UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – whether tenants who were not parties to initial notice subsequently became participating tenants – deed of adherence – relativity – benefit of the Act – whether a purchaser's margin to be deducted from aggregated leasehold values – appeal allowed in part

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

BETWEEN

82 PORTLAND PLACE (FREEHOLD) LIMITED **Appellant**

AND

HOWARD DE WALDEN ESTATES LIMITED **Respondent**

Re: 82 Portland Place
London W1

Before: Martin Rodger QC, Deputy President and A J Trott FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
17-20 March 2014

Stephen Jourdan QC, instructed by TLT LLP Solicitors for the Appellant
Michael Pryor, instructed by Speechly Bircham LLP, Solicitors for the Respondent

The following cases are referred to in this decision:

McHale v Cadogan [2011] L & TR 18
Cadogan Square Properties Ltd v Earl Cadogan [2010] UKUT 427 (LC)
Arbib v Earl Cadogan [2005] 3 EGLR 139
Nailrile Limited v Earl Cadogan [2009] 2 E.G.L.R. 151
Arrowdell Limited v Coniston Court (North) Hove Limited [2007] RVR 39 (LT)
Hauser v Howard de Walden Estates Ltd [2013] UKUT 0579 (LC)
Earl Cadogan v *Cadogan Square Ltd* [2011] UKUT 154 (LC)
Cadogan v Sportelli [2007] 1 EGLR 153
Earl Cadogan v Cecil [2001] LRA/10/2000 (LT)
Ryde International Plc v London Regional Transport [2003] ACQ/147/2000 (LT); [2004] 2 EGLR 1 (CA)
Daejan Investments Ltd v The Holt (Freehold) Ltd (2008) LRA/133/2006
Hildron Finance Ltd v Greenhill Hampstead Ltd (2007) LRA/120/2006
Church Commissioners for England v Chelwood House Freehold Ltd [2007] LON/ENF/1866/06
Zuckerman v Trustees of the Calthorpe Estate [2009] EKUT 235 (LC)
Sinclair Gardens Investment (Kensington) Ltd v Ray [2014] UKUT 079 (LC)
Polydorou v Management Nominees (Reversions) Ltd [2010] UKUT 236 (LC)
Clarise Properties Ltd [2012] UKUT 4 (LC)
Midland Freeholds Ltd [2014] UKUT 0304 (LC)
Westbrook Dolphin Square Ltd v Friends Life Ltd [2014] EWHC 2433 (Ch)

The following cases were referred to in argument:

31 Cadogan Square Freehold Ltd v Cadogan [2010] UKUT 321 (LC)
Cadogan Holdings Ltd v Pockney (2004) LRA/27/2003
Carey-Morgan v Trustees of the Sloane Stanley Estate [2012] HLR 47
Chelsea Properties Ltd v Cadogan (2007) LRA/69/2006
Langinger v Cadogan (2001) LRA/46/2000
Northway Management Ltd v John Lyons Charity (2008) LON/00BK/OCE/2007/0375
Pledream Properties Ltd v 5 Felix Avenue London Ltd [2011] L & TR 20
Vignaud v Keepers and Governors of John Lyon's Free Grammar School (1995) 71 P & CR 456

DECISION

Introduction

1. This appeal is against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") given on 24 November 2010 and concerns the price payable on the acquisition by the appellant nominee purchaser of the freehold interest in 82 Portland Place, London W1 under Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). The LVT's decision of 24 November 2010 was the first of three decisions by which it determined that the price payable on the acquisition was £21,340,923.

2. Both parties sought permission to appeal from the LVT, which granted it to the appellant nominee purchaser on a single issue. The Tribunal (George Bartlett QC, President) subsequently granted permission to appeal on a further three issues but refused the respondent's application for permission to cross-appeal and directed that the appeal be dealt with by way of rehearing. A stay of the appeal was agreed pending an anticipated decision of the Supreme Court on an appeal from the decision of the Court of Appeal in *McHale v Cadogan* [2011] L & TR 18. That appeal was eventually compromised causing the stay to lapse.

3. At the hearing before us Stephen Jourdan QC, representing the appellant, called Mr Peter Beckett FRICS to give expert evidence on valuation matters. Michael Pryor of counsel, appearing for the respondent, called Kevin Ryan FRICS and Julian Clark MRICS to give expert evidence.

The building

4. 82 Portland Place is a purpose-built 1920's mansion block comprising 25 units of accommodation on basement, ground and eight upper floors. It stands on the south east corner of the junction of Portland Place and Devonshire Place, a short distance south of Regents Park in the Harley Street conservation area. It is served by two passenger lifts, a resident porter and a communal central heating and hot water system.

5. A headlease of the whole building granted on 28 November 1924 is now vested in 82 Portland Place Ltd, and will expire on 6 July 2021.

6. The flats in the building include one used to accommodate the resident porter. 12 of the remaining flats are held on leases which will come to an end immediately before the expiry of the headlease in July 2021. It is agreed that, at the valuation date, these leases had unexpired terms of 11.82 years.

7. A further 11 flats are held on long leases expiring in July 2111, granted following individual lease extension claims under Chapter 2 of Part 1 of the 1993 Act. Two additional units are also held on leases expiring in 2021 and are in mixed use: Unit I, which is occupied by medical practitioners, and Unit Z which comprises office accommodation on the ground floor and a residential flat in the basement.

8. The building also includes a number of storerooms at eighth floor level, four of which have been combined to create one of the residential flats, referred to as Flat 40.

9. The tenants of 13 of the flats in the building were named in the initial notice given under section 13 of the 1993 Act as participating tenants. Subsequently the tenant of Unit I became a participating tenant, and it is agreed that there are therefore 14 flats whose tenants are participating. The tenants of 10 flats, including the porter's flat and Unit Z, are agreed not to be participating tenants. There is however an issue as to whether the tenants of Flats E and Q, who were not amongst the 13 named in the initial notice, have subsequently become participating tenants.

10. Flats E and Q adjoin each other on the fourth floor of 82 Portland Place. Although held on separate leases, alterations have been carried out to combine the two flats into a single unit with a gross internal area in excess of 5,500 sq ft. Each of the flats is held on a short lease with only 11.81 years unexpired at the valuation date. The flats are owned by associated companies, Apeejay London Limited in the case of Flat Q and Surrendra Holdings Limited in the case of Flat E. Neither company was amongst the tenants who gave the initial notice.

The statutory valuation criteria in outline

11. Section 32(1) of the 1993 Act provides that the price payable by the nominee purchaser for the freehold (and also in respect of any other interests to be acquired) is to be calculated in accordance with Schedule 6.

12. Paragraph 2(1) of Schedule 6 stipulates that there are three components to the purchase price. The first is the value of the freeholder's interest in the premises (determined in accordance with paragraph 3). The second is the freeholder's share of the marriage value (determined in accordance with paragraph 4). The third component, which is not contentious in this appeal, is any amount of additional compensation (determined in accordance with paragraph 5).

13. A number of important valuation assumptions are specified in paragraph 3. In particular, paragraph 3(1)(b) require that it be assumed 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)". This is often referred to as a "no-Act world" assumption, although as the Tribunal (Morgan J and A J Trott FRICS) pointed out in *Cadogan Square Properties Ltd v Earl Cadogan* [2010] UKUT 427 (LC) it can also be described as a "no-Act building" assumption – an assumption that, for some unspecified reason, the rights conferred by Chapters I and II of Part I of the 1993 Act do not apply to the tenants in the building which is the subject of the collective enfranchisement claim.

14. The value of the freeholder's interest is the first of the three components of the price payable and is defined in paragraph 3(1) as: "the amount which at the valuation date that interest might be expected to realise if sold on the open market by a willing seller …"

15. As the Tribunal described in *Cadogan Square Properties* at paragraphs 48 to 53, in valuation terms, there are three aspects of the freeholder's interest which contribute to the price it would fetch in the open market:

(a) There is the right to receive the rent under the lease(s) to which the freehold is subject, during the term of the lease(s). This is referred to as "the term".

(b) There is the right to possession of the property when the terms of the lease(s) expire. This is referred to as "the reversion".

(c) There is the hope that, in the period before the terms of the lease(s) expire, it may be possible to sell the freehold or an extended lease to the tenant(s), or to buy in the lease(s), so unlocking the marriage value, with a share of the marriage value being payable to the freeholder. This is referred to as "hope value".

16. The traditional term and reversion method of valuation is intended to replicate in a logical way the thinking of a hypothetical purchaser of a freehold reversion.

17. The value of the term – the right to receive the rent – is calculated by capitalising the rent. This aspect of the valuation has been agreed in this appeal.

18. The value of the reversion is normally calculated by taking the estimated vacant possession value of the building and then discounting it at an appropriate rate of interest to arrive at the value today of the freeholder's right to possession at some point in the future. This rate of interest is the deferment rate and it is agreed in this case that a deferment rate of 5% should be adopted.

19. The second component of the price payable is the freeholder's share of the marriage value determined in accordance with paragraph 4 of Schedule 6. Conventionally, in determining marriage value the tenants' existing leases are valued on the assumption that the tenants do not have rights under the 1993 Act. In *McHale* it was argued on behalf of a nominee purchaser that, as a matter of statutory construction, the tenants' leases should be valued as if they attracted rights under the 1993 Act, but that argument was not accepted by the Tribunal or by the Court of Appeal.

Agreed facts and valuations

20. The expert witnesses prepared a statement of agreed facts and agreed matters of valuation from which we take the following.

21. The initial notice, served by the tenants of Flats A, B, C, D, F, G, M, O, R, S, T, U and W, was given on 11 September 2009. It claimed the freehold of 82 Portland Place together with the leasehold interest vested in 82 Portland Place Ltd by the headlease of 28 November 1924. A

combined purchase price for the freehold interest and the intermediate leasehold interest of £12.16m was proposed and the appellant was identified as the participating tenants' nominee purchaser.

22. A counter notice under section 21 of the 1993 Act served by the respondent on 16 November 2009 admitted the right of the participating tenants to acquire the freehold but disputed the price they proposed to pay.

23. The valuation date at which the relevant interests are to be valued is agreed to be 11 September 2009.

24. By its final decision of 12 August 2011 the LVT determined that the price payable was £21,340,923, apportioned as to £21,170,501 to the freehold and £170,422 to the headlease.

25. The headlease held by the intermediate landlord was granted on 28 June 1924 for a term expiring on 6 July 2021. The rent currently payable is £500 per annum plus the "reside and practice" fee payable by the medical practitioner who uses Unit I for consulting and minor surgical procedures and 22.5% of the rent from an underlease of Unit Z.

26. The lease of Suite I was granted on 3 May 1977 for a term expiring on 3 July 2021 at a rent of £125 per year for use as private residential accommodation and is subject to a personal right for the tenant to use the premises for consulting purposes and minor surgical procedures.

27. The underlease of Unit Z was granted on 17 October 1985 also to expire on 3 July 2021. At the valuation date an annual rent of £22,500 was payable. Once again the permitted use of the premises is as residential accommodation and their current use for medical purposes is the subject of a personal licence to the tenant.

28. The freehold vacant possession value ("FHVP") of the flats in the building was in dispute before the LVT. It accepted the evidence of Mr Ryan that a flat at third floor level in the south or north rear stacks of the building had an FHVP of £1,139 per sq ft. That benchmark rate was adjusted by 2.5% to reflect the benefit of certain flats with a dual aspect and further adjusted upwards by 2% per floor for floors above the third floor and reduced by 2% per floor for the first and second floors. The valuers reached agreement on the value of these flats on the ground and lower ground floors on an individual basis and agreed that the porter's flat and a basement staff restroom ought not to attract a separate value of their own as this was reflected in the underlying values of the remaining flats in the building.

29. The FHVP of Unit I and Unit Z was agreed at £1,370,382 and £945,251 respectively, while Flat 40 was agreed to have an FHVP of £282,682. The storerooms and other accommodation on the eighth floor was agreed to have a value of £340,000.

30. The experts agreed that the present value of the freeholder's head rent was £4,147.

31. In order to assess the present value of the freehold reversions in the flats a deferment rate of 5% was adopted which, for reversions due in 11.82 years produced a present value ("PV") multiplier of 0.5617, while for reversions due in 101.80 years, a PV multiplier of 0.0070 was applied.

32. The present value of the intermediate leasehold interest in the participating and non-participating tenants' flats was agreed at £159,000, excluding marriage value, with no entitlement to any share of hope value in respect of the non-participating tenants' flats.

33. It was agreed that for the purpose of ascertaining marriage value the 999 year leases of the participating tenants' flats were to be valued at 99% of the corresponding FHVP. The value of the intermediate landlord's existing interest in the participating tenants' flats with 11.82 years unexpired was agreed to be £2,750.

34. Although it was not agreed when the experts prepared their joint statement we were informed at the commencement of the appeal that agreement had been reached on one aspect of the relativity issue, namely the relationship between the FHVP of a flat in the building and the value of a lease with 11.82 years of the term unexpired on the assumption that the provisions of Chapters 1 and 2 of Part 1 of the 1993 Act applied to the leases (a relationship which was referred to before us as "real world relativity").

35. Real world relativity is relevant in this case for two reasons. First, because one of the methods of arriving at a view of the value of a lease with only a short unexpired term in the "no Act world" is to make an adjustment to a real world relativity established by evidence of market sales of short leases. In order to undertake that exercise it is necessary first to establish the real world relativity at the relevant lease length. The second reason for our interest in real world relativity is that, if the appellants are right in their contention that the decision of the Court of Appeal in *McHale* was wrong, so that, contrary to that decision, marriage value should be ascertained by reference to the value of the existing leases in the real world without disregarding any effect on that value of rights under the Act, the ascertainment of real world relativity will be a necessary step in determining one element of the price payable for the freehold of the building.

36. The LVT accepted the contention of Mr Ryan and Mr Clark on behalf of the respondent that, in the real world, a lease of 11.82 years with rights under the 1993 Act is worth 38% of the FHVP of the same flat. Notwithstanding that acceptance of the respondent's evidence, the parties agreed for the purposes of the appeal that the real world relativity at 11.82 years was 41.25% (a figure rather closer to that for which Mr Beckett had contended on behalf of the appellant).

The issues

37. Permission to appeal was given in relation to the following four issues:

(a) Whether, for the purpose of ascertaining marriage value under paragraph 4 of Schedule 6 to the 1993 Act, the leases of the participating tenants should be valued without the benefit of rights under the 1993 Act ("the *McHale* issue)".

(b) Whether the tenants of Flats E and Q, who did not join in the initial notice, are nonetheless to be treated as participating tenants for the purpose of ascertaining marriage value ("the participation issue").

(c) The appropriate method of valuing the leases which will expire in 2021 ("the relativity issue").

(d) Whether, in determining the value of the freeholder's interest in the building, a "purchaser's margin" should be deducted from the aggregated FHVP values of the constituents parts of the building ("the purchaser's margin issue").

The *McHale* issue

38. The appellant's case on this issue is that for the purpose of ascertaining marriage value in accordance with paragraph 4(2) of Schedule 6 of the 1993 Act it is wrong, as a matter of law, to apply to the tenants' leases the artificial assumption provided for by paragraph 3(1)(b) and (c) that the Act confers no right to acquire any interest in the specified premises or to acquire any new lease. As the LVT pointed out in paragraph 46 of its decision, conventionally the tenants' existing leases are valued on the assumption that the tenants do not have rights under the Act.

39. At the date of the LVT decision in this case the Court of Appeal was about to hear the appeal in the *McHale* case, which concerned the enfranchisement of a building in Sloane Gardens, and in which it was argued on behalf of the nominee purchaser that the tenants' leases should be valued as if they attracted rights under the 1993 Act. The Court of Appeal dismissed the nominee purchaser's appeal but on 5 July 2011 the Supreme Court granted permission to appeal. As Mr Jourdan points out in his skeleton argument, the Supreme Court must have been satisfied that the challenge to the decision in *McHale* raised an arguable point of law of general public importance. It was for that reason that the LVT granted permission to appeal on the *McHale* issue and that the Tribunal decided to stay the appeal to await the decision of the Supreme Court. In the event, however, although the appeal was initially pursued, it was eventually withdrawn by consent following the settlement of the dispute between the parties to those proceedings.

40. The parties agreed that the Tribunal is bound by the decision of the Court of Appeal in *McHale* and that we must therefore dismiss the appeal on this issue. Nonetheless, the issue may not be resolved for all purposes, in light of the willingness of the Supreme Court to entertain an appeal raising it, and the parties have presented their evidence to us on alternative bases to enable us to make alternative determinations in case the dispute goes further. We will consider whether we ought ourselves to give permission to appeal the *McHale* issue to the Court of Appeal at the conclusion of these proceedings.

The participation issue

41. The facts relevant to the participation issue were not agreed between the parties and, with the exception of three documents, no relevant evidence was adduced either before us or before the LVT. The primary facts are not in dispute but it is very much in dispute whether it is appropriate for the Tribunal to draw inferences from those primary facts.

42. On the first day of the appeal hearing an application was made by the appellant to admit a witness statement which sought to establish further facts said to be relevant, but we declined to admit it into evidence because it had been served only on the previous working day.

43. The valuation consequences of this issue are agreed in principle. If the tenants of Flats E and Q are to be treated as participating the price payable by the appellant for the freehold interest in 82 Portland Place will include 50% of the marriage value for those two flats. If Flats E and Q are held by non-participating tenants no marriage value will be payable but instead the price for the freehold will include hope value which it is agreed in this case is equal to 15% of the latent marriage value of Flats E and Q.

44. The real financial value of the issue depends on other valuation outcomes. By way of example, if it is assumed that the value of short leases is to be determined on the hypothesis that they do not enjoy rights under the Act, the difference between the two outcomes on this issue is said by Mr Clark on behalf of the respondent to be worth £331,000 (the price being £21,354,000 if Flats E and Q are taken as participating and £21,023,000 if non-participating).

Participation: the statutory provisions

45. Although the right to collective enfranchisement is conferred by Chapter I of Part I of the 1993 Act on qualifying tenants generally, there is no requirement that the right be exercised by all qualifying tenants. Those who choose to join in the exercise of the right are referred to in the 1993 Act as "participating tenants" and, as directed by section 38(1), that expression is to be construed in accordance with section 14. The status of participating tenant confers rights, including the right to appoint the nominee purchaser (section 15(2)). The nominee purchaser conducts all proceedings arising out of the initial notice with a view to the acquisition, on behalf of the participating tenants, of the freehold and leasehold interests in the relevant premises (section 15(1)). The participating tenants also have the right to withdraw the initial notice (section 28(1)), and are exposed to liabilities, including a joint and several liability for the costs of the reversioner and any other relevant landlord in the event that the initial notice is withdrawn or deemed to be withdrawn (sections 28(4) and 29(4)). It is therefore obviously important that the identity of the participating tenants should be capable of being clearly established.

46. The identity of the participating tenants is first established on the relevant date, i.e., as defined by section 1(8), the date on which notice of the claim to exercise the right to collective enfranchisement is given under section 13. At that date the participating tenants are "the qualifying tenants by whom the initial notice is given" (section 14((1)(a)).

47. A participating tenant who assigns the lease after the initial notice has been given, ceases to be a qualifying tenant and can no longer be a participating tenant. That outcome is achieved by section 14(1)(b) which provides that, in relation to any time after the relevant date, the participating tenants are such of the qualifying tenants by whom the initial notice was given "as for the time being remain qualifying tenants of flats contained in the specified premises".

48. Where a participating tenant assigns the lease by virtue of which he is a qualifying tenant of his flat, the status of participating tenant does not pass automatically to the assignee. Instead the assignee is given a right of election, and is required by section 14(2) to notify the nominee purchaser both of the assignment and "as to whether or not the assignee is electing to participate in the proposed acquisition." The right of the assignee to elect to participate is not dependent on the approval of any other person.

49. A second category of qualifying tenants is given a more qualified opportunity to participate in the proposed acquisition. That category comprises qualifying tenants who did not join in giving the initial notice and who did not acquire their interest by assignment from one who did. Their position is dealt with by section 14(3) which provides as follows:

> "(3) Where a qualifying tenant of a flat contained in the specified premises—
>
> (a) is not one of the persons by whom the initial notice was given, and
>
> (b) is not such an assignee of the lease of a participating tenant as is mentioned in subsection (2),
>
> then (subject to paragraph 8 of Schedule 3) he may elect to participate in the proposed acquisition, but only with the agreement of all the persons who are for the time being participating tenants; and, if he does so elect, he shall notify the nominee purchaser forthwith of his election."

50. It will be seen that that the election to participate conferred by section 14(3) is contingent, in that it may only be exercised "with the agreement of all the persons who are for the time being participating tenants."

51. Section 14(4) describes the effect of an election to become a participating tenant, as follows:

> "(4) Where a person notifies the nominee purchaser under subsection (2) or (3) of his election to participate in the proposed acquisition, he shall be regarded as a participating tenant for the purposes of this Chapter—
>
> (a) as from the date of the assignment or agreement referred to in that subsection; and
>
> (b) so long as he remains a qualifying tenant of a flat contained in the specified premises."

52. Section 14 also makes provision for the death of a participating tenant and for circumstances where a lease may become vested in a personal representative, a trustee in bankruptcy or a mortgagee, but it is not necessary to consider those provisions in this appeal.

53. It is finally necessary to refer to section 18 of the 1993 Act, which imposes a duty on the nominee purchaser to disclose the existence of agreements affecting any interest in the specified premises or other property specified in the initial notice. It provides as follows:

> "18 (1) If at any time during the period beginning with the relevant date and ending with the valuation date for the purposes of Schedule 6—
>
> (a) there subsists between the nominee purchaser and a person other than a participating tenant any agreement (of whatever nature) providing for the disposal of a relevant interest, or
>
> (b) if the nominee purchaser is a company, any person other than a participating tenant holds any share in that company by virtue of which a relevant interest may be acquired,
>
> the existence of that agreement or shareholding shall be notified to the reversioner by the nominee purchaser as soon as possible after the agreement or shareholding is made or established or, if in existence on the relevant date, as soon as possible after that date.
>
> (2) If—
>
> (a) the nominee purchaser is required to give any notification under subsection (1) but fails to do so before the price payable to the reversioner or any other relevant landlord in respect of the acquisition of any interest of his by the nominee purchaser is determined for the purposes of Schedule 6, and
>
> (b) it may reasonably be assumed that, had the nominee purchaser given the notification, it would have resulted in the price so determined being increased by an amount referable to the existence of any agreement or shareholding falling within subsection (1)(a) or (b),
>
> the nominee purchaser and the participating tenants shall be jointly and severally liable to pay the amount to the reversioner or (as the case may be) the other relevant landlord.
>
> (3) In subsection (1) "relevant interest" means any interest in, or in any part of, the specified premises or any property specified in the initial notice under section 13(3)(a)(ii).
>
> (4) Paragraph (a) of subsection (1) does not, however, apply to an agreement if the only disposal of such an interest for which it provides is one consisting in the creation of an interest by way of security for a loan."

54. Section 18 is clearly an anti-avoidance provision. Its rationale is explained by the authors of *Hague: Leasehold Enfranchisement* (5th ed.)(2009) at paragraph 26-04 (citing Hansard). On a collective enfranchisement, marriage value is payable only in respect of the flats of participating

tenants. If all the tenants in a block of flats wished to enfranchise, they might arrange that only the minimum number participate in the claim, and then share the benefit of a lower price between them. Section 18 requires them to disclose such an arrangement, or pay the true price once it is discovered. This explanation seems sound. It indicates, as one would expect, that an agreement for the purpose of section 14(3), between the participating tenants and a qualifying tenant who elects to become a participating tenant, would be within the scope of section 18(1) and would require to be notified by the nominee purchaser to the reversioner, so that its impact on the determination of the price payable could be taken into account.

The Participation Agreement

55. The initial notice given by the participating tenants on 11 September 2009 was given pursuant to a Participation Agreement entered into on 28 August 2009. The parties to the Participation Agreement were the appellant, as nominee purchaser (referred to in the agreement as "the Company"), the tenants of the 13 flats who had joined in giving the initial notice (referred to collectively as "the Participants") and the intermediate landlord.

56. The Participation Agreement recited that the appellant had been created by the Participants in order to exercise the right to enfranchise "on behalf of its members for the time being participating in the claim in respect of the Property". It also recited that each member of the Company was a Participant. The expression "Participant(s)" was defined in clause 1.1.14 as the lessee(s) who executed the Participation Agreement "together with (a) any assignee of a Participant who has complied with clause 4.11 hereof and (b) any other lessee at the Property who has with the agreement of all the Participants subsequently executed in this Agreement." The "Property" was defined in clause 1.1.20 as the freehold interest in 82 Portland Place together with any other leasehold interest in the premises capable of acquisition pursuant to the 1993 Act.

57. By clause 2.1 of the Participation Agreement the Participants appointed the Company as their nominee purchaser of the Property under section 15 of the 1993 Act. The Participants irrevocably authorised the Company to do certain things on their behalf including completing the purchase of the Property pursuant to the 1993 Act and granting new leases for a term of 999 years at a peppercorn rent in accordance with the provisions of the Participation Agreement. By clause 2.2 the following additional authority was given:

> "The Participants irrevocably authorise the Company to enter into such agreements as may be necessary or appropriate to ensure that there is funding available to cover the proportion of the Price attributable to any non-participating flat or other area not being a reversion on a participating flat or a common part, and to grant New Leases in respect of each non-participating flat or other such area."

58. Clause 4 comprised a series of covenants by each Participant with every other party to the Participation Agreement. These included a covenant at clause 4.2 that the Participant would become a member of the Company and further covenants to pay all sums required to be paid pursuant to the Participation Agreement. Each Participant agreed not to withdraw from participation while the initial

notice remained in force, nor to do anything which might result in his being prohibited from participating in the claim to collective enfranchisement of the Property.

59. By clause 4.12 each Participant covenanted as follows:

> "Upon enfranchisement the Participant will surrender the lease or leases held by him (and obtain the consent of any mortgagee in respect of the same to such surrender), details of which are set out in the Fourth Schedule hereto, and he will accept and execute the grant of a New Lease."

This obligation was matched by clause 6.11 in which the Company covenanted that after completion of the purchase it would accept the surrender of the existing lease of each participating flat and grant a new lease for nil consideration.

60. Detailed provisions were made in the second schedule to the Participation Agreement concerning contributions towards the purchase price of the Property. The net effect of these was that each of the Participants who held a short lease was required to contribute towards that part of the total price which was attributable to the reversions of all of the participating flats in the Property; additionally, all of the Participants (including those who had previously extended their leases) were entitled (but not obliged) to contribute towards that part of the purchase price attributable to the reversion on the leases of non-participating flats and any other area having some separate identifiable value.

61. By clause 6.1 the Company covenanted with the Participants that it would act at all times as their nominee, would give the initial notice and would thereafter pursue the claim. By clause 6.7 the Company covenanted:

> "To ensure that each Participant is kept reasonably informed of matters relevant to the Claim including, but without prejudice to the generality of the foregoing, any proposals for settlement in relation to the Claim made by the reversioner."

62. Finally, by clause 9.2 the following was agreed:

> "For the avoidance of doubt, decisions as to the conduct of the claim shall be taken by the Company acting by its directors or in a general meeting as provided for by the Memorandum and Articles of Association of the Company and nothing in this Agreement is to be construed as providing for any other decision-making forum among the Participants nor as providing for any right to challenge decisions of the Company duly taken in accordance with its Memorandum and Articles of Association."

The Deed of Adherence

63. Neither Apeejay London Ltd nor Surrendra Holdings Ltd, the tenants respectively of Flats E and Q, was amongst the participating tenants who executed the Participation Agreement and gave the initial notice.

64. On 8 December 2009, less than three months after the service of the initial notice, the appellant entered into agreements with each of the companies in the same form. The agreement was described as a "Deed of Adherence". Once again the appellant was referred to as "the Company" and the two tenants were referred to in their respective deeds as the "New Party".

65. The Deed of Adherence was first stated to be supplemental to the Participation Agreement and continued with the following recital, at (C):

> "The New Party wishes to adhere to the Participation Agreement as if it were an Original Participant bearing the obligations and paying its contribution to the expenses and outgoings as if it were an Original Participant and benefiting from the agreements between the Original Participants and the Company in the event that the freehold of 82 Portland Place is acquired."

66. The substance of the Deed of Adherence is to be found in clause 2, which provides as follows:

> "The New Party confirms that it has been supplied with a copy of the Participation Agreement and undertakes with the Company that, from the Effective Date the New Party shall observe and perform and be bound by the provisions of the Participation Agreement as though the New Party was an original party to the Participation Agreement."

The letter of 21 July 2010

67. The final document said to be relevant to this issue is a letter dated 21 July 2010, eight months after the Deed of Adherence. It was written by the appellant's solicitors to the respondent's solicitors and dealt with procedural matters in anticipation of the hearing before the LVT. The letter concluded with this sentence:

> "Please note that flats E and Q have also joined in the collective enfranchisement claim and will also be participating."

The dispute and the LVT's conclusion

68. No statements of case had been filed by the parties before the LVT hearing and the significance of the Participation Agreement, the Deeds of Adherence and the letter of 21 July 2010 did not emerge until after the exchange of their valuation evidence. The appellant's evidence proceeded on the assumption that Flats E and Q were not participating in the collective enfranchisement, whereas the evidence on behalf of the respondent assumed, in the light of the letter of 21 July 2010, that Flats E and Q were participants.

69. Mr Pryor submitted on behalf of the respondent that the Deeds of Adherence were an election by the tenants who had executed them to participate in the proposed acquisition for the purpose of section 14(3) of the 1993 Act. Mr Jourdan, for the appellant, contended that they were no such thing but, rather, were agreements within the scope of section 18(1). He submitted that there was nothing

in the Deeds of Adherence providing evidence of any agreement between the original participating tenants and the tenants of Flats E and Q as required by section 14(3) for there to be an effective election.

70. In paragraph 25 of its decision the LVT found in favour of the respondent, saying this:

> "We are quite satisfied that the only reasonable inference to be drawn from the Deeds of Adherence is that the nominee purchaser entered into them on behalf of all the original participating tenants, that the tenants of flats E and Q should be taken to have elected to participate with the agreement of the original participating tenants, and that their participation clearly falls within section 14(3) of the Act."

Submissions

71. Mr Jourdan submitted that the resolution of the participation issue is entirely a matter of law turning on the proper construction of the Participation Agreement and the Deeds of Adherence. Those documents should be taken at face value and, as Mr Pryor confirmed, no suggestion was made that they were a sham or in any way sinister. They had clearly been drafted, Mr Jourdan submitted, without regard to the issue which now arises. Had the draftsman wished to make it clear that the Deeds of Adherence were intended to record an election by the New Parties to participate in the proposed acquisition with the consent of all the participating tenants, that could easily have been spelled out so that there would be no doubt that the agreement was within section 14(3). Equally, it would have been possible to put it beyond doubt that the agreement was intended to fall within section 18(1).

72. Mr Jourdan submitted that neither of the requirements of section 14(3) was satisfied in this case. There was, he suggested, a material difference between electing to participate in an acquisition on the one hand, and entering into an agreement conferring the same rights as if one had previously elected to participate on the other. The Deeds of Adherence were made between the nominee purchaser and the individual tenants alone, none of the other participating tenants joined in the deeds and the New Parties therefore had a distinct and different status from that enjoyed by the original participants. The effect of the Deeds was to place the lessees of Flats E and Q under a contractual obligation (which was owed only to the nominee purchaser) to perform the same obligations as the participants in the Participation Agreement, but nothing in the Deeds constituted or evidenced any agreement with any other person. There was therefore no basis on which it could be said that all of the participating tenants for the time being had agreed to the New Parties electing to participate in the proposed acquisition, as required by section 14(3).

73. In Mr Jourdan's submission the inference drawn by the LVT in paragraph 25 of its decision was contrary to the clear and express terms of the Deeds of Adherence (in particular clause 9.2) and was unsupported by any evidence. The nominee purchaser was not the agent of the participating tenants, except for the purposes expressly identified in the Participation Agreement, and these did not include agreeing on behalf of the participating tenants to the election by a further party to participate in the acquisition. The nominee purchaser was, in effect, in a trustee relationship with the participating

tenants and things done by the nominee purchaser were therefore not done on behalf of the participating tenants as their agent. Section 18 expressly contemplates agreements between the nominee purchaser and third parties but there is no restriction on the form which such agreements may take. Clause 6.7 of the Participation Agreements required the Company to keep the Participants "reasonably informed of matters relevant to the Claim". For that reason Mr Jourdan accepted that it was legitimate to assume that the appellant had informed the participating tenants of the Deeds of Adherence once they had been executed, but there was no requirement in clause 6.7 to obtain the prior consent of the participating tenants to entry into an arrangement such as that provided for by the Deeds of Adherence.

74. In his submissions Mr Pryor emphasised that the obligations imposed on the New Parties by the Deeds of Adherence included an obligation to participate in the claim and to become members of the Company. No formalities were required for an election by a third party under section 14(3) and the only question was whether the New Parties had chosen to participate in the acquisition. Clearly, he submitted, they had because the effect of the Deeds of Adherence was to make the New Parties subject to all of the provisions of the Participation Agreement as though they had been original parties to it.

75. As for the agreement of the participating tenants, Mr Pryor submitted that despite the fact that the respondent's case had been pleaded clearly in its statement of case for the appeal (which proceeds as a re-hearing) no evidence had been adduced from any of the participating tenants that they had not agreed to the election by the New Parties to participate. In the face of the inference drawn by the LVT (correctly, Mr Pryor submitted) the failure of any of the participating tenants to assert that the inference was false and that the contrary was true in their case lent strong support to the inference. The letter of 21 July 2010 from the appellant's solicitors, while it could not influence the proper construction of the two relevant documents, clearly suggested that the effect of the documents was understood by the appellant's legal advisers to be that the tenants of Flats E and Q were now participants.

Discussion and conclusion

76. We agree with Mr Pryor's observation that section 14(3) requires no particular formalities to be observed for a third party to become a participating tenant. Only two matters must be established: first, an election by a qualifying tenant of a flat contained in the specified premises "to participate in the proposed acquisition"; and, secondly, agreement on the part of all of the persons who are for the time being participating tenants. Where a qualifying tenant notifies the nominee purchaser of his election to participate, the effect of section 14(4) is that the tenant "shall be regarded as a participating tenant for the purposes of this Chapter" from the date of the agreement of all of the participating tenants for the time being.

77. There seems to us to be no significant difference, even in form, between Section 14(4), which confers the status of participating tenant on someone who does not satisfy the requirements of

section 14(1) but only those of section 14(3), and the effect of clause 2 of the Deeds of Adherence. It was common ground that, although clause 2 refers only to the New Parties being bound by the provisions of the Participation Agreement, it was necessarily implicit that the New Parties were also entitled to the benefit of the Participation Agreement and could insist on surrendering their existing leases of the relevant flats and on being granted new leases. The New Parties chose to take on all of the obligations and to receive all of the benefits of participation; that choice seems to us to fall clearly within the concept of the election to participate required by section 14(3).

78. We next consider whether the need for agreement to the election by all of the participating tenants for the time being is met in this case.

79. It would be surprising indeed if the appellant had felt entitled to give away part of the benefit of enfranchisement (the opportunity to sell new long leases of Flats E and Q) without either sufficient prior authorisation of the participating tenants or their individual approval.

80. There is no evidence of individual approval and we are satisfied that nothing in the Participation Agreement or the Deeds of Adherence permits an inference that the participating tenants must, individually, have agreed to an election to participate by the New Parties. Nonetheless, the participating tenants conferred substantial powers on the appellant to act on their behalf. Those powers included the irrevocable authorisation conferred by clause 2.2 allowing the appellant to enter into "such agreement as may be necessary or appropriate to ensure that there is funding available to cover the proportion of the Price attributable to any non-participating flat" and "to grant new leases in respect of each non-participating flat."

81. When the Participation Agreement was entered into Flats E and Q were non-participating flats within the meaning of clause 2.2. One effect of the Deeds of Adherence (and no doubt one of their purposes) was to ensure that an additional source of funding was available which would cover the proportion of the price attributable to Flats E and Q. A second effect of the Deeds was to oblige the appellant to grant new leases of Flats E and Q to the New Parties. The Deeds of Adherence were therefore agreements of a type already contemplated by clause 2.2 of the Participation Agreement. As a result we are satisfied that there was no need for the appellant to seek the individual approval of each of the participating tenants before entering into the Deeds of Adherence. Clause 2.2 conferred all the authority which the appellant required and, by reason of that authority, the appellant's agreement to the Deeds of Adherence satisfied the requirement of clause 14(3) that the election should be with the agreement of all of the participating tenants.

82. We are therefore satisfied that the conclusion of the LVT that Flats E and Q were participants was correct, although our reasons differ slightly from theirs.

The relativity issue

83. In the jargon of leasehold enfranchisement "relativity" is used to denote the relationship, expressed as a percentage, between the value of the unexpired term of a lease of property and the

FHVP of the same property. In the case of flats it is generally acknowledged that, even at very long terms, the value of a leasehold interest is less than that of a notional freehold and it is often conventionally assumed that a lengthy term is worth 99% of the equivalent FHVP.

84. One component of the price payable for the freehold of premises is the freeholder's share of any marriage value determined in accordance with paragraph 4 of Schedule 6 to the 1993 Act. In order to ascertain that marriage value it is necessary first to establish the value of the current leases of the participating tenants. Where those leases are of relatively short duration it is obvious that their value will be influenced by the length of the unexpired term: a buyer is likely to pay more for a new lease of 999 years than for a lease with only 25 years left to run. One difficulty often encountered in establishing the value of leases of shorter durations is a paucity of transaction evidence of sales of comparable flats with unexpired terms of equivalent length. Evidence sufficient to establish the FHVP value of the subject flat is more readily available, and as a result, it has become a standard valuation technique to apply an appropriate relativity percentage to that FHVP value in order to arrive at a value for the lease of the same flat for the unexpired term required.

85. Although the use of relativity percentages is a standard valuation technique, there is little, if any, agreement over the adjustment appropriate for leases of different lengths or the most appropriate method of determining it. The assessment of relativity is not straightforward and, even for those who eschew complex theoretical models, involves difficult valuation judgments.

86. As the Court of Appeal confirmed in *McHale*, paragraph 4 of Schedule 6 requires that marriage value be determined on the assumption that the tenants enjoy no rights to enfranchise (individually or collectively) under the 1993 Act. The ascertainment of relativity in this notional no-Act environment is complicated by the passage of time since such conditions existed, by the very limited availability of reliable valuation data, and by the consequent difficulty of testing the subjective analyses of those whose relevant market experience pre-dates the 1993 Act. Evidence is available to establish the relativity of short leases to FHVP value in current conditions, but that evidence requires to be adjusted to reflect the no-Act hypothesis. As the Lands Tribunal observed in *Arbib v Earl Cadogan* [2005] 3 EGLR 139 (at paragraph 46): "To decide the effect of the Act is a theoretical exercise."

87. Serious attempts have been made in the recent past to achieve either a satisfactory theoretical model for relativity or a consensus based on pooled wisdom and experience, but without success in either respect. The report of an RICS working party published in October 2009 entitled "Leasehold Reform: Graphs of Relativity" surveyed the competing views in detail. As the RICS report demonstrates, instead of a consensus, the major firms of surveyors have produced a catalogue of contentious relativity graphs, each based on that firm's analysis of the primary evidence known to it. Some of these graphs (notably that produced by Savills in 2002) attempt to track relativity in the real world, but most focus on the notional no-Act world. None of these no-Act graphs commands uncritical acceptance, and they provide a range of relativity percentages which may be employed in support of a higher or lower purchase price as the interest and negotiating strength of the employing party requires.

88. Relativity issues are not new territory for the Tribunal. In *Nailrile Limited v Earl Cadogan* [2009] 2 E.G.L.R. 151 at paragraphs 228-229, the Tribunal (George Bartlett QC, President and A.J.Trott FRICS) endorsed the use of both transaction evidence ("even though such transactions take place in the real world rather than the no-Act world") and relativity graphs, despite the criticisms to which they had been subjected. Referring to its earlier comments in *Arrowdell Limited v Coniston Court (North) Hove Limited* [2007] RVR 39 (LT) the Tribunal concluded (at paragraphs 228 and 229(s)) that in the absence of any better evidence:

> "Relativity is best established by doing the best one can with such transaction evidence as may be available and graphs of relativity."

As can be seen from Nailrile at paragraph 228, "doing the best one can" is not a mechanistic exercise but, rather, is a matter of judgment involving the analysis of any transaction evidence which has been put forward and the assessment of such graphs as are relied on to determine their relevance to the circumstances of the particular case.

89. In its more recent decision in *Hauser v Howard de Walden Estates Ltd* [2013] UKUT 0579 (LC) the Tribunal (His Honour Judge Huskinson and Mr P D McCrea FRICS) reflected the consensus between the expert witnesses in that case (who included Mr Ryan and Ms Tolgyesi, an associate member of Mr Beckett's firm) when it described relativity graphs as being "of some secondary assistance, by way of check, once an appropriate relativity has provisionally been identified through some other methodology". The circumstances of that case were unusual in that the lease length in issue was of 138 years, much longer than is catered for by most of the graphs referred to. Nonetheless, the proposition that the value of graphs is as a cross check where other more specific evidence is available is of general application. The difficulty, of course, is in finding reliable evidence on which to base an alternative methodology, particularly when trying to determine relativity on the no-Act hypothesis.

90. It is appropriate at this stage to refer to *Earl Cadogan* v *Cadogan Square Ltd* [2011] UKUT 154 (LC) at [79]-[80] in which the Tribunal (His Honour Judge Reid QC and Mr A.J. Trott FRICS) considered the no-Act relativity of a term of approximately 18 years unexpired for flats at 38 Cadogan Square. At paragraph 79 of its decision the Tribunal found a limited degree of assistance when ascertaining the order of magnitude of a deduction for Act rights by comparing the Gerald Eve 1996 graph (which purports to track relativity net of Act rights) with the Savills 2002 enfranchisable graph (which aspires to the same objective for real world relativity). As the Tribunal said "the difference in relativities for equal unexpired terms should (theoretically) represent the value of the Act rights". That exercise assisted the Tribunal in concluding that the allowance of 10% for the value of Act rights at 18 years unexpired contended for by one of the parties was significantly too low. The Tribunal's own deduction was 25% which, it stated, was reached without relying exclusively on the analysis of the two graphs and recognising the limitations of the comparison. In the present appeal there has been some debate about the utility of this approach. In the light of that debate it is important to stress the limited purpose for which the comparison exercise was undertaken by the Tribunal in the 38 Cadogan Square case (to assist in determining which of two widely diverging relativity figures was more likely to be of the right order of magnitude) and to recognise that it could only be used for any more precise purpose if the two graphs to be compared themselves commanded a high degree of confidence (which, as the range of views canvassed in the RICS report demonstrates, is not the case).

The LVT's approach to relativity

91. In this case the LVT concluded that on the hypothesis that the tenants had no right to enfranchise, the short leases of flats at Portland Place with only 11.82 years unexpired were worth 28.5% of FHVP value of the same flat; it also held that, with the right to enfranchise, the same short leases were worth 38% of the FHVP value; to put it another way, the absence of statutory rights justified a reduction by 25% of the relativity percentage of leases with the benefit of rights.

92. Although the LVT settled on a "with rights" or "real world" relativity of 38%, for the purpose of the appeal the parties agreed that, in the real world, with the benefit of rights under the 1993 Act, the short leases at Portland Place were worth 41.25% of FHVP value. The third issue in the appeal concerns the relativity percentage of the same short leases in the hypothetical no-Act world. Unless the *McHale* issue goes further and the current understanding of the law is reversed, it is this no-Act relativity which will be used in determining the marriage value component of the price payable for the freehold of the building.

93. Before the LVT Mr Beckett, who gave expert evidence on behalf of the appellant, was of the view that no-Act relativity should be 36% of FHVP value while Mr Ryan, for the respondent considered that 28.5% was the appropriate figure. Mr Beckett's no-Act relativity percentage represented a 14.3% reduction from "real world" relativity, which he took to be "not less than 42%". Mr Ryan's no-Act figure was arrived at by reducing his preferred real world relativity of 38% by 25%.

94. The LVT accepted Mr Ryan's evidence. It considered such limited transaction evidence as was available but arrived at its conclusion "principally on the basis of graphs" after recording that it was unpersuaded by the various arguments deployed by Mr Beckett to justify his conclusion. The LVT dealt robustly with Mr Beckett's views at paragraph 59 of its decision where it said that: "in our view his conclusion that the 11.81 year leases have a value without Act rights of more than a third of the value of the freehold defies common sense".

Mr Beckett's evidence and the case for the appellant

95. In a thorough report Mr Beckett explained his own preferred method of arriving at no-Act relativity, then reviewed the evidence of transactions in the building, both before and after the valuation date, and finally considered a number of alternative approaches which had been adopted in other cases. In his written evidence Mr Beckett discriminated between these different approaches, giving weight to some and less or no weight to others; he made clear his preference for transactional evidence as the starting point, and regarded the use of graphs as no more than a check that the result obtained from transactions seemed sensible. He concluded (as he had in his evidence to the LVT) that, disregarding rights under the 1993 Act, a lease with an unexpired term of 11.82 years would be worth 36% of the FHVP value of the same flat.

96. Mr Beckett's starting point was to use transactional evidence to establish a relativity figure for the 11.82 year leases in the real world. He then sought to identify a principled basis on which to make an appropriate deduction from this real world relativity to arrive at relativity in the no-Act world. His preferred approach to establishing the quantum of this deduction was by considering the relationship between marriage value and relativity.

97. Between August 2001 and November 2005 open market sales of five short leases (with terms of between 17 and 20 years duration) had taken place in the building. In three instances the FHVP value of the flat had been agreed between Mr Beckett and Mr Ryan in previous proceedings in the LVT. By making adjustments for changes in value over time a relativity percentage for each of the transactions could be determined. This data was further adjusted by Mr Beckett to provide relativity figures at 11.82 years, from which he deduced his figure of 42% for real world relativity which was very close to the figure eventually agreed by both parties for the purpose of the appeal.

98. Mr Beckett postulated that the sole benefit which a tenant achieved by obtaining an individual lease extension was the share in the marriage value released by the coalescence of the short leasehold interest and the landlord's freehold which the Act required to be divided equally between them. There was, he suggested "nothing else that the purchaser gets by getting the lease extension" (which we took to mean nothing else for which he does not pay full value). Mr Beckett then suggested two methods of determining the value of that benefit.

99. Entitlement to 50% of the marriage value could be realised by the tenant after taking all of the risks of the enfranchisement process and after incurring the legal and valuation costs on both sides of the transaction. In principle these risks, uncertainties and costs had to be set against the tenant's share of the marriage value, but they must leave some benefit for the tenant to make the exercise worthwhile. Mr Beckett suggested that the tenant could always avoid the "risks, uncertainty, delay and bewilderment that he will experience" in the statutory process by going straight to the open market and purchasing an equivalent flat on a long lease. Mr Beckett considered that 25% of the marriage value was the lowest return the tenant could be expected to accept as recompense and he therefore took this figure as representing the net benefit the tenant would achieve by enfranchisement.

100. Alternatively the tenant could realise his share of the marriage value in a different way which avoided the risks and costs. After giving notice of his intention to exercise his right to a lease extension under Chapter II of the 1993 Act the tenant could immediately sell the short lease, thereby transferring the risks and costs inherent in the enfranchisement process to the purchaser. The purchaser could not be expected to pay the whole of the estimated profit to the tenant, but would instead insist on participating equally in the tenant's 50% share of the marriage value. The tenant could therefore expect at most 25% of the marriage value, if he was not prepared to assume the risks.

101. For these two reasons Mr Beckett proposed that in principle 25% of the marriage value "represents nearly all the value of Act rights". He applied this assumption to the marriage value identified by the LVT in earlier proceedings (*Welty v Howard de Walden)* which had determined the price payable under Chapter II of the 1993 Act for new long leases of three flats in the building (Flats F, L and O). The short leases in *Welty* were for terms of between about 17 and 20 years, and Mr

Beckett calculated relativity figures of between 49.34% and 56.05% based on the *Welty* decision for leases of those durations. Taking the average of those figures produced a relativity of 52.56% which Mr Beckett considered appropriate for a term of about 17 years. He then adjusted or "decayed" this average by a further 8 percentage points (which he derived from the Savills enfranchisable (i.e. with Act rights) graph as the difference between relativity at 12 and 17 years). These calculations led him to the conclusion that the transaction evidence supported a relativity at 11.82 years of 44.56%.

102. Mr Beckett was challenged in cross examination on his view of the relationship between marriage value and the benefit of the Act, especially at short lease lengths when marriage value was low but the benefit of the Act was of considerable significance. He agreed that at very short terms the opportunity to enfranchise may acquire additional significance (for example to a tenant who wished to refurbish his flat and secure the benefit for himself, rather than losing it on the expiry of the lease) but at 11 or 12 years he considered that the benefit of the Act was fully reflected in his 25% of marriage value.

103. Mr Beckett consciously pressed his analysis of the benefit of the Act to an extreme in order to provide a cross check by assuming that a tenant might pay as much as 100% of the marriage value for the benefit of the right to enfranchise. This calculation produced a no-Act relativity at 11.82 years unexpired of 34.7%. This, Mr Becket considered, represented a floor below which at that lease length relativity could not logically fall.

104. Mr Beckett pointed out that the Lands Tribunal had accepted substantially the same marriage value methodology in *Arbib*. Its proponent on that occasion was not Mr Beckett but Mr Cullum of Cluttons, whose relevant argument on marriage value is at paragraph [46] of the Lands Tribunal's decision and was singled out as the Tribunal's preference at paragraph [59]. Although *Arbib* had been a decision under the Leasehold Reform Act 1967 relativity was critical because, owing to an absence of comparable freehold sales, the FHVP value of 40 Chelsea Square had to be built up from leasehold sales. The lease of 40 Chelsea Square itself had had 30 years unexpired at the time of its sale to Mr Arbib and the conclusion that the deduction for Act rights was equal to 25% of the marriage value supported a deduction of 10.3% for Act rights at that duration. The parties were not far apart on the issue as the tenant's valuer's equivalent deduction for Act rights was 9.3%.

105. In *Nailrile* Mr Beckett's partner, Mr Kay, had adopted the same methodology to allow for the benefit of the Act (at paragraph [146]) but on that occasion the model had not found favour and the Lands Tribunal had instead accepted contrary evidence that a deduction of 7.5% for Act rights was appropriate for leases with 44 years unexpired. The Lands Tribunal did not agree that the benefit of the 1993 Act comprised only an entitlement to an equal share of marriage value, which meant that where there was no marriage value the Act itself was of no benefit to the tenant. At paragraph [216] of its decision it said this:

> "Those benefits include the legal right to enfranchise or extend the lease at a time of the leaseholder's choosing. The price is fixed by the LVT in the absence of agreement and excludes the tenant's overbid whilst guaranteeing him 50% of the marriage value. There is a fixed valuation date and the tenant does not have to pay the purchase price

immediately. This contrasts with the no Act world where the landlord is in an overwhelmingly strong negotiating position and the leaseholder has no certainty of being granted a new lease."

In cross examination Mr Pryor also invited Mr Beckett to consider additional benefits: that the tenant would not have to pay interest on the purchase price after the notice date, could not be gazumped by another purchaser, was not at risk of being removed from his home at the end of the lease, and would enjoy the benefit of his own improvements (which was of particular significance for tenants whose leases were of less than about 15 years unexpired, who would be free to carry out refurbishment without the risk of being removed from their home at the end of the lease).

106. Mr Beckett defended his preferred methodology against these criticisms. He considered and rejected the significance of each of the benefits of the Act identified by the Lands Tribunal in *Nailrile* except the last (that the tenant need not pay the purchase price immediately). The right to enfranchise could not be worth more than half the marriage value for the reasons he had already advanced; the role of the LVT in determining the purchase price was as much a risk as it was an advantage and substantial costs were involved; the guarantee of 50% of the marriage value reflected his own view of the benefit of the Act; while the fixed valuation date could be an advantage in a rising market it was a disadvantage when the market was falling and therefore on balance he regarded this feature as being of small monetary value; the opportunity to carry out refurbishment without risk of losing the investment was of significance only at lease lengths of 5 years or less. The appropriate comparison to make when considering the value of Act rights, he suggested, was between the purchase of a flat on a long lease and the purchase of the same flat on a short lease with the intention of enfranchising.

107. On reflection Mr Beckett accepted that some allowance should be made for the benefit to the tenant of not having to pay the purchase price immediately. This had a value which Mr Beckett felt was best reflected by supplementing the figure arrived at on the basis of 25% of marriage value by adding 4% of the anticipated lease extension price to represent one year's interest.

108. Mr Beckett then made three further calculations based on what he referred to as "*Nailrile* averages*"*. These involved identifying and applying certain arithmetical relationships derived from the Lands Tribunal's decision in *Nailrile.*

109. Mr Beckett first pointed out that in *Nailrile* the Lands Tribunal had adopted an adjustment for the benefit of the Act of 7.5% of the existing leasehold value for a 44 year term (this can be seen most clearly at paragraph [228] of the decision). Applying this approach to the average with rights relativities he had calculated for the three flats which had featured in the LVT's *Welty* decision Mr Beckett found a without rights relativity of 51.65% at 17 years which he adjusted as before by 8 percentage points to produce a relativity of 43.65% at 11.82 years. It was suggested in cross examination that the reduction of 8% was inadequate and that applying the Savills graph to the relativity of the three *Welty* transactions showed an average drop of 10.87%, but Mr Beckett preferred to rely on the Savills enfranchisable graph at 17 years and at 12 years as the sole source for

adjusting the transaction evidence for differences in lease length. In any event, Mr Beckett did not approve of this approach, describing it as "questionable", because it was wrong in principle to relate the benefit of the Act to the value of the lease rather than to FHVP value.

110. Mr Beckett next expressed the allowance for the benefit of the Act of 7.5% of the price of the lease of 44 years in *Nailrile* as a proportion of the value of the freehold; he was able to do this by adopting the relativity of 71% determined by the Lands Tribunal which enabled him to deduce that the 7.5% allowance was equivalent to 5.76% of FHVP value. It was widely agreed (he said) that marriage value was at its greatest at "middling terms unexpired" and fell towards zero at both long terms unexpired or as the term date approached. It was therefore a conservative approach to a lease of only 11.82 years unexpired to treat the benefit of the Act as equivalent to the same 5.76% of FHVP as it had had in *Nailrile* where the lease was of 44 years unexpired. Applying that approach to the historic transaction evidence (adjusted as before) led Mr Beckett to a no-Act relativity at 11.82 years of 42.08%.

111. Mr Beckett acknowledged in response to a question from the Tribunal that the result of expressing the benefit of the Act as a percentage of FHVP value was that in monetary terms that benefit would remain constant irrespective of the length of the lease. The figure of 5.75% of FHVP value derived from *Nailrile* was based on a lease of 44 years duration and Mr Beckett agreed that the same figure could not be applicable to all lease lengths. Nonetheless he considered that the application of this approach was conservative (i.e. against his client) where the lease in question was of 11.82 years unexpired.

112. The third of Mr Beckett's "*Nailrile* averages" was, as he confirmed in cross examination, unrelated to *Nailrile* itself and seemed in fact to be based on the way the LVT had expressed its acceptance of Mr Ryan's evidence in its decision in this case. Mr Ryan had argued that relativity with Act rights should be reduced by 25% to arrive at relativity without rights, but the LVT had summarised his view in paragraph 58 of its decision by saying "Act rights will add some 25%" to the relativity of a lease without rights. Mr Beckett applied this misconception to the evidence of the three short lease market transactions and concluded that it suggested a relativity at 11.82 years of 36.67%.

113. Mr Beckett also looked at four later sales of short leases of flats in the building, which post dated the LVT's decision, and compared them to sales of long leases. He discounted as unreliable two short leases which had been sold with the right to participate in the collective enfranchisement which is the subject of this appeal. The two remaining transactions produced relativities of 55.9% and 35.9% for leases with unexpired terms of 9.85 and 9.24 years. The higher figure did not strike Mr Beckett as plausible, but the other figure was said by Mr Jourdan QC to support Mr Beckett's opinion of relativity of 36% at 11.82 years. Mr Beckett himself claimed rather less for the later sales evidence, describing it only as not undermining his conclusion.

114. Finally Mr Beckett considered what assistance could be derived from graphs. He first addressed the Tribunal's own exercise in *Earl Cadogan* v *Cadogan Square Ltd* (see paragraph 90 above) of comparing the real world relativity shown by the Savills enfranchisable graph with the no-

Act relativity of the Gerald Eve/John D Wood 1996 graph. While the difference ought theoretically to represent the value of Act rights at different lease lengths Mr Beckett was not impressed by this approach. It had no validity because, in Mr Beckett's view, the Gerald Eve graph was not reliable (if it was it would not be necessary to do the exercise the Tribunal had attempted in *Cadogan Square*); nor was the Savills enfranchisable graph a suitable tool for a precise determination of relativity in the real world because it was based on "the opinion of estate agents at Savills" on a notional basket of properties, rather than on transaction evidence.

115. Mr Beckett regarded all graphs as being no more than "of background interest". They provided a rough range of 28% to 39% at 12 years unexpired. The Gerald Eve graph produced the lowest figure, at 28.5%, while the John D Wood gave the highest, at 39%; between these extremes Knight Frank, Cluttons and Charles Boston each produced graphs showing figures between 34% and 35% at 12 years unexpired.

116. Mr Beckett reserved his strongest criticism for the Gerald Eve graph. He described it as having three "troubling features". First, it had been disowned by John D Wood, one of the firms originally responsible for its compilation, when the partner who had worked on it had left the firm. Secondly, the original source material was almost entirely based on transactions concerning houses rather than flats; relativity in houses was not the same as relativity in flats and indeed FHVP value for flats was notional rather than real since flats were not sold on a freehold basis. Mr Beckett suggested that in principle one would expect every level of relativity for flats to be higher than the corresponding relativity for houses. Finally, and most problematic of all in Mr Beckett's view, was the fact that the Gerald Eve graph was based on historic transactions in the period 1974 to 1996 for which no data survived so that it could not be analysed, and on subsequent settlement data which he regarded as self-reinforcing and therefore as being of no evidential value. Its use was based on habit rather than analysis.

117. Mr Beckett did not challenge the *bona fides* of the Gerald Eve graph, and did not doubt that it represented a fair assessment of the transactions recorded. He regarded it as a fairly reliable guide to relativity in houses, but its only other merits were that it enabled the likely response of the major London landlords to relativity issues to be predicted with consistency, and it permitted easy settlement of cases for the faint-hearted. Neither of these practical consequences of its widespread adoption in prime central London enfranchisement disputes lent it any additional credibility.

118. Underlying Mr Beckett's thinking was the proposition that the aggregate of the value of the short lease and the sum payable to enfranchise it could not in principle amount to a sum greater than the value of the long lease obtained by the enfranchisement, and ought to show a profit for the tenant. Given the risks and trouble inherent in the statutory enfranchisement process Mr Beckett considered that "it is obvious that at least a small gain must be in prospect for [the tenant] to proceed in this way".

119. The same data as had been used to establish real world relativity (see paragraph 97 above) was also relied on by Mr Beckett to test the reliability of the rival no-Act relativity figures. The application of a no-Act relativity percentage to the FHVP value of the flats which had been the

subject of agreed lease extensions enabled a value to be ascribed to the short leases of those flats. If that value, when added to the price known to have been paid to obtain the long lease, resulted in a total sum which exceeded the FHVP value of the same flat, the tenant would notionally have made a loss by enfranchising rather than by simply finding and buying a long lease of a comparable flat. Such behaviour, Mr Beckett argued, would be irrational. It followed, he suggested, that if the application of a relativity figure to the facts of a known transaction resulted, on analysis, in the tenant making a loss, the relativity percentage must be excessive. In a supplemental report Mr Beckett adopted this approach to demonstrate that applying Mr Ryan's relativity percentages resulted in four of the five market transactions showing a significant loss to the tenant, while only one showed a very modest profit; in four cases out of five the tenant would have been significantly better off buying a new long lease rather than by acquiring and then enfranchising their short lease. Such consistent irrational overpaying by tenants could not be explained and, said Mr Beckett, must mean that Mr Ryan's relativity figure was simply wrong (or as he diplomatically put it, "internally inconsistent").

120. Mr Beckett's criticism of the internal inconsistency of Mr Ryan's approach mellowed somewhat ("these figures are not as shocking as they were") when it was put to Mr Beckett that his assessments of the five short lease sales were inaccurate; one failed to take into account that the sale had been with the benefit of an enfranchisement notice (a point material to Mr Ryan's method of determining no-Act relativity), another involved a special purchaser who wished to amalgamate the purchased flat with one he already owned, while in three cases the processes of the Act had delayed completion for several years in a sharply rising market so that the purchasers had made a substantial profit. Mr Beckett nonetheless regarded these outcomes as irrelevant to the achievement of a satisfactory principled means of assessing the value of Act rights. He also considered that, in principle, it was irrelevant that a particular purchaser may not be able to find a flat available on a long lease and may have to take a short lease with a view to enfranchisement.

121. In his written evidence, having analysed the transactional material in six different ways, and having reviewed the graphs, Mr Beckett resisted the temptation to average the nine different relativity figures his efforts had yielded. The range was from 28.5% (the Gerald Eve Graph) to 44.56% (based on 25% of marriage value) but Mr Beckett preferred to remain at what he considered to be the conservative 36% he had espoused before the LVT. He acknowledged that there was at present no reliable, systematic way of assessing the benefit of the Act throughout the whole term, and none of the methods in which he had any confidence directly supported his own figure, but he felt comfortable that it was nonetheless an appropriate one.

122. In cross examination Mr Beckett justified his interest in the battery of figures he had produced by saying that he had not yet settled in his own mind on a principled basis on which to ascertain relativity so he had tried to look at the problem of relativity from all angles and had not given special weight to any particular technique. He regarded his 25% of marriage value approach as "a first class starting point" but acknowledged that in any given lease extension it may have to be adjusted for specific circumstances.

The Respondent's case and the evidence of Mr Ryan and Mr Clark

123. The Respondent's experts, Mr Ryan and Mr Clark, both gave evidence in support of a relativity of 28.5% without Act rights at a term of 11.82 years.

124. The Respondent's main witness on the relativity issue was Mr Ryan, a partner in Carter Jonas, whose career as a residential estate agent and valuer in central London had commenced in 1977. He had been active in the market long before the advent of statutory rights of enfranchisement for the tenants of flats in 1993 and had also had considerable experience of the sale of leasehold houses where enfranchisement was not possible (for example because rateable value or residence conditions were not satisfied).

125. Mr Ryan's experience was that purchasers of short leases sometimes overpaid, in the sense that they paid a sum for a short lease which, added to the sum they were advised by him they should expect to have to pay for a lease extension, amounted to more than his assessment of the FHVP value of the flat in question; on the other hand some purchasers negotiated a more favourable price than he had advised them to expect. He resisted strongly the suggestion that apportioning marriage value provided a method by which the benefit of the Act could be assessed, describing Mr Beckett's approach as unreal.

126. Mr Ryan's approach to relativity was first to ascertain from market evidence where possible the appropriate relativity of a lease of given duration with the benefit of statutory rights. He then made a deduction to reflect the benefit of the Act and to arrive at a notional relativity net of those rights. His experience suggested to him that the benefit of the Act increases as the unexpired term of the lease diminishes. He reflected this effect by making a 20% deduction from real world relativity for the benefit of the Act at unexpired terms of between 10 and 20 years, and a deduction of 15% for terms of between 21 and 40 years. In both cases he would make a further deduction of 5% where the relevant short lease sale had taken place with the benefit of a notice claiming a new lease already having been served. In the case of a lease of 11.82 years where no notice had been served the appropriate adjustment would be 20%. In his experience the results produced by adopting this approach were generally consistent with the figures shown on the Gerald Eve graph, from which he concluded that the graph was generally reliable.

127. Mr Ryan acknowledged that he could offer no empirical evidence to support his approach; he had not been involved in enfranchisement valuation until the late 1990s and had not kept files from his earlier career. Mr Ryan applied this approach to the evidence of five short lease sales of flats in Portland Place with terms of between 15 and 28 years unexpired which had taken place between November 2005 and August 2009. Of these transactions only one was in the building (Flat E, which had been sold with the benefit of a statutory notice of claim and so attracted an adjustment of 25% on Mr Ryan's approach). Of the remaining sales two were at 88 Portland Place and two were at 55 Portland Place (which Mr Ryan further adjusted to reflect the benefit of three parking spaces in one case and two in another). The sales data enabled Mr Ryan to arrive at no-Act relativity figures for each of the five transactions, which he then adjusted for lease length by reference to the Savills enfranchisable graph (as Mr Beckett had done); averaging these results showed a mean no-Act

relativity of 28.32%. This figure was sufficiently close to the corresponding figure on the Gerald Eve graph at 11.75 years to prompt Mr Ryan to adopt that figure, 28.5%, as his preferred relativity percentage.

128. It was put to Mr Ryan in cross examination that the agreed real-world relativity, based on transactions in the building, was some way below (by around 8%) the figure one would have expected based on the Savills enfranchisable graph (compiled in 2003). Mr Ryan acknowledged the divergence but was less willing to accept Mr Jourdan's suggestion (which had not featured in Mr Beckett's evidence) that it was to be explained as a consequence of the reduction in the deferment rate used to determine the price payable for a long lease following the decision of the Lands Tribunal in *Cadogan v Sportelli* [2007] 1 EGLR 153.

129. Mr Ryan was prepared to modify his opinion during cross examination by Mr Jourdan QC in the light of the agreement that real-world relativity was 41.25%, and following a closer examination of the transactional evidence. Mr Ryan's original real world relativity figure (accepted by the LVT) had been 36% which he had adjusted to 38% in his written evidence to the Tribunal before reaching agreement with Mr Beckett that 41.25% was the appropriate figure. His acceptance of a slightly higher real-world figure than he had previously acknowledged prompted him to concede that a comparable upward movement in his no-Act relativity was also required. On reflection he thought that a no-Act relativity of around 31% was appropriate based on applying his approach to the market evidence of sales in Portland Place.

130. Mr Ryan also considered that it was appropriate to make use of the comparison between the Gerald Eve graph and the Savills enfranchisable graph, as the Tribunal had done in the 38 Cadogan Square case (see paragraph 90 above). At 11.75 years the differential represented a deduction of 36.45% (significantly greater than the 20-25% rule of thumb he had adopted in his own practice). Applying this approach to the five short lease sales he relied on suggested a mean no-Act relativity of 27.84% which, as Mr Ryan accepted, was lower even than the figure suggested by the Gerald Eve graph. In cross examination Mr Ryan acknowledged that this approach depended on the reliability of the graphs on which it was based and that if the same comparison was undertaken between the Savills enfranchisable graph and Savills own no-rights figures (taken from its 2003 report on the impact of leasehold reform on the PCL residential market) the differential was very much smaller (being only 22% at 10 years as opposed to 38.9% if the Gerald Eve graph was used).

131. Evidence on relativity was also given on behalf of the respondent by Mr Clark of Gerald Eve who associated himself with Mr Ryan's conclusions but did not seek to add significantly to his reasons. Mr Clark did take the opportunity of responding to the criticisms made in Mr Beckett's evidence (and by valuers acting for tenants generally) of his firm's relativity graph.

132. Mr Clark produced the same explanatory material to us as had been placed before the Lands Tribunal in *Nailrile,* in the form of a letter from his firm to the RICS working group in 2007. This confirmed that the data on which the graph was based comprised settlements in enfranchisement claims between 1974 and 1996, and transactional evidence of the price realised on the sale of leases without statutory rights of enfranchisement which had been used as comparables during the

negotiation of the same settlements. Mr Clark confirmed that the transactional data relied on was no longer available, and it was not clear that the details of the transactions had been available when the graph was compiled, although the authors had relied on their recollection of it.

133. In cross examination Mr Clark agreed that where the components of a settlement (including relativity) had not been agreed, it was likely that the relativity analysis produced by the tenant's valuer would be higher than that shown on the Gerald Eve graph. He did not dissent from the criticisms of settlement evidence in general made by the Lands Tribunal in *Arbib* (at paragraph 127) namely: that it was usually only evidence of the price agreed, rather than its component parts; it may be affected by the anxiety of one or other party to reach a settlement in order to avoid the stress and expense of tribunal proceedings; and that it tended to become self-perpetuating. He acknowledged that the only graphs which distinguished between relativity in flats and in houses, those produced by Cluttons, showed a differential of 4.3 percentage points at about 12 years, although he was aware of no other analysis which supported this differential. If that differential was added to the figure show on the Gerald Eve graph a relativity of about 33% would be suggested.

Discussion and conclusion on relativity

134. Our task on this aspect of the appeal has been made easier by the parties' agreement, based on the evidence of short lease sales in the building prior to the valuation date, that in the real world a lease of 11.82 years unexpired which enjoyed rights under Chapter II of the 1993 Act was worth 41.25% of the FHVP value of the same flat.

135. The challenge then becomes to identify a sound basis on which to assess the discount to be made from that real-world relativity figure to take account of the statutory direction to assume that none of the tenants enjoys rights under the Act. It is clear that a lease of any given unexpired term will be worth less than a comparable lease of a similar unexpired term coupled with the statutory right to acquire a further long lease at a date of the tenant's choosing and on favourable valuation assumptions. Mr Jourdan QC characterised the benefit of the Act as akin to an option to acquire a new long lease at a price assessed under the 1993 Act, and described the valuation exercise in this case as being to determine the value of such an option. Because we stand on the relatively firm ground of the parties' agreement on real-world, or with-rights, relativity we agree that that description is apt in this case.

136. Although, as Mr Beckett pointed out, the Lands Tribunal in *Arbib* had endorsed his preferred approach of equating the benefit of the Act with 25% of the marriage value, his own adherence to that methodology is no longer what it was once was. While he described it as a first class starting point, he acknowledged the need for at least one adjustment to take account of the benefit to the tenant of being able to delay payment of the purchase price. More strikingly he was eventually willing to lump his previous preferred method in with the eight alternative approaches he had canvassed (some of which he regarded as highly questionable) and to give each of them equal weight in arriving at his impressionistic assessment of no-Act relativity. This equal-weight approach involved the same averaging exercise which he had avoided in his original report on the basis that it

"would be pretty crude methodology – averaging averages, and averaging numbers of different analytical methods".

137. We take the same view as the Lands Tribunal in *Nailrile* that an attempt to quantify the benefit of the Act in terms of a proportion of marriage value is unsound, particularly at short lease terms, because it fails to take into account the real benefits which the Act secures (including those additional benefits put to Mr Beckett in cross examination: see paragraphs 105 to 106 above). The significance of individual factors is no doubt a matter on which a range of views is possible, but it is indisputable that the Act provides more to a tenant than the opportunity to share in the marriage value created on the grant of a new long lease. As the term of the lease becomes shorter the immediate benefits of the statutory option to extend the lease increase (including the mitigation of any disincentive to carry out refurbishments which Mr Pryor particularly stressed); that is in contrast to the marriage value, which falls as the term diminishes. There is no evidence that the opportunity to profit by sharing in marriage value which would not otherwise be available is a significant motivating factor in enfranchisements, and Mr Beckett himself explained that he always counsels his clients that such a profit could not be guaranteed. Once it is acknowledged, as it was by Mr Beckett, that it is necessary to supplement the tenant's share of marriage value to reflect other benefits of the Act, it ceases to be a reliable yardstick and becomes simply one factor to be taken into account.

138. We do not criticise Mr Beckett for his willingness to address this theoretical problem from as many different angles as he could but, in the end, we did not find any of his *Nailrile* averages of assistance. The two to which he devoted most attention (equating the value of the Act with 7.5% of the price paid for the existing lease, and with 5.76% of FHVP) were arithmetical relationships derived from the facts of *Nailrile* which concerned a much longer lease. They were patently inappropriate to a lease of 11.82 years duration, as Mr Beckett acknowledged; the simplest means of demonstrating that is to note that both methods suggested a relativity which was *above* that which the parties had agreed was the right figure for a term of 11.82 years with statutory rights. The same criticism can be made of the 25% of marriage value approach which yielded a no-Act relativity based on what Mr Beckett called "the earlier market evidence" of 44.56%. A similar analysis of Mr Beckett's "later market evidence" produced a no-Act relativity of 39.53%. None of these methods lent any direct support to Mr Beckett's adopted figure of 36%.

139. The results of Mr Beckett's analysis of the earlier transactions show a real-world relativity of 44.97% and a no-Act relativity of 44.56%, meaning that the reduction for the benefit of the Act is less than 1%. The corresponding figures for the later evidence are 41.86% and 39.53%, or a reduction of some 5.6% (but see paragraph 141 below). In our opinion these results show unrealistically low allowances for the benefit of the Act and throw doubt upon Mr Beckett's view that an adjustment of 25% of the marriage value "represents almost all the value of the Act rights".

140. Mr Jourdan suggested to Mr Clark and Mr Ryan that the effect of the decision in *Sportelli*, in which the Lands Tribunal reduced the traditional deferment rate from 6% to 5%, was to increase the value of the freehold reversion and decrease the marriage value, thereby reducing the benefit of the Act to the lessee. This would mean also that the real-world relativity would be reduced. Mr Jourdan noted that the Savills enfranchisable graph had been prepared before the change in deferment rate and therefore would not reflect the effect of that change. Neither Mr Clark nor Mr Ryan accepted this

proposition, which was not based on Mr Beckett's evidence. Mr Ryan said that the suggested effect of the *Sportelli* decision had not occurred to him although in theory if the lessee had to pay more for the freehold then the benefits of the Act to him should be less. Mr Clark accepted the mathematical correctness of Mr Jourdan's worked example but said that "in reality I don't think it happened".

141. Mr Beckett's "earlier evidence" was derived from three sales which pre-dated the Lands Tribunal's decision in *Sportelli*. His "later evidence" comprised four sales which took place several years after the decision. Mr Beckett adjusted all of the comparables for lease length by reference to the Savills enfranchisable graph and did not suggest that it was wrong to do so for the post *Sportelli* evidence. Nor did Mr Beckett's later evidence support Mr Jourdan's submission that *Sportelli* had reduced the relativity. The average of the four comparables showed an Act world relativity (adjusted for lease length) of 60.32% compared with an equivalent figure of 44.97% for the three earlier comparables. Mr Beckett considered such a result to be "inherently implausible" and instead relied upon the lowest of the four later comparables to produce an Act world relativity of 41.86%. But this comparable had a relativity that was over a third less than the average of the other three later comparables and cannot, in our opinion, be relied upon. There was no evidence to support Mr Jourdan's submission on the impact of the change in the deferment rate on relativity and we do not accept it.

142. In any event the experts agree that real world relativity in this case is 41.25% which is less than the Savills enfranchisable graph figure for 12 years unexpired of 45.4%. So any diminution in relativity caused by the *Sportelli* reduction in the deferment rate may already be reflected in the agreed figure.

143. Mr Ryan's approach is comparatively unsophisticated, comprising a simple banded tariff to be deducted from real world relativity to reflect the benefit of the Act for leases of 10 to 20 years and 21 to 40 years unexpired. The approach is not supported by empirical evidence and rests upon Mr Ryan's recollection of what first happened in practice ("doing my best") more than 20 years ago. It is not an approach that is adopted in any of the graphs of relativity produced in the RICS working group report where all of the contributors show the relativity (whether with or without Act rights) as changing continuously (and variably) as a function of lease length. Mr Ryan gave no reason for the choice of bands or why there was a step change beyond 20 years. Such a change seems to us to be arbitrary, as are the uneven length of bands of 10 and 20 years. It is a method that has the attraction of simplicity and of being rooted in experience but it is not one which is sufficiently well founded for us to adopt.

144. Both parties referred to the use of unenfranchisable graphs, although Mr Beckett considered that they were "of no more than background interest". Mr Ryan placed most reliance on the Gerald Eve graph. Mr Clark said that the Gerald Eve graph, of which he had personal knowledge, provided the "most comprehensive guide to relativities for leases of different unexpired terms in prime central London areas". Mr Clark addressed a number of criticisms of the Gerald Eve graph and reviewed the other PCL graphs contained in the RICS working group report.

145. For an unexpired term of 11.82 years the Gerald Eve graph shows a no-Act relativity of 28.6%. The relativities derived from the other PCL unenfranchisable graphs were:

(i) Knight Frank: 34.14%

(ii) Cluttons: 34.4% (flats) and 30.1% (houses)

(iii) John D Wood: 38.64%

(iv) W A Ellis: 27.47%

(v) Charles Boston: 34.9%

Mr Ryan said during his oral evidence that he considered the appropriate relativity to be 31%. Mr Beckett adopted a figure of 36%. Both values fall within the range of the graphs.

146. The use of such graphs has been considered extensively by the Tribunal in recent years and the criticisms made of them are well known. The graph which features in most of the cases and which is usually adopted, as here, by landlords, is that produced by Gerald Eve. The criticisms of that graph made for instance in *Nailrile* (176F [227]) and *Cadogan Square Limited* ([62]) are relevant here. In particular we note that 90% of the database for the Gerald Eve graph was in respect of houses and that the graph relies upon settlements (and opinion) rather than transactions.

147. In *Sportelli* at paragraphs [92] to [96] the Lands Tribunal recognised that the reversion on the lease of a flat was intrinsically a less attractive investment than the freehold reversion on a house because of the increased problems associated with managing flats. As Mr Jourdan pointed out, there is a big difference between owning a 999 year lease of a flat with a share in the company that owns the freehold, and owning the freehold of a house. The freeholder of a house is answerable to no-one but the lessee of a flat is subject to the views of his fellow shareholders. We are therefore not surprised that, where an attempt has been made to ascertain the relativity of flats alone, a higher figure has been assessed than where flats and houses are considered together. The differential indicated by the Cluttons graph for flats is about 4 percentage points at a lease length of 11 to 12 years. In this appeal we are concerned solely with flats.

148. The problems associated with the use of settlement evidence were discussed by the Tribunal in *Arbib* at page 150 ([127] to [129]). In *Earl Cadogan v Cecil* [2001] LRA/10/2000 (LT) the Lands Tribunal, Mr N J Rose FRICS, gave a "particularly vivid" example of how the parties to a dispute can interpret a settlement differently. In that example the landlord's expert (Mr Clark) analysed the relativity at 53.2% while the lessee's expert analysed the same transaction at a relativity of 57.3%.

149. Mr Clark addressed these criticisms in his evidence but we agree with Mr Beckett that, although widely adopted, the Gerald Eve graph is not determinative of the relativity of the flats in this appeal.

150. Taking the PCL graphs as a whole, they represent the collective efforts of a large group of knowledgeable valuers adopting different methods and using slightly different base data. The range of figures at 11.82 years unexpired is from 27.4% (WA Ellis) to 38.6% (John D Wood), but given the varying methodologies employed that range is unsurprising and casts little doubt on the validity of any of the graphs. The average of these is 32.6%; if WA Ellis is excluded because at this duration the graph takes an atypical swerve downwards, the average is 33.5%. The use of decimal places lends spurious precision to the exercise and the best one can say in this case is that consideration of the graphs reinforces the conclusion that the appropriate relativity lies in the range from Mr Ryan's 31% to Mr Beckett's 36%. Any assessment of the value of a lease of 11.82 years duration which was based on a relativity figure within that range is, in our judgment, eminently defensible.

151. Mr Ryan allowed 25% for the benefit of the Act (41.25% to 31%) while Mr Beckett allowed approximately half that amount, namely 12.7% (41.25% to 36%). In our opinion, and doing the best we can with the evidence available, the appropriate allowance to make for the benefit of the Act at this length of term is 20%. Applying this to the agreed real-world relativity of 41.25% gives a no Act relativity of 33%, which is the relativity figure we will adopt in this case.

The purchaser's margin issue

152. Paragraph 3 of Schedule 6 to the 1993 Act states that the value of the freeholder's interest in the subject premises is the amount which at the valuation date that interest might be expected to realise if sold on the open market by a willing seller on a number of specified assumptions. The traditional way to value a freehold interest subject to leases (but without development value) is to capitalise the rent receivable until the expiry of the leases and then to add the present value of the reversion. The value of the reversion is represented by the aggregate FHVP value of the individual flats.

153. "The purchaser's margin" is an expression introduced by Mr Beckett to refer to the difference in value which he suggests must exist between the amount that a dealer or an investor (the purchaser) would pay on reversion for the freehold of the building with vacant possession of the short leasehold flats (described by Mr Jourdan as the "bulk value", although Mr Beckett himself disavowed the notion that the margin was a discount for bulk) and the aggregate value of those flats if sold individually to an end user ("the aggregate value"). The issues between the parties on this aspect of the appeal are whether a purchaser's margin is permissible in principle, and whether on the facts of this case such a margin should be allowed in the determination of the price payable by the appellant on acquisition of the freehold interest in 82 Portland Place. The LVT was persuaded by Mr Beckett's evidence that a purchaser's margin would feature in a sale of 82 Portland Place, but reluctantly concluded that it was impermissible and unnecessary to reflect it in the statutory valuation exercise because the factors which accounted for the existence of the margin were already accommodated in the 5% deferment rate which the guidance given by the Lands Tribunal in *Cadogan v Sportelli* [2007] 1 EGLR 153 required should be adopted in prime central London enfranchisement valuations. The relevant part of the LVT's decision is at paragraphs 73 to 77, where it said this:

> "73. Mr Pryor submitted … that the risks of which Mr Beckett spoke were intended fully to be taken into account in the risk premium which formed part of the deferment rate. He

submitted also that the vacant possession value of each unit would have any purchaser's margin built in because a developer would look to works for his profit, or otherwise he would be outbid by the end user. He submitted that in any event the open market comparables on which Mr Beckett relied … were irrelevant to a prestigious building, attractive to domestic and international buyers, such as 82 Portland Place.

74. We think there is force in Mr Beckett's argument but we have reluctantly concluded that we are constrained by *Sportelli* from acceding to it, because it appears to us that Mr Pryor is correct in his submission that the risks which Mr Beckett considers to justify the purchaser's margin are intended by the Lands Tribunal to be taken account of in the risk premium.

75. … We are satisfied that we are required by Schedule 6 to the Act to value the block as a whole. We are satisfied that the purchaser whom we should assume for the purpose of establishing the open market value of the block as a whole is an investor or developer who will wish not only to cover his holding and other costs and risks but also to make a profit, and who will formulate his bid with those considerations in mind. In these circumstances we accept that the price the investor will pay will be likely to be less than the aggregate value of the individual units, in order to allow for risks and profit. The problem which concerns us is the straightjacket which *Sportelli* imposes. In our view the risks which a purchaser of a block of flats will factor into his bid will vary, depending on the nature of the block which he intends to purchase. To conclude that the risk premium is inevitably the same for a block such as 82 Portland Place, comprising different types of accommodation held on leases of different lengths, as it will be for a simpler investment such as a small block of identical flats in which all the leases terminate at the same time, does not strike us as realistic. Were it not for the guidance of the Lands Tribunal as to the nature of the risk premium, we might well have concluded that an additional risk premium of 0.25% for flats was insufficient in the present case to allow for the risks and problems of which Mr Beckett spoke.

76. Until *Arbib* and *Sportelli,* valuers used a conventional approach and analysed sales evidence by using known facts, such as rents or vacant possession values, to arrive at property yields. The fact that, for the purposes of analysis, the valuer valued the block by aggregating the values of all the flats in it did not mean that that was how the investor purchasing the block would value it, but would simply be the valuer valuing as he devalued the evidence. The difficulty since *Sportelli* is that the conventional approach has now been replaced by a standard deferment rate which is not derived from the property market and has been made relatively inflexible in order to produce consistency. This deferment rate was, conventionally, applied to the combined vacant possession values of each flat in the block. Now that the *Sportelli* approach has introduced standard deferment rates, we consider that other previously accepted components of the valuation may have to be reconsidered.

77. Our own view, unfettered by authority, would be that the open market value of the block under Schedule 6 should be arrived at by using a valuer's normal approach, based on analysis of the property market rather than the financial market. We believe, indeed we are satisfied, that Mr Beckett is likely to be right to say that in the real world the investor, arriving at his bid for the freehold interest in this property, would

> factor into his bid his holding costs and his need to make a reasonable profit and that in these circumstances he would not necessarily assume that the open market value of the whole block, comprising as it does, many diverse interests, is the same as the sum of its individual parts. We accept that in the market these discounts are made, and we do not necessarily reject as irrelevant Mr Beckett's evidence of blocks in secondary locations. We very strongly suspect that similar evidence exists in relation to blocks of flats in prime central London, although it was not put before us and is probably exceedingly difficult to find. We reject the suggestion that the vacant possession [value] of each flat has its own purchaser's margin and profit built in. The margin arises because of the diverse components of a block of flats, whereas, generally speaking, the residential market in individual flats is for owner occupation."

154. That lengthy citation from the decision of the LVT substantially encapsulates the arguments which were repeated to us. Their force is reflected in the respect which they received from the extremely experienced tribunal which heard this case.

The components of the purchaser's margin

155. The difference between the price which the freehold would command if sold in the open market as a whole at the date of reversion of the short leases and the aggregate value of the individual components which a purchaser would acquire on such a sale is said by Mr Beckett to comprise a number of elements which can be divided between costs and profit. Although the principle of applying a purchaser's margin was not accepted by the respondent, the parties were able to agree figures for those elements which represent costs so that these could be adopted if the Tribunal accepted the appellant's argument that an explicit allowance should be made for the purchaser's margin. The following matters were agreed:

Purchaser's acquisition costs

(i) Surveyor's costs: £25,000

(ii) Solicitors fees: 0.50%

(iii) SDLT: 4.00%

(iv) VAT on (i) and (ii): 15.00%

Purchaser's re-sale costs

(v) Estate Agent's commission: 1.50%

(vi) Solicitor's fees: 0.50%

(vii) VAT on (v) and (vi): 15.00%

Interest

Rate of interest on borrowed money: 6.00%

The parties did not agree the amount of any profit element which a purchaser would expect to achieve but Mr Beckett took this to be 10%. Mr Beckett calculated the total purchaser's margin to be 21.53%, i.e. for every £1m of aggregate value the bulk value, net of the purchaser's margin, would be £784,700.

The case for the appellant

156. Mr Beckett said that it was necessary to allow for the purchaser's margin when calculating the FHVP value of the short leases upon their expiry in 11.82 years time. He explained what he understood by the expression "value" at paragraph 6.2.5 of his report:

> "It is a general truth about valuation that it is an attempt to produce a simulation or analogue of an actual transaction in the real market on a given day. If I say that a given property had a value of £X on a particular day, that only has one meaning – that I think it would have sold for that price (or thereabouts) on that day. Of course, I could be wrong about the actual figure, but the principle is that I am attempting to assess a sale price, rather than, for example, intrinsic worth.
>
> 6.2.6 I therefore approach the assessment of this value from the point of view of an actual sale of a freehold interest at expiry of the Headlease on 6 July 2021, but at the price levels applying at our present valuation date, 11 September 2009. If we do not do this, we are not assessing a value as a property valuer conceives it, but something else. The valuation implies sale, even if that sale is only hypothetical or imaginary."

157. In order to arrive at the value of the freehold on the valuation date Mr Beckett first assumed that there would be a hypothetical sale of the whole freehold interest at the expiry of the head lease on 6 July 2021, which will occur three days after the expiry of the short term leases. This provided the figure which was then to be deferred by the application of the agreed 5% deferment rate. Mr Beckett considered how a hypothetical purchaser would approach such a sale and concluded that he would assess the value of the individual flats he was acquiring as well as the delay, expense and risk involved in their subsequent disposal. He identified the hypothetical purchaser at reversion as being an investor, a dealer or a hybrid of the two, but he excluded what he described as a "true end-user – an occupier of the whole." In assessing the FHVP value of 82 Portland Place such a hypothetical purchaser would consider the risks and opportunities which the investment presented and, in Mr Beckett's view, would allow in his bid for a purchaser's margin.

158. The risks which Mr Beckett considered a purchaser would have in mind included the prospect that some of the flats might be returned with vacant possession but in poor condition, so that they would require refurbishment before they could be sold or re-let; other flats might not be vacated at all so that the hypothetical purchaser might face delay and potentially legal costs in order to remove the former leaseholders or their subtenants; nor did Mr Beckett rule out the possibility that the leaseholders of some of the smaller flats might be entitled to statutory security of tenure under the Housing Act 1988. Additionally, the distribution of flats held on short leases which would expire in

2021 and those whose leases had already been extended and which would not come in hand, would limit the potential to combine flats or otherwise reconfigure the building.

159. Mr Beckett explained that he saw the purchaser's margin in this case as a reward to the hypothetical purchaser for sorting out the problems which would arise on the expiry of the headlease, or for the inconvenience of purchasing a mixed bag of different investment and dealing propositions which might more normally be offered to a variety of purchasers rather than as a single package. He preferred not to regard it as a "bulk discount" simply reflecting quantity because, as he put it, "there are a lot of property buyers capable of taking on a large purchase".

160. Mr Beckett stressed that the purchaser's margin related to the costs which would be incurred and the profit which would be expected by a purchaser on a notional sale of the freehold interest in 82 Portland Place at the expiry of the head-lease and short leases in July 2021. It did not relate to the acquisition or sale costs of the (other) hypothetical purchaser of the freehold interest at the valuation date. In a supplemental report he carefully distinguished between those costs incurred by the hypothetical purchaser on the valuation date, and which would be incurred by that purchaser when selling (he assumed at the expiry of the head-lease in 2021) all of which he said were taken account of in the *Sportelli* deferment rate, and the costs which would be incurred by the subsequent purchaser of the freehold in 2021 who would acquire with a view to selling on or developing the individual components which go to make up the package. It was that ultimate purchaser of the freehold to whom Mr Beckett intended to refer when he used the expression "purchaser's margin".

161. Mr Beckett said that in order to calculate the value of the freehold at the expiry of the headlease in 2021, it was necessary to assume an open market sale. Mr Beckett referred to this value as the receipts (called "R" by him) in preference to the FHVP value because at the date of reversion in 2021 the landlord would not have vacant possession of the whole property since the long leases which had already been extended would continue. He said it was important to distinguish R from the deferment rate. The receipts had to be determined while the deferment rate had already been determined by the Tribunal in *Sportelli* and was agreed by the parties to be 5% in this appeal. Mr Beckett said that "R" was:

> "The market value – sale value therefore – of the landlord's interest (assessed at current [valuation date] prices) at the moment the Headlease expires. Whether the actual landlord will or would sell at that moment is nothing to the point: we are trying to arrive at the price he will get if he does, or would if he did. 'Value' in a property context means 'price payable in a hypothesised sale.'
>
> ...
>
> So the question to be addressed is: what is the receipt... that will come to the landlord on a hypothesised sale of his interest when the Headlease expires. There is no way around it, once one sees it in those correct terms: a margin is required between the aggregate value of all the components – individually not realisable at that point – and the purchase price. …"

162. The determination of the FHVP value had nothing to do with the deferment rate. The determination of that value required the deduction of the purchaser's margin to allow for the costs of

acquisition and sale together with the profit of a hypothetical purchaser at the date of reversion. The deferment rate was used to calculate the present value of the FHVP value and did not include any allowance for purchaser's margin at reversion.

163. Mr Beckett postulated that the function of the deferment rate had changed since *Sportelli*. He explained that, previously, it had been widely believed that the value of freehold reversions could be derived from real world transactions. He said that the analysis of such a transaction comprised a comparison between the aggregate value on reversion and the price paid. This revealed the deferment rate which could then be applied to a comparable property. Mr Beckett said that "this methodology said nothing, and did not have to say anything, about the exact value which arose on reversion." So the existence of the purchaser's margin, although not explicitly allowed for as a deduction from the aggregate value, would be reflected in the deferment rate because the purchaser's margin would be allowed for in the price paid. That changed with *Sportelli* which explicitly dissociated the deferment rate from actual market transactions. That being so Mr Beckett said it was necessary to consider to what the deferment rate should now be applied. He concluded that it should be applied to the FHVP value net of the purchaser's margin.

164. In *Sportelli* the Lands Tribunal had stated at paragraph [80] that it had concentrated upon identifying a generic deferment rate, applicable to long-term residential property reversions in general. It then went on to consider whether that generic rate needed to be adjusted in any particular case for specific factors. One such specific factor was transaction costs which the Tribunal dealt with at paragraph [97] of its decision. Mr Clark, who gave evidence on behalf of one of the respondents in *Sportelli* (Maybury), had expressed the opinion that the hypothetical purchaser's (actual) acquisition and (potential) sale costs should be deducted from the aggregate value of the reversion following its discount by the deferment rate. The Tribunal rejected that approach:

> "To reach his deferment value, Mr Clark made a deduction from the vacant possession value to reflect transaction costs on the sale and purchase of the property. Although, no doubt, in comparing a freehold reversion with an investment in equities the cost of management and dealing will affect the relative rate of return, Mr Clark's approach must, we think, be wrong in principle, as a substitute for valuing the freeholder's reversionary interest by using a deferment rate to discount the vacant possession value. There can, in the first place and in any event, be no justification for a deduction to reflect the cost of purchase as opposed to sale, and Mr Clark was unable to propose one, save the practice of his firm in valuing investment portfolios. Secondly, since the statutory requirement is to arrive at "the amount which … the interest might be expected to realise if sold on the open market", the requirement is to arrive at the price to be paid, not that price less deductions for the cost of sale. This, indeed, makes practical sense, since, in regard to the actual transaction for which the valuation is required, namely the collective enfranchisement by the respondents, the costs of enfranchisement are borne by Maybury, under section 33 of the 1993 Act."

165. Mr Beckett said that the Lands Tribunal's rejection of these transaction costs was not a rejection of the purchaser's margin. The transaction costs identified by Mr Clark in *Sportelli* were those of the purchaser of the freehold interest under paragraph 3 of Schedule 6 to the 1993 Act, whereas the purchaser's margin was an adjustment that needed to be made to the aggregate FHVP

value before it was discounted at the deferment rate. The former costs were reflected in the deferment rate, the purchaser's margin was not.

166. Mr Beckett also emphasised that the purchaser's margin was nothing to do with the risks associated with the management of flats during the term (which was the justification in *Sportelli* for the adoption of a higher deferment rate for flats than for houses). He suggested that the LVT appeared to elide two separate sets of costs and risk in the final sentence of paragraph 75 of its decision (see above) but he distanced himself from that analysis. As Mr Jourdan said in his skeleton argument:

> "The purchaser's margin has nothing to do with the period between the valuation date and the expiry of the leases. The purchaser's margin applies in assessing the FHVP at the end of the deferment period."

167. Mr Beckett supported his evidence by reference to three open market transactions in which he identified the existence of a purchaser's margin.

168. First, he relied upon the sale of the long leasehold interest in 146 newly developed flats (predominantly 1 and 2 bed units) and parking spaces at the former home of Arsenal Football Club, known since its residential redevelopment as Northstand, The Stadium, Highbury Square, London N5 for £41.4m in September 2009. Based on the limited information he was able to obtain Mr Beckett assumed an average FHVP value of each flat of £400,000 (with 4 penthouses at £1.1m) and calculated that the purchase price represented a discount of 32.35% from the aggregate value of the individual flats and parking spaces. He attributed this discount in part to the existence of a purchaser's margin and in part to the fact that most of the flats were already let.

169. The second transaction relied on was a sale of The Pantiles, Finchley Road, London NW11, which Mr Beckett described as a "once grand block of flats, now somewhat neglected but in a good location" just north of Golders Green. The building comprised 41 flats of 3 or 4 bedrooms (many of which were let on assured shorthold tenancies) together with 15 garages and 14 parking spaces. The headlease was sold in June 2003 for £5.875m and a number of the individual flats were immediately resold at auction the following month, achieving prices of £200,000 to £220,000. Mr Beckett calculated that the sale price represented a discount of 34.87% from the aggregate value of the flats, garages and parking spaces, and which he considered provided "unmistakable evidence of the existence of some form of discount when flats are sold together".

170. Mr Beckett's final example was taken from two blocks of flats in Harrow Weald offered for sale at auctions in September 2009. One of the auctions resulted in the sale of a block in Kenton Lane which Mr Beckett described as "not very well managed" and where no improvements had been made for many years. One of the flats was let on a regulated tenancy and the remaining 11 on assured shorthold tenancies. Mr Beckett estimated the FHVP value of each of the individual flats at £180,000 and calculated that the sale price of £2.16m represented a discount from the value of the components of 20.14%, which he took to be evidence of a purchaser's margin. The second auction included lots comprising five blocks totalling 49 flats (let predominantly on assured tenancies with

some regulated tenancies) none of which was sold. Mr Beckett analysed the last bid for each lot which he thought "clearly sets a ceiling for the likely value". He calculated that there was a total discount from aggregate value of 25.86% which he considered must have included a purchaser's margin and a discount for occupation.

171. Mr Beckett acknowledged that none of these examples were transactions of properties within prime central London. He identified Duke's Lodge, 80 Holland Park, London W11 3SG as being a possible example of such a sale. It was sold in July 2013 for £55m but upon further analysis Mr Beckett concluded that this sale was not analogous to the hypothetical sale of 82 Portland Place and that it "neither confirms nor contradicts" his hypothesis that a purchaser's margin would be achieved on a sale of those premises. There was therefore no evidence before us of any freehold sale of a block of flats in prime central London where the existence of a purchaser's margin was indicated.

172. The appellant also relied upon *Ryde International Plc v London Regional Transport* [2003] ACQ/147/2000 (LT); [2004] 2 EGLR 1 (CA) in which the Court of Appeal upheld the approach to valuation adopted by the Lands Tribunal (Mr P R Francis FRICS) in a compulsory purchase case involving the acquisition of a block of 37 flats and five bungalows in Croydon. The development had been constructed in 1989 with a view to the sale of the units to house elderly persons, and with planning permission for that use; no sales were achieved and after a year of unsuccessful marketing the developer decided to let the flats on short term tenancies to any tenant it could find. The local planning authority overlooked the breach of planning control which such general occupation would have represented because it soon became clear that the property would be compulsorily acquired for the creation of the Croydon Tramlink scheme, and it was in that context that the Lands Tribunal had to determine its value.

173. It was common ground before the Lands Tribunal that the appropriate method of determining the value of the freehold interest was by undertaking a residual valuation, because a purchaser would need to refurbish the flats to make them suitable for use as sheltered accommodation consistently with the planning permission (see paragraphs 5.6, 7 and 17). The claimant's expert assumed a sale of the individual flats and bungalows phased over an eight month period. The acquiring authority's evidence was that the price payable for the property on the valuation date would have been less than the aggregate value of the flats and bungalows if sold separately because in formulating its bid the purchaser would factor into the price the amount that was required to put the units into a suitable condition for use as sheltered accommodation and would also allow a profit to account for his costs and risks in undertaking the project. This evidence was accepted in principle by the Lands Tribunal (paragraphs 37, 44 and 45) and its decision was upheld by the Court of Appeal. Mr Beckett emphasised the comments of Carnwath LJ (as he then was) at [20]:

> "It follows that the Tribunal was right to accept the approach of Ms Ellis based upon an assumed sale on the valuation date. It is irrelevant that, in the real world, *Ryde* would not in fact have sold on a single date, but would have refurbished and marketed the flats as individual units over a period of months."

The case for the respondent

174. Mr Pryor submitted that, as Mr Beckett had advanced it, the appellant's argument for a purchaser's margin depended upon a hypothetical sale of the freehold interest in the whole building upon the expiry of the short leases in July 2021, but that there was no warrant for assuming such a sale on any date other than the valuation date, in accordance with paragraph 3 of Schedule 6 to the 1993 Act.

175. The purchaser at the valuation date would consider the nature of the investment he was buying. If vacant possession of the whole block was available on reversion in 2021 he might undertake a residual valuation to reflect any redevelopment potential at that time, as was the case in *Ryde* where the condition of the premises meant that there was a need for a development appraisal involving a deduction of costs and profit from the gross development value. But in the subject appeal Mr Beckett's allowance for a purchaser's margin had nothing to do with the existence of any development potential; he was only concerned with the unimproved FHVP value of some of the flats. Vacant possession of the whole block would not be available at reversion in 2021 because there were still 11 flats let on long leases that would not expire for a further 90 years. The traditional approach to valuing a reversion to FHVP value under these circumstances was to discount the aggregate value and there was no reason not to do so in this appeal.

176. Mr Clark said that in determining the value of the freehold in the whole building at the valuation date, there was no reason to assume that there would take place a single hypothetical sale of all 12 flats upon reversion of the short leases in 2021. A purchaser at the valuation date would have complete flexibility about what he did with those flats upon reversion; he could renovate some or all of the flats and sell them on at a profit; he might want to live in some; he might want to sell them on long leases or let them for short periods. Far from being a disadvantage for which a discount was required, this flexibility and the diversity of the opportunity which a sale of the freehold represented would be a positive feature. Mr Clark considered that if the freehold of 82 Portland Place had come to the market at the valuation date there would have been considerable competition to acquire a rare opportunity such as this in prime central London and the successful purchaser would calculate the aggregate FHVP value and defer it until the reversion in 2021 without incorporating any purchaser's margin.

177. Mr Clark criticised the market transactions on which Mr Beckett relied as supporting the existence of a purchaser's margin as not being remotely comparable to 82 Portland Place. None of them were in prime central London. The Northstand at Highbury was a "distressed" sale made at a time when Arsenal was known to be in negotiations to refinance its expenditure on the construction of its new stadium; press reports of the transaction also suggested that a sale of a smaller number of the same flats, but at a higher purchase price, had recently fallen through. Given the limited evidence available the Highbury sale was therefore of no assistance. The blocks at Harrow Weald were considered by Mr Clark to be letting investments, while the purchaser at The Pantiles was said by Mr Beckett to have acquired the property and then sold on a number of flats to profit on the turn. Mr Clark said that such a purchaser would not be the successful bidder for 82 Portland Place. Mr Beckett no longer relied upon Dukes Lodge in Holland Park since its sale reflected development potential. In his closing submissions Mr Pryor said that Mr Beckett was trying to compare Fords with a Rolls Royce and that it could not be done.

178. Mr Pryor said that Mr Clark had wrongly been accused by Mr Jourdan of having introduced development value as a factor into the valuation of 82 Portland Place. Mr Pryor explained that the agreement of the unimproved FHVP values by the parties reflected Mr Ryan's analysis of the varied condition of the comparables which he concluded, taken as a whole, would accurately reflect a rate for an "average" condition flat. That rate depended upon the analysis of some comparables in 82 Portland Place – notably flats L, N and A – which were purchases and sales by developers. So the agreed FHVP values did reflect some development value. The respondent's case was that a desire to unlock the value inherent in the agreed FHVP values was one reason why a purchaser of 82 Portland Place would be prepared to pay the aggregate of such value and not allow for a purchaser's margin. Mr Clark also said that a purchaser buying 12 separate flats would be able to reduce his development costs and could spread his risk by means of phasing.

179. Mr Pryor denied that *Sportelli* had changed the function of the deferment rate in the manner suggested by Mr Beckett and which the LVT had appeared to accept. Mr Jourdan (but not Mr Beckett) had said that one of the reasons the purchaser's margin had not previously been raised was that, before *Sportelli,* the deferment rate was generally understood to reflect the hope value of doing a deal with tenants before the expiry of their leases. This relieved the purchaser of the risk of having simultaneous vacant possession of all the flats upon reversion. After *Sportelli* this factor was no longer to be reflected in the deferment rate and needed to be reflected in the purchaser's margin instead. Mr Pryor disputed this analysis and said that hope value was never included in the FHVP value and that had not changed following *Sportelli*.

180. Mr Pryor also disputed Mr Beckett's suggestion that before *Sportelli* the value of freehold reversions could be derived from the real world market, and that the Lands Tribunal's decision in 2006 had represented a sea change. Mr Pryor pointed out that in *Arbib* (at 155F) the Tribunal found that although market evidence was usually the best evidence of value, the extent of the right to enfranchise was by then so wide that there was unlikely to be any dependable market evidence. So *Sportelli* had not brought about any great change of principle or approach that meant an allowance for a purchaser's margin had become necessary.

181. During cross examination, Mr Beckett had accepted that the risks which he had identified (see paragraph 158 above) were all reflected in the risk premium component of the deferment rate rather than the FHVP, being factors that arose from the fact that the freeholder's interest was a reversionary one.

182. Mr Pryor questioned why the purchaser whom Mr Beckett hypothesised at the reversion date in 2021 should receive a profit of 10% just for buying and then selling on again in time. Mr Pryor submitted that such an "indolent" purchaser would not succeed in any hypothetical sale. Mr Beckett had interposed a dealer who created a purchaser's margin unnecessarily.

183. Mr Pryor said that *Ryde* did not assist the appellant. In that case it was common ground that a residual valuation was necessary so that costs and profit had to be deducted from an estimate of the gross development value in order to arrive at the value of the freehold interest. The approach in *Ryde* contrasted significantly with Mr Beckett's approach in this appeal where there was no

requirement for a residual valuation. Mr Beckett's deduction for a purchaser's margin had been made from unimproved FHVP values and not from a gross development value following improvement. Any purchaser at the valuation date who deducted a purchaser's margin simply would not succeed in their bid. The successful purchaser would be one who looked to achieve a profit by refurbishment, amalgamation or the exploitation of other opportunities which might be presented over time.

Discussion and conclusion on purchaser's margin

184. The statutory criteria for the valuation of the freeholder's interest are contained in paragraph 3 of Schedule 6 to the 1993 Act. The value of the freeholder's interest in the specified premises is the amount which at the valuation date that interest might be expected to realise if sold on the open market by a willing seller on the assumptions set out in sub-paragraphs (a)–(d). What falls to be determined therefore is how much a hypothetical purchaser would pay on that date for the freehold interest, sold in a single transaction, subject to the leases that existed at that time.

185. The 1993 Act does not prescribe a method of valuation by which that amount is to be ascertained, and in principle any appropriate valuation technique may be adopted provided it is capable of accommodating the statutory assumptions.

186. For that reason we do not consider that it is possible to suggest that any rule of law prohibits the adoption of an approach to valuation which incorporates a purchaser's margin. The question for us in this case is whether, given the parties' agreement on the unimproved FHVP values of the individual flats, and their adoption of the generic *Sportelli* deferment rate, there is any justification for assuming that the successful purchaser on the valuation date would discount the price they were prepared to pay by a margin to reflect the risks and costs on which Mr Beckett relied in his evidence. Expectations of how a purchaser of the building at any other date might behave are irrelevant to that assessment, except to the extent that the hypothetical purchaser on the valuation date might be influenced by them.

187. We accept Mr Beckett's evidence that there is a difference between the hypothetical purchaser's costs of acquisition and disposal, disallowed as a deduction in *Sportelli* because they were already reflected in the deferment rate, and the margin that (another) hypothetical purchaser might obtain if buying the freehold with simultaneous vacant possession on the date of reversion of the short leasehold interests. We also agree that the purchaser's margin proposed by Mr Beckett has nothing to do with the risks associated with the management of leasehold blocks of flats during the term (for which an additional 0.25% risk premium is included in the deferment rate for flats). We are not convinced that the LVT thought that the pre- and post-termination risks were both accounted for by this allowance, but if the final sentence of paragraph 75 of its decision is to be understood in that sense we accept that it would be mistaken. Nonetheless, our acceptance of these distinctions does not entail an acceptance that the purchaser's margin is a valid deduction from the aggregate FHVP value of the short leasehold interests at 82 Portland Place. It is necessary to consider whether there is either evidence or persuasive theoretical justification for making such an allowance.

188. On the matter of evidence Mr Jourdan QC submitted that in paragraph 77 of its decision the LVT had made a finding of fact that on a sale of the building in the open market a purchaser would require a purchaser's margin to reflect the investor's holding costs and its need to make a reasonable profit. It was only the LVT's view of the effect of *Sportelli* which had prevented it from giving effect to that finding of fact. Mr Jourdan submitted that, notwithstanding that the Tribunal was conducting a re-hearing, *prima facie* the appellant was entitled to the benefit of the LVT's finding of fact so that the burden of supplying evidence that the LVT's conclusion was wrong fell on the respondents. We do not accept that contention, nor was it accepted by the Lands Tribunal when a similar submission was made in *Daejan Investments Ltd v The Holt (Freehold) Ltd* (2008) LRA/133/2006 (see paragraphs 40-41). It is our task to consider the evidence adduced before this Tribunal and to determine whether we are satisfied that the purchase price determined in accordance with the statutory criteria should include a purchaser's margin. In doing so we obviously give weight to the views expressed by the LVT, which in this case was particularly experienced in enfranchisement valuation, but those views cannot act as a substitute for evidence which has not been presented or lend greater weight to evidence which has.

189. In his original report Mr Beckett distanced himself from characterising the purchaser's margin as a discount for bulk, describing it as the weakest explanation for the discount he proposed. Nonetheless he suggested that the notion of a bulk discount appeared to have been endorsed by the Lands Tribunal (HHJ Robert Reid QC and Mr N J Rose FRICS) in *Hildron Finance Ltd v Greenhill Hampstead Ltd* (2007) LRA/120/2006, a collective enfranchisement appeal where one aspect of the dispute had concerned the proper approach to the valuation of a porter's flat.

190. In *Hildron* the premises being acquired were a 1930s block in Hampstead on five floors comprising possibly as many as 138 flats. One of the flats was used to house a porter and the rest were let on long leases with at least 63 years unexpired. The Lands Tribunal interpreted the leases as requiring the provision of a porter, although he need not be resident, and found that only the more recent forms of lease enabled the landlord to recover a notional rent for accommodation provided for the porter. The landlord could therefore sell the porter's flat, but to do so would create other problems in relation to the provision of portering services. It was argued for the nominee purchaser that in those circumstances a purchaser would not value the porter's flat as a stand alone investment, but would view it as a small part of a larger investment, and as such would not add the full vacant possession value of the flat to its offer price. The Lands Tribunal accepted that view but although at paragraph 76 it used the expression "bulk discount" as a shorthand for the issues it had recited we do not read its decision as endorsing a generalised discount reflecting the scale of the hypothetical transaction, but rather as an assessment of the contribution to the purchase price of an individual flat the sale of which would create management issues and potentially other irrecoverable expense.

191. We agree with Mr Beckett that, if the freehold reversion to the 25 flats at 82 Portland Place, was offered for sale in the open market, there would be significant interest in it from purchasers with very deep pockets. If a purchaser's margin is to be justified in assessing the price payable, it cannot therefore be on the basis of a discount for bulk.

192. Mr Beckett also referred to a decision of the LVT in 2007 (post *Sportelli)* in which the suggestion of a purchaser's margin had been dismissed. *Church Commissioners for England v*

Chelwood House Freehold Ltd LON/ENF/1866/06 concerned the enfranchisement of a block of 39 flats let on leases of at least 55 years unexpired. One of the issues was whether (assuming hope value was to be excluded from the valuation) the value of the property at reversion was less than the agreed aggregate value of its component parts. It was common ground that a purchaser who wished to buy such a block of flats with the intention of holding it until the leases of the flats expired and then selling would expect a profit and would make an allowance for the possibility of difficulty over obtaining possession, as well as for holding costs pending resale. It was submitted on behalf of the freeholder that those risks were accounted for in the risk premium incorporated into the deferment rate and that the purchaser of such an investment would look to long term growth to provide his profit and would not expect to obtain a margin as part of the purchase price. The LVT accepted that approach, describing the nominee purchaser's proposed discount as wrong in principle and unjustified, concluding that:

> "… the risks at termination are part of the risk premium which is built into the deferment rate, and that there is no evidence or theoretical justification for assuming that such an investor would make any additional discount for the categories of risk outlined by [the nominee purchaser's valuer], notwithstanding that an investor in the real world, buying for a quick return would … undoubtedly take a different view."

193. In *Sportelli* (at paragraph 52) the Lands Tribunal analysed the risks to which an investor in freehold residential reversions would be exposed and identified four which would prompt that investor to require a risk premium. Those risks were: volatility in the market and prolonged periods of downturn; illiquidity, in the sense that any sale would take time to achieve and may only be achieved after a delay and at a time when the market is low; and the risk that the property may become obsolete and deteriorate physically. These factors were considered further at paragraphs 75 to 79 before the Tribunal concluded that they would command a risk premium of 4.5%. That risk premium was added to the risk free rate of 2.25% and reduced by the real growth rate of 2% to produce the generic deferment rate for houses of 4.75%. In cross examination Mr Beckett accepted that the risks of adverse outcomes and inconvenience at the reversion which he had relied on as characteristics of the investment for which the hypothetical purchaser would expect compensation through the purchaser's margin were all accounted for in the 4.5% risk premium included in the deferment rate which he had agreed was to be adopted in this case. Those risks were aspects of the relative illiquidity of a long term property investment. Mr Beckett had also acknowledged in his supplemental report that the nominee purchaser's costs of acquisition and sale were also accommodated in the risk premium, as the Lands Tribunal had indicated in *Sportelli* (at paragraph 97) when it dismissed Mr Clark's suggested allowance for the purchaser's costs.

194. In its final form the case presented by Mr Beckett in favour of a purchaser's margin for 82 Portland Place rested on two foundations: the hypothetical purchaser's desire for a hedge against the view a subsequent purchaser at the short lease reversion date would take over the costs of acquiring the investment as a whole and the costs and uncertainties of selling on the individual components of the package (the hypothetical purchaser's own costs being accounted for in the valuation as a component of the deferment rate); and the hypothetical purchaser's desire to ensure the achievement of a profit on a future sale.

195. There is no statutory requirement to assume a further sale upon expiry of the short leasehold interests and we see no justification for the assumption of such a sale. The only sale required to be assumed is at the valuation date. The term and reversion approach to valuation may propose the assumption of a sale of individual flats at the date of reversion as one element of a technique to arrive at the value which would be realised on the statutory valuation date, but that is no more than valuation methodology and should not be taken too far. In particular we consider that there is no justification for the assumption, which became one of the twin pillars of Mr Beckett's argument for a purchaser's margin, that the hypothetical purchaser on the valuation date would seek and achieve an allowance to cover not his own costs of buying and selling the property, but the costs of a subsequent purchaser which that purchaser might seek to recoup by discounting the price which he would otherwise be prepared to pay at the reversion date.

196. The FHVP values of the flats comprising the specified premises are not subject to appeal. These values were either agreed or determined by the LVT. The parties also agreed the present value of the freehold interest (before allowance for a purchaser's margin, if any) of Units I and Z and the FHVP value of the eighth floor staff and storerooms and Flat 40. The value of the porter's flat and basement staff restroom were reflected in the underlying values of the flats and were not valued separately. We understand these agreed values are net of purchaser's costs and are the amounts receivable by the vendor.

197. The interposing of another hypothetical purchaser at the reversion date introduces the unnecessary assumption of a further sale. The purchaser at the valuation date would himself be an investor or a dealer and would, we suggest, not be prepared to sell the property to another such person only to see them deduct their acquisition and future sale costs together with a 10% profit from the agreed (net of purchaser's costs) FHVP values. We appreciate that the purchaser's margin relates to a deemed rather than an actual future sale but any prospective purchaser who allowed for such a future purchaser's margin would, in our opinion, be most unlikely to be the successful bidder at the valuation date.

198. The LVT saw the *Sportelli* decision as imposing a straightjacket which prevented them from allowing a purchaser's margin and compelled them to determine the acquisition price by reference to the aggregate value of the component parts. The Lands Tribunal did not consider the purchaser's margin in *Sportelli* although it did explain the components of the deferment rate which should be adopted in prime central London enfranchisement valuations unless there are particular special features justifying a departure. To the extent that Mr Beckett's case for the purchaser's margin rested, at that stage, on costs and risk which were already accommodated within the risk premium included in the deferment rate, the LVT was correct (as Mr Beckett himself now acknowledges) to regard itself as precluded from making a further allowance since to do so would be double counting. The LVT clearly thought that the risks in a case such as this were greater than those which would be encountered in a much simpler investment (paragraph 75 of its decision) but no case was advanced to the LVT, or to us, that a different deferment rate was justified on special facts (nor do we think such a case would have had much prospect of success).

199. The possibility that exceptional features of a building may require special consideration and justify a different deferment rate or a separate allowance was acknowledged by the Lands Tribunal in

Sportelli in observations to which effect has been given in subsequent decisions. Where the length of the relevant lease term was less than 20 years the deferment rate would have to have regard to the property cycle at the time of valuation (*Sportelli* paragraph 85, and *Cadogan Square Properties Ltd v Earl Cadogan* [2010] UKUT 427 (LC)). Clear evidence of regional or locational considerations not fully reflected in the freehold vacant possession value may justify a departure from the *Sportelli* rate (paragraph 88, and *Zuckerman v Trustees of the Calthorpe Estate* [2009] EKUT 235 (LC) and *Sinclair Gardens Investment (Kensington)Ltd v Ray* [2014] UKUT 079 (LC)). Obsolescence and condition where, exceptionally, they were not fully reflected in the vacant possession value could also justify a variation (paragraph 91, *Zuckerman* and *Polydorou v Management Nominees (Reversions) Ltd* [2010] UKUT 236 (LC) where an addition to the deferment rate of 0.5% was justified in the case of a house in multiple occupation).

200. In an appropriate case the assessment of the purchase price may also take account of an allowance for the specific risk that the purchaser might perceive of the long leaseholder acquiring security of tenure at the end of the term as an assured tenant under Schedule 10 to the Local Government and Housing Act 1989. In *Clarise Properties Ltd* [2012] UKUT 4 (LC) the Tribunal allowed such an allowance on the enfranchisement of a house subject to a lease with 78 years unexpired under the Leasehold Reform Act 1967, and more recently, in *Midland Freeholds Ltd* [2014] UKUT 0304 (LC), a similar allowance was made in a claim for an individual long lease of a maisonette under the 1993 Act. In neither of these cases was there a respondent to the appeal by the freeholder and in neither did the Tribunal refer to *Sportelli* (both cases concerned modest properties in the West Midlands, rather than in prime central London).

201. These examples illustrate that in an appropriate (exceptional) case the *Sportelli* straightjacket (as the LVT described it) may be loosened. That statement is no more than a recognition of the Lands Tribunal's observation in *Sportelli* at paragraph 123:

> "123. The application of the deferment rate of 5% for flats and 4.75% for houses that we have found to be generally applicable will need to be considered in relation to the facts of each individual case. Before applying a rate that is different from this, however, a valuer or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate."

202. We do not rule out the possibility that such loosening may include the incorporation of a purchaser's margin if the facts and evidence clearly demonstrated that the *Sportelli* risk premium was inadequate. A case involving leases with a very short reversion might provide facts sufficient to justify such consideration (such cases already fall outside the *Sportelli* norm) but a proper assessment of the deferment rate as a whole would be required. In this case there was no consideration of the property cycle at the valuation date, nor whether the short unexpired terms might justify a modified deferment rate where the hypothetical purchaser at the reversion would not have vacant possession of a substantial part of the building since there would still be 11 outstanding leases with 90 years unexpired term.

203. The possibility also exists that a very substantial investment property might justify a "bulk discount" adjustment in the risk premium to reflect greater risks. That possibility was the subject of expert evidence referred to in the very recent decision of Mann J in *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch) at paragraphs 372-378; the argument was described as "thin [but not] to the point of unarguable". Dolphin Square comprises 1,229 flats and is on an entirely different scale to 82 Portland Place and it will be remembered that Mr Beckett was dismissive of the characterisation of his purchaser's margin as a bulk discount. (In *Westbrook* the possibility of a discount for holding costs was also referred to at paragraphs 379-391 and this appeal was mentioned; we have considered the judgment which was published shortly before the draft of this decision was released to counsel, but it has not caused us to alter our approach.)

204. In general therefore, and on the evidence presented to us, we consider that the LVT was correct to regard itself as precluded by *Sportelli* from acceding to Mr Beckett's approach.

205. The appellant argues that the deferment rate set by the Lands Tribunal in *Sportelli* is different in kind to that which was previously understood to apply in the market. For example, as we understand Mr Beckett's evidence, an investor would not pay £561,700 today for an investment worth £1m with vacant possession in 11.82 years time if he wanted a return, net of his hypothetical purchaser's costs, of 5%. He would only pay, using Mr Beckett's purchaser's margin of 21.53%, £440,766 (£1m less 21.53% deferred 11.82 years at 5%). This represents a gross return, before deducting costs, of approximately 7.2%. Before *Sportelli* the deferment rate would have been 7.2% and not 5% as determined by the Tribunal. The result of adopting a 5% deferment rate but not explicitly deducting the purchaser's margin is, says Mr Beckett, an over valuation of the reversionary interest.

206. It does not seem to us that this advances the appellant's argument. It pre-supposes that an investor, before *Sportelli*, implicitly allowed for a purchaser's margin on the reversionary value within the market discount rate adopted. There is no evidence that, in circumstances such as those in this appeal, a purchaser today would deduct a hypothetical purchaser's hypothetical costs and profits upon a hypothetical future sale at the reversion of the short leases. The sales evidence produced by Mr Beckett to demonstrate a purchaser's margin does not support a deduction for a hypothetical future event. Such evidence was also flawed for the reasons given by the respondent and did not relate to any property in prime central London.

207. Nor do we accept that *Ryde* assists Mr Beckett's argument. *Ryde* concerned the assessment of a gross development value following a programme of refurbishment and both parties relied upon residual valuations. There is no serious suggestion in the current appeal that the property would realise development value over and above any potential already reflected in the agreed unimproved FHVP values.

208. We therefore conclude that it is not necessary to allow for a purchaser's margin when calculating the value of the freeholder's interest in 82 Portland Place under paragraph 3 of Schedule 6 to the 1993 Act.

Determination

The McHale Issue

209. The Tribunal will follow the Court of Appeal's decision in *McHale*, as it is bound to do. Under paragraph 4 of Schedule 6 to the 1993 Act the leases of the participating tenants should therefore be valued without the benefit of rights under that Act. The appeal is dismissed on this issue.

The participation issue

210. The tenants of Flats E and Q are to be treated as participating tenants for the purpose of ascertaining marriage value. The appeal is dismissed on this issue.

The relativity issue

211. The relativity of the short leasehold interests, excluding the benefits of the 1993 Act, is determined as 33% of their FHVP value. The appeal succeeds in part on this issue.

The purchaser's margin issue

212. No deduction should be made from the aggregate FHVP value of the short leasehold interests to reflect a purchaser's margin arising on a hypothetical sale of those interests at the date of reversion. The appeal is dismissed on this issue.

213. The enfranchisement price is determined at £20,823,592 in accordance with the attached valuations at Appendices 1 and 2.

Martin Rodger QC
Deputy President

A J Trott FRICS
Member

8 September 2014

APPENDIX 1

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION
82 PORTLAND PLACE, LONDON W1B 8NS

A. Value of freeholder's present interest

(i) Capital value of headrent (agreed)		4,147
(ii) FHVP of short leaseholds[1]	29,932,073	
x PV in 11.82 years @ 5%	0.5617	
		16,812,845
(iii) FHVP of long leaseholds[2]	31,748,543	
x PV in 101.82 years @ 5%	0.0070	
		222,240
(iv) Freeholder's interest in Unit I (agreed)		1,370,382
(v) Freeholder's interest in Unit Z (agreed)		945,251
(vi) FHVP of 8th floor staff/store rooms (agreed)	340,000	

[1] Flats E, G, H, J, K, M, Q, R, T, V, W and Flat 40

[2] Flats A, B, C, D, F, L, N, O, P, S and U

x PV in 11.82 years @ 5%		0.5617		
			190,978	
(vii) Freeholder's hope of marriage value (see Appendix 2):			138,055	
Value of freeholder's present interest				19,683,898

B. Value of intermediate leaseholder's interest

Agreed at				159,000
Total value of landlords' present interest				19,842,898

C. Marriage value (participating tenants with under 80 years unexpired term[3])

1. *Value of proposed interests*

Freeholder				Nil
Intermediate leaseholder				Nil
Participating tenants	19,992,879			
Agreed @ 99% of FHVP value		0.99		
				19,792,950

2. *Value of existing interests*

(a) *Freeholder's interest*

(i) Apportioned headrent @ $^{7}/_{25}$ of £4,147			1,161	
(ii) FHVP of participating tenants		19,992,879		
x PV in 11.82 years @ 5%		0.5617		
			11,230,000	
			11,231,161	

(b) *Intermediate leaseholder's interest*

Agreed at			2,750	

(c) Participating tenants

[3] Flats E, G, M, Q, R, T and W

FHVP value	19,992,879		
Relativity at 33%	0.33		
		6,597,650	
			17,831,561
			1,961,389

3. *Marriage value*

Landlords' share of marriage value @ 50%	980,694[4]
Enfranchisement price	20,823,592

APPENDIX 2

HOPE VALUE FOR NON-PARTICIPATING SHORT LEASEHOLD FLATS: H, J, K, V and FLAT 40

1. **Value of proposed interests in flats**

Assuming a lease extension of 100 years and relativity at 98% of FHVP value

Flat	Near FHVP	
H	2,743,758	
J	699,867	
K	3,466,426	
V	2, 553,331	
40	277,028	
		9,740,410

2. **Value of freeholder's proposed interest**

FHVP value of flats:	9,939,194		
x PV of £1 in 111.82 yrs @ 5%	0.0043		
		42,739	
			9,783,149

Less

3. **Freeholder's present interest**

FHVP value of flats:	9,939,194

[4] Apportionment of marriage value:

Freeholder: £980,694 x £19,683,898 / £19,842,898 = £972,836

Intermediate leaseholder (remainder) = £ 7,858

	x PV of £1 in 11.82 years@ 5%	0.5617		
			5,582,845	
4.	**Intermediate leaseholder's present interest**			
	Agreed at		Nil	
5.	**Short leaseholders' present interest**			
	FHVP value of flats	9,939,194		
	Relativity @ 33%		3,279,934	
				8,862,779
	Marriage value			920,370
	Hope value attributed to freeholder at 15%			138,055