both unimproved houses and that the leasehold interest at 2 Crescent Place was unenfranchiseable.

87. We are not assisted by Mr Lawrence-Smith's analysis of the two freehold sales of 144 Walton Street as an aid to the time adjustment of the sales at 2 Crescent Place. The sales of 144 Walton Street were in July 2009 and July 2013. They showed an increase in value of 43.4% which is the figure that Mr Lawrence-Smith then adopts to adjust the values of the two sales at 2 Crescent Place. But the time adjustment derived from the sales of 144 Walton Street (July 2009 to July 2013) is for a period which is 6 months longer than that required to adjust the sales at 2 Crescent Place (October 2009 to May 2013). Mr Lawrence-Smith's figure of 43.4% derived from the sales at 144 Walton Street cannot be used to adjust for the shorter time period with which we are concerned. The four indices which Mr Lawrence-Smith uses as a check, and which are analysed over the correct time period, show a range of price increases from 38.6% to 43.8% with an average of 41.7%.

88. The appellant submits that the three years and seven months period between the sale of the leasehold and freehold interests at 2 Crescent Place is too long for a time adjustment to be reasonably made.

89. In *31 Cadogan Square Freehold Limited v Earl Cadogan* [2010] UKUT 321 (LC) the

Tribunal said at [128]:

> "We do not accept that it is reasonable to index the sale price for such an extended period (well over 5 years). Mr Orr-Ewing has reservations about doing so. Indexation can be of assistance when adjusting comparables, especially when, as in these appeals, the experts have agreed the index to use. But the further away one goes from the valuation date, and the greater the volatility of the market in question, the less reliable it becomes as an indicator of contemporary value."

90. In *The Trustees of John Lyon's Charity v Alamouti* [2014] UKUT 0087 (LC) the Tribunal considered the use of a comparable ("No.68") which had been sold three years and seven months before the valuation date. It concluded at [131]:

> "The problem with the use of No.68 as a comparable is the date of its sale. The freehold was sold in July 2007 well over three years before the valuation date for No.70 (November 2010). That is a long period over which to index a transaction in a stable market, but in this case the period between the sale of No.68 and the valuation date saw several significant market movements.… Indexation in such a volatile market over so long a period is not reliable."

The Tribunal gave the comparable at No.68 no weight.

91. By contrast in *Earl Cadogan v Cadogan Square Limited* [2011] UKUT 154 (LC) the Tribunal gave weight to a comparable that had been sold three years and two months before the valuation date (see [132] and appendix 1).

92. It is clear from the above authorities that the Tribunal does not generally favour the indexation of property prices over as long a period as that used by Mr Lawrence-Smith (three years and seven months), particularly over periods where the market is volatile or showing extreme price movements. The annual rate of growth represented by the 41.7% increase in prices between October 2009 and May 2013 (see paragraph 86 above) is 10.2%. This is strong, but not extreme, growth. Given that the matched pair of transactions at 2 Crescent Place is the only useful market evidence in this appeal we give them some limited weight.

93. We accept the appellant's argument that the purchaser of the leasehold interest in 2 Crescent Place would have taken account of a probable lessee's repairing obligation and the possibility of a dilapidations claim at the end of the lease. There is no evidence that such a claim was likely or that the condition of the property was such as to require major repairs and it is, as Mr Loveday submitted, a theoretical point. Nevertheless it is a factor which the hypothetical bidder would take into account and one which would affect the price paid.

94. Mr Lawrence-Smith suggested that the purchaser of the leasehold interest of 2 Crescent Place had "taken a punt" on being able to acquire the freehold interest at the end of the unexpired lease term. He viewed this as a factor which would have increased the amount paid and he said that this would counter-balance any discount that would have otherwise been made

in respect of the lessee's probable repairing obligations. We do not accept that approach. Mr Lawrence-Smith's information on this point came from the agent of one of the parties involved in the transaction, although Mr Lawrence-Smith did not know whether the agent acted for the vendor or the purchaser. Mr Lawrence-Smith's evidence is double hearsay and was not corroborated. We give it no weight.

95. Adjusting the purchase price of the leasehold interest at 2 Crescent Place by 41.7% rather than 43.4% gives an adjusted figure of £283,400 and a relativity of 6.67%. We would have expected the purchaser to have paid a higher price than this had the property been offered on statutory terms requiring it to be assumed that the lessee had no repairing obligations. This in turn would have resulted in a higher relativity.

96. Mr Lawrence-Smith supported his preferred approach using market transactions by reliance on the F-tT's adopted net rental approach. This assumes an investor would buy the unexpired leasehold term using a dual rate, tax adjusted year's purchase and reducing the rental value by 20% to reflect the condition of the appeal property and by another 10% "for terms".

97. While the F-tT does not explain what it mean by "terms" we are satisfied that it did include an allowance for repairs given the various references to such an adjustment contained in their decision as set out in Miss Ellis's evidence. In our opinion the deduction for repairs should be added back to the rental value. Miss Ellis adds back £13,000 p.a. or 9.6%. In our opinion, although it is to be assumed under section 9(1A)(c) of the 1967 Act that the tenant has no liability to carry out any repairs, he would nevertheless set aside money to pay for unplanned repairs required, as Mr Loveday put it, to ensure his own comfort; e.g. repairing a broken boiler or replacing a broken tile. Miss Ellis says that this type of cost would be reflected in the 20% allowance for condition, but we prefer to make a small explicit adjustment and we therefore add back only 7.5% (£10,140 p.a.) to allow for such contingencies and insurance. (We are not persuaded by Mr Lawrence-Smith's opinion that the cost of building insurance would be significantly greater than Miss Ellis allows). The adjusted rental value is therefore £104,780 p.a. which we round to £104,750.

98. Under the net rental approach the rent is multiplied by the year's purchase for 3.195 years at 2.27%, 2.25% annual sinking fund and 30% tax (there being no dispute about these rates) i.e. a year's purchase of 2.1788. In our opinion the value of the leasehold interest using the net rental approach is therefore £228,229, which gives a relativity of 7.2%.

99. Mr Lawrence-Smith denied that an occupier would buy the unexpired term of the lease for the appeal property in its existing condition. He said that improvements costing at least £100,000 plus VAT would be required before such an occupier would be interested. It cannot be assumed that the vendor will do these works before selling the unexpired lease: the statutory assumptions require that the lease is sold on the valuation date in its existing and unimproved condition. So any improvements would have to be done by the purchaser, whether an investor or an occupier. The rental difference between the appeal property in good

condition and in its existing condition was determined by the F-tT at 20% or £27,040 p.a. Taken over 3.195 years (which makes no allowance for the time it would take to do the works or for discounting the future rental value) this comes to £86,393, an amount less than Mr Lawrence-Smith's estimated cost of the upgrade works.

100. The F-tT's approach, which Mr Lawrence-Smith adopts unaltered in support of his primary valuation, assumes that the appeal property could be let in its existing condition. Therefore Mr Lawrence-Smith does not appear to dispute that an investor could let the property immediately on that basis. But Mr Lawrence-Smith does not accept that an occupier would take the unexpired term of 3.195 years in its existing state. The assumption inherent in the F-tT's valuation (adopted by Mr Lawrence-Smith) that an investor would have no difficulty in finding a tenant to occupy the appeal property is contrary to Mr Lawrence-Smith's assumption that an occupier would not purchase the unexpired term unless the property was improved. The investor, of course, could let the property on an assured shorthold tenancy while an occupier purchaser would be taking on a firm commitment for over three years. The advantages and disadvantages of occupation under an assured shorthold tenancy versus the unexpired term of the lease were raised in cross-examination and submissions. The main advantage to a tenant of an assured shorthold tenancy was identified as the flexibility it gave him to move during the three year period and the benefit of repairing covenants from the landlord regarding structural and certain other matters (eg the boiler). On the other hand an occupier under the unexpired term of the lease would have security of tenure, a known fixed ground rent, the power to change the property (subject to the necessary consents), the right to rent it out and would not have to make a deposit of six weeks' market rent. It seems to us that the advantages to an occupier purchaser of buying the unexpired term of a lease are significant and we consider that there would be a market for the appeal property from occupier purchasers even in its existing unimproved state.

101. Miss Ellis, a more experienced surveyor than Mr Lawrence-Smith in this field, considered that such a market would be a strong one and that there would be keen competition to acquire an unenfranchiseable short lease such as the one hypothesised at the appeal property. She considered that the competition would be such as to ensure that the successful purchaser would have to offer the capitalised rental value of the property, without discount, at the outset. But although Miss Ellis described her experience of underlettings in blocks of flats where she said that up to three year terms had been granted, she did not produce any specific examples to support her opinion that occupier purchasers would pay an undiscounted capital sum up front for the opportunity.

102. In his closing submissions Mr Loveday said that we were not considering whether someone would take a lease for three years but whether they would pay a sum representing the entire rental value up front (over £343,000) upon purchase of the lease. If such deals existed, said Mr Loveday, one would expect to see them. One could not simply hypothesise the existence of such a market without evidence. We find force in that argument and given that the appeal property was in an unimproved condition which did not meet modern requirements we do not accept Miss Ellis's opinion that the market for occupier purchasers would have been so strong as to command a price which reflected the undiscounted full rental value of the appeal property for the unexpired term of the lease.

103.An occupier purchaser, whose benefits are occupational rather than financial, would be able to outbid an investor who bids on the basis of a dual rate, tax adjusted year's purchase. Such an investor requires a return of his capital as well as a return on it. By comparison an occupier purchaser can discount the future rent by the present value of £1 per annum (year's purchase) using a single rate yield. That will always produce a higher year's purchase than a dual rate, tax adjusted year's purchase for an equivalent term (assuming the same remunerative rate).

104. In our opinion the successful purchaser would not be prepared to pay the whole of the capitalised rental value at the outset but would be aware that, based on the dual rate approach adopted by the F-tT and adopted by Mr Lawrence-Smith, they could nevertheless pay more than an investor and still obtain value for money. We consider, contrary to Miss Ellis's opinion, that the successful occupational purchaser would discount the future rental value. In our opinion the most they would pay would be our adjusted rental value of £104,750 p.a. multiplied by the year's purchase single rate for 3.195 years at the adopted net remunerative rate of 2.27% (3.049), i.e. £319,400 (rounded). This compares with the maximum price an investor would pay of £228,229 (see paragraph 97 above).

105.We think that an occupational purchaser would be in a strong negotiating position to agree a price with the vendor between these figures, given that the product being sold is in an unimproved and unpopular condition. We think, taking into (limited) account Mr Lawrence-Smith's matched pair of sales at 2 Crescent Place, which show, as adjusted by us, a relativity of 6.67%, that the negotiated price for the unexpired term of the leasehold interest in the appeal property would be £250,000 which represents a relativity of 7.9% to its unencumbered freehold value.

106.We therefore determine the enfranchisement price of the freehold interest in the appeal property assuming that the existing lease has an unexpired term of 3.195 years at £2,866,295 (see Appendix 1 attached).

Determination

107.We allow the appeal and determine that the enfranchisement price should be the agreed amount of £1,748,000 calculated on the assumption that the existing lease has an unexpired term of 53.195 years. If we are wrong in our decision on the legal issue and the unexpired term of the lease is properly to be taken as 3.195 years, we determine the enfranchisement price to be £2,866,295.

Dated 19 November 2015

His Honour Judge Huskinson

A J Trott FRICS

APPENDIX 1

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION

3 VALE CLOSE

1. **EXISTING VALUE OF FREEHOLD INTEREST**

(i) Value of term

Current rent pa =	£25	
x YP 3.195 years @ 7%	2.7772	
		£69

(ii) Value of reversion

Freehold VP value =	£3,175,000	
x PV of £1 in 3.195 years @ 3.925%	0.88426	
		£2,807,522
		£2,807,591

2. **MARRIAGE VALUE**

Freehold VP value =		£3,175,000	
Less			
(i) Freeholder's present interest =	£2,807,591		
(ii) Lessee's present interest =	£250,000		
		£3,057,591	
Marriage value =		£ 117,409	
50% share of marriage value =			£ 58,704
Enfranchisement price =			£2,866,295