UPPER TRIBUNAL (LANDS CHAMBER)

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LRA/129/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – whether price enhanced by value potentially available from a reconversion of the relevant building into a single house – extent of the additional value potentially realisable from such a reconversion – extent of risks regarding ability to obtain vacant possession and carry out such redevelopment including whether planning permission would be needed and (if needed) would be granted – how such risks would affect a properly advised hypothetical purchaser – nature of such a hypothetical purchaser and of the advice he should be assumed to act upon – Leasehold Reform, Housing and Urban Development Act 1993 section 61 and Schedule 14

IN THE MATTER OF TWO APPEALS (HEARD TOGETHER) AGAINST THE DECISIONS OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **(1) 31 CADOGAN SQUARE FREEHOLD LIMITED**
(2) 37 CADOGAN SQUARE FREEHOLD LIMITED **Appellants**

and

THE EARL CADOGAN **Respondent**

Re: 31 Cadogan Square and
130 Pavilion Road,
London SW1
and
37 Cadogan Square
London SW1

Before: His Honour Judge Nicholas Huskinson and Mr A J Trott FRICS
Sitting at 43-45 Bedford Square, London WC1B 3AS
on 5-9, 12 and 13 July 2010

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Andrew P D Walker instructed by Bircham Dyson Bell LLP, solicitors, on behalf of the First Appellant.
Steven Jourdan QC instructed by Bircham Dyson Bell LLP, solicitors, on behalf of the Second Appellant.
K S Munro instructed by Pemberton Greenish LLP, solicitors, on behalf of the Respondent

The following cases are referred to in this decision:

Earl Cadogan v Sportelli [2007] 1 EGLR 153 (Lands Tribunal); and [2008] 1 WLR 2142 (Court of Appeal)
Richmond upon Thames LBC v Secretary of State [2000] 2 PLR 115
Cadogan Estates Limited v Panagopoulos Lands Tribunal LRA/97&108/2006 (unreported)
Earl Cadogan v 2 Herbert Crescent Freehold Ltd Lands Tribunal LRA/91/2007 (unreported)
W Clibbett Ltd v Avon CC [1976] 1 EGLR 171
West Midlands Baptist Trust v City of Birmingham [1968] 2 QB 188
Arbib v Earl Cadogan [2005] 3 EGLR 139
Arrowdell Limited v Coniston Court (North) Hove Limited [2007] RVR 39
London Rent Assessment Committee v St George's Court Limited [1984] 1 EGLR 99
Inland Revenue Commissioners v Clay [1914] 3 KB 466
Lady Fox's Executors v Commissioners of Inland Revenue [1994] 2 EGLR 185
Railtrack Plc v Guinness Limited [2003] 1 EGLR 124
Marazzi v Global Grange Limited [2003] 2 EGLR 42
Ivorygrove Limited v Global Grange Limited [2003] 2 EGLR 87
Transport for London (London Underground Limited) v Spirerose Limited [2009] UKHL 44
Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands [2008] 3 EGLR 13

The following cases were also referred to in argument:

Earl Cadogan v Sportelli [2010] 1 AC 226 (House of Lords)
Segama NV v Penny Le Roy Ltd [1984] 1 EGLR 109
Gaze v Holden [1983] 1 EGLR 147
Earl Cadogan v Faizapour [2010] UKUT 3 (LC)
Majorstake v Curtis [2008] 1 AC 787
Marks v British Waterways Board [1963] 1 WLR 108
Gilmour Caterers Ltd v St Bartholomew's Hospital Governors [1956] 1 QB 387

PRELIMINARY DECISION

Introduction

1. There are before the Tribunal two appeals, each from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT"), regarding the calculation of the price to be paid by the nominee purchaser under the Leasehold Reform, Housing and Urban Development Act 1993 Schedule 6 upon the acquisition by that nominee purchaser of the freehold of the property in question. The case concerns the acquisition by the First Appellant of the freehold in 31 Cadogan Square and 130 Pavilion Road (hereafter together called "No.31") and the acquisition by the Second Appellant of the freehold in 37 Cadogan Square (hereafter called "No.37"). The earlier LVT decision related to No.37 and is dated 26 February 2008 whereby the LVT decided that the price to be paid by the Second Appellant was £5,276,994. The second decision of the LVT is dated 11 July 2008 whereby it decided that the price payable by the First Appellant in relation to No.31 was £7,503,373. In each case in its calculation of the price payable the LVT identified substantial additional value in the freehold reversion to reflect the prospect of a development of the property in question by way of a reconversion of that property from one containing several flats back to a single dwellinghouse. In each case the Appellant argues that the LVT was wrong in including any such development value (or so much development value) in its calculation of the price payable and each Appellant also argues that the LVT was wrong in using a deferment rate of 4.75% as part of the exercise in calculating the price payable. These are the two points raised on each of these two appeals.

2. The valuation dates are 29 August 2007 for No.31 and 19 February 2007 for No.37. In each case the relevant long leases were to expire in 2023 save in each case for one separate lease where there had been an extension to 2113. Accordingly the deferment rate to be applied in the present cases is to be applied for a period less than 20 years. The question of the proper deferment rate to be adopted in such a case falls to be decided in the light of the decision of this Tribunal and the Court of Appeal in *Earl Cadogan v Sportelli* [2007] 1 EGLR 153 (Lands Tribunal); and [2008] 1 WLR 2142 (Court of Appeal). A separate hearing before this Tribunal has been set for the purpose of hearing evidence and argument upon the question of the proper deferment rate. The present hearing before us was agreed by all parties to be one which should give rise to a preliminary decision of this Tribunal, being a decision given pursuant to a hearing at which all relevant matters except for the question of deferment rate were the subject of evidence and argument.

3. In outline it is argued by the Respondent in each case that the value of the freehold reversion, as assessed in accordance with Schedule 6, was substantially increased by the prospect of an opportunity to develop the property in question by reconverting it into a single dwellinghouse (or into two separate units) at 2023 and that the hypothetical purchaser of the freehold reversion, when deciding how much to pay for it, would have concluded there were no substantial problems in the path of achieving a profitable such development in 2023. The Appellants argue that the hypothetical purchaser would view the prospect of such a development in 2023 to be of doubtful value even assuming it could be achieved. They further

argue that the hypothetical purchaser would perceive substantial difficulties in the way of being able to bring about such a development and would pay nothing extra, or alternatively would pay little extra, for the freehold reversion for the purpose of undertaking it in 2023. In particular (and by way of outline summary) it is contended by the Appellants that the following matters would weigh in the mind of the hypothetical purchaser and would lead him to pay nothing (alternatively little) extra for the possible development opportunity in 2023:

(i) The question of the extent of any additional value (ie to reflect the prospect of reconversion) supposing vacant possession was available at the valuation date. Also the question of whether market conditions in 2023 would still be such that the same (or any) additional value could be obtained from a reconversion.

(ii) The question of whether planning permission would be needed and (if needed) would be granted for the proposed development even if such development was proposed at the valuation date rather than in 2023 – and the further question of whether additional uncertainty concerning the planning situation would be perceived having regard to the fact that the proposed development, if it was to be carried out, would not take place until 2023.

(iii) The question of the extent of potential difficulties and delays under section 61 and Schedule 14 of the 1993 Act in obtaining possession from the relevant long lessee in each building who had already extended his lease to 2113 and the question of the level of compensation that might be payable to such lessee if possession could be obtained.

(iv) Also the question of whether other matters such as building costs and building regulations (including any tension between such building regulations and listed building considerations) or other regulations such as those relating to access for the disabled or carbon emissions might move against the proposed development and make it less attractive or unattractive in 2023.

4. It has been agreed between the parties that these points do not relate to the question of the deferment rate but instead relate to the assessment of the value of the freehold which will revert to the hypothetical purchaser in 2023, being a value which must then be deferred. Accordingly at the hearing before us we heard evidence and argument directed towards the matters mentioned above, the purpose being that we should reach a conclusion in each case as to the sum representing the value which the hypothetical purchaser would enjoy when the freehold reversion reverted to him in 2023. As regards the rate at which this value should be deferred, that is to be dealt with at a separate hearing of this Tribunal (when it will sit differently constituted under the chairmanship of a High Court Judge and when other parties will also be involved). This question of the deferment rate is a matter of potentially wide application in the light of the *Sportelli* decision and of a potential importance beyond an importance to the parties in these proceedings before us.

5. In each case the parties have prepared a list of agreed facts and issues. The matters agreed include the value of the freehold reversion supposing that the properties were to remain as flats, such that there was no development value for a reconversion to a single dwellinghouse. It is not necessary to set out all of these agreed facts but in summary the position is as follows.

6. As regards No.31 the property comprises three flats/maisonettes in 31 Cadogan Square itself held on individual long leases; a caretaker's living accommodation in the basement owned by the head lessee pursuant to the headlease; common areas; and the attached mews property behind at 130 Pavilion Road which is held on an individual long lease. For practical purposes, as currently laid out, the building comprises four flats and an attached mews house: five units of accommodation in all. There is a head lease of No.31 which is owned by 31 Cadogan Square Residents Association Limited. This head lease expires on 25 March 2023 which is three days after the expiry of the original terms of the leases of the individual units (22 March 2023). The valuation date is 29 August 2007. As regards Flat 2 (the ground and first floors) this lease has been extended to expire on 22 March 2113. Flat 2 is owned by Mr B, who is a person of great wealth and international importance, who is not one of the participating tenants. The property is Grade II listed. At the valuation date the property did not have planning permission or listed building consent for conversion to a single house nor had any certificate been obtained under section 192 of the Town and Country Planning Act 1990 as amended in respect of such a use or development.

7. As regards No.37 it is agreed that this also is a Grade II listed building. It is divided into six flats. There is no mews house. The building is subject to a head lease in favour of Hasler Properties Limited expiring on 25 March 2023. All of the flats, other than the caretaker's flat in the basement, are held under underleases and all of these (save in respect of Flat 3) expire on 15 March 2023. The underlease of Flat 3 has been extended and expires on 25 March 2113. The valuation date is 19 February 2007. Although not set out in the joint statement of agreed facts and issues, it is common ground that there existed at the valuation date no planning permission or listed building consent for the conversion of No.37 to a single house nor had any certificate been obtained under section 192 of the 1990 Act.

8. Each list of agreed facts and issues ends with a statement of issues in substantially the same form which can be taken from the document relating to No.37 (paragraph 7 of the list relating to No.31 no longer being an issue):

> "**The Issues for determination at this hearing**
>
> 10. The following issues arise for determination at this hearing
>
> (1) How should the valuation be approached?
>
> (2) In February 2007, would a purchaser have perceived that there was a demand for houses in Cadogan Square?
>
> (3) At that time, what would the purchaser have estimated as the likely freehold vacant possession value ("FHVP") of no.37, for conversion into a house?

(4) How should the effect of s.61 and Sch 14 be dealt with?

(5) Would the purchaser anticipate at the valuation date that he would or might need to get planning permission and listed building consent in 2007 alternatively in 2023? (On the Appellant's case, it is the position in 2023 which is relevant; on Cadogan's case, it is the position in 2007.) If so, how confident would he be that he would be able to get those consents and if he did, how quickly, at what cost and on what terms?

(6) Would he be concerned about any of the following: (1) the risk of a change in building regulations; (2) the risk of the conversion costs being higher and/or relatively higher than predicted; (3) the risk of a change to s.61 and/or Sch 14; (4) the risk of the growth rate for houses being lower than that for flats between the valuation date and 2023.

(7) Having regard to the above, how would the purchaser have valued the reversion?

(8) Subject to determination of the appropriate deferment rate(s), what price is payable under Sch 6, having regard to the LT's decisions on the above issues?"

9. In each case there has been prepared a statement of agreed town planning evidence on behalf of the parties by their respective experts. This includes the following points of agreement:

(1) At each valuation date the relevant "Development Plan" comprised the 2002 Royal Borough of Kensington and Chelsea Unitary Development Plan (UDP). Other planning documents which were available at the valuation dates were the November 2005 London Plan Supplementary Guidance (Housing), the December 2006 London Plan "Housing Provision Targets, Waste and Minerals Alterations", the November 2006 Planning Policy Statement 3 (PPS3) "Housing", and the 2004 Greater London Authority London Plan.

(2) At the valuation date the existing lawful planning use of No.31 was: Class C3 use as four self-contained residential dwellings and a caretaker's flat, ie five units in total. As regards No.37 the existing lawful planning use at the valuation date was: Class C3 use as five self-contained residential flats and a caretaker's flat, ie six units in total.

(3) Listed building consent would be required for the internal conversion works.

10. At the hearing the parties called the following witnesses. The Appellants each called the same witnesses, namely: Colin Martin Lizieri, Grosvenor Professor of Real Estate Finance at the University of Cambridge, who gave evidence relating to financial matters including the movement in the market values of flats and houses; Robert Edward Reynolds BSc, MRICS, MRTPI, principal of the Planning & Development Partnership, who gave planning evidence and Robert James Orr-Ewing, a partner at Knight Frank LLP, who gave valuation evidence. The Respondent called Simon Avery BA, BPhil, Dip.Urban Design, MRTPI, senior partner of

Bell Cornwell LLP, who gave planning evidence and Simon Scott-Barrett MA, FRICS, a partner in Cluttons LLP, who gave valuation evidence.

11. On 6 July 2010 we inspected the subject properties both externally and internally (save for Flat 2 in respect of No.31 and Flat 4 in respect of No.37) and we also inspected externally the various comparables referred to by the parties (with the agreed exception of 11 Egerton Place).

The LVT's decisions

12. In its decision relating to No.37 the Tribunal noted the parties' agreement that at the valuation date the property was worth more as a house than as flats. The LVT accepted that this preference would, at the valuation date, be expected to continue. The LVT's approach was therefore to assess the freehold price of the property with vacant possession ready for conversion and then to deduct from that the improved value of Flat 3 (the lease of which had already been extended) together with a £500,000 inducement to ensure the owner of Flat 3 left on time. The LVT concluded that, subject to the application of that inducement, section 61 would cause no problems for the hypothetical purchaser. The LVT made no deduction to reflect any risk of not obtaining planning permission, but as regards this it is right to note that on behalf of the Appellant Mr Orr-Ewing is recorded as stating that as at the valuation date there was no planning obstacle in the way of converting the property back to a single unit (but he had pointed out that that situation could change in the years ahead as planning constraints change).

13. In its decision relating to No.31 the LVT noted that both parties' valuers agreed that the property was worth more as a house than as flats as at the valuation date. The LVT concluded that it would be mere speculation to reach any other conclusion than that this demand for houses in prime central London would continue. The LVT concluded there was a small risk that planning permission for a reconversion might be needed and might be refused and that a discount of 5% from the vacant possession value was appropriate to reflect that risk. The LVT also said that it had made allowance for the possibility of having to pay a relatively high price to buy in the lease of Flat 2 (the lease of which had already been extended).

14. Accordingly in each case the LVT applied what has been referred to before us as a "top down" approach rather than a "bottom up" approach. In other words the LVT assessed the value which the property would have if it were available for reconversion into a single dwellinghouse and then made some allowance for the costs of buying out the extended lease and then made (as regards No.31) a 5% deduction for planning risk. Part of the argument in the present case is whether this top down approach is correct or whether instead the starting point for calculating the price payable is the value of the relevant property in its existing configuration as flats, with some uplift being made (if thought appropriate) to reflect any additional value which the hypothetical purchaser might perceive in the property having regard to the alleged potential value of a development involving a reconversion to a single dwellinghouse in 2023 (the bottom up approach).

Statutory Provisions

15. Section 32 and Schedule 6 of the 1993 Act make provisions for the purchase price payable by the nominee purchaser. Paragraph 3 of Schedule 6 provides as follows:

> 3 (1) Subject to the provisions of this paragraph, the value of the freeholder's interest in the specified premises is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls within sub-paragraph (1A) buying or seeking to buy) on the following assumptions–
>
> (a) on the assumption that the vendor is selling for an estate in fee simple –
>
> (i) subject to any leases subject to which the freeholder's interest in the premises is to be acquired by the nominee purchaser, but
>
> (ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the nominee purchaser;
>
> (b) on the assumption that this Chapter and Chapter II confer no right to acquire any interest in the specified premises or to acquire any new lease (except that this shall not preclude the taking into account of a notice given under section 42 with respect to a flat contained in the specified premises where it is given by a person other than a participating tenant);
>
> (c) on the assumption that any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and
>
> (d) on the assumption that (subject to paragraphs (a) and (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the conveyance to the nominee purchaser of the freeholder's interest is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to Schedule 7.
>
> (1A) A person falls within this sub-paragraph if he is –
>
> (a) the nominee purchaser, or
>
> (b) a tenant of premises contained in the specified premises, or
>
> (ba) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 1(2)(a), or
>
> (c) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 2(1)(b)."

16. Paragraph 4 of Schedule 6 deals with marriage value in the following terms:

> "**Freeholder's share of marriage value**
>
> 4 (1) The marriage value is the amount referred to in sub-paragraph (2), and the freeholder's share of the marriage value is 50 per cent of that amount.

(2) Subject to sub-paragraph (2A), the marriage value is any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the participating tenants, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value –

(a) which is attributable to the potential ability of the participating tenants, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term, and

(b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price.

(2A) Where at the relevant date the unexpired term of the lease held by any of those participating members exceeds eighty years, any increase in the value of the freehold or any intermediate leasehold interest in the specified premises which is attributable to his potential ability to have a new lease granted to him as mentioned in sub-paragraph (2)(a) is to be ignored.

(3) For the purposes of sub-paragraph (2) the value of the freehold or any intermediate leasehold interest in the specified premises when held by the person from whom it is to be acquired by the nominee purchaser and its value when acquired by the nominee purchaser –

(a) shall be determined on the same basis as the value of the interest is determined for the purposes of paragraph 2(1)(a) or (as the case may be) paragraph 6(1)(b)(i); and

(b) shall be so determined as at the relevant date.

(4) Accordingly, in so determining the value of an interest when acquired by the nominee purchaser –

(a) the same assumptions shall be made under paragraph 3(1) (or, as the case may be, under paragraph 3(1) as applied by paragraph 7(1)) as are to be made under that provision in determining the value of the interest when held by the person from whom it is to be acquired by the nominee purchaser; and

(b) any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser shall be disregarded."

17. Section 61 makes provision for a landlord's right to terminate a new lease on the grounds of redevelopment:

"61. **Landlord's right to terminate new lease on grounds of redevelopment**

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

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

(i) to demolish or reconstruct, or

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

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

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

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

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

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

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

(3) …

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

(5) ….”

18. Schedule 14 makes provisions for the operation of section 61 and for the calculation of compensation payable to a lessee who is required to give possession pursuant to section 61. Paragraph 5(1) makes the following provisions regarding the amount of compensation payable to such a lessee:

> “5 (1) The amount payable to a tenant, by virtue of an order for possession, by way of compensation for loss of his flat shall be the amount which at the valuation date the new lease, if sold on the open market by a willing seller, might be expected to realise on the following assumptions –
>
> (a) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant’s flat or to acquire any new lease;
>
> (b) on the assumption that the vendor is selling –
>
> (i) subject to the rights of any person who will on the termination of the lease be entitled to retain possession as against the landlord, but otherwise with vacant possession, and
>
> (ii) subject to any restriction that would be required (in addition to any imposed by the terms of the lease) to limit the uses of the flat to those to which it has been put since the commencement of the lease and to preclude the erection of any new dwelling or any other building not ancillary to the flat as a dwelling; and

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

Professor Lizieri’s evidence

19. Professor Lizieri’s evidence had been prepared also in relation to the deferment rate question, which is not before us. However parts of his reports in both of the appeals deal with a question he was asked to consider relevant to the matters before us, namely the risk of changes in values as between the valuation date and 2023 and the prospect that, even though a house may be substantially more valuable than flats as at the valuation date, this situation might change by 2023.

20. Professor Lizieri produced two reports, one in respect of No.31 and one in respect of No.37. He was cross-examined about certain differences between them and he stated that the reports contained the same substantive argument but that the report regarding No.37 represented his edited and more fully considered analysis. In particular his conclusion at paragraph 36 in the report regarding No.37 represented his more fully thought out conclusion. This paragraph states:

> “36. If, at the valuation date, house prices per square metre are substantially higher than flat prices per square metre due to the faster rate of house price growth over the last decade, then, if growth rates even out in the long run, there must be a convergence. It is possible that, by 2023, slower house price growth relative to flat price growth will have eliminated the gap by the reversion date, rendering conversion uneconomic. As an example of a possible correction mechanism, house prices may be higher in an area because of lack of supply relative to flats. However, as developers and investors seek to exploit that gap by acquiring flatted buildings and converting them (back) to houses, the supply of houses rises and, *ceteris paribus*, the price of houses falls. In my view, this is a substantial risk that any potential purchaser of the freehold reversion in 2007 would have to consider in evaluating any benefits of converting the building to a house in 2023.”

21. Professor Lizieri drew attention to a graph prepared by the Nationwide Building Society in relation to Greater London flat and house prices 1991-2007 and also to data provided by Savills in relation to prime central London, south west area, flat and houses prices for June 1979 to February 2007. He stated that flat prices had over time tracked house prices closely but that figures for prime south west London showed that house price appreciation was faster than flat price appreciation over the first half of the 2000s, which explained the gap observed at the valuation date. He pointed out that there had been other periods where that had not been the case and that the very existence of houses converted into flats showed that there had been periods where the economics justified developers converting buildings from houses into flats.

22. Professor Lizieri drew attention to evidence given by the landlords' valuers, Mr Clark and Mr Cullum in the *Sportelli* case in the Lands Tribunal. He referred to the Tribunal's decision at paragraph 95 where it accepted Mr Clark's view

> "… that any disparity between growth rates for houses and flats is likely to even out over the longer term."

He also drew attention to evidence from Mr Cullum to the following effect:

> "There are periods of time when, particularly in the sort of area that we are dealing with here – the Prime Central London area – there are periods of time when the demand for flats is very much higher than it is for houses and vice versa … it is a cycle, there are periods when one is more favourable than the other".

23. Accordingly Professor Lizieri concluded that a hypothetical purchaser would have to take into account the probability that the price gap would be eliminated or reduced as between houses and flats by 2023. He thought there was a substantial risk of this happening. He did not accept that Cadogan Square could be viewed in isolation – no rational purchaser would pay a much higher price for a house in Cadogan Square if an equivalent property was available elsewhere. He said that the prices of houses could not indefinitely diverge from the prices of flats – in the long run the two values must converge. He was not able to point to any abundance on the supply side of properties available for conversion to houses in Cadogan Square, but the availability of other high quality properties, for instance in Holland Park, would mean that houses in Cadogan Square could not grow in price in an isolated market of their own.

The planning evidence: Mr Reynolds

24. On behalf of the Appellants Mr Reynolds considered the following questions:

1. Whether planning permission for a conversion of No.31 into a single dwellinghouse would have been required at the valuation date and, if required, whether it would have been granted.

2. Whether planning permission would have been required at the valuation date for a conversion of No.37 into (a) a single dwellinghouse or (b) two units, with one unit being a dwellinghouse on all but the front part of the basement and with a separate small residential unit in the front part of the basement by way of a caretaker's flat; and if such planning permission would have been required, whether it would have been granted.

3. What conclusions should be reached as at the valuation date as to the likely planning situation in 2023.

25. The proposed development of No.31 would involve converting five units into one unit (a loss of four units). The proposed conversion of No.37 into a single dwellinghouse would

involve a conversion of six units into one unit (a loss of five units). The alternative scheme of converting No.37 into two units (a large house and a small caretaker's flat) would involve going from six units to two units, a loss of four units.

26. As regards the question of whether the reconversion of a building comprising several flats back to a single dwellinghouse constituted a material change of use and hence development for which planning permission was needed, Mr Reynolds referred to the leading case on the point (as was accepted by the Respondent): *Richmond upon Thames LBC v Secretary of State* [2000] 2 PLR 115. This indicated that whether such a change constituted a material change of use depended on whether the change gave rise to planning considerations. Mr Reynolds said that the loss of a particular type of residential accommodation, such as the stock of units of private accommodation, was an important planning consideration.

27. Mr Reynolds drew attention to a letter written to him by Ms Anne Salmon of the planning department of the Royal Borough of Kensington and Chelsea ("RBKC") dated 3 October 2007 in response to an inquiry which he had made of her. That letter included the following text:

> "I note that it is intended to convert a property from 6 flats into a single family dwelling. I would advise that policy H17 of the Council's Unitary Development Plan resists the loss of existing small self-contained flats. Your letter does not specify how many habitable rooms are contained in each flat. This information should be submitted if you would like more detailed advice.
>
> I would advise that conversion of a property from 4 flats or more into a single dwelling constitutes a material change of use and would therefore require planning permission. If the existing flats are small, with one or two habitable rooms, then the conversion would be contrary to policy H17."

28. Mr Reynolds referred to a further letter he wrote to Ms Salmon in April 2008 making a specific inquiry relating to Cadogan Square concerning (inter alia) a proposed conversion of 6 flats into a single family dwellinghouse and attaching a copy of Ms Salmon's letter of 3 October 2007. Ms Salmon's e-mail response was:

> "We would always treat 6 flats into 1 as a material change of use requiring planning permission. This would be contrary to our policies and to the London Plan since it would reduce the borough's housing stock."

29. Mr Reynolds also drew attention to a letter dated 23 February 2009 from Ms Salmon to him specifically in relation to No.37 repeating that a conversion from six flats into a single family dwelling would constitute a material change of use and would require planning permission and continuing:

> "I would further advise that the loss of five residential units would contravene policies 3A.1 and 3A.2 of the London Plan which seek to increase rather than decrease the housing stock of the Borough and London as a whole. In addition, the proposal would

contravene policy H1 of the Unitary Development Plan and also policy H17 which seeks to retain smaller housing units. Hence any proposal to convert the property would be unlikely to receive favourable consideration."

30. Mr Reynolds referred to a decision of a planning inspector in respect of 113/114 Sloane Street dated 25 February 2005 in which the inspector dismissed the appeal (made by Cadogan Estates Ltd) against the refusal by RBKC to grant permission for the conversion of nine individual flats to form two 4-storey family town houses. Mr Reynolds contended that there were two strands to the inspector's decision, namely (a) the fact that there would be a loss of nine smaller units to be replaced by two large family houses, where five of the smaller units had one or two habitable rooms (and hence were protected by Policy H17 which sought to resist the loss of such units), and (b) the fact that the loss of seven residential units would be contrary to the objectives of policies within the London Plan, the UDP and PPG3 which all sought an increase in residential provision in appropriate locations and that if the present permission were granted then the Council would find it hard to resist other similar proposals and the cumulative impact would reduce residential provision in the borough. Overall the inspector concluded that the proposal would conflict with the objectives of policies 3A.2 and 3A.12 of the London Plan, UDP policies Strat 2, Strat 16, Strat 17, H13 and H17 and with the guidance contained in PPG3. Mr Reynolds pointed out that this appeal decision would have been known about as at the valuation date for each property and that this would heighten concern that planning permission for the proposed development would (a) be needed and (b) be refused. As regards No.37 the existing basement caretaker's flat is a small unit of one or two habitable rooms and within the protection of Policy H17. Accordingly planning permission would be refused not just on the grounds of loss of units but also because of breach of Policy H17 if the proposal was a conversion of No.37 into a single dwellinghouse. If instead the proposal was to convert from 6 units to 2 units (one unit being a retained small self-contained flat in the front basement) then Policy H17 would not be engaged, but planning permission for a conversion of 6 to 2 (or 5 to 1), being a loss of four units, would require planning permission, just as it would in relation to No.31, and would be likely to be refused.

31. Mr Reynolds stated that Ms Salmon had been a planning officer for 20 years, mostly with the team dealing with the south area of RBKC. He stated that RBKC had never had a uniform approach to whether developments involving a loss of residential units constituted development, there being a different and more flexible approach in the north of the borough compared with that of the south. Mr Reynolds suggested that this difference in approach between the south area team and the north area team explained the decisions in the cases mentioned in the following paragraphs. He said that in the south area the text in the letters obtained by him was more rigidly applied. However it was his case that, as set out in paragraph 4.10 of his witness statement relating to No.37, the council "habitually choose the conversion of more than 4 flats into one to amount to a material change of use". Thus Mr Reynolds' evidence was to the effect that where a building comprising five (or more) flats was to be converted into one unit planning permission was required – and he appeared not to endorse the literal meaning in the text of the letter of 3 October 2007 which indicated that the conversion of four or more flats into one constituted development, such that a loss of three flats (four to one) would constitute development.

32. Mr Reynolds was asked to reconsider his opinions in the light of certain material contained within the bundle:

(1) On 27 April 2007 RBKC granted a certificate of lawful proposed use or development in relation to 43 Kensington Park Gardens in respect of the internal conversion of a building containing six self-contained flats into two self-contained units – the certificate stating that such a change was not considered to result in a material change of use. This was a property in the north area of the borough and Mr Reynolds saw no reason to change his views.

(2) A certificate of lawful proposed use or development in relation to 6 Upper Addison Gardens for a proposed change of three flats to one at basement and lower ground floor levels and four units to one at second, third and loft levels. Mr Reynolds expressed disagreement with the planning officer's conclusion that the proposed change did not require planning permission.

(3) A grant of planning permission dated 18 September 2007 in respect of the conversion of 31 Holland Park from eight flats into a single family house. This proposal would involve the loss of seven units, including two units which were small units protected by Policy H17. The officer's report referred to the fact that PPG15 advised that the most appropriate use for a listed building would normally be the use for which the building was designed and that UDP Policy CD67 encouraged the use of listed buildings for their original purpose. It was also pointed out to Mr Reynolds that the report indicated there would be no conflict with Policy H1 because no residential floor space would be lost (there would be a loss of units but all the floor space would remain residential). Mr Reynolds stated he thought the officer's analysis was wrong regarding whether Policy H1 was engaged. He accepted that PPG15 and Policy CD67 would also apply to a listed building in Cadogan Square and that there should be a balance between the loss of residential units and the restoration of listed buildings. However in the case of 31 Holland Park there was reason to believe the building was in disrepair and that the works would involve a substantial enhancement of the listed building. The subject buildings in Cadogan Square were not in any such state of disrepair.

(4) A grant of planning permission dated 6 July 2006 by RBKC in relation to 25 Lennox Gardens. There the report of the officers indicated the authorised use was four self-contained flats and one self-contained maisonette with porter's quarters in the basement. The proposal was to convert to a single family dwellinghouse. Mr Reynolds argued that the planning officer's analysis regarding which planning policies in the UDP were engaged was once again wrong, in that Policy H1 should have been referred to. Mr Reynolds explained that this permission had been granted on the basis that there was a significant enhancement to, and restoration of, a listed building in poor repair and that this enabled the council to conclude that "on balance the principle of the conversion into one single dwellinghouse is acceptable".

33. Mr Reynolds expressed surprise that in the case of neither No.31 nor No.37 had the Respondent made an application for a certificate of lawful proposed use or development insofar as it was the Respondent's case that the proposed reconversions could be effected without the need for planning permission.

34. Mr Reynolds pointed out that one can only speculate about planning policies that may be in force in 2023, but that the trend was towards the retention of more, and smaller, units of accommodation. He stated that he would expect the policies at that time to be tightened and clarified to prevent the loss of dwellings. Accordingly it was his opinion that the prospects of securing a planning permission for the proposed conversion of Nos.31 and 37 into a single dwellinghouse (or No.37 into two units) would be perceived as at the relevant valuation dates to be likely to be less favourable in 2023 than at the valuation dates themselves.

The planning evidence: Mr Avery

35. As regards No.31 Mr Avery considered the question of whether planning permission would have been needed (and if needed would have been granted) for (a) its conversion from a total of five self-contained units to a single family dwellinghouse, and (b) the retention of the basement caretaker's flat as a separate unit with the conversion of the remainder into a second self-contained dwelling.

36. As regards No.37 Mr Avery considered the question of whether planning permission would have been required (and if required would have been granted) for (a) its conversion from five flats plus a caretaker's flat to a single family dwellinghouse and a caretaker's flat (ie six units to two units), and (b) for the conversion of all six flats to a single family dwelling, either in two stages or as a single operation.

37. On the first question, namely whether planning permission would be required on the basis the proposal constituted a material change of use, Mr Avery stated that regard should be had to the extent of the change of use and also the prevailing local plan policy context.

38. Mr Avery referred to a telephone conversation between himself and the Head of Development Control, Lesley Jones, on 9 May 2008 in which Mr Jones confirmed that throughout the borough RBKC would not consider planning permission was required to convert five self-contained flats to a single family dwelling (ie a loss of four units). Mr Avery also referred to a telephone conversation between himself and Derek Taylor (who had replaced Lesley Jones) on 30 March 2009 during which Mr Taylor (who was a development control area team leader at RBKC in 2007) confirmed to him that RBKC have consistently interpreted a reduction of six dwellings to one as a material change of use which requires permission and that they have taken that to be the threshold. Mr Taylor therefore informed him that the approach of the Council had been not to require planning permission for a reduction of five dwellings or fewer to one dwelling and he indicated that lawful development certificates had been granted in certain cases where this had been the level of loss involved. Mr Avery accepted that he had not posed the questions in writing and he had not sought confirmation in

writing of the answers, nor did he produce to the Tribunal any notes made at the time of the conversations. However he had signed his witness statement in the present cases on the same date or very soon after the later conversation with Mr Taylor. He did not consider there was any misunderstanding between him and the persons he spoke to. As regards the letter of 3 October 2007 from Ms Anne Salmon referred to by Mr Reynolds, Mr Avery concluded that that was simply wrong and must contain a typographical error insofar as it purports to say that a conversion from four flats to one (ie a loss of three units) would require planning permission – the letter should have read "six flats or more" rather than "four flats or more".

39. Mr Avery did not accept that there was a difference in approach across the borough as between the north and south areas. He stated that this was his absolutely clear understanding regarding the granting of certificates of lawfulness, which of course turn on whether planning permission for a conversion is needed or not. On the question whether planning permission should be granted, supposing that planning permission were required, Mr Avery was less firm on whether there was a difference between the north and south areas. He noted what Miss Rust (an associate planning expert in his own firm) was recorded as saying in the decision regarding 47 Cadogan Square in *Cadogan Estates Limited v Panagopoulos* Lands Tribunal LRA/97&108/2006 (unreported) at paragraph 22:

> "… that it was a fact that the different area planning teams within RBKC did have a tendency to interpret planning policies in different ways…".

Mr Avery accepted that Miss Rust had a pretty good understanding of the situation in RBKC.

40. Mr Avery concluded that a conversion from five units to one unit or five units to two units would not require planning permission. Accordingly no planning permission would be required for either such conversion at No.31. As regards No.37 he was of the opinion that a conversion directly from six units to one unit would require planning permission, but a conversion from six units to two units (a loss of only four units) would not require planning permission. He also added that once such a conversion from six units to two units had been implemented, then a separate subsequent application for a certificate of lawfulness to convert from two units to one unit should be successful because such a conversion would not require planning permission. He cited as an example the circumstances of 6 Upper Addison Gardens, a case with which he had been involved and where the final stage (a conversion to achieve a dwellinghouse in the entire building) had occurred in 2008.

41. On the question of whether planning permission would be required at all, Mr Avery attached significance to the grants of certificates of lawful proposed use or development in respect of 43 Kensington Park Gardens (granted 27 April 2007) and 6 Upper Addison Gardens (granted 26 July 2007). The former showed that a conversion from six units to two units (a loss of four units) was not development and the latter showed that a conversion from seven units to two units was not development. He accepted that both of these decisions were later than the valuation date for No.37 (although before the valuation date for No.31) and accordingly the actual decisions themselves would not have been known to the hypothetical purchaser (or his planning adviser) of the freehold reversion of No.37. However Mr Avery stated that these decisions still constituted reasonable evidence regarding what the attitude of RBKC was as at

RBKC was as at the valuation date for No.37 in February 2007.

42. Mr Avery's attention was drawn to the evidence given by Mr Julian Clark, a valuation expert with Gerald Eve, on behalf of the present Respondent in the case *Earl Cadogan v 2 Herbert Crescent Freehold Ltd* Lands Tribunal LRA/91/2007 (unreported). In that case the building comprised three flats plus a caretaker's flat and accordingly a reconversion would have involved four units becoming one unit (a loss of three units). Mr Clark in his witness statement said:

> "On the issue of whether planning consent would be required in the first place, I am aware from discussions with my colleagues in our Planning and Development Department at Gerald Eve, who have direct dealings with RBKC, that the Authority applies a rule of thumb such that the reduction in residential units from four to one would not require planning consent, the reduction from five units to one would require a planning application for which consent may be refused and the reduction from six or more units to one would require an application which would definitely be refused. Applying this approach to the Specified Premises, I very much doubt that the proposal to merge the four flats to create one house would encounter planning difficulties."

As regards this evidence by Mr Clark, Mr Avery stated that Mr Clark had got it wrong.

43. If planning permission were required Mr Avery drew attention to the nature of the relevant policies. He pointed out that the UDP contains four different types of policy, namely:

(i) "Prescriptive" policies, taking the form of "to resist" or "to allow";

(ii) "Negotiations" policies, allowing the council to negotiate;

(iii) "Encouraging" policies, taking the form "to seek";

(v) "Informative" policies, explaining actions by the council.

Mr Avery pointed out that whilst the first two types of policy can be used as reasons for refusal, a "to seek" policy cannot be so used. He pointed out that neither the London Plan nor the UDP had policies which resist the loss of dwelling units – what they do resist is the loss of permanent residential accommodation to non-residential uses. Also, although Policy 3A.1 of the London Plan and Policies Strat 17 and H2 of the UDP "seek" to maximise the provision of residential accommodation, these policies are not grounds for refusal.

44. Mr Avery stated that the proposed reconversions did not involve any net loss of housing for the purposes of Policy H1 or London Plan Policy 3A.12 and there existed no "resist" policies relevant to the mere loss of units as contemplated in the present appeals. This was to be contrasted with the situation in Policy H17 which did specifically state:

> "To resist the loss of existing, small, self-contained flats of one or two habitable rooms".

No problem under Policy H17 would arise in relation to No.31. There would be the loss of a small unit in No.37 if the conversion was from six units to one unit, but planning permission should nevertheless be granted for this having regard to policy CD67 which states:

> "To encourage the use of listed buildings for their original purposes".

On this point Mr Avery drew attention to the grant of planning permission (and the relevant officer's report to committee) in relation to 31 Holland Park/7 Holland Park Mews and in relation to 25 Lennox Gardens. These show there is a balance between the loss of small units under H17 and listed building considerations under CD67. This led Mr Avery to conclude that the prospect of planning permission being granted at No.37 for a conversion from six to one was over 80%. As regards a conversion from five to one or five to two (at No.31) or from six to two (at No.37) planning permission would not be required at all for this, but if it was required then even more clearly such planning permission would be granted – there would be no Policy H17 objection because the small flat at No.37 would be retained and there is no such small flat at No.31.

45. Mr Avery referred to the 6 Upper Addison Gardens case where, through a two stage process, seven units were converted ultimately to one unit. He said that the advice available to a hypothetical purchaser would have included advice that at No.37 it may be possible to move from six units to one unit, despite the ultimate loss of a small flat within Policy H17, by this two stage process of converting from six units to two units (with no planning permission being required because there would be no material change of use) and then converting from two units to one unit (with again no planning permission being required because there would be no material change of use). He agreed that such an approach could not be considered a 100% certainty.

46. As regards the planning inspector's decision on the appeal at 113/114 Sloane Street Mr Avery accepted that the inspector gave two reasons for refusal, namely (a) reasons based on general housing policies and (b) reasons specifically directed to Policy H17 and the loss of five small flats. However Mr Avery said he would have no hesitation in advising that the proposals at No.31 and No.37 were not similar proposals to what was involved in that case and that that decision should not cause a hypothetical purchaser concern.

47. Mr Avery stated that there should be no problems in obtaining appropriate listed building consent for the necessary development at either property. He accepted that it might become more difficult to deal with potential conflicts between the requirements regarding listed buildings on the one hand and those concerning building regulations, disabled access and climate change considerations on the other but he stated that although finding a solution might become more challenging this should not concern the purchaser. He said that in RBKC heritage considerations were likely to take precedence.

48. As regards the position at the valuation dates Mr Avery accepted that the pressure for housing appeared to be growing rather than lessening in RBKC and that the trend seemed to be towards a need for more homes.

49. One additional piece of material produced during the course of Mr Avery's evidence was the result of a search done by him overnight. He found something which previously he and Mr Reynolds had not been aware of, namely a grant of a certificate of lawful proposed use dated 9 August 2005 in relation to the conversion of 12-14 Egerton Place from nine residential units to five residential units. The reason given in the report for this certificate was that each building would remain divided into flats and maisonettes (and there were no external alterations). Mr Avery suggested that this lent support to his contention that the loss of four units, as contemplated in the present appeals, would not require planning permission.

The valuation evidence: Mr Orr-Ewing

50. The expert valuers agreed a number of issues, the principal of which was the freehold vacant possession (FHVP) value of the appeal properties as flats. They also agreed the areas of Nos.31 and 37 if converted to houses, as well as relativities and several of the other adjustments to be made when analysing comparable transactions (including all relevant gross internal areas). Brief details of these agreed issues are contained in Appendix 1.

51. Mr Orr-Ewing said that there were two approaches to determining the FHVP value of Nos.31 and 37 for conversion to a house. Firstly, there was the "bottom up" method, based upon the analysis of buildings configured as flats which had been purchased ready for conversion to houses. This was Mr Orr-Ewing's preferred method since it required the fewest adjustments to the comparables. However, there was only one suitable comparable transaction in Cadogan Square and so it was necessary to rely upon nearby comparables which meant making an adjustment for location. Secondly, there was the "top down" method, which was based upon the deduction of the costs of conversion from the adjusted sale price of buildings sold as houses. This method required more adjustments and was described by Mr Orr-Ewing as being akin to a residual valuation.

52. Mr Orr-Ewing used both approaches when valuing No.31 but began with the bottom up method. In doing so he identified two key comparables: 16 Cadogan Square and 25 Lennox Gardens. 16 Cadogan Square was the only example in Cadogan Square of a sale of a property configured as flats that was subsequently converted into, and sold as, a house. This property was first sold in September 2001 (when configured as flats) and Mr Orr-Ewing acknowledged that he would not normally index a transaction for such a long time (until August 2007). However, he felt that it was reasonable to do so because the market had been fairly flat between September 2001 and June 2006. His adjusted FHVP rate for this comparable was £1,607 per sq ft. 25 Lennox Gardens was a building configured as five flats and a mews house that was converted into a single house by the purchaser. It was sold prior to conversion in July 2005 at an adjusted FHVP rate of £1,356 per sq ft. Mr Orr-Ewing said that Lennox Gardens was adjacent to Cadogan Square and of comparable quality. 25 Lennox Gardens was sold again (as a house) in April 2009 but Mr Orr-Ewing did not consider this transaction to be representative of the property's open market value and he did not rely upon it.

53. Three other comparables were referred to in the context of the bottom up approach. The sale of 25 Cadogan Square in May 2008 showed an adjusted FHVP rate of £1,970 per sq ft. Mr Orr-Ewing said that this property had remained in use as flats and that the current owner, Mr Ismail Ghandour, had no intention of converting it into a house. (Mr Ghandour had written to Mr Orr-Ewing to that effect on 30 March 2009.) Planning permission was granted in November 2009 for the erection of rear extensions at various levels in connection with the conversion from five flats to four. Mr Orr-Ewing concluded that this transaction was not, strictly speaking, evidence of a building sold for conversion to a house.

54. 23 Cadogan Place was sold twice; in December 2006 and again in August 2007. The property consisted of four flats at the time of both sales but subsequently received planning permission for conversion into a single house in November 2007. Mr Orr-Ewing said that the location of this property was not as good as Cadogan Square and he adjusted the sale prices accordingly. His analysis showed an adjusted FHVP rate for the first sale of £2,063 per sq ft and for the second sale of £2,923 per sq ft.

55. 11 Egerton Place was purchased as a block of flats by a developer in May 2006 and was then converted to a house which was resold in April 2007. Mr Orr-Ewing considered the location to be slightly inferior to that of Cadogan Square and considered that the wedge shape of this building was a disadvantage. The adjusted FHVP rate for the first sale was £1,825 per sq ft and that of the second sale was £2,743 per sq ft.

56. Mr Orr-Ewing considered the top down approach by reference to the sale of houses in Cadogan Square. In order to allow for the cost of converting flats to a house he made an adjustment of £300 per sq ft when analysing the comparables. He said that this took account of the fact that each flat had its own front door, kitchen and at least one reception room. It also had its own electrical and central heating systems. The arrangement of pipes and wiring that conversion to a house required meant going back to the brickwork and completely redecorating every room. He supported his allowance of £300 per sq ft by reference to two letters that he had received. Firstly, Mr Ismail Ghandour, the purchaser of 25 Cadogan Square and an active investor in and around Cadogan Square, had written on 30 March 2009 saying that a figure of £300 per sq ft was required "to simply carry out the switch" from flats to a house. Secondly, Mr Derrick Hammond, a quantity surveyor with experience of the refurbishment of residential properties in prime central London wrote on 28 May 2010 to give his views about the costs of converting flats into a house. He stated:

> "… For the most part, [my] work consists of carrying out substantial refurbishment of existing single houses.
>
> …the costs of a refurbishment project do vary considerably. There is no general rule or benchmark cost…. I would say that, in my experience, most projects costs in excess of £400.00 per square foot. The costs can be substantially more than that …
>
> … all other things being equal, it would cost considerably more to convert a building divided into flats such as either 31 or 37 Cadogan Square into a refurbished single house than if you were starting with a building which was already a single house.

There would need to be a considerable amount of demolition and reconfiguration of rooms to a single occupancy layout before any work gets underway."

57. Mr Orr-Ewing said that the evidence of the two sales of 11 Egerton Place, which showed an uplift (adjusted only for time) of £1,163 per sq ft following conversion to a house, suggested that his adjustment for the costs of conversion and improvement might be inadequate. A possible reason for this was the fact that not all of the allowances that a developer would make in undertaking such a project were included in Mr Orr-Ewing's adjustment, for example allowances for risk and profit and contingencies.

58. 16 Cadogan Square was sold in May 2007 at an adjusted FHVP rate of £2,076 per sq ft. 24 Cadogan Square was sold twice, firstly in May 2006 at an adjusted FHVP rate of £1,497 per sq ft and again in May 2007 at an adjusted rate of £1,531 per sq ft. 28 Cadogan Square was sold in April 2006 at an adjusted FHVP rate of £1,664 per sq ft and 36 Cadogan Square was sold in May 2007 at adjusted FHVP rate of £1,890 per sq ft (subsequently increased to £2,012 per sq ft following agreement about the floor area).

59. Mr Orr-Ewing placed most weight upon the bottom up approach and, in particular, upon the 2001 sale of 16 Cadogan Square (£1,607 per sq ft) and the sale of 25 Lennox Gardens in July 2005 (£1,356 per sq ft). He then reviewed these figures in the context of the average values of the sales of buildings configured as flats. He excluded from this average the second sale of 23 Cadogan Place because, in his opinion, it gave a result that was out of line with the other sales evidence. The average adjusted FHVP rate so calculated was £1,764 per sq ft. Finally, Mr Orr-Ewing compared his main comparables with the average values of the sales of buildings as single houses. He excluded from this average the first sale of 24 Cadogan Square (since this would distort the average by including two sales of the same property within a short space of time) and the second sale of 11 Egerton Place (since he restricted this part of his analysis to Cadogan Square properties only). The average adjusted FHVP rate so calculated (using the amended floor area for 36 Cadogan Square) was £1,821 per sq ft.

60. In summary, Mr Orr-Ewing's analysis showed the following:

Sale of 16 Cadogan Square (September 2001):	£1,607 per sq ft
Sale of 16 Cadogan Square (May 2007):	£2,076 per sq ft
Sale of 25 Lennox Gardens (November 2005):	£1,356 per sq ft
Average adjusted FHVP value (Flats):	£1,764 per sq ft
Average adjusted FHVP value (Houses):	£1,821 per sq ft

61. Mr Orr-Ewing adopted a rate of £1,793 per sq ft (the average of the averages) that lay between the value of the two sales of 16 Cadogan Square. Applying this rate to the agreed floor area of 12,592 square feet for conversion to a house gave a FHVP value for 31 Cadogan Square of £22,577,456.

62. Mr Orr-Ewing adopted the same approach, and the same comparables, when valuing 37 Cadogan Square. The difference in the final FHVP rates reflected the different valuation dates in the two appeals and the absence of a mews house at No.37. The equivalent analysis of 37 Cadogan Square produced the following results:

Sale of 16 Cadogan Square (September 2001):	£1,273 per sq ft
Sale of 16 Cadogan Square (May 2007):	£1,540 per sq ft
Sale of 25 Lennox Gardens (November 2005):	£1,063 per sq ft
Average adjusted FHVP value (Flats):	£1,391 per sq ft
Average adjusted FHVP value (Houses):	£1,346 per sq ft

63. Mr Orr-Ewing adopted a rate of £1,370 (the rounded average of the averages) that lay between the value of the two sales of 16 Cadogan Square. Applying this rate to the agreed floor area for conversion to a house of 8,615 sq ft gave a FHVP value at 37 Cadogan Square of £11,802,550.

64. In calculating the price payable by the nominee purchaser for the freehold of each of the appeal premises on the assumption of their conversion to a house in 2023, Mr Orr-Ewing considered the improved value of the two extended leasehold interests in Flat 2 at No.31 and Flat 3 at No.37. These were agreed by the experts at £8,724,000 and £2,240,700 respectively. In both cases Mr Orr-Ewing added a further £500,000 as an "inducement". When asked about this in cross-examination Mr Orr-Ewing explained that it was an inducement for the tenant to comply with the terms of a properly served section 61 notice and to move out when required by the freeholder, knowing that he was getting a "bit of a ransom". When pressed by the Tribunal Mr Orr-Ewing said that for No.37 the payment of £500,000 could be divided between £100,000 for stamp duty, legal fees, removals etc and £400,000 (or 17.85% of the improved value of the flat) as a "sweetener" for the tenant to leave when the freeholder wanted and without the freeholder incurring the legal costs of litigation (estimated by Mr Orr-Ewing at £50,000) and the financial costs associated with a delay of approximately one year.

65. The Tribunal asked Mr Orr-Ewing to undertake a similar analysis for No.31 where he had also adopted a figure for an inducement of £500,000. He estimated the transfer costs to be approximately £400,000, leaving £100,000 (or 1.15% of the improved value of the flat) as the sweetener. Mr Orr-Ewing accepted that an inducement of just over 1% of the improved value of Flat 2 would not be sufficient to persuade the tenant to leave voluntarily. He acknowledged that he had accepted the LVT's decision on this point on No.37 and had then adopted the same figure when valuing No.31, a process which he described as "lazy thinking" on his part. On consideration he thought that an inducement of at least 10% of the improved value of Flat 2 at No.31 would be required, ie £872,400, to which should be added the estimated transfer costs of £400,000, giving a total of £1,272,400.

The valuation evidence: Mr Scott-Barrett

66. Mr Scott-Barrett relied upon the same comparable transactions as Mr Orr-Ewing except for the two sales of 24 Cadogan Square, which he did not consider to be a house, and the first sale of 16 Cadogan Square in 2001 which he considered to be too remote from the valuation dates to be of assistance. He agreed with Mr Orr-Ewing that the second sale of 25 Lennox Gardens in April 2009 was an unreliable comparable. Mr Scott-Barrett did not agree that the two sales of 16 Cadogan Square and the first sale of 25 Lennox Gardens should be given the most weight. He thought that this approach was too restrictive and that it was wrong to use those comparables alone. Unlike Mr Orr-Ewing, Mr Scott-Barrett adjusted two of the comparables, 25 Cadogan Square and the sale of 25 Lennox Gardens in November 2005, to reflect the absence of a lift. At the hearing he accepted that the presence of a mews house would add value and made a similar adjustment to that of Mr Orr-Ewing. The experts differed in their adjustment for the location of two of the comparables. Mr Orr-Ewing considered that 25 Lennox Gardens was an equal location to Cadogan Square whereas Mr Scott-Barrett thought it was slightly (5%) worse. Both valuers thought that Cadogan Place was a less attractive location than Cadogan Square but made different adjustments (5% for Mr Orr-Ewing and 10% for Mr Scott-Barrett).

67. The largest difference between the expert valuers in the analysis of the comparables was in the approach to the adjustments for the condition of the buildings and the costs of their conversion to houses. Mr Scott-Barrett did not accept Mr Orr-Ewing's proposition that it would cost £300 per sq ft to convert flats into a house. He said it was far from clear that a lot more work was required in such a conversion and that once a major project was started it was difficult to distinguish between converting flats to a house and radically changing the configuration of an existing house. Consequently he made no allowance for conversion costs. There was only one difference between the experts in the adjustments to be made for condition. Mr Scott-Barrett considered that 25 Cadogan Square was in the same condition as the appeal properties whereas Mr Orr-Ewing thought that it was in better condition and made an adjustment of £100 per sq ft accordingly.

68. The effect of these different approaches to the assessment of condition and conversion costs meant that generally Mr Scott-Barrett's analysis of the relevant comparables showed FHVP rates that were some £200 to £300 per sq ft greater than those analysed by Mr Orr-Ewing.

69. Mr Scott-Barrett concluded from his analysis that he did not disagree with the LVT's decision about the FHVP rate for No.31 (£1,946 per sq ft) which gave a FHVP value for that property of £24,500,000 (rounded) for conversion to a house.

70. He did not accept the LVT's decision that the FHVP for No.37 should £1,550 per sq ft, preferring instead to use the figure of £1,700 per sq ft for which he had argued before the LVT and which he thought was supported by his analysis of the comparables before this Tribunal. This gave a FHVP value for No.37 of £14,645,500 for conversion to a house.

71. Mr Scott-Barrett also made additions to the agreed improved value of the two extended leasehold interests when calculating the price payable by the nominee purchaser for the

freehold of each of the appeal premises on the assumption of their conversion to a house in 2023. Unlike Mr Orr-Ewing, Mr Scott-Barrett did not include any payment for an inducement. He confined this addition to stamp duty and other transfer costs and described it as a fair and proper amount for which the freeholder would budget. For 31 Cadogan Square this gave an additional cost of £400,000 and for 37 Cadogan Square an additional cost of £100,000.

The parties' submissions

72. Before coming in turn to the submissions made by counsel for each party dealing with the particular facts of the present appeals it is appropriate first to notice certain submissions regarding the general law or general valuation approach which demonstrated a difference between the parties.

73. Mr Munro raised a question regarding the admissibility of and (if admissible) the weight to be attached to certain material. In particular he was concerned regarding the Appellants' reliance upon (a) previous LVT or Lands Tribunal decisions and (b) reliance upon evidence given by witnesses (not called in the present case) in such previous cases and (c) material relied upon by the Appellants in the form of letters from persons not called as witnesses. As regards this latter category Mr Munro in particular objected to the letter dated 28 May 2010 from Derrick Hammond to Mr Orr-Ewing giving his broad opinion regarding the costs of certain types of conversion and also the letter from Ismail Ghandour dated 30 March 2009 to Mr Orr-Ewing in relation to 25 Cadogan Square which indicated his intention to keep No.25 in its existing configuration as flats rather than convert them to a single house and in which he gave his views regarding the finance costs of carrying out such a switch, the planning advice he had obtained and his perception of a total absence of interest from the market place for single residences at the moment and for the foreseeable future.

74. Mr Munro submitted that this Tribunal must act upon the evidence given to it by the witnesses appearing, because such evidence can be tested in cross-examination and such witnesses can be questioned by the Tribunal itself, but should find inadmissible (or if admissible should find of no, or very little, weight) the evidence of the nature mentioned above. Mr Munro submitted that previous decisions of the Lands Tribunal (or the LVT) are relevant only to arguments on law or procedure (see *W Clibbett Ltd v Avon CC* [1976] 1 EGLR 171) and that even then such decisions are not binding (see per Salmon LJ in *West Midlands Baptist Trust v City of Birmingham* [1968] 2 QB 188 at p201). Mr Munro referred to paragraph 115 of the Lands Tribunal's decision in *Arbib v Earl Cadogan* [2005] 3 EGLR 139 at 148J:

> "115. LVT decisions on questions of fact or opinion are indirect or secondary evidence and should be given little or no weight in other LVT proceedings and in proceedings in this tribunal, even if they are admissible."

Mr Munro also referred to the Lands Tribunal decision in *Arrowdell Limited v Coniston Court (North) Hove Limited* [2007] RVR 39 at 45:

> “37. The Tribunal did not, in what it said in the *Romines* and *Arbib* cases, determine that leasehold valuation tribunal decisions on questions of fact and opinion were inadmissible, although it did not reject the possibility that they might be. It is not, we think, the case that *Hollington v Hewthorn* and *Land Securities* compel the conclusion that evidence of such decisions is inadmissible. In our judgment leasehold valuation tribunal decisions on relativity are not inadmissible, but the mere percentage figure adopted in a particular case is of no evidential value. The reason for this is that 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.
>
> 38. It is certainly understandable that valuers negotiating the settlement of an enfranchisement claim should have regard to leasehold valuation tribunal decisions on relativity, since these might seem to them to be the best guide of the likely outcome if they were unable to reach agreement, even though, as Mr Pridell said, the decisions are disparate and fail to show any established pattern. But the decisions themselves can constitute no useful evidence in subsequent proceedings.”

75. Mr Munro submitted that a witness who is actually giving evidence before the Tribunal can be tested in cross-examination by being confronted with evidence given by another expert in his field in another case, especially if that other expert is connected with the testifying expert’s firm or was giving evidence on behalf of the same party for whom the testifying expert is acting, and the way in which the testifying expert stands up to any such challenge may affect the weight given to that expert’s evidence – but the material from the previous non-testifying expert is not evidence in the case before the Tribunal and, not being evidence, can be accorded no weight.

76. In response to these points Mr Jourdan submitted that whatever may have been the position before the Civil Evidence Act 1995, that Act now makes clear that in civil proceedings (which these present proceedings are) evidence is not to be excluded on the grounds that it is hearsay. Fair notice must be given to the other side that hearsay evidence is to be relied upon, which has happened in the present case, and the question of the weight to be attached to the hearsay material will always be for the Tribunal. However the material remains evidence – it is wrong to argue that the material is inadmissible and should be disregarded or accorded zero weight for that reason. The weight to be attached to earlier evidence given by other experts in other cases would be enhanced if those experts were acting on behalf of the same party (namely the present Respondent) and dealing with similar questions to those which arose in the present case, but where the evidence adduced on behalf of the Respondent in that other case was different from the evidence relied upon by him in the present case.

77. Mr Jourdan drew attention to the Lands Tribunal decision in *Sportelli* which stated at paragraph 121:

> "It is obviously undesirable and, indeed, it would be impossible, for the sort of financial and valuation evidence that we have heard to be called and considered in every enfranchisement case. It is, in our judgment, unnecessary that it should be, because LVTs and this tribunal are entitled to rely upon their own expertise, guided by this decision."

Also in the Court of Appeal decision in *Sportelli* at paragraphs 91 and following there is an analysis of the extent to which the Lands Tribunal decision on deferment rates in *Sportelli* should have a precedent effect. There is nothing in that decision to indicate that in subsequent cases LVTs or this Tribunal should ignore previous decisions of this Tribunal save only in respect of law or procedure – indeed the analysis in the Court of Appeal indicates the contrary. Mr Jourdan also relied upon *London Rent Assessment Committee v St George's Court Limited* [1984] 1 EGLR 99 where it was held (in relation to the fixing by rent assessment committees of fair rents) that unless it can be demonstrated that the rent assessed for a comparable property has been arrived at under a fundamental misapprehension, it is the duty of a committee to regard the previous assessment as a proper assessment of the rent and as the best evidence of the fair rent for the subject property.

78. Mr Walker also referred to the Civil Evidence Act and made submissions to a similar effect as those of Mr Jourdan.

79. We give our conclusions upon this point here. We accept the arguments of Mr Jourdan and Mr Walker. All the material relied upon by the Appellants has been served substantially before the present hearing. No objection has been taken by Mr Munro to the effect that the Respondent has been taken by surprise and that having regard to the lack of advance notice regarding the material to be relied upon we should exclude the material on that basis. The Civil Evidence Act makes the material admissible. The question of the weight to be placed upon it is a matter for us to decide, but it would be wrong wholly to disregard the material on the basis that it was not evidence in the case. So far as concerns previous Lands Tribunal decisions we would add this. We accept Mr Jourdan's submissions, based upon *Sportelli*, that it would be wrong to limit examination of such earlier decisions to questions solely of law or procedure. The earlier decisions may also be relevant upon matters of fact or opinion evidence. It would seem that an earlier Tribunal decision could include the following type of material, and we take by way of example a case where a question arises as to whether the building of an additional storey on a house in a particular part of a particular town would be permitted and would be valuable. The Tribunal decision regarding such a question may:

(1) record factual evidence from X that there already exist in the area houses which have had additional storeys built upon them;

(2) record opinion evidence from Y (an expert) that such development would be permitted by the local planning authority and would be a profitable development;

(3) make a finding of the Tribunal that such a development would indeed be permitted by the local planning authority and would indeed be a profitable development.

As regards material as mentioned in paragraphs (1) and (2) above, such material would be admissible under the Civil Evidence Act as evidence, but the question of weight would be for the Tribunal. It would be strange if material within paragraphs (1) and (2) above was admissible but material within (3) was not admissible. In our view a subsequent Tribunal is entitled to take into consideration and give weight to a finding such as that in paragraph (3) above – but once again the Tribunal must do so in the light of the other evidence called in the particular case.

80. Mr Munro raised a separate question regarding the approach to be adopted by the Tribunal when assessing the attitude of the hypothetical purchaser of the freehold reversion. Mr Munro recognised that this Tribunal was unlikely to depart from the approach it adopted in *2 Herbert Crescent*. In that case we decided (in a case concerned with whether the hypothetical purchaser of the freehold reversion would increase his bid to reflect the possible value of a redevelopment back into a single house at the termination date of the qualifying leases) that it was not for the Tribunal to reach final decisions as to whose argument was right upon points of law which might emerge under Section 61 and Schedule 14 of the 1993 Act between the hypothetical purchaser and lessees in the building at the reversion date. Thus we concluded that the legal points did not have an "all or nothing" result such that if the potential legal problem raised by the tenant was found to be right it would destroy wholly any development value and that if it were found to be wrong it would not decrease at all the development value as perceived by the hypothetical purchaser. Instead the Tribunal concluded that, rather than seeking to decide the potential legal problems, it should assess how a properly advised hypothetical purchaser would view those problems as at the valuation date and how such problems might affect his bid. In paragraph 72 we said:

> "On taking such advice as at the valuation date hypothetical purchasers of the freeholder's interest could be given a range of advice upon the potential legal problems from the ultra cautious to the over optimistic. Clearly a hypothetical purchaser who received ultra cautious advice and acted upon it would be unlikely to be the person who made the highest bid for the freeholder's interest and therefore would not be the successful purchaser. We conclude therefore that we should not assess the value of the freeholder's interest under Schedule 6 paragraph 3 on the basis that the successful hypothetical purchaser would receive ultra cautious advice. However we conclude that we must assume that this successful hypothetical purchaser would receive sound and responsible advice rather than over optimistic advice."

81. As regards the *2 Herbert Crescent* decision Mr Munro asked us to record (as we do) that he was not to be taken as making any concession that the approach there adopted was correct. However he recognised this Tribunal was likely to follow the decision and he did not seek to advance any argument before us that we should decline to follow the general approach in that case. He did however take issue with the precise phraseology in the passage cited above where we concluded that we must assume that the successful hypothetical purchaser would receive "sound and responsible advice rather than over optimistic advice". Mr Munro submitted that the successful purchaser buying property with development potential of any sort would be the purchaser who

(1) receives the most optimistic advice, or

(2) takes the most optimistic view of the advice, or

(3) takes a more optimistic view than his rivals.

Mr Munro submitted that the purchase would go to the least prudent bidder. As we understood Mr Munro he contended that the hypothetical purchaser who was the successful ultimate bidder should be assumed to be someone who was (i) an adventurous (rather than cautious) purchaser and who (ii) received the most optimistic planning advice that could properly be given without such advice being negligent and who (iii) received the most optimistic legal advice that could properly be given without such advice being negligent. He submitted that this combination of optimism would be present in the successful bidder, because otherwise he would be outbid by someone else. The price payable should be assessed accordingly.

82. In response Mr Walker drew attention to *Inland Revenue Commissioners v Clay* [1914] 3 KB 466 where Swinfen Eady LJ stated at 475:

> "In order to arrive at the amount which land might be 'expected to realise', all these matters ought to be taken into consideration. 'Expected' refers to the expectations of properly qualified persons who have taken pains to inform themselves of all the particulars ascertainable about the property, and its capabilities, the demand for it, and the likely buyers. The price actually realized by a sale is not necessarily the price which it might have been expected to realize, but if the valuer be competent, and has taken proper pains in the matter, there ought to be little difference between the two figures."

Mr Jourdan referred to *Lady Fox's Executors v Commissioners of Inland Revenue* [1994] 2 EGLR 185 where Hoffman LJ stated at 186D-G:

> "In all other respects, the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that, although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable.
>
> The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus upon what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a

> higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world, but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.
>
> It is often said that the hypothetical vendor and purchaser must be assumed to have been 'willing', but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that, having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or disappointed with the result; for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant."

Mr Jourdan submitted that it is the best price reasonably obtainable which is to be assessed and that the parties must be assumed to be prudent and that the Tribunal is concerned in a retrospective exercise in probabilities. Accordingly although there may be a possibility of a combination of the most optimistic purchaser with the most optimistic possible planning advice and the most optimistic possible legal advice, such a combination is improbable and a bid from such a hypothetical purchaser should not be the bid which determines the price to be fixed under Schedule 6 paragraph 3 of the 1993 Act. Mr Jourdan also referred to *Railtrack Plc v Guinness Limited* [2003] 1 EGLR 124 where Carnwath LJ stated that whilst the seller and the buyer are assumed to be willing, neither is taken to be over eager and where he stated in substance the valuation exercise is no different to professional definitions of "market value", citing as an example the RICS Practice Statement 4 dated 1 March 2000:

> "The estimated amount for which an asset would exchange on the date of valuation between a willing buyer and a willing seller in an arms-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."

Once again Mr Jourdan stressed the purchaser must act knowledgeably and prudently.

83. We give at this stage our conclusions upon this point of issue between the parties. For the reasons advanced by Mr Walker and Mr Jourdan we reject Mr Munro's contention that the following combination of circumstances must be assumed to exist in relation to the hypothetical purchaser (for otherwise he will be outbid), namely the most optimistic purchaser with the most optimistic non-negligent legal and planning advice. There is a remote possibility that such a combination of circumstances would arise, but we are not concerned with remote possibilities we are concerned with deciding the case on the balance of probabilities and in the light of the authorities referred to by Mr Walker and Mr Jourdan. It is the best price reasonably obtainable which we are required to assess and the hypothetical purchaser is prudent rather than rash.

84. A further argument advanced by Mr Munro concerns what if any significance should be attached to arguments on the part of the Appellants that, whatever the position might have been at the valuation date so far as concerns prospects of a reconversion to a house if full vacant possession had been available on that date, there were risks that matters might move adversely to any proposed reconversion after the valuation date (eg by the lessening or the extinguishment of a differential between house and flat values or changes in the planning regime or in the 1993 Act or other matters as referred to by the Appellants). Mr Munro argued that the proper approach, which was adopted as a matter of convention by valuers rather than because it was expressly required by statute, was to value to term and reversion and that once such an approach is adopted the proper way forward is to take the value of the property with vacant possession at the valuation date and to judge the risk and uncertainties as at that date. He submitted that the Tribunal must therefore view the possibility of a reconversion to a single dwellinghouse as a development opportunity on the valuation date itself and that the Tribunal should value as at the valuation date and not take into consideration any prospect that in the future (namely 2023) the owner of the building might not be able to do what he wanted regarding a reconversion – such potential problems were only relevant if they would affect the position as at the valuation date itself – otherwise such potential problems were merely speculation regarding the future.

85. Mr Jourdan argued that such an approach was fundamentally wrong and that any reasonable hypothetical purchaser would give careful consideration to matters impinging upon the ability to carry out a reconversion in 2023. He pointed out that while it may be conventional to value the freehold reversion under Schedule 6 paragraph 3 by taking the estimated freehold vacant possession value as at the valuation date and deferring it to the end of the term at an appropriate deferment rate, this is not a mandatory requirement of Schedule 6 paragraph 3 but is merely a valuation tool designed to replicate the thinking of a hypothetical purchaser of a freehold reversion. Such a tool may work well where it is anticipated there will be no significant change in the use of the property between the valuation date and the term date, but where (as here) it said that there is potential development value, it is the potential development value at the end of the term that needs to be considered, not that at the valuation date.

86. Upon this point we conclude that Mr Jourdan is correct for the reasons he gave. The Respondent's case is that the hypothetical purchaser would pay more for the freehold reversion than was justified solely on the basis of the property remaining as flats, the extra bid being to represent the prospect of a future reconversion in 2023 (not at the valuation date). If there were presently perceivable risks that matters might become less attractive in 2023 for such a reconversion than as pertained at the valuation date, then the hypothetical purchaser would take such matters into account.

87. There was a further point of disagreement between the parties as to the relevance of post valuation date planning decisions. This was of more relevance in relation to No.37 than No.31, because certain of the material relied upon by Mr Avery involved planning decisions in the first half of 2007 which came after the valuation date for No.37 but before the valuation date for No.31. Ultimately it seems to us there was little by way of dispute between the parties. Mr Munro accepted that if a planning decision had not been made by the relevant valuation

date, then of course that decision was not available to any planning expert advising a hypothetical purchaser and the expert would have to advise without the benefit of that decision. However if a planning expert gave evidence that at the valuation date he would have advised in a certain way and if shortly thereafter there is a planning decision from RBKC based upon a similar planning approach, then this supports the soundness of the advice which the expert says he would have given at the valuation date. Mr Jourdan submitted that post valuation date planning decisions could not help regarding what the approach of the hypothetical purchaser would be (because he would not know of them). However Mr Jourdan accepted that an examination of a planning officer's report given to the planning committee shortly after the valuation date can constitute relevant evidence as to what the attitude of RBKC would have been to a similar development on the valuation date itself. For instance if in a planning report shortly after the valuation date RBKC's planning officer advises that the conversion of X units to one unit does not constitute development, this lends weight to the suggestion that if such a question had been posed to the local planning authority by the hypothetical purchaser at the valuation date the hypothetical purchaser (or his advisor) would have got an answer consistent with the advice given in the planning report written shortly thereafter.

88. There was a further point of principle raised in the opening speeches by Mr Jourdan and Mr Walker to the effect that, the existence of any marriage value was inconsistent with an approach which valued the freehold reversion as having any redevelopment value. In his opening skeleton Mr Jourdan argued:

> "If the freeholder is getting redevelopment value he cannot also have marriage value; the two are quite inconsistent."

Mr Walker advanced a similar argument. The Tribunal indicated a provisional difficulty in accepting this proposition and asked for more detailed argument upon it later. However in due course Mr Jourdan and Mr Walker withdrew this contention and accepted that there was no necessary inconsistency. At the invitation of the Tribunal Mr Jourdan produced worked examples where he showed what he submitted was an appropriate approach to the calculation of marriage value in circumstances where (i) there was certain redevelopment value and (ii) there was zero redevelopment value and (iii) there was a possibility of redevelopment. As regards these exercises Mr Munro was concerned that if development value existed at all then it also existed after enfranchisement when the freehold in the building would be under the control of the nominee purchasers (and the qualifying tenants). He pointed out that development value does not cease to exist depending upon in whose hands the freehold happens to be and that therefore if there is development value this should be reflected in the value of freehold in the hands of the nominee purchaser, such that when assessing this value the assessment should not be limited to considering the value of the extended 999 year leases in the flats of the qualifying tenants but should instead take into account not only that but also any extra value derived from a potential redevelopment. Mr Munro argued that this would or could increase the value of the freehold in the hands of the nominee purchasers and could therefore increase the amount of the marriage value. As regards this argument Mr Jourdan and Mr Walker pointed out that the parties had agreed the value of the 999 year leases in the hands of the qualifying tenants and it was therefore not open to the Respondent to say that these agreed figures should in some unspecified way be increased. Also they pointed out that no evidence had been given by either valuer to suggest that the value of the freehold in the hands of the nominee purchasers had any additional value to reflect some possible redevelopment value. Accordingly in the assessment

value. Accordingly in the assessment of marriage value, while a development value (if it existed) could increase the value of the freehold reversion in the Respondent's hands, it could not increase the value of the 999 year leases which could be granted to the qualifying tenants after enfranchisement.

89. We conclude that Mr Jourdan and Mr Walker were correct to abandon their original submission that there is some fundamental inconsistency between the existence of development value and marriage value. We also conclude that they were correct in saying on the evidence and the agreed facts in the present case that it is not open to the Respondent to argue that the value of the freehold in the hands of the nominee purchasers (or the value of the 999 year leases which can be granted to the qualifying tenants) is increased by the existence of some potential development value.

90. Having dealt with the foregoing general points we now come to the respective submissions of the parties.

Mr Jourdan's submissions

91. Mr Jourdan pointed out that the freehold vacant possession value of No.37 configured as flats (and to remain as flats) was not in dispute. The essential issue was whether, at the valuation date, there was any (and if so what) additional value attributable to the prospect that, in March 2023, it may be possible to undertake a profitable development involving reconverting No.37 into a house. Mr Jourdan submitted that in assessing whether any such additional value existed the hypothetical purchaser would not simply assess the value of the freehold with vacant possession as at the valuation date and defer it to 2023, but would also consider the following issues:

(1) Whether there was a sustainable demand for houses in Cadogan Square sufficient to make it likely that, if vacant in 2023, there would be a sufficient margin between the value of the property as flats and as a house to make the project of converting to a house profitable. He would not just consider demand for houses at the valuation date, but also whether the demand was likely to persist until 2023.

(2) The likely effects of section 61 and Schedule 14, bearing in mind that, in order to redevelop in 2023, it would be necessary to recover possession of Flat 3.

(3) Even if section 61 could be relied on, it would be necessary to make an application for possession in the 12 months ending on 15 March 2023, so that the window for pursuing a redevelopment was a very narrow one.

(4) Whether planning permission and listed building consent would probably be needed in 2023 and what the chances were of getting any necessary consents at that time. He would not just consider the planning position in 2007, but also the risk of that position changing over the following 16 years.

(5) The risk of a change in building regulations over the 16 years until 2023, increasing the cost of redevelopment, and rendering the redevelopment uneconomic or less profitable by 2023.

(6) The risk that the rate at which the cost of conversion (including professional fees) rises may prove to be different by 2023 from the movement in the value of the property, with knock on effects on the viability of any conversion.

(7) The risk of a change to the 1993 Act, to limit or remove the right to determine the lease of Flat 3 under section 61. The 1993 Act was amended twice in the 9 years after it was passed, in 1996 and 2002, on both occasions in ways detrimental to landlords.

92. Mr Jourdan submitted that even on the figures adopted by the LVT there was an insufficient uplift in the value of the building if sold for conversion to a house (£10,612,550) as compared with the value if sold with vacant possession to remain as flats (£9,885,625) to justify any additional bid being made to reflect this potential development value. He pointed out that the difference is only marginal between these two values and that once the risks are taken into account this marginal amount would disappear, such that there is no reason why a hypothetical purchaser in February 2007 would have paid anything extra for the freehold reversion to reflect the speculative possibility of a higher value for conversion into a house in 2023.

93. As regards the question of whether there was a sustainable demand for houses in Cadogan Square, Mr Jourdan referred to the evidence of Mr Orr-Ewing and to the findings of the Tribunal in *Panagopoulos* and to the position recorded by Mr Ghandour in his letter regarding 25 Cadogan Square. He referred to the evidence that any additional demand and value for houses as compared with flats had only recently emerged. He referred to Professor Lizieri's evidence to the effect that the demand for houses as compared with flats went in cycles and was likely to converge in the long term. He drew attention to the absence of any evidence from the Respondent of the type given by Professor Lizieri directed towards whether there would in 2023 still be a sustainable additional value for houses as compared with flats. He referred to the evidence of Mr Cullum and Mr Clark on behalf of the present Respondent in the *Sportelli* case which once again he argued showed a recognition that the demand for houses over flats (or vice versa) could be said to be cyclical. He submitted therefore that whatever a hypothetical purchaser might have thought of the position in February 2007, he could have no confidence at all that in 2023 there would be any extra value in the property attributable to the prospect of converting it into a house. He submitted that that was a complete answer to the Respondent's claim for additional value to represent such a redevelopment.

94. As regards the freehold value of No.37 with vacant possession at the valuation date and with all necessary permissions to convert it into a house Mr Jourdan referred to the various comparables examined by Mr Orr-Ewing and Mr Scott-Barrett. He submitted that the transaction of November 2005 in relation to 25 Lennox Gardens was by far the best comparable. He submitted that the Tribunal should focus principally on the pre-valuation date comparables. He drew attention to the fact that there was no evidence regarding sales in the

market of freehold reversions. He submitted, after examining the various comparables, that the right conclusion was that the value of No.37 with planning risk reflected in the price was in the order of around £1050 to £1250 per sq ft. In the alternative if the value is assessed without assessment of planning risk (with an adjustment for this being made later) then he invited adoption of Mr Orr-Ewing's figure of £1370 per sq ft.

95. As regards the prospect which the hypothetical purchaser would face of having to obtain vacant possession from the long lessee of Flat 3 pursuant to section 61 and Schedule 14, Mr Jourdan invited the Tribunal to adopt the same approach as in *2 Herbert Crescent*. He did not rehearse again in argument the legal difficulties potentially facing the hypothetical purchaser under section 61 and the potential valuation and delay difficulties facing him under Schedule 14 because these are extensively set out as part of the summarising of the parties' cases in the decision at *2 Herbert Crescent*. He invited the Tribunal to adopt the same conclusion as in that case, namely that the points raised under section 61 and Schedule 14 are difficult and that there are serious arguments on both sides with no authorities thereon and that the hypothetical purchaser would be advised to that effect and would also be advised that if litigation (rather than compromise) with the long lessee of Flat 3 were pursued then there was the virtual inevitability that the recovery of possession (if ultimately achieved) would be greatly delayed beyond the term date and that the cost of any such delay could be large. Mr Jourdan invited the Tribunal to reject the argument advanced by Mr Munro on the precise wording of Schedule 14 paragraph 5(1)(b) (see below) which was said by Mr Munro to be an argument which the hypothetical purchaser could take comfort from as enabling him to escape from having to pay any form of ransom value to the long lessee of Flat 3. He pointed out that this argument, albeit ingenious, had not even been raised in *2 Herbert Crescent* when the present Respondent had been represented by the editor of Hague on Leasehold Enfranchisement. Mr Jourdan submitted that such an argument (even if there were merit in it) was highly unlikely to have occurred to any solicitor from whom the hypothetical purchaser took advice regarding potential difficulties under section 61. Mr Jourdan accepted that it was permissible for the hypothetical purchaser to take into account the prospect of doing a deal with the long lessee of Flat 3, rather than having to litigate in the County Court and thereafter in the LVT. He accepted that such a deal was not a matter which the "buying or seeking to buy" direction (as interpreted by the House of Lords in *Sportelli*) requires to be disregarded.

96. Mr Jourdan pointed out that a further potential difficulty, which should not be ignored, under section 61 is the need for a landlord to show that he intends to demolish or reconstruct or carry out substantial works of construction on the whole or a substantial part of any premises in which the flat is contained. He pointed out that the fact that No.37 is a listed building will constrain the amount of works which can be done, and such constraint may be perceived as giving rise to a risk that the works will be insufficiently substantial and may lead, if pressed to litigation, to a failure by the landlord to prove his case under section 61. Comparison was invited to two cases under section 30(1)(f) of the Landlord and Tenant Act 1954 as amended namely *Marazzi v Global Grange Limited* [2003] 2 EGLR 42 and *Ivorygrove Limited v Global Grange Limited* [2003] 2 EGLR 87.

97. On the question of whether planning permission would be required for the proposed reconversion and, if so, whether it would be granted, Mr Jourdan pointed out (as Mr Avery had

accepted in cross-examination) that the question of whether a change from flats to a house is a material change of use will not receive the same answer in all places or at all times and will depend upon the availability of, and need for, different types of accommodation in the local area at the time that the question arises, which will be reflected in the local policies which may well change over time. As regards the policies at the valuation date Mr Jourdan particularly drew attention to:

(1) UDP Strat 16, a prescriptive policy "to ensure the contribution of the Royal Borough to the dwelling stock of Greater London is not diminished and is increased wherever appropriate";

(2) UDP Policy H1, a prescriptive policy "to resist the loss of permanent accommodation in all but the most exceptional circumstances"

(3) UDP Policy H17, a prescriptive policy "to resist the loss of existing, small, self-contained flats of one or two habitable rooms", and

(4) UDP Policy CD67, a non-prescriptive policy "to encourage the use of listed buildings for their original purpose".

Mr Jourdan drew attention to the London Plan 2004 Policy 3A.1 and the revised version of that policy published in December 2006 which, as accepted by Mr Avery in cross-examination, showed a growing rather than lessening pressure in London to preserve and increase the number of homes.

98. Mr Jourdan submitted that the hypothetical purchaser or his advisor would contact the local planning authority (ie RBKC) regarding the need for and prospect of obtaining planning permission and would have obtained advice as in Ms Anne Salmon's letters of 3 October 2007 or 23 February 2009. The latter letter was written specifically in relation to No.37. He also referred to the evidence given by Mr Clark in *2 Herbert Crescent* which he submitted showed that a conversion from five units to one (a loss of four units) would require planning permission for which consent may be refused and that an application for a reduction from six or more units to one would require planning permission which would definitely be refused. He invited the Tribunal to attach little weight to Mr Avery's evidence about his telephone conversations with Lesley Jones in May 2008 and Derek Taylor in March 2009 on the grounds that a telephone conversation may involve unconsidered and off the cuff comments and also there was the prospect of misunderstanding arising which cannot be checked if there is nothing in writing.

99. Mr Jourdan invited the Tribunal to place significance on the evidence given by Miss Rust (a colleague of Mr Avery who had also worked for many years in RBKC's planning department) in *Panagopoulos*. As regards the additional certificate of lawful proposed use relating to 12-14 Egerton Place which Mr Avery discovered only during the course of his evidence, Mr Jourdan pointed out that it was for a very different type of proposal to the ones concerned in the present case and also that this had never previously been discovered and therefore was unlikely to have been discovered by the hypothetical purchaser or the planning advisor advising the hypothetical purchaser at the valuation date.

100. Mr Jourdan submitted that the hypothetical purchaser or his advisor would be concerned by the planning refusal by the inspector at 113/114 Sloane Street – the refusal being on two separate grounds, one of which being Policy H17 but the other being that "the proposal would undermine housing policies which seek to avoid a decrease in the level of housing stock". He argued that the grant of planning permission in relation to other listed buildings which were in disrepair (thereby in particular allowing benefits in conservation terms and Policy CD67 to become prominent) were of less relevance to a hypothetical purchaser in respect of No.37 which was not in disrepair.

101. In conclusion he submitted that a prudent hypothetical purchaser in February 2007 would have taken the view:

(1) that planning permission would be needed to convert six units into one and would not be obtained;

(2) that planning permission would be needed to convert six units into two and might or might not be obtained and that a substantial deduction for risk would be required. He submitted that it was very unlikely that the hypothetical purchaser would have been advised about Mr Avery's clever two stage scheme (namely coming down from six units to one unit in two separate steps) and that even if the hypothetical purchaser had been told about this scheme he would not place any reliance or value upon it in the absence of any evidence at the valuation date that it had already been tried and had succeeded.

102. Looking purely at planning risk Mr Jourdan submitted that a 50% reduction would have been appropriate simply looking at the position as at the valuation date and that a substantially greater reduction would be appropriate bearing in mind the real risk of the planning position changing for the worse by 2023.

103. Mr Jourdan submitted that a hypothetical purchaser would also be concerned about the risk of a change in the building regulations, a risk of conversion costs becoming higher, and a risk of change to section 61 and/or Schedule 14.

104. In conclusion Mr Jourdan submitted that there was no extra value to be attached to the prospect of a development as contemplated by the Respondent in 2023; alternatively if there was any such value it was no more than 10% of the estimate of the potential development value.

Mr Walker's submissions

105. There was understandably much overlap between the submissions advanced by Mr Walker and Mr Jourdan. We intend no disrespect to Mr Walker if we do not summarise again those parts of his submissions which in effect coincided with Mr Jourdan's.

106. Mr Walker pointed out that it was no part of Mr Scott-Barrett's valuation evidence on behalf of the Respondent that No.31 possessed a development value for the purpose of converting it not into one single dwellinghouse (five units to one unit) but instead into a basement flat and a large dwelling comprising the remainder of the property (five units to two units). Such a possibility can therefore be ignored. The question was whether there was development value in the prospect of developing No.31 (including the mews at 130 Pavilion Road) into a single dwellinghouse (five units into one unit).

107. Mr Walker submitted that the Respondent's case involved the remarkable proposition that a buyer in the market in August 2007 would pay a substantial sum for the prospect of carrying out a speculative development in 2023. He submitted that the Respondent's approach was remarkable because of its failure to take any proper account of the inevitable commercial unattractiveness of such a proposition. As regards the arguments made on behalf of the Respondent that the risks advanced by the Appellants are speculative regarding the prospect of circumstances changing by 2023, Mr Walker advanced the following answer. The fact that it was impossible to know what the position would be in 2023 – the fact that this was speculative – did not mean that the lack of certainty, and the risks involved, could be ignored: quite the opposite. He submitted that value which was too speculative must be ignored, not the risks and uncertainties which made it speculative.

108. Mr Walker submitted that the nature of the interest to be valued was the reversionary freehold interest. The valuation of a property must take account of its potentialities as well as its actualities, but this did not justify the making of artificial assumptions about any such potentialities, see *Transport for London (London Underground Limited) v Spirerose Limited* [2009] UKHL 44. In seeking to identify whether potential development value would have given rise to any additional payment for the freehold reversion in the open market on the valuation date it was critical to appreciate that this related to a possibility of development in 2023 and not the possibility of a development on the valuation date.

109. Mr Walker drew attention to the well recognised principle that residual valuations are unsatisfactory, see for instance *Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands* [2008] 3 EGLR 13 especially at paragraph 7. Mr Walker criticised the Respondent's approach of valuing No.31 simply as if it were ready for conversion to a house and then making certain allowances. While some regard could be had to such a method the better and primary method of valuation was to follow a "bottom up" approach, namely by reference to comparables involving properties laid out as flats (indeed the value of No.31 as flats is agreed) and then adding, if appropriate, an uplift to reflect any potential development value in 2023. The calculation of any such uplift would involve assessing the potential added value (if any) of a reconversion to a single dwellinghouse before making any adjustment for risk and uncertainty and then, having decided the extent of this potential development value, to place a figure on what would be paid for that (if anything) in the market on the valuation date, bearing in mind that it cannot be realised (if at all) until 2023 – essentially that involves discounting for risk and uncertainty.

110. Mr Walker drew attention to what he described as the very recent phenomenon as at the valuation date of buildings being worth considerably more as houses than as flats and to Professor Lizieri's evidence regarding the likely long term convergence of house and flat price growth. He addressed us on the various comparables and invited us to find the two best comparables to be 25 Lennox Gardens and 16 Cadogan Square and to conclude that these should be accorded real weight in deciding on the uplift in value that might be applicable to No.31 for conversion to a house. He said that before the LVT Mr Scott-Barrett had not adjusted the price of 25 Lennox Gardens by 10% to reflect the absence of a lift. This was an afterthought and not a considered adjustment and Mr Scott-Barrett's original view was the correct one. Mr Orr-Ewing had been right to rely upon the sale of 24 Cadogan Square as a comparable. It had been accepted as such by the Lands Tribunal in *Panagopoulos*. The property was of a substantial size and had a mews house attached to it; it was a house and not a maisonette. Mr Walker invited us to find persuasive Mr Orr-Ewing's final figure of £1793 per sq ft.

111. As regards the comparables which were houses (rather than flats) these had the disadvantage of the need for adjustments and in effect involved a form of residual valuation. Mr Walker addressed us on these comparables and noted that Mr Scott-Barrett had limited his evidence to four transactions, all of which were in Cadogan Square. Mr Walker submitted that this was a very narrow package of evidence, limited to the top-down approach, and subject to adjustments that were too small. There was no direct evidence of conversion costs and the large difference in the prices before and after conversion to a house could not be explained by costs alone; it was possible that the experts' analyses had not taken some factors into account. The Respondent had not produced any costs evidence. Mr Scott-Barrett assumed that any purchaser would strip out the property whether it was bought as flats or as a house. He had made a very low adjustment for costs whereas Mr Orr-Ewing had relied upon the opinion of Mr Hammond, a quantity surveyor, and the views of Mr Ghandour, a person active in the market. Mr Scott-Barrett's conclusions were not supported by the analysis of flats before conversion, the price of which was very much lower than the price following conversion to a house. It was not sufficient for Mr Scott-Barrett to say that because the latter price was high then the price before conversion must also be high.

112. Mr Walker submitted that the Tribunal should prefer Mr Orr-Ewing's evidence to that of Mr Scott-Barrett. Mr Orr-Ewing was immensely knowledgeable about Cadogan Square and had acted for active investors such as Mr Ghandour and Mr Panagopoulos and knew how they behaved. He was in touch with the market and had inspected the inside of the comparable properties. He had been tremendously fair and had not sought to defend his position, admitting bad points and not "rigidly sticking to his guns". He had thought carefully about his approach and should be commended for changing his opinion when it was appropriate to do so. Mr Walker contrasted Mr Orr-Ewing's approach to that of Mr Scott-Barrett which he described as intractable and unwilling to change.

113. Mr Walker advanced a similar argument to that of Mr Jourdan based upon the planning policies and the various enquiries of RBKC to the effect that a development involving the loss of four units (five units to one unit) would require planning permission. As regards the certificate of lawful proposed use for 43 Kensington Gardens (six flats to two units) he drew

attention to the fact that in the report it was concluded "on balance" that there was not there a development requiring planning permission – he submitted that this was very far from a clear statement that five units to one unit at No.31 would not involve a material change of use. Also that case was dealt with by the north area team. As regards the certificate of lawful proposed use for 6 Upper Addison Gardens that was also a north area team case, although he recognised that a hypothetical purchaser might take comfort from the passage in the report in that case that RBKC have interpreted case law to require planning consent to convert six or more existing units to one dwellinghouse. The late introduction of the certificate of lawful proposed use for 12-14 Egerton Place related overall to a loss of four units (nine to five) and was dealt with by the south area team, but the certificate was granted on the basis that the buildings would remain arranged as several flats, which he submitted was very different from what was proposed for No.31.

114. Mr Walker submitted that the best evidence regarding No.31 is Ms Anne Salmon's letter to Mr Reynolds dated 3 October 2007. In conclusion on the question of whether planning permission would have been required at No.31 Mr Walker invited us to find that a conversion from five units to one would have required planning permission or would have been likely to require planning permission as at the valuation date; alternatively there would have been a real issue about this question on the valuation date, and that prospective changes in planning policy would merely make this conclusion more likely rather than less likely as at 2023.

115. As to whether planning permission would be granted Mr Walker relied upon the e-mail from Ms Anne Salmon to Mr Reynolds dated 11 April 2008 stating that a reduction of six units to one "would be contrary to our policies and to the London Plan since it would reduce the borough's housing stock". That was written without reference to Policy H17 and showed that loss of housing stock was regarded as a ground in itself for refusing consent. He submitted that this was consistent with one of the two separate reasons given by the inspector for refusal of planning permission in respect of 113/114 Sloane Street.

116. As regards the grants of planning permission at 31 Holland Park and 25 Lennox Gardens, these were both granted as being accepted "on balance" bearing in mind the advantages in listed building considerations.

117. Mr Walker stressed the various aspects of potential difficulty for a developer under section 61 and Schedule 14, including the difficulty of ensuring, consistently with listed building considerations, that the works would be sufficiently substantial to enable a landlord to succeed under section 61. He also pointed out that the hypothetical purchaser would only enjoy a narrow window of opportunity for converting the buildings, having regard to the scheme of section 61. In effect the development would have to proceed as at 2023 or not at all – it would not be possible for the hypothetical purchaser to shelve development plans, if circumstances were not propitious, for a year or two from 2023 because there was a once and for all opportunity within a narrow window to operate section 61 against the long lessee of Flat 2 (supposing that section 61 could be operated at all).

Mr Munro's submissions

118. We have already recorded and considered above certain general submissions which Mr Munro made. We now turn to the submissions directly concerned with Nos.31 and 37.

119. As regards the question of whether planning permission would be required it was accepted that the conversion of No.37 from six units to one unit would require planning permission (as to the prospects for the grant of which see below). However a conversion of No.31 from five to one and a conversion of No.37 from six to two (each involving a loss of four units) would not require planning permission. Mr Munro submitted that the letter dated 3 October 2007 from Ms Anne Salmon relied upon by Mr Reynolds must contain a misprint – he suggested that it should be read as indicating that a conversion of a property from six flats or more (not from four flats or more) to a single dwelling constituted a material change of use and would require planning permission. This was an argument also advanced by Miss Rust in *Panagopoulos*. Paragraph 20 of the decision in that case records how RBKC interpret case law to require planning consent to convert six or more existing units to one dwellinghouse (see the report in 6 Upper Addison Gardens) and how a conversion from five flats to a single dwellinghouse at 27 Stafford Terrace was not considered to result in a material change of use.

120. As regards No.37 there was accordingly no problem in converting from six units to two units (thereby retaining the small flat in the least valuable part of the front basement – the precise location of the flat could be rearranged bearing in mind the extent of the necessary works). The hypothetical purchaser would then have in mind that he could either keep No.37 as these two units (large maisonette and small flat in front basement) or he could, after an appropriate pause, convert from two units to one unit. Mr Munro submitted that the valuation evidence showed that there would be no significant disadvantage in valuation terms in keeping a separate small flat in the least valuable front part of the basement even supposing that such a flat did have to be retained.

121. As regards the prospect of obtaining planning permission supposing that it was needed (which it would be in relation to a six to one conversion at No.37) the relevant policies would be H17 and CD67. No issue under Policy H1 would arise regarding the loss of housing accommodation because the entirety of both buildings would remain as housing accommodation. Mr Munro submitted that the inspector's decision on the planning appeal at 113/114 Sloane Street principally turned upon the loss of units within Policy H17 and that there was nothing in the decision to make a properly advised hypothetical purchaser concerned. Even as regards the direct conversion of No.37 from six units to one unit the purchaser would be optimistic (Mr Avery put the prospect of success at 80% to 90%). Mr Munro submitted that the debate took on an almost surreal element involving arguments regarding the loss of one unattractive small unit against the evidence that CD67 carried real weight so far as concerns returning listed buildings to their original use.

122. As regards the question of the value as at the valuation dates for the conversion of Nos.31 and 37 to houses Mr Munro submitted that had there been abundant evidence of flats being converted to houses then the expert valuers' task would have been a lot easier. But there was

was no evidence that provided a basket of comparables and there was no ‘master’ comparable. The sale of 16 Cadogan Square in 2001 did not fit that description; it was a historic transaction that took place some 5 years before the valuation dates. It could not properly be considered to be a house due to its very unusual layout. It was more akin to a property suitable for conversion to a house. The second sale of 25 Lennox Gardens was of no assistance except that it demonstrated a demand for houses. 24 Cadogan Square was not a house and never would be. Mr Orr-Ewing had said that it felt like a house but Mr Munro submitted that it would not feel like one to a purchaser finding no bedrooms on the upper floors. Somebody looking to buy a house in Cadogan Square would not be satisfied with No.24.

123. Mr Scott-Barrett was justified in his approach of only looking at transactions within Cadogan Square. There was no assistance to be had by going beyond the Square. Mr Orr-Ewing relied upon average adjusted prices for the comparables but had not sought to weight the component transactions. The valuations required the considered exercise of value judgment and Mr Orr-Ewing did not achieve that by using an undifferentiated average.

124. As regards Professor Lizieri’s evidence Mr Munro submitted that this dealt in generalities whereas the issue was whether a recognisable demand for large houses in and around Cadogan Square would disappear between the valuation date and the term date. He submitted that Professor Lizieri did not take into consideration the imbalance between the supply of such properties (low and limited) with the demand for them and that he failed in consequence to recognise that such properties would command an enduring premium, just as was the case for properties possessing some other special feature (eg being waterside properties).

125. As regards the possible difficulties under section 61 and Schedule 14 Mr Munro’s general position regarding the approach adopted by this Tribunal in *2 Herbert Crescent* has been recorded in paragraphs 80-81 above. Mr Munro further pointed out that a well advised landlord could always ensure that the works proposed were sufficiently substantial to satisfy section 61 (or, in another sphere, section 30(1)(f) of the Landlord and Tenant Act 1954) such that no anxiety would be suffered by the hypothetical purchaser on that point. On the question of whether the long lessee (ie whose lease had been extended to 2113) should enjoy any development value on being bought out under section 61 and Schedule 14, Mr Munro pointed out that such a lessee did not pay for any development value in the first place when obtaining the extended lease and that there was no reason to make a gift to such a lessee of a share of the development value when he leaves. Mr Munro drew attention to the fact that Schedule 14 paragraph 5 made no provision for any removal costs to be paid to such a lessee – he submitted this was a deliberate omission because the lessee had chosen to stay on (by extending his lease) rather than leaving and if eventually he was asked to leave under section 61 he would have to bear his own removal costs and stamp duty upon a new purchase just as he would have had to do if he had left at the end of his original lease. As regards the prospect of any compensation payable to such lessee including some ransom value (or special value to the landlord) to reflect the development value, Mr Munro drew attention to Schedule 14 paragraph 5(1)(b)(ii) which required it to be assumed that the vendor was selling the new lease subject to various restrictions including a restriction to limit the uses of the flat to those for which it had been used since the commencement of the lease and to preclude the erection of any new dwelling or

any other building not ancillary to the flat as a dwelling. He submitted therefore that on this notional sale the purchaser was having to give covenants (which would remain binding by way of privity of contract) with the notional vendor and accordingly if on the notional sale the landlord purchased there would be no purpose in the landlord making an extra bid because the landlord would not unlock development value by purchasing because the landlord would be bound as a matter of privity of contract with his vendor upon these restrictive covenants and would therefore not have obtained the freedom to carry out the development. Quite apart from the foregoing Mr Munro pointed out that there was limited attraction or scope for the long lessee to cause difficulties under section 61 and Schedule 14 bearing in mind that he faced receiving no disturbance compensation to cover removal costs or stamp duty and faced difficult arguments in the way of seeking any ransom value and faced the prospect of paying substantial costs if he litigated against the landlord and lost. Also the landlord would prepare himself properly for the purpose of implementing section 61 at the relevant time and, if delayed by the tenant, would be able to put occupants into other parts of the building on assured shorthold tenancies thereby generating substantial income to cover the period of the delay. In these circumstances Mr Munro submitted that the lessee had only a limited ability to make such a nuisance of himself that the landlord would pay handsomely to persuade him to go.

126. Mr Munro argued that in each of the two appeals the appeal should be dismissed.

Conclusions

127. We have already given above our conclusions on certain general points which were raised by the parties. We now turn to give our conclusions upon the following matters:

(1) The extent of any development value at the relevant valuation date supposing that No.31 and No.37 were available for reconversion as at that date to a single dwellinghouse.

(2) The approach the hypothetical purchaser would take to the question of whether any such extra value would still exist in 2023.

(3) The approach the hypothetical purchaser would take to the question of whether planning permission was needed for the proposed reconversion and (if needed) would be granted as at the valuation date – and the question of whether this position was likely to be the same as at 2023.

(4) The approach the hypothetical purchaser would take to the question of potential legal difficulties in obtaining possession under section 61 and Schedule 14 from, respectively, the long lessee of Flat 2 in No.31 and the long lessee of Flat 3 in No.37.

(5) The approach the hypothetical purchaser would take to other points alleged by the Appellants to be liable to have moved adversely to the proposed reconversion by 2023.

(6) The amount which the hypothetical purchaser would bid for the freehold reversion of, respectively, No.31 and No.37 at the relevant valuation dates in the light of the foregoing – in particular whether such a hypothetical purchaser would attribute an additional value to the freehold reversion to reflect the prospect of a development in 2023 by the reconversion of the property in question to a house or in the case of No.37 to two units, there being retained a small flat in the basement.

Conclusion (1): The extent of any development value at the valuation dates

128. In our opinion the best evidence of the FHVP value of the appeal properties assuming their conversion to houses is the sale of comparable buildings configured as flats which have been sold for such conversion (the bottom up approach favoured by Mr Orr-Ewing). Only two of the relevant comparables are within Cadogan Square. The sale of 16 Cadogan Square is historic, having taken place in September 2001. 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 appropriate index to use. But the further away one goes from the valuation date, and the greater the volatility of the market over the period in question, the less reliable it becomes as an indicator of contemporary value. Mr Orr-Ewing pointed out that the market had only risen by 31% between September 2001 and June 2006 before rising aggressively by a further 58% to September 2007. In his analysis the adjustments from the September 2001 price were 103% for No.31 and 77% for No.37. We do not accept that indexation under these circumstances produces a reliable result, especially where this leads to a doubling of the initial purchase price. We have therefore excluded the first (2001) sale of 16 Cadogan Square from our analysis.

129. The other comparable in Cadogan Square of a building configured as flats and suitable for conversion to a house is the sale of No.25. The evidence suggests that the purchaser, Mr Ghandour, had, and continues to have, no intention of converting it to a house. But at the time of the sale the property had the potential to be converted to a house and the price paid would have reflected the market's view about this, notwithstanding the declared intentions of the actual purchaser. We therefore place weight upon this comparable and include it in our analysis. In doing so we have considered whether it is appropriate to make an adjustment for the absence of a lift in No.25. Mr Scott-Barrett allows 10% whereas Mr Orr-Ewing makes no allowance. Mr Jourdan submitted that "No addition is justified where the building is being valued as a site for redevelopment." We conclude that no such adjustment should be made. It was evident from our inspection of the appeal properties that the lifts in 31 and 37 Cadogan Square will need to be replaced and modernised as part of any conversion works to a house. The cost of this is unlikely to be materially different to the cost of installing a lift for the first time. There would be no effect on the measured floor areas since the experts have measured to gross internal area, the definition of which includes lift-wells. In his oral evidence Mr Scott-Barrett said that it would be impossible to install a lift at 25 Cadogan Square because of its status as a listed building and the fact that such installation would disturb the original rooms. We are not persuaded by this argument for two reasons; firstly, the developers of this type of building have shown ingenuity in overcoming design problems of this type (for instance at 25

Lennox Gardens where Mr Scott-Barrett referred to the "enormous lengths" that the developer had gone to in order to provide a glass lift in the lightwell) and, secondly, no planning evidence was adduced in support of Mr Scott-Barrett's assertion. Mr Orr-Ewing also makes an adjustment of £100 per sq ft in respect of the condition of 25 Cadogan Square compared with the unimproved condition of the appeal premises. Mr Scott-Barrett makes no such allowance. We prefer Mr Orr-Ewing's evidence on this point since he knows the building well from when it was enfranchised.

130. The remaining three comparables of buildings configured as flats that were sold for conversion to houses are all outside Cadogan Square. We agree with Mr Orr-Ewing that the most similar of these to the appeal properties in terms of location and quality is at 25 Lennox Gardens and we make no adjustment for location between the two sites. (For the reasons given above we make no adjustment for the absence of a lift from 25 Lennox Gardens.) We agree with the experts that the subsequent sale of 25 Lennox Gardens in April 2009, following its conversion to a house, is unreliable and should not be used. The other two comparables are at 11 Egerton Place and 23 Cadogan Place. Both of these properties were sold twice. At the date of the first sale of 11 Egerton Place in May 2006 the building was configured as flats. By the time of the second sale in April 2007 it had been converted to a house. Both the sales of 23 Cadogan Place were of a building configured as flats. The sales of 11 Egerton Place are therefore the only evidence of the before and after value of a building configured as flats that was actually converted to a house (the evidence of the first sale at 16 Cadogan Square and the second sale of 25 Lennox Gardens having been rejected). The expert valuers had reservations about placing weight upon 11 Egerton Place as a comparable. They agreed that it is a less attractive location than Cadogan Square and both made an adjustment of 5% to reflect this. The building also has an unusual wedge shape which reduces the flexibility of its layout and design. Mr Orr-Ewing excluded the second sale from his analysis of house sales, saying in response to questions from the Tribunal that this analysis was restricted to houses in Cadogan Square and that it would not be right to include it in the averaging process. We do not accept this argument. There seems to us to be no good reason for excluding house sales outside Cadogan Square; no such restriction was applied by Mr Orr-Ewing to the evidence of the sales of buildings configured as flats and it is clear from his supplementary note of evidence that he would have included the second sale of 25 Lennox Gardens in his analysis had he been able to rely upon it. Furthermore Mr Walker criticised Mr Scott-Barrett for limiting his evidence to properties in Cadogan Square (see paragraph 111 above). We accept that 11 Egerton Place is not as good a comparable as 25 Lennox Gardens but nevertheless we attach weight to the evidence of its sale.

131. Mr Orr-Ewing said that the second sale of 23 Cadogan Place should be ignored because it "appears out of line" with the other evidence. This was because Mr Orr-Ewing had made a mistake by incorrectly adjusting the sale for time. We consider that the comparable, when properly adjusted, is of assistance and we have had regard to it. We accept Mr Orr-Ewing's view that it would be wrong to include two sales of a property in the calculation of average values where the sales were close together and the building had not been reconfigured as a house in the meantime. We have therefore excluded the first sale of 23 Cadogan Place from our analysis. (The date of the second sale coincides with the valuation date of 31 Cadogan Square and by that time it seems likely that conversion to a house was being actively considered since planning permission was granted for that use in November 2007.) While both

experts considered Cadogan Place to be less attractive than Cadogan Square they differed as to the appropriate adjustment. Mr Orr-Ewing allowed 5% and Mr Scott- Barrett allowed 10%. We have adopted the midpoint of 7.5%.

132. Our analysis of the comparable sales of buildings configured as flats (with potential for conversion to houses) for both Nos.31 and 37 is shown in Appendix 2. We have adopted a weighted average that places more weight on 25 Lennox Gardens (0.4), which we consider to be the best comparable, and places less weight on 11 Egerton Place (0.1) which both expert valuers agree is not such a useful comparable. We place equal weight (0.25) on the remaining two comparables.

133. The main difference between the experts about the top down method lies in the approach taken to conversion costs. There was no direct evidence on the point; the only evidence was the letters written to Mr Orr-Ewing by Mr Hammond and Mr Ghandour (see paragraph 56 above), neither of which could be tested by cross-examination. Mr Orr-Ewing says that there is a substantial added cost when converting properties configured as flats into a single house, eg removing separate kitchens, central heating, electrical and other service systems. Mr Scott-Barrett says that there would be no such additional costs since any purchaser of a comparable property, whether configured as flats or as a single house, would wish to carry out such substantial works of re-arrangement that there would be no material difference in costs whatever the original configuration.

134. We do not accept that a purchaser of a house will inevitably want to strip it back to bare walls and undertake a complete refurbishment. We accept Mr Walker's closing submission that there is a distinction to be made between the nature and extent of the works required to convert flats to a house and those required to refurbish an existing house:

> "If there are sufficient buyers [of houses] who will not wish to carry out such substantial re-arrangements, then their bids will determine the market price, and no discount will be made for the additional costs of substantial re-arrangements of buildings configured as houses. In the case of buildings configured as flats, however, such substantial re-arrangement is inevitable, so a discount will be applied in the market."

135. Mr Orr-Ewing's adopted figure of £300 per sq ft for the additional cost of conversion of flats to a house was not taken from Mr Hammond who did not quantify such additional cost in his letter to Mr Orr-Ewing dated 28 May 2010. Mr Hammond said that this "would cost considerably more… than if you were starting with a building which was already a single house" but did not say by how much. The figure of £300 per sq ft appears to have been based upon discussions that Mr Orr-Ewing had with "developers and my sales colleagues" as well as the letter from Mr Ghandour dated 30 March 2009 in which he says that £300 per sq ft would be needed "to simply carry out the switch" from flats to a house. (That figure was presumably appropriate at the time Mr Ghandour wrote his letter since there was no reference in it to an earlier valuation date.) Mr Orr-Ewing explained that the figure of £300 per sq ft reflected the conversion costs to a basic level of finish, described by Mr Walker in his submissions as the "shell" first-fix form. It would still be necessary for a purchaser to allow for the cost of putting the building into its final, well specified, condition.

136. We prefer Mr Orr-Ewing's evidence regarding the costs of conversion and consider that his approach is reasonable. But his adjustment of £300 per sq ft is not well-supported and is based upon hearsay evidence. We are not satisfied that Mr Ghandour's comments should be viewed as an objective assessment of the likely costs given the various properties that he owns in this area and the possibility that he would have an interest in minimising the potential for reconversion to a house. We therefore attach little weight to Mr Ghandour's letter. Mr Orr-Ewing was asked what weight he invited the Tribunal to place upon Mr Hammond's letter. He said that whilst it was not for him to say, he took comfort from Mr Hammond's statement that:

> "…most [refurbishment] projects cost in excess of £400.00 per sq ft. The costs can be substantially more than that. I have recently been involved in one property in Knightsbridge where the costs were in excess of £500.00 per sq ft and I am currently involved with a property in Westminster where the costs are in excess of £1,000.00 per sq ft."

On balance we consider that a figure of £200 per sq ft is a fair estimate of the additional cost of the works necessary to convert flats to a house at the valuation dates and it is against this background that we have considered the comparable house sales that have been put in evidence. In the cases of 16 Cadogan Square and 11 Egerton Place, where there is also being made a £300 per sq ft adjustment for condition, we have reduced the £200 per sq ft adjustment for the additional costs of conversion to £150 per sq ft to avoid double counting. (In reaching this conclusion we have not overlooked the fact that in *2 Herbert Crescent*, on the evidence placed before the Tribunal in that case, no cost adjustment was made for the extra cost of converting flats to a house compared with that of refurbishing an existing house.) There are six relevant sales; Nos. 16, 24 (twice), 28 and 36 Cadogan Square and 11 Egerton Place (we have already rejected the second sale of 25 Lennox Gardens, see paragraph 130 above).

137. We are not satisfied that the two sales of 24 Cadogan Square should be considered as evidence of a house sale. The top two storeys of this building are in the ownership of 22 Cadogan Square and this reduces the flexibility of design and limits the available accommodation. The sales are also of a short (47/48 year) leasehold interest which therefore requires an additional (albeit agreed as to method) adjustment for relativity. The property is unenfranchisable, so even if a purchaser extended the lease he could not acquire the freehold interest. These factors diminish the utility of the sale as a helpful comparable and we have not taken it into account.

138. Our analysis of the comparable sales of houses for Nos.31 and 37 is shown in Appendix 3. We have adopted a weighted average that places the same weight on the sales of 16, 28 and 36 Cadogan Square (0.3) but less weight on the sale of 11 Egerton Place (0.1).

139. The results of our analyses of the comparables of both flats and houses are summarised in the table below:

Flat Comparables	**31 Cadogan Square**	**37 Cadogan Square**

Weighted average adjusted rate (all comparables)	£1,811 psf	£1,429 psf
<u>House Comparables</u>		
Weighted average adjusted rate (all comparables)	£2,070 psf	£1,572 psf

140. The weighted average of all the comparables shows that the bottom up approach, which we prefer, produces lower results than the top down approach, ie £1,811/£2,070 per sq ft respectively for No.31 and £1,429/£1,572 per sq ft respectively for No.37.

141. We note that the only example of two sales of the same property, one when it was configured as flats and the other after it had been converted to a house, was at 11 Egerton Place. The analysis of these sales shows that whereas the first sale was marginally above the weighted average of all the comparables, the second sale (as a house) was well above it (by 30%). This lends some support to Mr Orr-Ewing's opinion that the top down approach understates the allowances that a developer would make when deducting costs from the value of the completed house conversion.

142. In our opinion, considering the evidence as a whole, but giving greater weight to the results of the bottom up approach (weighted 0.65/0.35), we conclude that the adjusted rate for No.31 for conversion to a house is £1,902 per sq ft and that for No.37 is £1,479 per sq ft. Applying these adjusted rates to the agreed areas of the two appeal properties gives a FHVP for No.31 of £23,950,000 (rounded) and for No.37 of £12,740,000 (rounded). (The agreed FHVP values of the appeal properties as flats are £18,406,986 for No.31 and £9,885,625 for No.37.)

Conclusion (2): The hypothetical purchaser's approach to whether any extra value will still exist in 2023

143. The hypothetical purchaser would in our view plainly address his mind to the question of whether he could be confident that any extra value (to reflect the prospect of a development by reconversion) would still exist in 2023. Professor Lizieri gave evidence that it is possible that, by 2023, slower house price growth relative to flat price growth will have eliminated the gap rendering a reconversion uneconomic. He concluded that this was a substantial risk which a potential purchaser of the freehold reversion in 2007 would have to consider in evaluating any benefits of converting the building to a house in 2023. Professor Lizieri produced material to support his views. The Respondent has called no evidence to the contrary. We do not accept that the hypothetical purchaser would assume that Cadogan Square was in some form of bubble cut off from the other parts of the property market and the economic realities prevailing therein. However, we do accept that the hypothetical purchaser would see Cadogan Square as a highly prestigious address where there was necessarily a limited supply of buildings capable of being transformed into impressive single dwellinghouses. We consider that the hypothetical purchaser would have been likely to conclude at the relevant valuation dates that as at 2023 there would still be extra value in houses as compared with flats. However by reason of the

matters to which Professor Lizieri draws attention the hypothetical purchaser would realise that he could not be certain upon this point and still less could he be certain that the extra value in houses as at 2023 would still be as great as it was at the valuation date. The result of Professor Lizieri's evidence is to draw authoritative attention to this inability in the hypothetical purchaser to be certain on these points. The evidence given by Mr Clark and Mr Cullum on behalf of the present Respondent in the *Sportelli* case serves to confirm that the hypothetical purchaser could not be certain upon these points.

Conclusion (3): The hypothetical purchaser's approach to the question of planning

144. This Tribunal is not sitting as a planning committee seeking to determine a planning application. Our function is to consider the approach which the hypothetical purchaser would take to the question of what if any significant difficulties relating to planning might exist such as to prevent a prospective reconversion in 2023.

145. The hypothetical purchaser, who must be assumed to act prudently, would take advice regarding the planning position. Such advice would not be ultra cautious but would not be overly optimistic. Also we conclude that the hypothetical purchaser would himself (or, more likely, through his planning advisor) make enquiry of RBKC so as to obtain guidance (albeit informal and non-binding) as to the likely attitude RBKC would take to the proposed works. The advisor should be assumed to be experienced in planning issues in RBKC and would consider the development plan and would research (or already be aware of) recent relevant planning decisions.

146. We consider first the planning position as at the valuation date in respect of a proposal to convert No.37 from six units to one single dwellinghouse. In our view the position is as follows:

(1) RBKC was expressly asked about this proposed development in a written enquiry from Mr Reynolds in February 2009 and he obtained the reply from Ms Anne Salmon dated 23 February 2009 to the effect that such a development would contravene policies of the London Plan and of the Unitary Development Plan both by reason of the decrease in the housing stock as a whole and also by reason of the loss of a small unit within Policy H17. The letter also made clear that the proposed conversion would constitute a material change of use and would require planning permission. Nothing has been laid before us to make us conclude that any more favourable response would have been obtained as at February 2007 if such an inquiry had been made on behalf of the prospective hypothetical purchaser shortly before the valuation date.

(2) Further research by the planning advisor would confirm that the attitude of RBKC was indeed likely to be as stated in the letter. Such research would include examination of the inspector's decision in the case of 113/114 Sloane Street, which would confirm the concern that planning permission would be refused not just for loss of a small unit within Policy H17 but also because of undermining housing policies which seek to avoid a decrease in the level of

housing stock. We agree with Mr Reynolds and Mr Avery who both accepted that in that decision letter the inspector gave two separate reasons for his decision, namely (i) a decrease in the level of housing stock and (ii) the loss of small units within Policy H17.

(3) However the planning advisor would note Policy CD67 and the planning permission granted in respect of 25 Lennox Gardens in July 2006. In that case RBKC allowed "on balance" a conversion from five or six units (it being uncertain how many there were) to one unit, including it seems the loss of one small unit within H17, because of significant enhancement/restoration to a listed building.

(4) In summary the advice upon which the prudent hypothetical purchaser would act would be that planning permission would be required to convert from six units to one and that there could be real problems in obtaining planning permission, but that such permission might ultimately be obtained on balance on the basis of Policy CD67 considerations.

(5) We do not consider that the planning advice (which we assume to be prudent rather than overly optimistic) would include advice that the result desired (conversion from six units to one unit) could be achieved and the above mentioned problems circumvented through the stratagem of first converting from six units to two units and then, after a decent interval, converting from two units to one unit on the assumption that RBKC would either accept this or be unable to prevent it. Even if such advice were given we do not consider that a prudent hypothetical purchaser would attach value to such a stratagem.

147. As regards a proposed conversion of No.37 from six units to two units retaining a small unit in the basement, this would avoid loss of a small unit within Policy H17 and would involve the loss of only 4 (rather than 5) units overall. Upon this proposal we consider that the planning advice at the valuation date in February 2007 would have been to the following effect, namely that RBKC was likely to treat these works as a material change of use which required planning permission, but that there were reasonable prospects that such consent would be granted. We take this view for the following reasons:

(1) On the question of whether planning permission was needed there is the letter dated 3 October 2007 from Ms Salmon to Mr Reynolds which expressly states

> "I would advise that conversion of a property from four flats or more into a single dwelling constitutes a material change of use which would therefore require planning permission."

The Respondent seeks to dismiss the significance of this letter as containing a misprint in that it should have said that conversion of a property from "six" flats or more into a single dwellinghouse constitutes a material change of use which would require planning permission. The question arises as to what weight we should place upon this letter. It is written by an experienced officer in the team dealing with the south of the borough in response to a written enquiry relating to

Cadogan Square and is written about eight months after the valuation date for No.37 (and two months after the valuation date for No.31). The letter has been on the table as relied upon by the Appellants for a long time. Also this letter has previously been relied upon before this Tribunal, see the decision in *Panagopoulos* where the hearing was in April 2008, and in that case an associate of Mr Avery from his own firm gave evidence on behalf of this same Respondent to the effect that she thought this opinion expressed by Ms Salmon was an error and should have referred to six flats rather than four. Mr Avery repeats this assertion. The fact however remains that this letter is before us. The Respondent has had every opportunity over a period of more than two years to write to RBKC and to ask for agreement that there has been a slip of the pen in this letter but has omitted to do so. In the present case the parties have agreed the value of the properties configured as flats, but it is the contention of the Respondent (denied by the Appellants) that there exists this extra value for conversion into a single dwellinghouse. It is part of this assertion by the Respondent that planning permission would not be needed or alternatively would be granted. On the basis that it is for the Respondent to prove his assertion we consider that it is for him to persuade us that this letter does indeed contain the alleged error. He has failed to do so. It may be noted that Mr Reynolds made a further inquiry of Ms Salmon in April 2008 when he sent her a copy of her letter of 3 October 2007, but despite having this letter laid in front of her again she did not volunteer that she had made any error in it. We are not prepared to accept that this letter says four flats when the writer meant six flats. However having regard to the evidence given by Mr Reynolds as recorded in paragraph 31 above, where he states that planning permission would be required where a building comprising five or more flats is to be converted into a single unit, we are prepared to accept (but solely for the purpose of the present appeals) that the advice which the inquiring hypothetical purchaser or planning advisor would have received from RBKC would not have been to the effect in the letter, namely that four or more units to one constitutes a material change of use, but would have been that more than four units to one constitutes a material change of use – ie such that five units to one would be a material change of use but four units to one would not be. We conclude that this is the nature of the reply which would have been given if the hypothetical purchaser or his planning advisor had enquired of RBKC as to its attitude as to whether a conversion from six units to two (or five units to one) was a material change of use requiring planning permission.

(2) In reaching the above conclusion we have not overlooked the passage in the report of April 2007 in respect of 43 Kensington Park Gardens where the proposal was converting six residential flats to two self contained units where it is stated

> "However it has been established that the conversion of two, three and four units into one does not amount to development. The present proposal results in the loss of four units. On balance, then, this proposal is considered to be materially different from the *Richmond* case …"

This was a decision by the north area team. Cadogan Square falls within the area covered by the south area team. There is evidence from Mr Reynolds, consistent with evidence given by Miss Rust (on behalf of the present Respondent) to the Lands Tribunal in *Panagopoulos*, to the effect that the different area planning teams within RBKC did interpret planning policies differently, such that RBKC may take a different view of a similar proposal dependent upon in which part of the borough the proposal falls. Nor have we overlooked the report of the north area team in respect of 6 Upper Addison Gardens in July 2007. However bearing in mind this evidence regarding the inconsistencies between the north and the south area team, we are not caused to doubt our conclusion in subparagraph (1) above.

(3) As regards the information obtained by Mr Avery during the course of his telephone conversations (see paragraph 38 above) we note that these were statements made on the telephone in response to enquiries made on the telephone and that the matters Mr Avery understood to have been said have not been recorded in any attendance note which has been produced to us nor have they been sent in writing to the relevant officer at RBKC for confirmation. The Appellants made clear that they in no way sought to impugn Mr Avery's honesty and nor do we. However there is plainly scope for misunderstanding and misinterpretation in a telephone call and a less considered off the cuff response is liable to be made as compared with the circumstance when a letter giving a considered response to a written inquiry is sent. Accordingly Mr Avery's evidence regarding these telephone conversations does not cause us to alter our conclusions.

(4) The south area team reached a decision in relation to 25 Lennox Gardens in 2006 (ie pre both valuation dates). There the matter proceeded on the basis that planning permission was needed for the conversion of five or six existing units to one (there was uncertainty as to which and the planning officer in the report did not appear to consider it of importance to distinguish whether the loss was five to one or six to one). This serves to support our conclusion that the advice given to the hypothetical purchaser would have been that RBKC was likely to treat the proposed development of six to two units at No.37 as amounting to a material change of use.

(5) Even if the hypothetical purchaser's planning advisor had discovered the previously undiscovered certificate of lawful proposed use in relation to 12-14 Egerton Place (dated August 2005) and had examined the report attached thereto, we do not consider that this would have led the advisor to give advice other than it was likely RBKC would treat a conversion of six to two as requiring planning permission. The Egerton Place report appears to have found of importance the fact that each building involved in the proposal would remain divided into flats and maisonettes.

(6) However on the question of whether planning permission would be granted we consider that the hypothetical purchaser would receive advice that Policy CD67 and conservation issues would be viewed as being important by RBKC and that these points, together with the retention of the small flat at No.37 in the proposal

under consideration, would result in the planning advisor advising the hypothetical purchaser that the result in 113/114 Sloane Street could be avoided despite there still being a loss of four units of accommodation and that there were reasonable prospects that planning permission would be obtained. The reasonableness of such a view is confirmed by the post valuation date report in respect of 31 Holland Park and 7 Holland Park Mews.

(7) We reject Mr Avery's conclusion that the hypothetical purchaser would receive and act upon substantially more favourable planning advice than the foregoing, but we also reject Mr Reynolds' conclusion that the advice would be that planning permission for a conversion from six units to two units would be likely to be refused. The evidence given by Mr Clark in *2 Herbert Crescent* confirms us in the view which we have reached in that we note Mr Clark said (in a case raising similar planning questions and where he was giving evidence to the Lands Tribunal on behalf of the present Respondent) that the position was as recorded in paragraph 42 above.

148. We now turn to the prospects as at the valuation date of obtaining planning permission for the conversion of No.31 from five units to one unit. Here no loss of a small unit under policy H17 arises. Also the valuation date is later such that the decision of RBKC (and the attendant officers' reports) in the cases regarding 43 Kensington Park Gardens and 6 Upper Addison Gardens would have been available. However both of these decisions were decisions of the north area team. We conclude that the hypothetical purchaser of the freehold reversion of No.31 would have taken a view regarding planning which was not significantly more optimistic than that taken by the hypothetical purchaser of No.37 when contemplating a development from six units to two units.

149. Accordingly the hypothetical purchaser for both No.31 and No.37 would in each case conclude that planning permission was likely to be required for the five to one and six to two developments but that as at the relevant valuation date there were reasonable prospects of obtaining such planning permission. However the hypothetical purchaser would also in each case note that if the development was to occur it would be in 2023 rather than at the valuation date and the hypothetical purchaser would take a view, in consultation with his planning advisor, regarding how sure he could be that planning considerations would be no less favourable in 2023 than in 2007. The only view that the prudent hypothetical purchaser could reasonably reach upon that question is that it was uncertain as to whether the planning situation would remain as favourable or would change and the hypothetical purchaser would be advised that insofar as there was some change then the likelihood (having regard to the way planning policies had been changing by the relevant valuation dates) was that if anything the policies would be more rather than less restrictive regarding the loss of residential units.

Conclusion (4): The approach of the hypothetical purchaser to potential legal difficulties under section 61 and Schedule 14

150. The parties did not address us in detail as to the extent of any legal or valuation difficulties in the way of the hypothetical purchaser if he sought in 2023 to recover possession

from the long lessees of, respectively, Flat 2 in No.31 and Flat 3 in No.37. This is because the matter was examined at length in *2 Herbert Crescent*. The Appellants invited this Tribunal to adopt the same approach as we did in that case. Mr Munro, while reserving his position and making no concessions, did not argue that we should do otherwise. There were however two additional arguments advanced. Firstly, it was argued by the Appellants that the fact Nos.31 and 37 are listed buildings could give rise to difficulties for a landlord in proving an intention to do sufficiently substantial works of demolition or reconstruction or construction as to satisfy section 61 and they referred to the unfortunate divergent results obtained by landlords in cases under 30(1)(f) of the Landlord and Tenant Act 1954 as amended in *Marazzi* and *Ivorygrove*. This was a point which was not pressed in *2 Herbert Crescent*. In response Mr Munro argued that the well advised landlord has plenty of time to prepare his plans by 2023 and can always ensure that the works will be sufficiently substantial to satisfy section 61. We consider that Mr Munro is correct upon this point and that the hypothetical purchaser would not see this point as a yet further problem, ie over and above those identified in the case of *2 Herbert Crescent*. Secondly, Mr Munro also advanced the new argument not raised in *2 Herbert Crescent* as summarised in paragraph 125 above. We accept Mr Jourdan's submissions that it is unlikely that the hypothetical purchaser's solicitor would have advised that this argument provided a safe answer to any claim by way of compensation to some form of ransom value.

151. Accordingly we conclude that the approach adopted by the Lands Tribunal in *2 Herbert Crescent* should be adopted again in this case. The prudent hypothetical purchaser would be advised that if he had to litigate against, respectively, the lessees of Flat 2 (No.31) or Flat 3 (No.37) rather than reaching some early compromise agreement for the yielding up of vacant possession, then there would be a substantial risk that the hypothetical purchaser might be unable to recover vacant possession or might be unable to do so without paying compensation which included a ransom value. This is because the points raised under section 61 and Schedule 14 are difficult and there are serious arguments on both sides with no authorities thereon. The hypothetical purchaser would be advised to that effect. We consider also that the hypothetical purchaser would have in mind that the lessee in each case with whom he would be dealing under section 61 was a lessee who was the owner of a valuable flat (over £2m in the case of Flat 3) or a highly valuable flat (nearly £9m in the case of Flat 2) and that the owners were likely (even if the present personalities moved on) to be persons of substance who, if they chose to litigate rather than come to terms and move out, would have the ability to do so and would be unlikely to be over anxious regarding prospective litigation costs.

152. Both experts assumed that, at the very least, it would be necessary in practice to pay the owners of the extended leases their costs of transfer in the event that an application under section 61 was successful. We accept that the purchasers of the freehold reversions looking to convert the appeal properties to houses would budget for such costs. We agree with Mr Scott-Barrett that these costs should be taken as £400,000 and £100,000 for Nos.31 and 37 respectively.

Conclusion (5): The approach of the hypothetical purchaser to other points

153. The Appellants raised further points which they contended might move adversely between the valuation date and 2023 and which would be of concern to the hypothetical purchaser. We do not see any significant weight in these arguments. We consider that someone who was otherwise minded to purchase these freehold reversions with a view to a development in 2023, and who had made allowance for the matters already discussed above, would not be further dissuaded by possible changes in building regulations or carbon emission considerations or access for the disabled considerations or a possible increase in building costs. Those are the form of general risks which a developer would consider were covered within his developer's profit and contingencies.

Conclusion (6): The amount which the hypothetical purchaser would bid for the freehold reversion in Nos. 31 and 37.

154. As shown above we conclude that as at the relevant valuation dates both Nos.31 and 37 possessed substantial additional value if they were then valued with vacant possession and available for conversion to a single dwellinghouse (or from six units to two units) as compared with their value on the basis they remained as flats.

155. However substantial difficulties and uncertainties existed at the relevant valuation dates regarding the prospects for such a development in 2023. These difficulties and uncertainties arose from

- (i) uncertainty as to whether the market would still accord additional value to houses (anyhow to the same extent) over flats as existed at the valuation date;
- (ii) whether planning permission for the proposed development would be available as at the valuation date and, even if available then, whether it would be available in 2023; and
- (iii) whether the hypothetical purchaser could successfully operate section 61 and Schedule 14 against the relevant long lessees and do so without undue delay and expense (either in buying out such lessees through negotiation or paying them statutory compensation).

156. The hypothetical purchaser would take an overall view and assess his prospects taking into consideration all relevant matters. He would not seek to make precise and discrete adjustments for each of the above mentioned factors separately. Viewed overall the hypothetical purchaser would see the prospect of obtaining extra value through the contemplated reconversion in 2023 as a possibility rather than a probability.

157. The hypothetical purchaser would in our view place particular reliance, when deciding how much to bid for the freehold reversion, upon the value he was certain to obtain, namely the

value based upon the property in question remaining as flats. The hypothetical purchaser would then decide what if anything extra he would be prepared to add to his bid to reflect the development possibility in 2023. He would thus follow what was referred to in the hearing as a bottom up approach, rather than follow a 'top down' approach by having regard to the full additional value which would be possessed by the properties supposing there was certainty regarding the proposed development in 2023 and then making some percentage adjustment downwards therefrom. We consider that this Tribunal should follow the same course, ie the same course as the hypothetical purchaser would take, and adopt a bottom up analysis, especially bearing in mind that in the present case the parties are agreed as to the relevant values applicable on the basis that the buildings remain as flats. Thus there is a sure starting point for a bottom up approach.

158. With due respect to the LVT we consider that in each of these two cases the LVT was wrong in adopting a top down approach and, in particular, in making far too small a deduction even supposing a top down approach was appropriate – the allowance appears merely to have been to have allowed a 5% deduction for planning risk (at No.31) and to have added a figure of £500,000 for the cost of buying out the lessee of Flat 3 (at No.37).

159. We consider that the successful hypothetical purchaser for the freehold reversion of each of Nos.31 and 37 separately would have to add something for development value. If the hypothetical purchaser bid no more than a figure which reflected only the value of the respective property on the basis it remained as flats then he would be outbid. However he would only be outbid by a modest amount because the successful hypothetical purchaser, acting prudently and on proper advice, would only add a modest additional bid to reflect the substantial uncertainties identified above. We consider that the best price which the hypothetical purchaser would pay is a price calculated by reference to the value of the property as flats plus 15% of the potential development value (ie 15% of the difference between the value of the property as flats and the value of the property available for conversion to a house).

160. We do not consider that the hypothetical purchaser would take a more optimistic view as between No.31 and No.37. Insofar as the hypothetical purchaser might have a reason to be slightly more optimistic regarding planning considerations at the later valuation date which applies in respect of No.31, any such additional optimism would in our view be counterbalanced by the fact that the hypothetical purchaser would have cause to be somewhat more pessimistic in relation to No.31 regarding his ability to reach a satisfactory outcome with the lessee of flat 2 – because there the hypothetical purchaser would have to deal with the owner of a flat worth about £9m who clearly had the means to create difficulties if he did not wish to move.

161. In our opinion the price to be paid in accordance with Schedule 6 paragraph 3 of the 1993 Act for Nos.31 and 37 should be calculated as follows:

(1) Determine the FHVP value of each property for conversion to a house. For No.31 this is £23,950,000 and for No.37 it is £12,740,000 (see paragraph 142 above).

(2) Deduct from the FHVP value (i) the improved value of the extended leasehold interests in Flat 2 (No.31) and Flat 3 (No.37), reflecting the length of the lease at the date of reversion (ie by applying a relativity of 95.3% – see Appendix 1); and (ii) the associated transfer costs. The value of Flat 2 as improved is £8,313,972 and that of Flat 3 is £2,135,387. The respective transfer costs are £400,000 and £100,000 (see paragraph 152 above). This gives net FHVP figures of £15,236,028 and £10,828,156 for Nos.31 and 37 respectively.

(3) Defer the net FHVP figures until the expiry of the short leases in 2023 (using the deferment rate to be determined by the Tribunal).

(4) Calculate the equivalent (deferred) figure on the assumption that the properties will remain configured as flats.

(5) Deduct (4) from (3) to determine the present value of any development value arising from the conversion of each property to a house.

(6) Take 15% of (5) (ie discount by 85%) to allow for risk.

(7) Add (6) and (4).

(8) Calculate the marriage value in respect of participating flats of less than 80 years.

(9) Add (8) and (7) to give the price payable.

162. The appropriate rate of deferment is to be the subject of a separate hearing. For the avoidance of doubt we state that the additional bid by the hypothetical purchaser to reflect development value (that is the additional 15% as explained above) would be viewed by the hypothetical purchaser as being just as secure as the remainder of the price he was paying, being a price reflecting the agreed and definite value of the building as flats. The hypothetical purchaser would in our view not consider any different deferment rate should be applied to this 15% figure – and indeed to do so would be to double count. The hypothetical purchaser would have allowed for all additional risks and uncertainties by limiting his bid to only 15% of the potential development value and, having done so, could and would treat this expenditure of 15% as being as secure as the remainder of his investment.

Dated 16 September 2010

His Honour Judge Huskinson

A J Trott FRICS

ADDENDUM

FINAL DECISION AND VALUATIONS

163. Our preliminary decision in these appeals dealt with all disputed issues other than the deferment rate which was considered at a separate hearing.

164. The deferment rate decision was issued on 3 December 2010 as *Cadogan Square Properties Limited and Others v The Earl Cadogan* [2010] UKUT 427 (LC). The deferment rate to be adopted for the valuation of both 31 and 37 Cadogan Square was determined as 5.5%.

165. Appendices 4 and 5 show our valuations for No.31 and 37 Cadogan Square respectively using the deferment rate of 5.5%.

166. In paragraph 161(2) of our preliminary decision we said that the FHVP value of No.37 was £10,828,156 after deducting the improved value of flat 3 and transfer costs of £100,000. The Appellants have pointed out that the correct figure after these deductions have been made should be £10,504,613. We accept this correction and we have reflected it in our valuations.

167. The total price payable for the appeal properties is determined as follows:

(i) 31 Cadogan Square £5,271,858

(ii) 37 Cadogan Square £3,794,843

168. Our decision in these appeals is now final.

Dated 15 February 2011

HH Judge Huskinson

A J Trott FRICS

APPENDIX 1

AGREED FACTS

1. **31 Cadogan Square**

(i) Freehold vacant possession value of flats

Flat 1 (caretaker) (basement)	£1,174,500	NP < 80 years
Flat 2 (first)	£8,724,000[1]	NP > 80 years
Flat 3 (second/third)	£2,960,784	P < 80 years
Flat 4 (third/fourth)	£2,465,814	P < 80 years
130 Pavilion Road (mews):	£3,081,888	P < 80 years
	£18,406,986	

[1] Improved value

(ii) Relativity

Short leases (15.56 years unexpired): 37%
Extended lease (Flat 2) (90 years unexpired at 2023): 95.3%

(iii) Capitalisation rates

Freehold: 5%
Leasehold: 6%, 2.5%, 30p tax

(iv) Areas (GIA)

Building if converted to a house: 12,592 sq ft
Existing area of building as flats: 11,545 sq ft

2. **37 Cadogan Square**

(i) Freehold vacant possession value of flats

Flat 1 (ground and basement)	£2,209,950	P < 80 years
Flat 2 (first)	£2,635,000	NP < 80 years
Flat 3 (second)	£1,901,200	P > 80 years
Flat 4 (third)	£1,222,975	P < 80 years
Flat 5 (fourth/fifth)	£1,381,250	NP < 80 years
Caretaker's flat	£ 455,650	NP < 80 years
Store rooms	£ 79,600	< 80 years
	£9,885,625	

Improved value of Flat 3: £2,240,700

(ii) Relativity

Short leases (16.07 years unexpired): 38.5%
Extended lease (Flat 3) (90 years unexpired at 2023): 95.3%

(iii) Areas (GIA)

Building if converted to a house: 8,615 sq ft

3. **Agreed adjustments to comparable transactions**

(i) Time

Savills Prime Central London Residential Capital Value Index: Prime Central London – South West Houses

(ii) Mews House

10%

(iii) Location

Off square: 10%

(iv) Gross internal areas

Agreed in respect of all comparables

APPENDIX 2

COMPARABLE SALES OF BUILDINGS CONFIGURED AS FLATS (WITH POTENTIAL FOR CONVERSION TO A HOUSE)

Property	Date	Price (£)	Floor area (sq ft)	Rate per sq ft (£)	Adjusted to valuation date (£/psf)	Adjusted for lease length (lease as % of F/H)	Adjusted for location (%)	Adjusted for mews house (%)	Adjusted for lift (%)	Adjusted for condition (per sq ft)	Adjusted for costs of conversion (per sq ft)	Adjusted rate (£/per sq ft)	Weighting factor	Weighted adjusted rate (£/per sq ft)
31 CADOGAN SQUARE (AUGUST 2007)														
25 Lennox Gardens	11/05	8,400,000	10,846	774	1,356	–	–	–	–	–	–	1,356	0.4	542
11 Egerton Place	5/06	7,100,000	7,132	996	1,580	–	5	10	–	–	–	1,817	0.1	182
23 Cadogan Place	8/07	12,700,000	6,273	2,025	2,025	–	7.5	10	–	–	–	2,379	0.25	595
25 Cadogan Square	5/08	18,350,000	9,681	1,895	1,882	–	–	10	–	(100)	–	1,970	0.25	492
							Weighted average adjusted rate:							**1,811**
37 CADOGAN SQUARE (FEBRUARY 2007)														
25 Lennox Gardens	11/05	8,400,000	10,846	774	1,181	–	–	(10)	–	–	–	1,063	0.4	425
11 Egerton Place	5/06	7,100,000	7,132	996	1,377	–	5	–	–	–	–	1,446	0.1	145
23 Cadogan Place	8/07	12,700,000	6,273	2,025	1,764	–	7.5	–	–	–	–	1,896	0.25	474
25 Cadogan Square	5/08	18,350,000	9,681	1,895	1,639	–	–	–	–	(100)	–	1,539	0.25	385
							Weighted average adjusted rate:							**1,429**

APPENDIX 3

COMPARABLE SALES OF HOUSES

Property	Date	Price (£)	Floor area (sq ft)	Rate per sq ft (£)	Adjusted to valuation date (£/psf)	Adjusted for lease length (lease as % of F/H)	Adjusted for location (%)	Adjusted for mews house (%)	Adjusted for Lift (%)	Adjusted for condition (per sq ft)	Adjusted for costs of conversion (per sq ft)	Adjusted rate (£/per sq ft)	Weighting factor	Weighted adjusted rate (£/per sq ft)
31 CADOGAN SQUARE (AUGUST 2007)														
28 Cadogan Square	4/06	12,650,000	10,931	1,157	1,876	–	10	–	–	(100)	(200)	1,764	0.3	529
11 Egerton Place	4/07	19,000,000	7,500	2,533	2,743	–	5	10	–	(300)	(150)	2,704	0.1	270
16 Cadogan Square	5/07	28,000,000	12,696	2,205	2,341	–	–	10	–	(300)	(150)	2,125	0.3	637
36 Cadogan Square	5/07	18,000,000	10,252	1,756	1,865	88.7	10	–	–	–	(200)	2,113	0.3	634
							Weighted average adjusted rate:							**2,070**
37 CADOGAN SQUARE (FEBRUARY 2007)														
28 Cadogan Square	4/06	12,650,000	10,931	1,157	1,634	–	10	(10)	–	(100)	(200)	1,334	0.3	400
11 Egerton Place	4/07	19,000,000	7,500	2,533	2,390	–	5	–	–	(300)	(150)	2,059	0.1	206
16 Cadogan Square	5/07	28,000,000	12,696	2,205	2,039	–	–	–	–	(300)	(150)	1,589	0.3	477
36 Cadogan Square	5/07	18,000,000	10,252	1,756	1,624	88.7	10	(10)	–	–	(200)	1,631	0.3	489
							Weighted average adjusted rate:							**1,572**

Appendix 4

31 CADOGAN SQUARE: LANDS CHAMBER VALUATION

1. *Value of freeholder's interest assuming reversion to a house*			
(i) Term			
Rent received from head lessee	£5		
Rent received from lessee of 130 Pavilion Road	£45		
		£50	
YP 15.56 years @ 5%[1]		10.639	
			£532
(ii) Reversion to FHVP value as a house			
12,592 sf @ £1,902 psf		£23,950,000	
Less			
(a) Improved value of flat 2	£8,724,000		
x relativity in 2023 @ 95.3%	0.953		
		£8,313,972	
(b) Section 61 Costs		£400,000	
		£15,236,028	
x PV of £1 in 15.56 years @ 5.5%[2]		0.435	
			£6,627,672
Total freehold value assuming reversion to a house			£6,628,204
2. *Value of freeholder's interest as flats*			
(i) Term			
As above			£532
(ii) Reversion to FHVP value as flats			
(a) Participating flats under 80 years			
(flats 3 and 4 and 130 Pavilion Road)	£8,508,486		
x PV of £1 in 15.56 years @ 5.5%	0.435		
		£3,701,191	
(b) Non-participating flats under 80 years			
(flat 1)	£1,174,500		
x PV of £1 in 15.56 years @ 5.5%	0.435		
		£510,907	
(c) Non-participating flats over 80 years			
(flat 2, improved value)	£8,724,000		
x PV of £1 in 105.56 years @ 5%[3]	0.006		
		£52,344	
			£4,264,442
Total freehold value assuming reversion as flats			£4,264,974

3. *Uplift in freehold value*			
Freehold value assuming reversion to a house	£6,628,204		
Less freehold value assuming reversion as flats	£4,264,974		
Uplift in freehold value if converted to a house		£2,363,230	
x 15%		0.15	
Uplift in freehold value allowed in purchaser's bid			£354,484
4. *Total value of freeholder's interest*			
(i) Freehold value assuming reversion as flats		£4,264,974	
(ii) Uplift in freehold value allowed in purchaser's bid		£354,484	
Total value of freeholder's interest			£4,619,458
5. *Value of head lessee's interest*			
Rent receivable	£95		
Less rent payable	£5		
Profit rent		£90	
x YP 15.56 years @ 6%, 2.5%, 30p tax[1]		7.340	
Total value of head lessee's interest			£661
6. *Marriage value*			
(i) Aggregate value of landlords' interests after enfranchisement:			
(a) FHVP (999 year lease) value of participating flats (3, 4 and 130 Pavilion Road)	£8,508,486		
(b) Reversionary value of flats 1 and 2	£563,251		
		£9,071,737	
Less			
(ii) Aggregate value of landlords' interests before enfranchisement			
(a) Freehold value	£4,619,458		
(b) Head leasehold value	£661		
		£4,620,119	
Difference in aggregate values		£4,451,618	
Less			
Leasehold values of participating flats @ 37%[1] relativity		£3,148,140	
Increase in aggregate value of landlords' interests consequent upon acquisition by nominee purchaser (marriage value)		£1,303,478	

Landlords' share of marriage value @ 50%		0.5	
			£651,739
7. *Apportionment of marriage value between freeholder and head lessee*			
(i) Head lessee's share $\frac{£661}{£661 + £4,619,458}$ x £651,739			£93
(ii) Freeholder's share $\frac{£4,619,458}{£661 + £4,619,458}$ x £651,739			£651,646
8. *Price payable*			
(i) Head lessee			
(a) Value of present interest	£661		
(b) Share of marriage value	£93		
Total price		£754	
(ii) Freeholder			
(a) value of present interest	£4,619,458		
(b) share of marriage value	£651,646		
Total price		£5,271,104	
Total price payable for landlords' interests			**£5,271,858**

Appendix 5

37 CADOGAN SQUARE: LANDS CHAMBER VALUATION

1. *Value of freeholder's interest assuming reversion to a house*			
(i) Term			
Rent received from head lessee		£650	
x YP 16.09 years @ 5%[4]		10.878	
			£7,071
(ii) Reversion to FHVP value as a house			
8,615 sf @ £1,479 psf		£12,740,000	
Less			
(a) Improved value of flat 3	£2,240,700		
x relativity in 2023 @ 95.3%[1]	0.953		
		£2,135,387	
(b) Section 61 costs		£100,000	
		£10,504,613	
x PV of £1 in 16.09 years @ 5.5%[2]		0.423	
			£4,443,451
Total freehold value assuming reversion to a house			£4,450,522
2. *Value of freeholder's interest as flats*			
(i) Term			
As above			£7,071
(ii) Reversion to FHVP value as flats			
(a) Participating flats under 80 years			
(flats 1 and 4)	£3,432,925		
x PV of £1 in 16.09 years @ 5.5%	0.423		
		£1,452,127	
(b) Participating flats over 80 years			
(flat 3, unimproved value)	£1,901,200		
x PV of £1 in 106.09 years @ 5%[3]	0.006		
		£11,407	
(c) Non-participating flats under 80 years			
(flats 2 and 5, caretaker's flat and store)	£4,551,500		
x PV of £1 in 16.09 years @ 5.5%	0.423		
		£1,925,284	
			£3,388,818
Total freehold value assuming reversion as flats			£3,395 ,889

3. *Uplift in freehold value*			
Freehold value assuming reversion to a house	£4,450,522		
Less freehold value assuming reversion as flats	£3,395,889		
Uplift in freehold value if converted to a house	£1,054,633		
x 15%	0.15		
Uplift in freehold value allowed in purchaser's bid			£158,195
4. *Total value of freeholder's interest*			
(i) Freehold value assuming reversion as flats		£3,395,889	
(ii) Uplift in freehold value allowed in purchaser's bid		£158,195	
Total value of freeholder's interest			£3,554,084
5. *Value of head lessee's interest*			
(i) Participating flats under 80 years (flats 1 and 4)			
Rent receivable	£257		
Rent payable	£257 [5]		
Profit rent		£0	
(ii) Participating flats over 80 years (flat 3)			
Rent receivable	£0		
Rent payable	£124		
Profit rent		(£124)	
x YP 16.09 years @ 6%, 2.5%[6], 30p tax[7]		7.507	
			(£931)
(iii) Non-participating flats under 80 years (flats 2 and 5, caretaker's flat)			
Rent receivable	£269		
Rent payable	£269		
Profit rent		£0	
Total value of head lessee's interest			(£931)
6. *Marriage value*			
(i) Aggregate value of the landlords' interests after enfranchisement			
(a) FHVP (999 year lease) value of participating flats (1 and 4)[8]	£3,432,925		
(b) Reversionary value in non-participating flats (2, 5 and caretaker's flats and store)	£1,925,284		
		£5,358,209	

Less			
(i) Aggregate value of landlords' interests before enfranchisement			
(a) Freehold value	£3,554,084		
(b) head leasehold value	(£931)		
		£3,553,153	
Difference in aggregate values		£1,805,056	
Less leasehold values of participating flats 1 and 4 @ 38.5% relativity[1]		£1,321,676	
Increase in aggregate value of landlords' interests consequent upon acquisition by nominee purchaser (marriage value)		£483,380	
Landlords' share of marriage value @ 50%		0.5	
			£241,690
7. *Apportionment of marriage value between freeholder and head lessee*			
(i) Head lessee's share: The marriage value is increased by the amount of the negative value of the head lessee's interest and therefore the amount of the landlords' marriage value apportioned to the head lessee is £931 x 0.5			£465
(ii) Freeholder's share: The balance of the landlords' marriage value is apportioned to the freeholder			£241,225
8. *Price payable*			
(i) Head Lessee			
(a) Value of present interest	£(931)		
(b) Share of marriage value	£465		
		(£466)	
(ii) Freeholder			
(a) Value of present interest	£3,554,084		
(b) Share of marriage value	£241,225		
		£3,795,309	
Total price payable for Landlords' interest			**£3,794,843**

Notes to Appendices 4 and 5

1. Agreed by the parties.

2. Deferment rate as determined in *Cadogan Square Properties Limited and Others v The Earl Cadogan* [2010] UKUT 427 (LC).

3. Long-term (over 20 years) deferment rate as determined in *Sportelli.*

4. Not agreed by the parties. Mr Scott-Barrett adopts 5.5%. The parties agreed 5% as the freehold capitalisation rate for No.31. The Tribunal does not consider that there is any difference in risk between the term rents for the two properties and has therefore adopted 5% as the freehold capitalisation rate for No.37.

5. Not agreed by the parties. Both Mr Scott-Barrett and the LVT say that the rent payable to the freeholder under the head lease is £650 pa (fixed). In his revised valuation Mr Orr-Ewing takes the head rent as £635 pa. No explanation is given for this and we adopt £650 pa. Mr Scott-Barrett and the LVT apportion the head rent between the individual flats on (approximately) a pro rata area basis. They do not attribute anything to the caretaker's flat and the total head rent so apportioned only amounts to £615 pa. In his expert report Mr Scott-Barrett provides a breakdown of the rents payable to the head lessee by the under lessees. The total is £526 pa. The difference of £124 pa between this amount and the head rent of £650 pa is presumably in respect of flat 3, where the rent payable by the under lessee since the lease extension has been reduced to a peppercorn. (The rent payable by the under lessee of flat 2 is also £124 pa.) In our opinion the rents payable under the under leases should equal the head rent payable to the freeholder by the head lessee (the assumption made by Mr Orr-Ewing, although he uses £635 pa and not £650 pa). The exception is in respect of flat 3 as described above. Thus, following the lease extension, the head lessee has a negative profit rent of £124 pa in respect of flat 3 and we have valued the head leasehold interest accordingly.

6. Mr Scott-Barrett uses a sinking fund rate of 3%. This is not agreed by the parties, unlike the sinking fund rate for No.31 which was agreed at 2.5%. Mr Scott-Barrett does not explain why the rate should be higher for No.37 and in the absence of such explanation the Tribunal adopts the sinking fund rate at 2.5%.

7. In *Nailrile Limited v Earl Cadogan and Another* [2009] RVR 95 the Tribunal determined that intermediate leasehold interests with negative profit rents should be valued at a single rate years' purchase based upon the yield on 2.5 per cent Consolidated Stock. Neither party has adopted that approach in this appeal nor is there any evidence before the Tribunal about the level of such yields at the valuation date. In view of the very small amounts involved and the fact that the difference in the results of the valuation methods will be de minimis, we have adopted a dual rate, tax adjusted years' purchase, which is the method used by both parties. This is not, however, an endorsement of the approach.

8. Flat 3 is excluded because the unexpired term exceeds 80 years and any marriage value attributable to it is to be ignored under Schedule 6 paragraph 4(2A) of the 1993 Act.