UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Leasehold enfranchisement – collective enfranchisement – leasebacks under Schedule 9 to the Leasehold Reform, Housing and Urban Development Act 1993 – units not in existence at the relevant date – common parts at the relevant date – rights over the common parts – leasebacks of commercial premises

IN THE MATTER OF AN APPEAL AGAINST DECISIONS OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN:

MERIE BIN MAHFOUZ COMPANY (UK) LIMITED **Appellant**

and

BARRIE HOUSE (FREEHOLD) LIMITED **Respondent**

Re Barrie House, 93-94 Lancaster Gate, London W2 3QJ

Before Sir Keith Lindblom, President, and Mr A. J. Trott F.R.I.C.S.

Sitting at 43-45 Bedford Square, London WC1B 3AS on 6, 7, 8 and 16 May 2014
Site inspection on 5 June 2014

Philip Rainey Q.C. and *Ellodie Gibbons*, instructed by Seddons, solicitors, for the appellant
Edwin Johnson Q.C. and *Christopher Heather*, instructed by Charles Russell LLP, for the respondent

The following cases are referred to in this decision:

Queensbridge Investment Limited v 61 Queens Gate Freehold Limited [2014] UKUT 437 (LC)
Barrie House Freehold Limited v Merie Bin Mahfouz Company (UK) Limited [2012] EWHC 353 (Ch.)
Cawthorne v Hamdan [2007] Ch. 187
Trongate v Eker, 13 Eaton Place, unreported, LVT/LON/00BK/OCE/2011/0058
Earl Cadogan v Cadogan Square Limited [2011] UKUT 154 (LC)
41-60 Albert Palace Mansions (Freehold) Limited v Craftrule Limited [2011] 1 W.L.R. 2425
Howard de Walden Estates Limited v Aggio and others [2008] UKHL 44
Cadogan v McGirk [1996] 4 All E.R. 643
Panagopoulos v Earl Cadogan [2011] Ch. 177
Gayford v Moffatt (1868-69) L.R. 4 Ch. App. 133
Green v Ashco Horticulturist Ltd. [1966] 1 W.L.R. 889
Wood v Waddington [2014] EWHC 1358 (Ch.)
William Aldred's Case (1610) 9 Co. Rep. 57b
F.C. Strick & Co. Ltd. v The City Offices Co. Ltd. (1906) 22 T.L.R. 667
Heslop v Bishton [2009] EWHC 607 (Ch.)
Deacon v S.E. Railway (1889) 61 L.T. 377
Re McGuckian & Ors' Appeal [2008] EW Lands LRA/85/2006 (3 January 2008)
R. (on the application of Cart) v Upper Tribunal [2012] 1 A.C. 663
Dartmouth Court Blackheath Ltd v Berisworth Ltd [2008] 2 P. & C.R. 36
9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council [2006] 1 W.L.R. 1186

The following further cases were referred to in argument:

Kintyre Limited v Romeomarch Property Management Limited [2006] 1 E.G.L.R. 67
Cravecrest Limited v Duke of Westminster [2012] UKUT 68 (LC)
West Hampstead Management Company limited v Pearl Property Limited [2002] EWCA Civ 1372
Gormley v Hoyt [1982] 43 N.B.R. (2d) 75
Gilchrist v Revenue and Customs Commissioners [2014] UKUT 0169 (TCC)
Hosebay Limited v Day [2012] 1 W.L.R. 2884

DECISION

Introduction

1. This appeal and cross-appeal concern the collective enfranchisement of a block of flats called Barrie House, at 93 and 94 Lancaster Gate, London W2 3QJ ("the building"). They challenge two decisions of a Leasehold Valuation Tribunal of the London Rent Assessment Panel ("the LVT"), the first dated 23 February 2012 ("the first decision"), the second 9 April 2013 ("the second decision"). The appellant, Merie Bin Mahfouz Company (UK) Limited ("MBM"), is the freeholder of the building. The respondent and cross-appellant, Barrie House (Freehold) Limited ("BHF"), is the nominee purchaser. The LVT granted permission for both the appeal and the cross-appeal on 13 May 2013, and the Tribunal directed that they be dealt with under the special procedure, by way of review.

2. Both the appeal and the cross-appeal focus on MBM's entitlement to leasebacks of particular parts of the building. As we shall explain, however, the cross-appeal gives rise to an issue of valuation, and at the invitation of both parties we have heard relevant expert evidence on that issue.

3. After the hearing we gave the parties the opportunity to make further submissions in writing in the light of the Tribunal's decision in *Queensbridge Investment Limited v 61 Queens Gate Freehold Limited* [2014] UKUT 437 (LC). Further submissions were made on behalf of MBM on 6 November and 27 November 2014 and on behalf of BHF on 27 October and 17 November 2014. We have taken those submissions into account.

Background

4. The building stands at the junction of Bayswater Road and Lancaster Gate, opposite Kensington Gardens. It was built in 1936. It has 11 floors – a basement, the ground floor and nine storeys above that – beneath a flat roof. Its main entrance is on its eastern side, where there is an area for vehicles to stop and turn and a small garden. It originally contained 37 flats let to tenants and a porter's flat in the basement.

5. In 2010 and 2011 MBM carried out various works to the building. These were described by the LVT in paragraph 10 of the first decision:

> "… In or about July 2010 [MBM] started work to extend the porter's flat by incorporating part of an adjacent redundant tank room and that work was completed in November 2010. In about mid 2010 it applied for planning consent to construct a one bedroomed flat in the entrance hall of the building, which was granted on 9 December 2010. In about January 2011 it started work to build facilities for the porters in the area on the left (as seen from the entrance) of the ground floor which was formerly used by the porters for the storage of their uniforms and other items and by residents for temporary storage of large items awaiting transport. In January 2011 it started work to form a new flat in the entrance hall to the right of the staircase. As the works proceeded, the landlord's project manager decided that there was room for a two bedroom flat, which was completed in June 2011 and named Flat 1A. In about July 2011 it started work on the formation of an office in the basement in an area formerly used by the porters and by residents for storage. In mid 2011 it dug an exploratory trench in the lawn

adjacent to the eastern elevation of the building as a first step in the creation of two lightwells, one serving the extension of the porter's flat and the other serving the basement office. Some of the leaseholders objected to the proposed works and the landlord undertook not to continue them pending an application by the tenants to the High Court for an injunction. On 17 August 2011 the landlord applied for planning consent to build two new flats on the roof of the building. Planning consent was refused on 19 January 2012 but the landlord proposes to appeal against the refusal."

6. Some time before the collective enfranchisement process got under way two mobile telephone antennae had been put up on the roof of the building, and associated equipment had been installed inside. One of these antennae, erected in 2005, belonged to O2 (UK) Limited ("O2"), the other, erected in 2008, to Orange Personal Communications Services Limited ("Orange"). Since the hearings before the LVT the equipment belonging to Orange has been removed.

7. The freehold of the building is registered under title number LN8017. There is no head lease. The porter's flat was retained in the freehold. So was Flat 1A. The other flats are let on long leases. 27 of them are occupied by qualifying tenants, 23 of whom participated in the enfranchisement. The leases of the other ten flats were held by MBM's parent company, Merie Bin Mahfouz Group, which, because it owned more than two flats in the building, was not a qualifying tenant. O2 and Orange both had commercial leases for their antennae and equipment. O2 had a lease, granted in August 2005, of a room in the basement and part of the surface and airspace of the roof of the building. Orange had a lease, granted in January 2008, of part of the surface and airspace of the roof and a vault in the basement under the pavement on the north side of the building.

8. On 12 January 2011 ("the relevant date") BHF served on MBM their "initial notice" under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), claiming to exercise the right to collective enfranchisement of the building. 12 January 2011 is therefore the valuation date, being the "the relevant date" under Chapter I of Part I of the 1993 Act. By the initial notice BHF claimed the right to acquire the whole of the freehold property registered under title number LN8017. The notice proposed a price of £2,350,000 for the freehold of the building and £500 for the strip of land on the eastern side of the building.

9. On 10 March 2011 MBM served a counter-notice under section 21 of the 1993 Act, admitting that BHF was entitled to acquire the freehold of the building. It proposed a price for the freehold of the building of £8,080,862, asserting that it was entitled to retain the strip of land to the east of the building but that otherwise the price for that land should be £1,000. It also proposed that several parts of the building should be leased back to it.

10. On 26 July 2011 BHF made an application under section 24(1) of the 1993 Act for the determination of the terms of acquisition which remained in dispute. The application came before the LVT at two hearings, in February 2012, after which the LVT issued the first decision, and in March 2012 and March 2013, after which it issued the second decision. The issues before the LVT were many and complex. The first decision was concerned with the terms of transfer, including the extent of the interests to be acquired in the building and the terms of a leaseback to MBM of parts of it. The second decision was concerned mainly with valuation.

11. In January 2012, Roth J. refused BHF's claim for an injunction to prevent MBM constructing the two lightwells at the front of the building, above the two units in the basement for which it was

seeking leasebacks (*Barrie House Freehold Limited v Merie Bin Mahfouz Company (UK) Limited* [2012] EWHC 353 (Ch)).

12. The first hearing before the LVT took place on 6 to 8 February 2012. The LVT inspected the building and its surroundings on 6 February 2012. As we have said, it issued the first decision on 23 February 2012. The second hearing took place on 28 to 30 March 2012 and 6 to 8 March 2013. The second decision, as we have said, was issued on 9 April 2013.

The issues for the Tribunal

13. The appeal is concerned mainly with MBM's proposed leasebacks of three parts of the building – Flat 1A, the porter's flat and the basement office. MBM contends that it was, and is, entitled to leasebacks of all three. BHF resists that contention. It says that no leaseback could be granted of the Flat 1A, for three reasons, each of which would be enough on its own to defeat MBM's claim: first, because Flat 1A did not exist at the "relevant date" and no right to a leaseback can arise unless the unit in question did exist at that date; secondly, because the area in which it was constructed was within the common parts of the building, and the relevant provisions of the 1993 Act do not allow a leaseback of common parts; and thirdly, because the construction of Flat 1A was a substantial interference with the rights of the tenants, and the 1993 Act does not permit a leaseback if that is so. A leaseback of the porter's flat could not be granted because it was a common part. And MBM was not entitled to a leaseback of the basement office, for any of these three reasons: first, because it did not exist at the relevant date; secondly, because it was within the common parts; and thirdly, because there was no evidence before the LVT that it was intended for letting on a business lease, and so it could not be a "unit" which qualified for a leaseback.

14. From those areas of dispute in the appeal seven main issues emerge. The first five all concern Flat 1A, the sixth the porter's flat, and the seventh the basement office. Those issues are:

(1) Does a unit have to exist at the relevant date if it is to be the subject of a valid claim for a leaseback?

(2) Can a unit which includes an area that was a common part at the relevant date be the subject of a valid claim for a leaseback?

(3) Do the lessees have any rights over the parts of the ground floor incorporated into Flat 1A other than the general right in the leases to pass and re-pass over the main hallway?

(4) Was the construction of Flat 1A a substantial interference with the lessees' right to use the fire escape route through the area in which Flat 1A has been constructed?

(5) What was the area within Flat 1A which had development value at the valuation date and what should its price be?

(6) Was the LVT wrong to apply a test for common parts which related to use at the relevant date rather than an obligation under a lease?

(7) Was the LVT wrong to refuse a leaseback of the basement office?

15. The cross-appeal raises a further issue:

(8) Was the LVT wrong to grant leasebacks of the O2 premises and the Orange premises?

16. The parties agreed that if issue (8) were to be decided against MBM (i.e. in the affirmative) it would be necessary for the Tribunal to determine the value of the freehold reversionary interest. That value was not determined by the LVT and is not agreed.

The statutory framework

17. The provisions for collective enfranchisement in the 1993 Act confer on "qualifying tenants" of flats in "relevant premises" the right to have those premises acquired on their behalf by a "nominee purchaser". Under section 3(1) the relevant premises must consist of "a self-contained building or part of a building", containing one or more flats, and the total number of flats held by qualifying tenants must be at least two thirds of the total number of flats in the premises. Under section 13(2)(b)(ii) the right must be exercised by the tenants of at least half of the flats in the building. Section 14 provides that the qualifying tenants by whom the right is exercised are the "participating tenants". The claim to exercise the right must be made by the giving of an "initial notice" under section 13, and that initial notice must specify the premises the freehold of which is proposed to be acquired, and the proposed purchase price. Section 1(8) provides that the date on which the initial notice is given is the "relevant date". Under section 32 and paragraph 3 of Schedule 6, after an amendment made by section 126(1) of the Commonhold and Leasehold Reform Act 2002, the relevant date is the date on which the freeholder's interest is to be valued.

18. Section 21 of the 1993 Act provides for the reversioner's formal response to the claim – by the giving of a counter-notice. Under section 21(2) and (3)(a)(ii), if the counter-notice states that the reversioner admits that on the relevant date the participating tenants were entitled to exercise the right to collective enfranchisement, it must specify "any additional leaseback proposals by the reversioner".

19. The relevant provisions for leasebacks are in section 36 and Schedule 9. Section 36(1) provides that upon the acquisition of a freehold interest in the specified premises the nominee purchaser "shall grant to the person from whom the interest is acquired such leases of flats or other units contained in those premises as are required to be so granted by virtue of Part II or III of Schedule 9". Section 38 defines a "unit" as "(a) a flat" or "(b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling", or "(c) a separate set of premises let, or intended for letting, on a business lease". Section 101 defines a flat as "a separate set of premises (whether or not on the same floor)", which "(a) … forms part of a building", and "(b) … is constructed or adapted for use for the purposes of a dwelling", and "(c) either the whole or a material part of which lies above or below some other part of the building". Paragraph 1(2) in Part I of Schedule 9 provides that any reference in that schedule to a flat or other unit, "in the context of the grant of a lease of it, includes any yard, garden, garage, outhouses and appurtenances belonging to or usually enjoyed with it and let with it immediately before the appropriate time". The "appropriate time" is defined in paragraph 1(1) as "the time when the freehold of the flat or other unit is acquired by the nominee purchaser".

20. Part II of Schedule 9 relates to mandatory leasebacks, Part III to a freeholder's right to require a leaseback of certain other units. The provisions for mandatory leasebacks in Part II relate specifically to flats and other units let under secure tenancies (paragraph 2) or by housing associations under tenancies of other kinds (paragraph 3). The provisions for leasebacks which are not mandatory, in Part III, relate to two other types of unit, including: a unit other than one to which paragraph 2 or paragraph 3 applies, which is not, immediately before the appropriate time, let to a qualifying tenant (paragraph 5). Paragraph 5(2) provides that "if the freeholder by notice requires him to do so" the nominee purchaser must grant him "a lease of the unit in accordance with section 36 and paragraph 7 below". Paragraph 7 requires such a lease to conform to the provisions of Part IV, except to the extent that any departure from those provisions is either agreed to by the nominee purchaser and the freeholder or is directed by the "appropriate tribunal". Paragraph 12 in Part IV requires that the lease includes "so far as the lessor is capable of granting them, the like rights to use in common with others any premises, facilities or services as are enjoyed immediately before the appropriate time by any tenant of the demised premises".

21. Under section 1 of the 1993 Act the "right to collective enfranchisement" is the right of the qualifying tenants to have acquired on their behalf the freehold of the relevant premises. Subsections (2)(a) and (3) of section 1 extend this right to the freehold of any property not comprised in the relevant premises if it is property which a qualifying tenant is "entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not)". Under section 2, when the right to collective enfranchisement is exercised, the participating tenants are required in certain circumstances, and enabled in others, to acquire interests under a lease. Section 2(1)(b) and (3)(a) provides that the participating tenants are entitled to have acquired for them the interest of a tenant under any lease in "any common parts of the relevant premises", where the acquisition of that interest is "reasonably necessary for the proper management of or maintenance of those common parts" on their behalf. Section 101, which contains general provisions on the interpretation of Part I of the 1993 Act, defines "common parts", where they relate to any building or part of a building, as including "the structure and exterior of that building or part and any common facilities within it".

22. Section 19 contains provisions which prevent the landlord from making any disposal severing his interest in the relevant premises after the collective enfranchisement process has been begun. Section 19(1)(a)(ii) provides that once the initial notice has been registered under section 97, and while it continues in force, the owner of the freehold of the relevant premises may not "grant out of that interest any lease under which, if it had been granted before the relevant date, the interest of the tenant would to any extent have been liable on that date to acquisition by virtue of section 2(1)(a) or (b)".

23. The determination of the price to be paid by the nominee purchaser for the freehold and other interests in the specified premises is governed by section 32 and Schedule 6. Under paragraph 3(1) of Schedule 6 the value of the freeholder's interest, subject to certain provisos, "is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller …", on a number of specified assumptions. Paragraph 3(4) provides that where a lease of any flat or other unit contained in the specified premises is to be granted to the freeholder under section 36 and Schedule 9, the value of his interest in those premises "at the relevant date" so far as relating to that flat or other unit is to be be taken to be the difference "as at that date" between the value of his freehold interest in it and the value of his interest in it under that lease, "assuming it to have been granted to him at that date …".

24. Section 24(3) permits either the nominee purchaser or the reversioner to make an application to the court if all the terms of the acquisition have either been agreed between the parties or determined by the appropriate tribunal but a binding contract has not been entered into within two months. When such an application is made "the court may … make such order under subsection (4) as it thinks fit". Section 24(4) allows various orders to be made, including an order providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3), but subject to such modifications as:

> "(i) may have been determined by the appropriate tribunal, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and
>
> (ii) are specified in the order".

Issue (1) – Does a unit have to exist at the relevant date if it is to be the subject of a valid claim for a leaseback?

25. The LVT accepted the submission made on behalf of BHF that the date at which an area of the relevant premises must exist if it is to be the subject of a valid claim for a leaseback is the date of the initial notice. In the first of the two paragraphs numbered 71 in the first decision it said:

> "If the unit is created after the date of the notice of claim, the landlord cannot claim a leaseback. …"

In the second paragraph numbered 71 in the first decision the LVT answered "Yes" to the question "Does the unit have to be in existence at 'the relevant date' in order to be eligible for leaseback?"

26. The entrance hall of the building originally had open areas either side of a central staircase ascending to the floors above. The LVT gave a detailed description of the layout in paragraph 44 of the first decision. It described the central staircase as "an imposing curved staircase in the Bauhaus flyaway style". The porters' desk was next to the staircase. Beside the porters' desk was a room used by the porters as a rest area and by the leaseholders for meetings. The LVT described this room as "the common room" (ibid.). Behind the common room there were several other rooms, including four originally provided for maids, which by the relevant date were used by leaseholders for storage. There was a fire escape route running from the central fire escape at the back of the building, through the common room, into a lightwell (known as "Lightwell No.2"), and down the stairs to the basement.

27. That arrangement was altered by the development of Flat 1A. The application for planning permission submitted by MBM to the City of Westminster Council in July 2010 described the proposal as a "change of use from 'maids room' to self-contained single bedroom residential apartment". The works involved moving the porters' desk forward in the entrance hall, to a position immediately inside the entrance doorway and in front of the lift shafts, forming a new porters' rest area to the left of the main staircase, and re-routing the fire escape from the rear of the building though the new porters' rest area into another lightwell (known as "Lightwell No.3") and down the stairs to the basement.

28. In its section 21 counter-notice MBM claimed a leaseback of Flat 1A, even though work on its construction was not yet complete. There was no dispute that that work had not been completed by the "relevant date". The LVT heard evidence from witnesses on either side about when it was begun.

29. BHF's evidence about the beginning of the work was that in about January 2011, just before the service of the initial notice, MBM started to carry out works to the left-hand side of the staircase, and that works to the right-hand side of the staircase – the works to construct Flat 1A –were commenced several weeks after the date of the notice of claim.

30. The relevant evidence for MBM was that Flat 1A had had distinct rooms since March 2011 and was formally completed on 30 June 2011.

31. The LVT preferred BHF's evidence on this question and went on to find, in paragraph 76 of the first decision, that the construction of Flat 1A was not begun until after the date of the initial notice.

32. The rival arguments before the LVT, elaborated at length in submissions before us, are essentially quite simple. For MBM it was submitted that the landlord's right to a leaseback depends solely on the property in question being a unit which was not let to a qualifying tenant at the "appropriate time" within the meaning of Schedule 9 – the time when the freehold of the flat or other unit is acquired by the nominee purchaser – and that, until the appropriate time, the landlord is entitled to create units, to grant leases of them to non-qualifying tenants, and to be granted leasebacks of them when the freehold is acquired by the nominee purchaser. For BHF it was submitted that a landlord is not entitled to a leaseback of any property which was not a "unit" within the meaning of the 1993 Act at the "relevant date", being the date of the initial notice under section 1(8).

33. The LVT rejected MBM's argument. It set out its reasons for doing so in paragraphs 65 and 66 of the first decision:

> "65. We have come to the conclusion that, to be the subject of a leaseback under section 36 of and paragraph 5 of Schedule 9 to the Act a unit must exist at the date of the notice of claim and the landlord cannot create units after that date and require them to be leased back to him. We do not accept Mr Rainey's submission that such a conclusion is contrary to paragraph 5(1) of Schedule 9. In our view the effect of that sub-paragraph, together with section 21(3)(a)(ii) which requires the landlord's leaseback proposals to be specified in the counter-notice, is limited to this: a claim to a leaseback of a unit which exists at the date of the notice of claim and is not at that date let to a qualifying tenant must be made in the counter-notice, but if, between the date of the notice of the claim and the date when the freehold is acquired by the nominee purchaser the unit is let to a person who is not a qualifying tenant, it may be subject to a leaseback under paragraph 5 of Schedule 9. We consider that paragraph 5(1) of Schedule 9 is concerned with the nature of the letting and does not authorise the creation of units after the date of the initial notice.
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> 66. In our view this conclusion accords with the valuation provisions of paragraph 3(4) of Schedule 6 and with the scheme of the Act which, as amended by section 126(1) of the Commonhold and Leasehold Reform Act 2002, requires, with very limited exceptions, the

valuation to reflect the circumstances as they exist at the date of the notice of claim. If, after it has been given a notice of claim under section 13 of the Act, a landlord chooses to create units, while it may by doing so succeed in illustrating the development potential of the premises, it does so at its own risk as to the costs of the works, insofar as they exceed any development value."

34. The application of those conclusions to the claim for a leaseback of Flat 1A is to be found in the first of the two reasons given by the LVT in paragraph 76 of the first decision:

> "The landlord has no right to a leaseback of Flat 1A for two reasons. The first is that it is a unit which was constructed after the date of the notice of claim. We are satisfied on the evidence that its construction was not started, and it is agreed that it was not completed and did not become a unit, until after the date of the notice of claim. …"

35. Mr Rainey argued that the LVT's analysis betrayed a clear error of law. He submitted that there was no statutory requirement for a flat or other unit to be in a completed state at the relevant date if it is to qualify for a leaseback to the landlord. Paragraph 5 of Schedule 9 to the 1993 Act entitled MBM to a leaseback of any unit which was not immediately before the "appropriate time" – as defined in paragraph 1(1) of Schedule 9 – a flat let to a qualifying tenant. The critical moment was the time when the freehold of the flat was acquired by the nominee purchaser, not the earlier date when notice was given under section 13. The LVT's reliance on the provisions of paragraph 3(4) of Schedule 6 in particular, and the scheme of the 1993 Act in general, with their emphasis on a valuation reflecting the circumstances as they existed at the relevant date, was misconceived. The LVT acknowledged in paragraph 66 of the first decision the "exceptions" to the principle that the valuation of the freeholder's interest must reflect the circumstances as they were at the date of the notice given under section 13. One of those exceptions relates to leasebacks of flats whose construction is already under way. In that situation, if the landlord was willing and able to go on and complete the works there would be no good reason to deny him a leaseback.

36. Mr Rainey submitted that one cannot infer any qualifying criteria for leasebacks from the provisions governing the procedure for the service of a counter-notice in section 21 of the 1993 Act. The relevant criteria are to be found in paragraph 5 of Schedule 9. Paragraph 5(1) applies to any unit which was not immediately before the "appropriate time" a flat let to a person who was a qualifying tenant of it. The freehold of the flat was acquired by the nominee purchaser only at the "appropriate time". Logically, therefore, the flat need not exist before then. Paragraph 5(2) allows notice to be given requiring a leaseback where a "unit" did not exist at the relevant date or did not qualify for a leaseback at the date of the counter-notice. Mr Rainey did not accept that the reference in paragraph 5(2) to the nominee purchaser granting a lease of a unit "if the freeholder by notice requires him to do so" is confined to a counter-notice served under section 21. If that were so paragraph 5(2) would be superfluous. Paragraph 5(2) envisages circumstances such as those of this case. In theory, a notice under paragraph 5(2) can be served at any time, whether before or during the LVT's – or First-tier Tribunal's – hearing, or after the hearing but before its decision, or even after that if an appeal is made to the Upper Tribunal. The terms of acquisition are not ultimately determined until the decision becomes final under section 101(9) of the 1993 Act.

37. Mr Rainey relied here on Roth J.'s decision in the injunction proceedings. In those proceedings BHF had argued that under the 1993 Act there was a duty on the freeholder "not to carry out any material alteration to the premises after the initial notice, save as expressly committed or reserved by

the lease" (paragraph 52 of the judgment). Roth J. rejected that argument. He held that there was nothing in the 1993 Act to prevent a landlord undertaking work to his building after the relevant date. He said (in paragraph 54):

> "The form of duty put forward by the claimants would have a very broad impact, effectively freezing any development of the building for the duration of the enfranchisement proceedings, even though such proceedings might never result in the participating tenants actually acquiring the freehold. They can withdraw their claim, and they may of course decide that they are unwilling to pay the price determined by the tribunal. I see no warrant to incorporate a duty of that nature by implication into this detailed statute."

38. Mr Rainey submitted that the LVT misunderstood the Court of Appeal's decision in *Cawthorne and others v Hamdan* [2007] Ch 187. In that case it was held that if a flat had no qualifying tenant at the date of the counter-notice the landlord would lose the right to claim a leaseback unless he had done so in his counter-notice, because section 21 of the 1993 Act requires that the counter-notice contains any leaseback proposals. In this case, MBM's counter-notice included a proposal for the leaseback of Flat 1A even though the flat was incomplete at that time. In *Cawthorne v Hamdan* the court left open the possibility that a valid claim for a leaseback could be made for a flat that did not meet all of the tests in Schedule 9 at the date of the counter-notice but did so later. Lloyd L.J., with whom Mummery and Rix L.JJ. agreed, said (at p.193H) that this was "very unlikely", but "could happen". Whether or not Lloyd L.J. was right about that, said Mr Rainey, *Cawthorne v Hamdan* is certainly not authority for the proposition that a flat which was to be the subject of a claim for a leaseback must exist on the relevant date.

39. Mr Rainey also submitted that the LVT's conclusion was inconsistent with its earlier decision in *Trongate v Eker, 13 Eaton Place*, unreported, 9 January 2012 (LON/OOBK/OCE/2011/0058). In that case, which concerned the date by reference to which a leasehold interest could be acquired under section 2(1) of the 1993 Act, the LVT concluded (at paragraph 44) that "[the] phrase 'relevant date' does not freeze the interests of the parties at that time in so far as leasehold interests are concerned and that there is a difference between the provisions relating to the freehold and leasehold interests as set out in section[s] 1 and 2 of the [1993] Act."

40. As Mr Rainey acknowledged, it is implicit in his argument on this issue that the appropriate tribunal might have to judge as best it could whether a flat or other unit would exist by the date of enfranchisement. But, he submitted, other judgments of this kind often have to be made in the enfranchisement process – such as in making assumptions about marriage value when applying the provisions of paragraph 4(2) of Schedule 6 (see, for example, the decision of the Tribunal (His Honour Judge Reid Q.C. and Mr A.J. Trott F.R.I.C.S.) in *Earl Cadogan v Cadogan Square Limited* [2011] UKUT 154 (LC), at paragraph 190). Mr Rainey submitted that if the First-tier Tribunal assumed a flat would exist by the time a binding contract was entered into but this proved to be wrong, this would be a change of circumstances which the LVT could be asked to deal with under the provisions of section 24(4)(b)(i) of the 1993 Act.

41. Mr Johnson submitted that Mr Rainey's argument is clearly ill-founded. The LVT accepted that the construction of Flat 1A had begun at the end of March or the beginning of April 2011 and was completed at the end of June 2011. So Flat 1A did not exist on the relevant date, or even at the date of the counter-notice. Therefore, said Mr Johnson, the claim for a leaseback of Flat 1A was misconceived. If Mr Rainey's argument was right a landlord would be free to claim leasebacks of

whatever random areas he wished, and only at completion would it be possible to see whether those areas had in fact become units. This would reduce the collective enfranchisement process to chaos. When the terms of acquisition came to be agreed, or determined by the First-tier Tribunal, no one would know whether a particular area specified by the landlord in his counter-notice for a proposed leaseback would in fact qualify for a leaseback. The First-tier Tribunal would be left to speculate about that. The valuation process would become hopelessly uncertain. How would a valuer know what he had to value, and, for example, whether to value the "phantom unit" – as Mr Johnson described it – as a flat or as a commercial unit? And how would he approach the valuation of other parts of the building that were not subject to a claim for a leaseback?

42. Mr Johnson accepted that a collective enfranchisement process might often involve the making of assumptions or judgments about future events. But he submitted that where proposals for leasebacks were concerned Parliament had not compounded the complexity of the whole exercise by leaving at large – at least until the completion date – the date on which the flat or unit in question had to exist. There was nothing in the statutory provisions to indicate that a date other than the relevant date should be taken as the moment when a unit had to exist if it was to be the subject of a valid claim for a leaseback.

43. It would be odd, said Mr Johnson, if the provisions of section 36(1) relating to the "specified premises", as defined in section 13(12), assumed that those premises had to exist at the relevant date but that the provisions relating to "flats or other units contained in those premises", for which leasebacks are required to be granted under Part II or Part III of Schedule 9, could include units which might or might not come into existence in the future. A "unit" as defined in section 38(1) cannot be any area within a building in which the landlord might choose to create a new flat between the relevant date and the date of completion. The proviso in paragraph 5(1) of Schedule 9 – that that paragraph "applies to any unit falling within sub-paragraph (1A) which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it" – operates as a condition subsequent to a claim for a leaseback. The relevant unit must exist at the relevant date and the leaseback of that unit must be claimed in the counter-notice. MBM's argument here is similar to the landlord's in *Cawthorne v Hamdan*, which failed. In his judgment in that case Lloyd L.J. explained how the proviso in paragraph 5(1) is intended to work (at p.196B):

> "[It] seems to me that the way in which the statutory scheme works, without giving rise to unreasonable and absurd consequences, is this. If the reversioner wants a leaseback of a flat in respect of which, at the time of the counter-notice, there is not a qualifying tenant, he must say so in his counter-notice. If he does so, then he will be entitled to a leaseback, so long as there is still no qualifying tenant immediately before the acquisition by the nominee purchaser. Thus, the reference to the appropriate time does not extend to that moment the opportunity for the reversioner to serve a leaseback notice if he has not made proposals to that effect in the counter-notice. Rather it imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counter-notice, such that he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does have a qualifying tenant."

In that analysis, said Mr Johnson, the landlord's entitlement to a leaseback must subsist at the relevant date. And it must subsist for a unit of the relevant kind. This cannot be so unless the unit itself exists at the relevant date, just as the premises containing that unit must exist if a valid claim for collective enfranchisement is to be made. If it does not, but the landlord presses on with work to

construct one before the completion date arrives, he does so in full knowledge of the collective enfranchisement process, and at his own risk.

44. In his further written submissions Mr Rainey sought to draw support for his argument from the Tribunal's decision in *61 Queens Gate*.

45. In that case, after the LVT had determined the terms of the leasebacks of three flats in the specified premises which had been claimed by the landlord in his counter-notice, and after the landlord had been granted permission to appeal to the Tribunal on several other aspects of the LVT's decision, the landlord granted 999-year leases of the three flats to qualifying tenants. The nominee purchaser complained that the new leases had been granted by the landlord in an attempt to circumvent the decision of the LVT without the need for an appeal, and urged the Tribunal, in the exercise of its discretion under section 24(2)(b), to refuse to modify the terms of the transfer, so that the landlord would have to take the leasebacks. The Tribunal (the Deputy President, Mr Martin Rodger Q.C.) accepted (at paragraph 65) that the landlord was entitled to grant the new leases. It observed (at paragraph 66) that the 1993 Act "makes no provision for an additional limitation on the freeholder's entitlement to deal with its own property once the terms of a leaseback have been agreed and determined", and that no such limitation can be implied. It acknowledged that "the only time when it can finally be known whether a leaseback is to be granted is 'immediately before the appropriate time' (paragraphs 2(1) and 5(1) of Schedule 9) …". The "condition subsequent" to the freeholder's entitlement to a leaseback, to which Lloyd L.J. referred in *Cawthorne v Hamdan*, must exist at that stage (paragraph 67). The Tribunal could not accept the submission that the appropriate tribunal has a discretion to refuse to recognize a change in circumstances the effect of which is that the conditions for the grant of a leaseback are no longer satisfied (paragraph 68). It saw nothing unconscionable in a freeholder exercising the freedom to deal with his own property which the 1993 Act allows him until immediately before completion (paragraph 73).

46. In the light of that decision Mr Rainey submitted that a landlord is entitled to deal with the freehold of the specified premises as it sees fit unless the 1993 Act prohibits it. There is nothing in the 1993 Act to prevent the leaseback of a unit not in existence at the relevant date, or of a common part. Changes in circumstances could be brought about by the landlord, even after an adverse decision by the LVT. Examples of this would include a lease of a flat which is intermediate at the relevant date, and thus liable to acquisition under sections 2(1)(b) and (2), ceasing to be intermediate – the situation which arose in *13 Eaton Place* – or the implications for the assessment of marriage value under paragraph 4 of Schedule 6 if a qualifying tenant either ceases to be a participating tenant or becomes one. In this case, where there have been physical changes to the building, in particular the creation of Flat 1A, the building must be taken as it is, not as it was at the relevant date. There is no provision in the 1993 Act requiring a unit to exist at the relevant date. In Schedule 9 the only requirement as to the existence of the unit is that it must exist at the "appropriate time", which is the date of completion. Likewise, the question of whether or not a unit comprises or includes a common part must be considered in the light of the circumstances as they are and not as if they had been frozen at the relevant date. It cannot sensibly be suggested that any of the area of Flat 1A is a common part now, three years after it was constructed. So, even if there cannot be a leaseback of a common part, that is irrelevant to the argument that there can be a leaseback of a unit which has come into existence after the relevant date. The same goes for the basement office, which existed by the date of the LVT's site inspection in February 2012. Even though MBM might still do as the landlord in *61 Queen's Gate* did and grant leases of Flat 1A, the basement office and the porter's flat to another entity, such as its parent company, the validity of such a grant remains untested. It might

not escape the prohibition in section 19(1)(a)(ii). The issues in this appeal remain live and must be decided in any event.

47. Mr Johnson's further submissions opposed that argument, as well as the suggestion now made by Mr Rainey that MBM might still be able to grant leases of Flat 1A, the basement office and the porter's flat – which he said was plainly inconsistent with the scheme of the 1993 Act. The facts of *61 Queen's Gate* were materially different from those of this case. The whole context for the Tribunal's analysis in that case was that the three flats with which that case was concerned existed at the relevant date, but were not let to qualifying tenants and could therefore be the subject of leasebacks under paragraph 5 of Schedule 9. By the time of the hearing before the Tribunal, however, this situation had changed and the "condition subsequent" for leasebacks of those particular flats could not be satisfied. The Tribunal relied upon but did not enlarge the existing jurisprudence, including that in *Cawthorne v Hamdan*.

48. We cannot accept Mr Rainey's argument on this issue. We think Mr Johnson's answer to it is correct. In our view the LVT's conclusion was right, essentially for the reasons it gave.

49. We should make it plain before we go any further that we have no intention of expressing any view on the suggestion made by Mr Rainey in his further submissions that MBM might now be able to grant leases of Flat 1A, the basement office, and the porter's flat. That is not an issue in this appeal.

50. Three basic points should be made at the outset. None of them is novel or controversial.

51. First, the 1993 Act comprises a self-contained code for the collective enfranchisement of leasehold property. The statutory scheme is comprehensive. It should be read as a whole. One should not have to imply into it provisions which it does not contain, or avoid the plain meaning of the provisions it does (see, for example, the judgment of Henderson J. in *41-60 Albert Palace Mansions (Freehold) Limited v Craftrule Limited* [2011] 1 W.L.R. 2425). If specific provisions are read in isolation from their full context they are liable to be misunderstood. As Lord Neuberger of Abbotsbury warned in *Howard de Walden Estates Limited v Aggio and others* [2008] UKHL 44 (in paragraph 33 of his speech), one should avoid "inventing a gap where none exists". One should assume that the statutory scheme, though complex, is nonetheless coherent and complete. Secondly, the statutory scheme should be interpreted and applied, if it can be, to provide consistency in its operation and, in every case, an outcome which is certain and clear. It is in the interests of both landlord and tenant that this should be so. Thirdly, however, one should not lose sight of Parliament's purpose – to enable tenants to acquire the freehold of the premises in which they live, in the circumstances prescribed by the 1993 Act. As Millett L.J. said in his judgment (with which Waite and Thorpe L.JJ. agreed) in *Cadogan v McGirk* [1996] 4 All E.R. 643 (at p.648B):

> "It would, in my opinion, be wrong to disregard the fact that, while the 1993 Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

As Roth J. said in *Panagopoulos v Earl Cadogan* [2011] Ch. 177 (in paragraph 19 of his judgment), in the interpretation of the 1993 Act, "considerations of practicality and convenience are important".

52. All of those three principles seem relevant here. And in our view they serve to strengthen the proposition that if a leaseback of a unit is to be claimed by the landlord it must exist at the "relevant date" – and that the leaseback will be of the unit as it was at that date.

53. The LVT accepted that proposition, and in our view were right to do so. The decision of the Court of Appeal in *Cawthorne v Hamdan* is not direct authority for it. Nor is *Panagopoulos v Cadogan*. But, as Mr Johnson submitted, it is consistent with both of those decisions. Lloyd L.J.'s analysis in *Cawthorne v Hamdan* was predicated on the assumption that the flat for which the leaseback is claimed is in existence at the time when the landlord serves his counter-notice in response to the tenants' notice of claim. If the landlord wants a leaseback of that flat he must claim it then. He will not get it if, immediately before the property is acquired by the nominee purchaser, there is a qualifying tenant in the flat. The Court of Appeal rejected the notion that the claim for the leaseback could validly be made at any moment before the "appropriate time", as defined by paragraph 1 of Part I of Schedule 9 to the 1993 Act. Neither Roth J. at first instance in *Panagopoulos v Cadogan* nor Carnwath L.J. in the Court of Appeal doubted the concept of the relevant date being the point in the process at which the status of a particular part of a building – in that case an area said to be a common part, as defined in section 101 of the 1993 Act – would fall to be judged.

54. Leaving authority aside, we also accept Mr Johnson's submission that the scheme of the provisions for collective enfranchisement claims in the 1993 Act makes it necessary to consider the circumstances as they were at the relevant date.

55. Two parts of the statutory scheme demonstrate that.

56. First, the whole process by which a claim for collective enfranchisement moves towards its result is begun on, and continues from, the relevant date, when the initial notice under section 13 is given. The process is designed to produce, at that stage, the greatest possible clarity as to what property is to be acquired by the participating tenants and subject to valuation when the purchase price is determined. The definition of "the specified premises" in section 13(12)(a) confirms that at the relevant date the nominee purchaser must be able to identify the premises to which the claim for collective enfranchisement relates. The scope of the process is set by the matters specified in the initial notice. Section 13(3)(c)(ii) – the requirement that the initial notice specifies the flats or other units in the specified premises which are considered to be subject to the provisions relating to mandatory leasebacks in Part II of Schedule 9 – clearly contemplates that at the date of the service of the initial notice the qualifying tenants will be able to identify such flats or other units. And section 13(3)(d)(i) – the requirement that the initial notice specifies the proposed purchase price for the freehold of "the specified premises" – assumes that at that date the tenants will be able to say what the ingredients in the valuation will be.

57. The counter-notice provisions in section 21 also focus on the position at the relevant date. The essential aim of those provisions is to establish whether the landlord accepts that, "on the relevant date", the tenants were entitled to exercise the right to collective enfranchisement. Section 19 precludes certain transactions by the landlord after the initial notice under section 13 has been registered, including the creation of new leasehold interests which would have been liable to be acquired under section 2(1)(a) or (b) if the lease had been granted "before the relevant date" (section 19(1)(a)(ii)). Under section 21(3) any counter-proposals by the landlord, and any "additional

leaseback proposals" he has, must be stated as a response to the tenants' proposals in the initial notice. As section 21(7) makes plain, the landlord's additional leaseback proposals are proposals relating to flats or other units to which either Part II or Part III of Schedule 9 "is" applicable, not "will be" or "might be". The absence of any specific reference to the relevant date in Schedule 9 itself is, we think, immaterial. The leaseback provisions in section 36 apply to flats or other units contained in "the specified premises". It is clearly implicit in these arrangements that the tenants will not have to resort to conjecture about flats or units which do not exist at the relevant date but might or might not come into being at some later stage.

58. Secondly, the provisions of paragraph 3(4) of Schedule 6, as to the valuation of the landlord's interest in a flat or other unit which is to be leased back to him under section 36 and Schedule 9, leave no room for doubt. The significance of the relevant date in that particular context is unmistakeable. Paragraph 3(4) is explicit. The value of the landlord's interest in the flat or other unit is to be ascertained at "the relevant date". If this value is to be ascertainable at that date the flat or other unit must have existed then. In our view, no other understanding of that provision is possible. We accept Mr Johnson's submissions to this effect.

59. In our view, therefore, the LVT was right to conclude, in paragraph 65 of the first decision, that if a unit is to be the subject of a leaseback under section 36 and paragraph 5 of Schedule 9 the unit in question must exist, as a unit in which a leasehold interest can properly be created, at the time when the initial notice is served. The LVT's understanding of the Court of Appeal's decision in *Cawthorne v Hamdan* was, we believe, entirely correct. Paragraph 5(1) of Schedule 9 is not to be read as authorizing leasebacks of units created after the relevant date. And in our opinion the LVT was also right to conclude, in paragraph 66 of the first decision, that this understanding of the provisions of section 36 and paragraph 5 of Schedule 9 is consistent with a basic principle apparent in the provisions relating to valuation in paragraph 3(4) of Schedule 6, and in the scheme of the 1993 Act as a whole, which is that, subject to changes in tenure affecting the entitlement to leasebacks, the valuation must represent the reality of the circumstances as they were at the relevant date. There is of course nothing in the 1993 Act to forbid the landlord from making physical changes to his building after the relevant date. As the LVT said, if the landlord chooses to do this by creating a new flat in the premises after the relevant date he is perfectly free to do so, though he proceeds at his own risk. If he does, he is likely to be able to demonstrate some development value. But this does not mean that he is entitled to claim a leaseback of the new unit. The 1993 Act does not provide him with any such right. And we see no justification for implying it.

60. We do not think those conclusions are inconsistent with the provisions in section 24 allowing for the terms of acquisition to be modified to take account of any change in circumstances after they have been agreed or determined. This flexibility in the statutory scheme is obviously sensible. In framing the provisions of Chapter I of Part I of the 1993 Act Parliament saw that it was impossible to eliminate every uncertainty at the relevant date. This pragmatism is reflected in Lloyd L.J.'s concept of the "condition subsequent" in *Cawthorne v Hamdan*. In our view the imperative that at the relevant date one must be able to identify the subject-matter of the claim, including the flats for which leasebacks may be available, is entirely compatible with that concept. If, after the relevant date, a flat for which a leaseback is claimed is let to a qualifying tenant, or if a flat ceases to be let to a qualifying tenant, the facts underlying the enfranchisement and the parties' respective entitlements will in that respect have changed. Often an enfranchisement process will be protracted. Sometimes a flat which was either not let at the relevant date or let to somebody who was not a qualifying tenant will have been let to a qualifying tenant by the time the premises is acquired by the nominee purchaser.

Parliament allowed for this in section 24(4), as the Tribunal recognized in *61 Queen's* Gate. But we do not discern in the Tribunal's decision in that case any expansion of the existing principles relating to collective enfranchisement. The case turned on its own, somewhat unusual facts. The decision does not, in our view, improve Mr Rainey's argument on this or any other issue in the appeal.

61. For those reasons we think the LVT was right to decide this issue as it did.

Issue (2) – Can a unit which includes an area which was a common part at the relevant date be the subject of a valid claim for a leaseback?

62. At the first hearing before the LVT it was submitted for BHF that if the area for which a landlord is claiming a leaseback comprised or included common parts at the date of the initial notice he was not entitled to that leaseback, regardless of whether the area in question was then a unit within the meaning of section 38 of the 1993 Act. In paragraph 59 of the first decision the LVT recorded the concession which had been made on behalf of MBM at that stage – though not necessarily for any appeal – "that the common room, porters' lavatories and shower had been common parts before their incorporation in Flat 1A, that Flat 1A was not a unit at the date of the initial notice, that the area surrounding the storage cages in the basement had been common parts before its incorporation in the office, the porter's flat and roof were common parts within the meaning of the Act, that the porter's flat was and is a unit within the meaning of the Act."

63. We have already referred to the evidence the LVT heard about the beginning of the construction of Flat 1A and the relevant findings it made.

64. In paragraph 67 of the first decision the LVT said:

> "67. We are also satisfied that it is not open to the landlord to incorporate in a unit parts of the building which the tenants seek to acquire which were at the date of their notice of claim a common part of the building, or to require a leaseback of common parts which existed at the date of the notice of claim, whether or not such common parts were at that date a unit. We do not consider Mr Rainey's submission that Cadogan could have obtained a leaseback of the caretaker's flat in [*Panagopoulos v Cadogan*] if only it had remembered to ask for one to be tenable. We agree with Mr Heather's submission [for BHF] that the policy of the Act is to enable tenants to acquire the freehold of the building, including the common parts within the building, as well as the freehold of or permanent rights over areas outside the building over which their leases give them rights, and, if necessary for the management or maintenance of the common parts, the interest of the tenant under any lease, other than a superior lease, which demises any common parts of the building. Those rights are necessary to give effect [to] what we regard as the clear purpose of Chapter I of Part I of the Act, which is to enable tenants, for a proper price, to acquire the freehold of the whole of the building which contains their flats.

65. In the first of the two paragraphs numbered 71 in the first decision the LVT considered the question "[Is] it relevant to the right of leaseback whether the unit comprises or includes common parts?" Its answer was this:

> "… If [the unit] was created before the date of the notice of claim and its creation did not substantially interfere with the tenants' rights under their leases, the landlord may claim a

leaseback, but if its creation substantially interfered with the tenants' rights, he may not do so."

66. Mr Rainey submitted that the LVT's conclusion on this issue lacked any basis in the relevant provisions of the 1993 Act. There was nothing in the definition of a "unit" in section 38, or in section 36 and Schedule 9, to support the view that a unit cannot incorporate a common part, and that there cannot be a leaseback of areas which were common parts at the relevant date. The LVT ignored the possibility that the part of the building now occupied by Flat 1A, even if it was originally within the common parts of the building, had ceased to be so once the construction of Flat 1A was begun and the fire escape route diverted. But in any event the question of whether or not a particular unit was, or had been, a common part had nothing at all to do with the statutory criteria for a leaseback. The LVT was wrong to hold otherwise. It had read more into the decision in *Panagopoulos v Cadogan* than is actually there. In that case it was held – somewhat surprisingly, said Mr Rainey – that a caretaker's flat was a common part despite also being a residential unit and potentially subject to a qualifying tenancy, and therefore, under section 19(1)(a)(ii) the lease granted by the landlord was void. But the court did not decide that the leaseback provisions of the 1993 Act cannot apply to a flat which incorporates a common part. That issue did not arise. Nor did the court have to consider what the position would be if an area had been a common part at the relevant date but had ceased to be a common part while the claim for collective enfranchisement was live.

67. Mr Johnson submitted that the extent of the common parts in a building fell to be determined as at the relevant date. The 1993 Act did not indicate any other date. The LVT had effectively found as a fact, in paragraph 44 of the first decision, that at the relevant date the area which had become Flat 1A comprised common parts as defined in section 101(1) of the 1993 Act, and also that it had been part of a designated fire escape route. Those findings were not controversial then, or now. The area incorporated in Flat 1A was within the common parts of the building at the relevant date. A leaseback of that area was not available because the statutory right to voluntary leasebacks was confined to units. It is clear from the definition of a unit in section 38 of the 1993 Act that the right to obtain a leaseback was not meant to apply to common parts, but was confined to distinct and separate units within the building which were not subject to common use by the tenants. The main purpose of the provisions for collective enfranchisement in the 1993 Act, said Mr Johnson, is to entitle participating tenants to acquire the whole of the relevant premsies, including its common parts. It would be inimical to that purpose to allow a leaseback of common parts, and the provisions of section 36 and Part III of Schedule 9 do not permit that.

68. Again, we cannot accept Mr Rainey's submissions. In our opinion the LVT's conclusion on this point in paragraph 67 of the first decision was correct.

69. The possibility of a leaseback of an area within the relevant premises which is, or contains, a common part is not specifically excluded by the provisions of section 36 and Parts II and III of Schedule 9. Those provisions are cast in terms of the landlord being granted leasehold interests in flats and units. Section 36(1) refers simply to "leases of flats or other units contained in those premises" as are required to be granted under Schedule 9. This does not mean that a flat or other unit cannot be, or include, or be included in, the common parts.

70. It is true that in *Panagopoulos v Cadogan* the landlord had made no attempt to get a leaseback of any common parts. After the collective enfranchisement process had begun he granted a 999-year lease of a caretaker's flat and a "patio", which was in fact the floor of a light-well. The court had to

decide whether it was lawful for the landlord to do that. The participating tenants said the lease was contrary to section 19(1)(a)(ii) of the 1993 Act because it was a lease of common parts which were reasonably necessary for them to have acquired under section 2(1)(b) and 2(3)(a). Roth J. accepted (in paragraphs 52 and 53 of his judgment) that, in principle, a residential flat can also be a common part as defined in section 101 of the 1993 Act. We see no reason to doubt that. Roth J. went on to hold, and the Court of Appeal agreed, that both the caretaker's flat and the light-well were common parts and that the lease of each was void under section 19. In considering the light-well Roth J. said (at p.195):

> "66. I consider that the matter can best be approached by considering the implications if the light-well were *not* part of the building. In that case, as it would not be part of the premises covered by section 3, the participating tenants would not have the right to acquire the freehold of the light-well under section 1(1). Nor would they have the qualified right to acquire its freehold under section 1(2)-(4) since it is not property which the tenants are entitled to *use* in common. It would therefore fall outside the scope of the right to collective enfranchisement.
>
> 67. In my view, such a capricious conclusion would be clearly contrary to the way the 1993 Act is intended to operate. …"

71. As Mr Johnson submitted, one of the essential aims of the 1993 Act, conspicuous in the provisions of Chapter 1 of Part I, is that the participating tenants in a claim for collective enfranchisement are, subject to certain limitations, entitled to acquire the common parts of the premises to which the claim relates. It is inherent in the provisions of sections 1 and 2 of the 1993 Act that the nominee purchaser will acquire the whole premises, including the common parts – irrespective of whether they are comprised in the freehold of the premises or subject to a lease, and so long as the specified circumstances apply. Under section 1(3) the right to collective enfranchisement enshrined in section 1(1) relates to two specific categories of property, namely "appurtenant property" demised by a qualifying tenant's lease of his flat in the relevant premises (subsection (3)(a)), and property which a qualifying tenant is entitled by his lease "to use in common with the occupiers of other premises", whether those other premises are contained in the relevant premises or not (subsection (3)(b)). Section 2(3)(a) entitles qualifying tenants to have acquired on their behalf leasehold interests under which the demised premises consists of or includes "any common parts of the relevant premises", provided that the acquisition of the interest in question is reasonably necessary for the proper management or maintenance of those common parts.

72. When it enacted those provisions Parliament cannot have foreseen the landlord having leased back to him those areas of the relevant premises which at the relevant date were common parts. That, we believe, would be hostile to the scheme and purpose of the statutory regime for collective enfranchisement. If the tenants are, in principle, entitled to have acquired the common parts the landlord cannot be allowed to defeat that entitlement by getting a leaseback of them. And we do not think the relevant provisions of the 1993 Act ought to be construed in that way.

73. In our view that conclusion is faithful to the provisions of section 19 which prohibit certain transactions by the landlord after the initial notice has been registered, including the granting of a lease under which the tenant's interest would have been liable to acquisition by the qualifying tenants under section 2 had the lease been granted before the relevant date. The prohibition in section 19(1)(a)(ii) expressly covers leasehold interests of the kinds referred to in section 2(1)(a) and (b), and the latter includes, in section 2(3)(a), the interest of the tenant under any lease of common parts.

74. We therefore agree with the LVT's conclusion in paragraph 67 of the first decision that a landlord may not have a leaseback of a unit, which was, or was included in, an area that was a common part at the relevant date.

75. We do not accept that in coming to that conclusion the LVT misunderstood the decision in *Panagopoulos v Cadogan*. The facts and issues there were of course different from those in this case. But in our view the LVT's approach was consistent with the principle underlying Roth J.'s observations on the status of the light-well in that case, which is that the 1993 Act enables tenants to acquire, for a proper price, the freehold of the whole of the building which contains their flats, including the common parts. The LVT was plainly conscious of that principle and applied it correctly.

Issue (3) – Do the lessees have any rights over the parts of the ground floor incorporated into Flat 1A other than the general right in the leases to pass and re-pass over the main hallway?

76. In paragraph 45 of the first decision the LVT said this:

> "…It is clear from the evidence and from [the plans showing the position of the maids' rooms and common room and the external envelope of Flat 1A] that, now that Flat 1A has been built, the entrance hall is smaller and less visually attractive than it was, and the fire escape route is different from its former route although it remains adequate. … We accept that, possibly with the exception of the maids' rooms which have in the past been let to individual tenants, all parts of the ground floor and basement were, prior to the landlord's recent works, used by the porters and/or by the residents and were regarded by landlord and leaseholders as communal areas, for the upkeep of which the leaseholders paid service charges under their leases."

77. In paragraphs 68 and 69 of the first decision the LVT considered whether a landlord may, either before or after the date of the initial notice, interfere with the tenants' rights in the common parts of the specified premises. On this question it said:

> "68 … As we have said, we are satisfied that he cannot, after the date of a notice of claim under section 13 of the Act, create a unit out of the common parts. But can he create a unit out of the common parts before the date of the notice of claim, and can he divert, modify or reduce the common parts?
>
> 69. It is the case, as Mr Rainey reminds us, that the building is in the freehold ownership and control of the landlord until the tenants acquire the freehold, and it follows that until the transfer of the freehold the landlord can in principle alter the building. Any alteration cannot, however, be such as substantially to interfere with the tenants' rights under their leases. That was the test applied by Roth J. in the recent application for an injunction and we respectfully agree with it. That is the test which we apply to each alteration to the building which the landlord in the present case has carried out. If any such alteration has substantially interfered with the tenants' rights without their consent, in our view the landlord ought not to be permitted to take advantage of it."

78. The second of the two reasons given by the LVT in paragraph 76 for its conclusion that MBM was not entitled to a leaseback of Flat 1A was this:

> "[In] our view it is a substantial interference with the tenants' rights under the first schedule to their leases *at all times by day or by night to go pass and repass over and along the main entrance of the said building*. We accept the evidence given to us by the tenants that the entrance hall was a feature of the building, that it was spacious and welcoming with an attractive and imposing staircase and that its appearance has been significantly adversely affected by the creation of Flat 1A. We also accept that they and the porters habitually used the porters' desk area and the common room which were incorporated in Flat 1A and that they had an implied right to do so and that the escape route which they had an express right to use went through part of what is now Flat 1A."

79. The First Schedule to the lease contains the "Easements Rights and Privileges included in this Demise". The rights provided in paragraph 1 of that schedule are these:

> "Full right and liberty for the Lessee and all persons authorised by him (in common with all other persons entitled to the like right) at all times by day or by night to go pass and repass over and along the main entrance of the said Building and the common passages landings and staircases thereof and to use the passenger lift therein and the gardens forecourts roadways pathways and rides in the curtilage thereof PROVIDED NEVERTHELESS that the Lessee shall not authorise the user of the said lift or gardens by any tradesmen or the user of the said lift for carrying of goods".

80. Those rights are qualified by paragraphs 10 and 13 of the Fifth Schedule, which provide respectively that "[the] Lessee shall not place or permit or suffer to be placed any bicycle perambulator boxes or other articles of any description or any obstruction in the entrance hall staircases or passages of the said Building …" and that "[the] Lessee shall not permit any person or persons or children under the control of the Lessee to loiter or play in or about the entrance stairs passages or lifts or use the said entrance stairs or lifts otherwise than as a means of approach to or egress from the Flat".

81. The LVT also concluded, in the final sentence of paragraph 76 of the first decision, that the tenants had "an implied right" to use "the porters' desk area and the common room which were incorporated in Flat 1A", as well as the "express right" to use the fire escape route which went through the area in which Flat 1A had been constructed.

82. Mr Rainey submitted that BHF could not show that the tenants had any rights over the area included in Flat 1A which had not been granted to them in their leases. The tenants had never had a right, either express or implied, to use the "common room" for any purpose. Their rights under the lease were limited to the express, though general, right "to … pass and repass over and along the main entrance" to the building. In paragraph 44 of the first decision the LVT said that the common room was used from time to time by the residents "for meetings and discussions with the porters". But the evidence that the tenants met there from time to time, and that MBM had done nothing to stop that, was not evidence of any right to do so. Nor was it a proper basis for implying such a right. The LVT did not get to grips with the law on the implication of terms in leases, and its conclusion on this point was contrary to authority. It could not be said that business efficacy required a right to use the porters' rest room to be implied into the leases, either at the time they were entered into or now. BHF had not argued, and the LVT had not found, that a right to use that room had arisen by some form of prescription. Such a finding could not have been squared with the principle that a lessee

cannot prescribe against his landlord (see the judgment of Lord Cairns, L.C., in *Gayford v Moffatt* (1868-69) L.R. 4 Ch. App. 133 (at p.135)).

83. In his skeleton argument Mr Johnson submitted that any use made of the common facilities by the tenants which was not already the subject of rights granted by the original leases would have become formal rights through the operation of section 62(2) of the Law of Property Act 1925 ("the 1925 Act") when the leases were renewed. Mr Rainey pointed out that this submission had not been made to the LVT, and ought not to be developed now in an appeal by way of review. But anyway, he submitted, the point is a bad one. In *Green v Ashco Horticulturist Ltd.* [1966] 1 W.L.R. 889 Cross J. held (at p.897E-F) that the plaintiff's use of a right of way, being always subject to the exigencies of his landlord's own business, could not have been the subject of a legal grant and that in those circumstances section 62 could not operate. In this case, Mr Rainey submitted, the LVT's findings of fact clearly did not support a claim under section 62. The LVT made no express finding about the nature or the extent of any rights, and even now the precise form of easement for which BHF was contending was obscure. As Morgan J. had said in *Wood v Waddington* [2014] EWHC 1358 (Ch) (at paragraph 133), "…a consideration of how the advantage was actually used and whether it was apparently for the benefit of the land conveyed and apparently a burden on the land retained will be of great importance". The LVT did not do that. It had not investigated the terms on which the tenants were allowed to use the so-called "common room".

84. Mr Rainey said that the LVT had recognized that only a substantial interference with rights of way was actionable. But its conclusion that there was a "substantial interference" with the tenants' rights under paragraph 1 of the First Schedule was apparently based, at least in part, on its view of the harm the development of Flat 1A had caused to the appearance of the "attractive and imposing staircase". The LVT had made a basic error here. It has been accepted at least since the decision of Wray C.J. in *William Aldred's Case* (1610) 9 Co. Rep 57b (at p.59a) that the right to a "prospect" – in the sense of a view – was not an easement known to English law. A right of passage implies no rights or restrictions as to how the servient tenement must look.

85. Mr Johnson submitted that the LVT was right to conclude that the 1993 Act does not permit a landlord to claim a leaseback of a unit whose creation has caused an actionable interference with the tenants' rights under the First Schedule to the lease to "pass and repass" across the entrance hall. In this case the construction of Flat 1A was clearly a substantial interference with the tenants' rights under the First Schedule to the lease. The LVT found, as it had to, that the construction of Flat 1A had substantially interfered with those rights. And MBM failed to demonstrate through its evidence before the LVT that they could be exercised over any other route without causing some actionable interference. In the injunction proceedings Roth J. referred (in paragraph 31 of his judgment) to the gardens in which the disputed lightwells were going to be inserted as enhancing "the prospect and character of the building for lessees and their guests when entering or leaving the property or when sitting out on their balconies". Mr Johnson submitted that the tenants' aesthetic enjoyment of the entrance hall was no less an aspect of their rights over that part of the building. The LVT found that before this work was done the entrance hall had been "spacious and welcoming", with "an attractive and imposing staircase". It was entitled to take into account the tenants' loss of enjoyment of these features when considering whether there had been a substantial interference with their rights to pass and repass over the entrance hall. But the harm MBM had done to the appearance of the entrance hall, though regrettable, is not the critical point. The critical point is that the work had completely obstructed access to the area which had been taken into Flat 1A.

86. Mr Johnson acknowledged that his argument on section 62 of the 1925 Act was not deployed before the LVT. But he said there was evidence to sustain that argument, from two of the tenants, Mr Somekh and Ms Hyer, which the LVT had accepted in its findings of fact in paragraph 76 of the first decision. *Green v Ashco* was distinguishable on its facts. In that case the tenant's use of the right of way was precarious. In this case the use of the "common room" by the lessees was not.

87. In our view, as the parties seem to agree, the 1993 Act does not entitle a landlord to a leaseback of any unit whose construction has involved an actionable interference with rights enjoyed by the tenants over the part of the premises in which that work has been done. No authority was cited in support of this proposition. But we see no reason to doubt it. The claim to a leaseback in those circumstances would be so inconsistent with the rights conferred on the tenants by their leases as to amount to a derogation of grant. We do not see why in those circumstances a leaseback should be permitted and the tenants left to seek an injunction or damages as their only remedy.

88. There are two questions to be considered here. First, precisely what rights were granted to the tenants? And the second, did the creation of Flat 1A substantially interfere with the exercise of those rights? Plainly, if the creation of Flat 1A did not substantially interfere with the tenants' use and enjoyment of the common parts for the purposes for which the rights were granted, these works would not have been inconsistent with those rights. On this question, MBM's appeal being by way of review, we think the LVT's relevant findings of fact ought to be regarded as decisive.

89. The tenants clearly had the express rights provided in the First Schedule to the lease. Those rights are in clear terms. They include a right, in effect, to unrestricted access "over and along the main entrance" of the building, and the other areas within and outside the building which are also specified. That particular right is not confined to any specific area within the entrance hall. It plainly applies to whole of that part of the building. The rights in the First Schedule are qualified only by the exceptions and reservations in paragraph 2 of the Second Schedule, and the restrictions in paragraphs 10 and 13 of the Fifth Schedule. None of those provisions sanctions any interference by MBM as landlord with the rights enjoyed by the tenants under the First Schedule to use "the main entrance" in the manner specified in the First Schedule. We see no reason to doubt that the LVT properly understood the extent and nature of those express rights. Nor can we fault its explicit finding in paragraph 76 of the first decision, in the light of the evidence it had heard, that the construction of Flat 1A had substantially interfered with those express rights, and specifically with the right "at all times by day or by night to go pass and repass over and along the main entrance of the … building". The appearance of the entrance hall, as it had been designed, was spoiled. But, more importantly, the interference with the tenants' rights was not merely visual. It was physical as well. And it was plainly substantial. That is what the LVT found. The finding is perfectly clear, and in our view it is unassailable in this appeal.

90. MBM denies that the tenants had any other rights over the area included in Flat 1A. On this question, leaving aside for the moment the tenants' right to use the designated fire escape route passing through that area, we see some force in Mr Rainey's submissions. In our view the LVT could not go any further than to find that the tenants' rights over the area in which Flat 1A was constructed were the rights provided in paragraph 1 of the First Schedule to the lease and such right, if any, as they had to use the designated fire escape route through the "common room". It could not find that the tenants had any right to use the "porters' desk area" and the "common room" for meetings or for any other purpose. No such right was provided in their leases. And, as Mr Rainey submitted, the evidence the LVT was given about the tenants' use of the "common room" for meetings is not in

itself evidence of any legal right – even if they did so, as the LVT put it, "habitually". But whether or not there was evidence to justify any such right being implied – which we doubt – and, if so, in what terms, the LVT did not explain how this could be done under the relevant law. We cannot see how it could be. We are not persuaded that business efficacy compelled the implication of any right for the tenants to use the "porters' desk area" and "common room" for any particular purpose when the leases were granted, or at any time since. BHF did not argue before the LVT that any right had arisen by prescription. We agree with Mr Rainey that such an argument would have been untenable. The idea that section 62 of the 1925 Act would have operated to harden the tenants' use of common facilities in the building into formal rights does not appear in the LVT's conclusions. That point was not argued below, and even if Mr Johnson is right to suggest that the evidence presented to the LVT by the BHF might have sustained it, we think Mr Rainey's objection to its being raised at this stage is justified.

91. None of this goes against our conclusion that the area in which Flat 1A was constructed was within the common parts of the building. The LVT found that it was, and, as we have said, we believe that finding was correct. As Mr Rainey submitted, however, it is important not to confuse the concept of common parts, or common facilities for the use of the staff employed in the building, with the concept of specific rights for the tenants to use those parts of the building in any particular way. They are not the same thing.

Issue (4) – Was the construction of Flat 1A a substantial interference with the lessees' right to use the fire escape route through the area in which Flat 1A has been constructed?

92. In paragraph 44 of the first decision the LVT noted that "[the] designated fire escape route for the residential tenants was down the main stairs and through part of the common room and thence down another staircase to the basement". We have already (in paragraph 76 above) quoted the passage in paragraph 45 where the LVT observed that the new fire escape route was "adequate".

93. At the first hearing the LVT received evidence about the fire escape route from several witnesses, including Mr Somekh, who said in his witness statement that "[a] fire escape leading from the central fire escape of the building also went through the common room" and told the LVT that MBM's original proposals for the ground floor had "completely blocked the residents' fire escape route" (paragraph 29 of the first decision); Mr Parsons, MBM's managing agent, who said in his witness statement that the residents had had to get to the area behind the old porters' desk to use the fire exit; Mr Marques, the then head porter, who said in his witness statement that "[a] fire escape route from the building also used to be via the maids' rooms", and accepted in cross-examination that the first stage of the works to create Flat 1A had been to re-route the fire escape; and MBM's "project manager", Mr Drayton, who said in his evidence that the new fire escape route came into existence in March 2011 (paragraph 39 of the first decision). The original route was shown on several plans in the evidence before the LVT, including two lease plans showing the fire escape staircases in each of the three lightwells. The new route was shown on a drawing in the Design and Access Statement submitted with MBM's application for planning permission for Flat 1A, which was also in evidence. A condition on the planning permission required the development to be carried out in accordance with that and the other drawings listed. There were several references to the fire escape route in the council's committee report. At the second hearing BHF's valuation witness, Mr French, produced a photograph showing a "Fire Exit" sign on a door from the basement corridor to the outside of the building.

94. Mr Rainey submitted that the LVT was wrong to find that the tenants had a right to use a fire escape route through the part of the building which is now Flat 1A. There was no express right for the tenants to use that, or any other, particular route, but merely the general right in their leases to "pass and re-pass" over "common passages landings and staircases". There was no legal impediment to MBM diverting the fire escape route when it created Flat 1A. Crucially, as the LVT found in paragraph 45 of the first decision, the new route was still "adequate". Having accepted that, and bearing in mind that a fire escape route will only be used in an emergency, the LVT could not properly conclude that there had been a substantial interference with the tenants' general right of way. The tenants did not have a right of way over every square inch of the main entrance, common passages, landings and staircases. In *F.C. Strick & Co. Ltd. v The City Offices Co. Ltd.* (1906) 22 T.L.R. 667, where the plaintiff lessees had sought an injunction to restrain the defendant landlord from reducing the size of a doorway and passage over which they had a right of way to their offices, Swinfen Eady J. (at pp.668 and 669) found that the plaintiff's right to "a reasonable user" would be "materially prejudiced" by what the defendants proposed, but that "if the defendants leave a space 6ft. wide at the archway extending to 10ft. wide at the top of the steps, the plaintiffs will … have no reasonable grounds of complaint." The LVT should have taken a similar approach to MBM's diversion of the fire escape route, but did not.

95. Mr Johnson submitted that the LVT was right to find that the construction of Flat 1A was an actionable interference with the tenants' right to use the designated fire escape route. Before the LVT the existence of that right was not in dispute. Now, in the appeal, MBM was seeking to qualify this right by describing it, in Mr Rainey's skeleton argument, as "a right of way to reach the fire escape for so long as the escape was accessed by such a route." This was wrong. The right was unconditional. After the relevant date, MBM granted an entirely new right of way, having completely obstructed the route that existed at the relevant date. So this case was materially different from *Strick*. In *Strick* the plaintiffs' access had been narrowed but not totally obstructed. Paragraph 9-101 of Gale on Easements (19th edition) identified two principles that were relevant here: (1) that a servient owner may not unilaterally take away a right of way over an existing route by offering an alternative route, even if that route was equally suitable, and (2) that in those circumstances the obstruction of the original route may still be an actionable infringement of the right of way over that route (see, for example, *Heslop v Bishton* [2009] EWHC 607 (Ch), at paragraphs 23 to 25). It was clear from paragraph 76 of the first decision that the LVT had those principles in mind and applied them. The blocking of the existing fire escape route where it crossed the area in which Flat 1A was constructed, and its realignment to avoid that area, was an actionable interference with the right to use the original route. The new route may have been, as the LVT found, "adequate", and would only have been used in an emergency, but the interference with the right was nonetheless substantial. The jurisprudence on easements of way was clear on this point (see, for example, *Deacon v S.E. Railway* (1889) 61 L.T. 377).

96. We cannot accept Mr Johnson's submissions on this issue. The LVT seems to have been satisfied that the tenants had an express right to use a particular fire escape route, that that route went through the area in which Flat 1A had been constructed, and that the construction of Flat 1A had prevented the tenants from using that particular route. However, we have been unable to find the grant of such a right in any material which was before the LVT. So far as we can see, there was no evidence on which the LVT could find that a right to use any particular fire escape route had ever existed. No such right was granted in paragraph 1 of the First Schedule to the lease. And there is no other apparent source for it. We see no reason to doubt that the tenants had a licence to use the original fire escape route. But we are not convinced that they had anything more than that. There was

no easement. There was, at most, a revocable licence. If this is correct MBM could divert the existing route when it chose to do so, and its designation of the new route was not an actionable interference with any right.

97. On this issue, therefore, we differ from the conclusion reached by the LVT.

Issue (5) – What was the area within Flat 1A which had development value at the valuation date and what should its price be?

98. This issue arises because, for the reasons we have given in dealing with the previous issues, the appeal against the LVT's rejection of the leaseback claim fails.

99. One of the matters remaining for determination by the LVT in the second decision was the development value relating to Flat 1A. In paragraph 35 of the second decision the LVT set out the background to this issue:

> "Prior to the valuation date the landlord obtained planning consent to build a one-bedroomed flat on the ground floor of the block with a GIA of 889 square feet. The works to construct it began, as we held in our previous decision, shortly after the valuation date, and it is common ground that the flat was not completed until well after the valuation date. In the course of constructing the flat the landlord decided to build a two-bedroomed flat, which it subsequently let on an assured shorthold tenancy for which, at the date of the first hearing in February 2012, the passing rent was £900 per week. We held in our previous decision that the flat as built substantially interfered with the tenants' rights over parts of the ground floor entrance hall of the block (see, particularly, paragraph 76 of the decision). Both valuers accepted, subject to any appeal by the landlord on the question whether it was entitled to a leaseback of Flat 1A, that the valuation of Flat 1A was of the potential to build it, and that the potential should be taken to be 60% of the potential value of the flat at the valuation date. The difference between them was the gross development value of the potential flat which ought to be assumed for the purpose of the valuation."

100. The LVT undertook this valuation on two different bases. The first basis was a gross internal area ("GIA") which excluded the part of Flat 1A that had encroached on to the area previously occupied by the porters' desk, the porters' room (or "common room") and the designated fire escape route. The second basis was the GIA as it actually was. The valuation witnesses on either side – Mr Thomas Hutchinson F.R.I.C.S. for MBM and Mr Gary French F.R.I.C.S. for BHF – agreed the GIA for each basis. In paragraph 35 of the second decision the LVT noted that both valuers accepted, subject to any appeal by MBM on the question of whether it was entitled to a leaseback of Flat 1A, that "the valuation of Flat 1A was of the potential to build it, and that the potential should be taken to be 60% of the potential value of the flat at the valuation date". The difference between them was "the gross development value of the potential flat which ought to be assumed for the purpose of the valuation". In paragraphs 40 and 41 of the second decision the LVT resolved the matter in this way:

> "40. Mr Hutchinson agreed with Mr French that if, contrary to his primary valuation, it should be assumed that the flat could not be built in the areas occupied by the porters' desk, porters' room and fire escape route, it would have a GIA of 581 square feet. He said that if it was of that size it would have four windows and might justify a higher rate per square foot, though he kept to £1,402 less 10% in the absence of evidence to support a higher rate.
>
> 41. We were asked by counsel to provide a valuation of the potential to build Flat 1A on the alternative bases of a GIA of 581 square feet and a GIA of 889 square feet. In accordance with our previous determination we regard the assumption of a GIA of 581 square feet to be correct, and on that basis we conclude that the rate to be applied is the standard rate we have adopted of £1385 per square foot, less 10% for the ground floor location, producing a gross development value of £742,216, 60% of which is £445,330, say £445,500. If, contrary to our view, it is correct to say that it could be assumed that the flat as built could be developed without impinging on the tenants' rights, and that accordingly 889 square feet is the GIA which ought to be assumed, we are satisfied that the 15% discount which Mr Hutchinson applied to Flat 2A ought also to be applied to Flat 1A, because of its very poor natural light which in our view is relevant not only to the flat's capital value but also to its rental value, and conclude that the value of the right to develop the flat is £627,945, which is 60% of £1,046,575."

101. Mr Rainey's argument on this issue depended upon his submissions on the preceding issues in the appeal being right. If that argument is right, he submitted, it would follow that the LVT was wrong to adopt 581 square feet as the basis for valuing the development potential of Flat 1A. It ought to have held that the entire GIA of Flat 1A – agreed at 889 square feet – was available for lawful development at the valuation date. That would have produced a valuation of £627,945.

102. Mr Johnson submitted that the LVT was right to find that the development value of the Flat 1A area should be restricted to a GIA of 581 square feet which the parties agreed would not have spread into the areas occupied by the porters' desk, the porters' room and the fire escape route. However, the LVT had miscalculated this value. Its valuation was, apparently, 581 square feet x £1385 x 0.9 = £742,216 x 0.6 = £445,330. The correct valuation was, in fact, 581 square feet x £1385 x 0.9 = £724,216 x 0.6 = £434,530. The error seems to have been caused by the transposition of the second and third digits in the figure £724,216. This meant that the LVT had overvalued Flat 1A by some £11,000.

103. It follows from our conclusions on the previous issues that we reject Mr Rainey's submissions on this one. We do not believe that the conclusion to which we have come on issue (4) – the question of whether there was an actionable interference with any right for the tenants to use the designated fire escape route – has any material implications here, because it would not, as we understand it, lead to any change in the relevant GIA. So it seems to us that we can endorse the agreed GIA of 581 square feet for Flat 1A, which the LVT accepted, as the correct basis for the valuation. The valuation approach was also agreed. We can endorse that too. There is no dispute that the LVT made the error highlighted by Mr Johnson. Thus we think the correct value, which we are minded to substitute for the figure arrived at by the LVT, is £434,530. However, we shall give the parties the opportunity to confirm that, in the circumstances, our conclusion on issue (4) has no implications for the valuation, or else to indicate what in their view would now be the correct GIA and to agree the valuation on that basis if they can.

Issue (6) – Was the LVT wrong to apply a test for a common part which related to use at the relevant date rather than an obligation under a lease?

104. On the relevant date the porter's flat in the basement of the building, also known as Flat 39, was occupied by the head porter. At that time it was a one bedroom flat with a GIA of 669 square feet. MBM had extended it by adding to it a redundant plant room, which had no natural light. Its front door was on the basement corridor.

105. The tenants' leases contain two relevant clauses. In clause 6(6) the Lessor covenants with the Lessee:

> "TO provide and use its best endeavours to maintain the services of a porter or porters for the performance of the following duties in the said Building:
>
> > (a) To cleanse the entrance hall stairs and passages and attend to the lighting and extinguishing of the lights therein
> >
> > (b) To remove each day from the Flat all domestic refuse and rubbish …
>
> PROVIDED THAT the Lessee shall not employ the said porter or porters to perform any special services for the Lessee"

In clause 2(2) the Lessee covenants with the Lessor:

> "TO pay and contribute to the Lessor a proportionate part … of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto."

The Fourth Schedule specifies the costs which are recoverable from the tenants through service charges. These include (at paragraph 5) "the costs of employing maintaining and providing accommodation in the Building for a porter or porters (including the provision of uniforms and boiler suits)".

106. In paragraph 74 of the first decision the LVT said:

> "The porter's flat is, and was at the date of the notice of claim, in our view a common part and the landlord is not entitled to a leaseback of it. We respectfully adopt the decision of the Court of Appeal, upholding Roth J, in *Panagopoulos*, that the status of the flat as a common part depends on its use and not on legal obligation. Our view is reinforced by the fact that the leaseholders have throughout paid a notional rent for the flat, and, we assume, its other outgoings, as a service charge."

107. At first instance in *Panagopoulos v Cadogan* Roth J. concluded (in paragraph 43 of his judgment) that the statutory definition of "common parts" in section 101(1) of the 1993 Act "clearly encompasses more than the ordinary meaning of common parts, which would not cover the exterior of the building", and "is intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or none at all". There was, he said, "no requirement that the part must actually be used by all the residents …". He went on to say (at paragraph 45):

> "Moreover, I do not think that to satisfy the definition [of 'common parts' in section 101(1) of the 1993 Act] the part must be devoted to this purpose as a matter of obligation in the residents' leases. For example, Mr Munro gave the example of a gym as something that would constitute a 'common facility', and I agree. But if the freeholder has devoted, say, a large room in the basement to serve as a gym and placed exercise machinery there, to which any resident may have access, I consider that this constitutes a common facility (and thus a 'common part') even if there is no covenant in the leases to provide such a facility. The test is applied as at the 'relevant date', which is the date of the tenants' section 13 notice."

Applying this general approach in determining whether the caretaker's flat was a common part, Roth J. said this (at paragraph 53):

> "… I consider that a flat housing a caretaker who services the building at the relevant date constitutes a common part within the statutory definition irrespective of whether the obligation under the leases to provide a caretaker requires that caretaker to be resident. …".

He concluded (in paragraph 61) that the freeholder would be in breach of two of the five leases if it did not use its best endeavours to maintain the services of a resident caretaker from the caretaker's flat in the property, and therefore that "if obligation were the test" this would be enough to justify the conclusion that the caretaker's flat was a common part. He then asked himself (in paragraph 62) whether it was reasonably necessary for the qualifying tenants to acquire the caretaker's flat for its "proper management or maintenance" as a common part. He concluded that it clearly was, because if the tenants did not acquire the interest under the lease they would not be able to use the flat to accommodate a caretaker, and, indeed, "if the lease remained in force, the basement flat would not be maintained as a common part at all".

108. The Court of Appeal did not disagree with any of those conclusions. In the leading judgment, with which Sir Andrew Morritt C. and Hughes L.J. agreed, Carnwath L.J. said that the inclusive definition of "common parts" in section 101(1) of the 1993 Act "impliedly assumes an ordinary meaning" of that expression (paragraph 14). He found little difficulty in agreeing with Roth J. on the issue in the appeal. The caretaker's flat had long been identified as a distinct part of the building, with a distinct function, and was referred to in the current leases, which gave the lessees rights to the services of a resident caretaker. The common benefit consisted principally in the services of the caretaker as a person, rather than the use of the flat itself, but a resident caretaker required a flat designated for the purpose. Together they could reasonably be regarded as a "common facility" under section 101 (paragraph 20). Carnwath L.J. said he could "see the force" of Roth J.'s conclusion in paragraph 45 of his judgment that it was not necessary for there to be a legal right to the use of the common facility if it was to come within the statutory definition of a "common part" – a view that may gain some support from section 4(2), which referred simply to "use, or intended use". But this was not an issue the court had to decide, because in that case two of the lessees had "a specific legal entitlement" to the facility. In Carnwath L.J.'s view it was "sufficient … that the lessees share the benefit of the caretaker's flat, by enjoying the services for the purposes of which it was provided" (paragraph 24). He accepted, as had Roth J., that if the caretaker's flat was a common part it was reasonably necessary for the nominee purchaser to acquire it for the proper management or maintenance of the common parts (paragraphs 25 and 26). He did not agree with the conclusion of the President of the Lands Tribunal in *Re McGuckian & Ors' Appeal* [2008] EWLands LRA/85/2006 (3 January 2008) that "flats" and "common parts" were mutually exclusive concepts.

He agreed with Roth J. (in paragraph 50 of his judgment) that the reference in section 2(4) to "any premises other than – (a) a flat contained in the relevant premises which is held by a qualifying tenant, (b) any common parts of those premises …" does not distinguish between common parts and flats, but merely between common parts and flats held by qualifying tenants, both of which are categories excluded from the effect of the subsection (paragraphs 30 and 31).

109. Mr Rainey submitted that Roth J. erred in *Panagopoulos v Cadogan* when he concluded that the status of the caretaker's flat as a common part depended on its use and not on any legal obligation, and that the LVT was wrong to adopt that concept when considering the porter's flat. A facility did not become a common part simply because it was used with the permission of the landlord. In fact, Roth J.'s view on this point was not part of his decision on the question before him, and therefore not binding either on the LVT or on the Tribunal, because, as he had noted (at paragraph 58), two of the leases in that case contained covenants which obliged the landlord to provide the services of "a full-time caretaker resident in the caretaker's flat" throughout the term of the lease. In the Court of Appeal Carnwath L.J. refrained from expressing any concluded view on the point. In this case there was no covenant requiring the provision of a caretaker's or porter's flat. MBM did not have to provide a resident porter. It was entitled not to put a porter into the so-called "porter's flat". And it could have moved the porter to another flat if it wanted to do so. There was therefore no justification – in statute, authority or principle – for the denying MBM the leaseback it sought. A user clause could be inserted in the lease to prevent this unit being used otherwise than to house a porter working in the building.

110. Mr Johnson submitted that the LVT's conclusion that MBM was not entitled to a leaseback of the porter's flat was unimpeachable. The porter's flat was at the relevant date, and had been for a long time before that, a common part of the building. A resident porter lived in it, and its upkeep was paid for by the tenants through the service charges. The definition of a common part in section 101(1) of the 1993 Act did not require there to be any covenant to provide it or any easement to use it. And there was no principle of law that precluded part of a building becoming and remaining a common part by "de facto" use alone. This could happen. The point was not formally decided in *Panagopoulos v Cadogan*, but it was accepted by Roth J. and not doubted by the Court of Appeal. On their facts the two cases were alike, though the issues were not the same. The leases in this case obliged MBM as landlord to provide the services of a porter, and the tenants to pay the costs of employing and providing accommodation for him in the building. The porter's flat had been provided, maintained and paid for in accordance with those provisions. Even if, in the light of the decision of the Supreme Court in *R. (on the application of Cart) v Upper Tribunal* [2012] 1 A.C. 663, the Tribunal was free to reject what Roth J. said in paragraph 45 of his judgment in *Panagopoulos v Cadogan* – because his remarks there were obiter – it should not be tempted to do so. The reasoning was plainly right. The Court of Appeal found it persuasive. And the Tribunal should accept it, as did the LVT.

111. Finally, Mr Johnson submitted, the Tribunal should discount Mr Rainey's idea of a restrictive user covenant being imposed if a leaseback of the porter's flat were to be granted. Paragraph 7 of Schedule 9 did not envisage a restriction of that kind, and there was no prospect of the parties agreeing it, or the appropriate tribunal directing it, as a departure from Part IV.

112. We cannot accept Mr Rainey's submissions on this issue.

113. In our view the LVT was right to conclude that the porter's flat was a common part of the building, and that MBM was not entitled to a leaseback of it. That conclusion finds support in the decision in *Panagopoulos v Cadogan*. We acknowledge that the decisive questions in that case did not include the one we are considering. We are also prepared to assume that the view expressed by Roth J. in paragraph 45 of his judgment – that it is not a prerequisite of a common part that the landlord is legally committed to providing or retaining it – is not binding upon us, at least because it lies outside the essential reasoning in the court's decision both at first instance and on appeal. We recognize that although Carnwath L.J. was attracted by Roth J.'s view on this question, he took care to point out that the result did not depend upon it. But in any event we regard that view as strongly persuasive. Nothing in the relevant provisions of the 1993 Act suggests that it is incorrect. And neither side has brought to our notice any relevant decision of the higher courts tending to a different approach.

114. As Mr Johnson submitted, the main principles on which the decision in *Panagopoulos v Cadogan* is based are clearly relevant here. Given the scope of the definition in section 101 of the 1993 Act, which includes "common facilities" within a building, the court favoured a generous understanding of the concept of "common parts" in the context of a claim for collective enfranchisement, encompassing a wide range of areas and facilities provided for the shared use or benefit of the tenants. Whether the tenants had access to the part of the premises or the facility in question does not matter. The essential attribute is some shared use or benefit. The court had no difficulty in finding the concept of "common facilities" wide enough to include the caretaker's flat in that case, even though the common benefit enjoyed by the tenants consisted in the services performed by the caretaker resident in the flat rather than any use by them of the flat itself. Those services and the flat provided by the landlord for the caretaker who performed them amounted to a common facility within the statutory definition. The court recognized the tenants' need to acquire the flat "for the proper management or maintenance of [the] common parts". Those conclusions seem compelling. They guide us in our approach to the issue we have to deal with here.

115. We share the view of both Roth J. and the Court of Appeal in *Panagopoulos v Cadogan* that any attempt to restrict the natural meaning of the definition of "common parts" in section 101 ought to be resisted. We cannot see any justification for narrowing the definition by reading into it a proviso that an area or facility can only be a common part if the landlord is under some legal obligation to provide it. Nor can we see any reason to regard the concepts of "common parts" and "common facilities" as excluding any part of a building that falls within the definition of a "unit" in section 38 or within the definition of a "flat" in section 101. To do that would go against the essential reasoning in *Panagopoulos v Cadogan*, which implicitly accepts that in certain circumstances, as in that case, a flat can be a common part. In fact, it would require us to hold that the Court of Appeal was wrong when it expressly disagreed with the view taken by the President of the Lands Tribunal in *McGuckian* and rejected the idea that the two concepts – the concept of a flat and the concept of a common part – are mutually exclusive.

116. In this case, as Mr Johnson submitted, the porter's flat was a common part of the building at the relevant date, just as the caretaker's flat was a common part of the premises in *Panagopoulos v Cadogan*. MBM used it to house a porter who worked in the building to serve the tenants, and received service charges from the tenants to pay for its maintenance. The leases contained covenants obliging the landlord to use its "best endeavours" to provide the services of a porter or porters, and the tenants to pay for accommodation within the building being provided and maintained for him. The facts are not distinguishable from those of *Panagopoulos v Cadogan* in any way that matters

here. MBM was right to concede before the LVT, and the LVT was right to find, that the porter's flat was both a common part and a unit within the meaning of the 1993 Act. We cannot see why it should resile from that concession now.

117. It makes no difference to our conclusion on this issue that, if a leaseback of the porter's flat could properly have been granted, the lease might have contained a user covenant of the kind referred to by Mr Rainey. That possibility does not invalidate any of the principles bearing on this issue which we have drawn from the relevant provisions of the 1993 Act and the rationale of the decision in *Panagopoulos v Cadogan*.

118. For those reasons we are satisfied that the LVT was right to reject MBM's claim for a leaseback of the porter's flat.

Issue (7) – Was the LVT wrong to refuse a leaseback of the basement office?

119. The basement office is on the eastern side of the building, next to the equipment room demised to O2 under the O2 lease. It was created in or about July 2011 – some six months after the relevant date – in an area which had previously been used by the head porter, and by some of the tenants for storage.

120. The LVT considered MBM's claim for a leaseback of the basement office in paragraph 77 of the first decision:

> "The office was constructed after the date of the notice of claim and was not a unit at the date of the notice. It was not presently let on a business lease (although it may have been intended for letting and will thus escape the effect of section 19 of the Act). Moreover it is conceded that it was formerly, at least partly, common parts, and we accept that that concession was correctly made because it was clear on the evidence that the whole of the basement was used either for communal plant, or by the porters, or by the residents for storage with the permission of the porters, given, it is to be assumed, on the landlord's behalf, and its upkeep was throughout paid for by the tenants through the service charges. Because it was not a unit at the date of the notice and also because it included common parts we are satisfied that it cannot be the subject of a leaseback although it is fair to say that in our view its construction did not interfere *substantially* with the tenants' rights *to go pass and repass over and along ... the common passages landings and staircases* of the building."

121. In paragraph 34 of the second decision the LVT accepted the valuation of the basement office presented to it by Mr Henderson on behalf of MBM. It explained why:

> "… Notwithstanding that there was no unit in existence at the valuation date and therefore, as we were and are satisfied, no premises subject to the leaseback to the landlord for which the landlord contended, there is nothing to prevent the owner of the block from extracting value from available space, provided that it does not thereby substantially interfere with the tenants' rights. We held in paragraph 77 of our previous decision that the use of the space as an office did not substantially interfere with the tenants' rights, and accordingly we accept that it is reasonable to value the space occupied by the office as storage space."

122. Mr Rainey submitted that the LVT's conclusions in paragraph 77 of the first decision were wrong in law, for the same two reasons as those on which he had built his argument on Flat 1A – first, that it was not necessary for a unit to have existed at the relevant date if a leaseback of it was to be granted, and secondly, that, in principle, there was no bar to a leaseback being granted for areas that had once been common parts. This part of the building had ceased to be a common part once the basement office was created. The tenants had been allowed to use it for storage but were never entitled to do so. The LVT found, correctly, that the creation of the basement office had not substantially interfered with any rights over this area, and it confirmed this in what it said about valuation in paragraph 34 of the second decision. The sum effect of all this was that no communal area could ever be the subject of a valid claim for a leaseback unless it had been closed up before the relevant date, even though the landlord had been free to do that whenever he wished. That, said Mr Rainey, could not be right.

123. Mr Johnson also relied here on his submissions for the issues relating to Flat 1A. But he sought to add a further argument, which had not been advanced before the LVT but which was based on the unchallenged evidence given to the LVT by Mr Drayton for MBM. The relevant part of Mr Drayton's evidence was summarized in paragraph 37 of the first decision:

> "He said that the creation of the office in the basement was at the planning stage when the initial notice was served and that the landlord's intention was to use it as its own office in order to look after its property interests in the UK and abroad. …".

Mr Johnson submitted that in view of this evidence, and in the absence of any other evidence of what MBM intended – either at the relevant date or later, the basement office could not be regarded as a "unit" within the definition in section 38 of the 1993 Act. It was neither a "flat" nor "any other separate set of premises … constructed or adapted for use for the purposes of a dwelling", and, crucially, it was not "a separate set of premises let, or intended for letting, on a business lease". If it was not a "flat" and not a "unit" within the statutory definition it could not be the subject of a leaseback under section 36. Although BHF had conceded before the LVT that the basement office was a unit by the time of the hearing, that concession did not go to its status at the relevant date, which was left as a matter for evidence.

124. We can deal with this issue shortly. We do so without reaching any conclusion on Mr Johnson's additional argument, though in the light of the evidence to which we have referred it seems to us that that argument may well be unanswerable. But in any event if we are right in our conclusions on the corresponding issues relating to Flat 1A, it follows that this one too must be decided against MBM.

125. As a matter of agreed fact, whether or not the basement office constituted a unit once it had been created, it certainly was not a unit at the relevant date – because at that stage it did not exist at all. This, in our view, is fatal to the claim for a leaseback. The position here is essentially the same as with the claim for a leaseback of Flat 1A.

126. That is not all. If, as we have held, the LVT was right to conclude that there cannot be a leaseback of parts of the relevant premises which at the relevant date comprised or were comprised in the common parts, it follows that for this reason too MBM's claim for a leaseback of the basement office had to be rejected. We accept, as was also agreed before the LVT, that none of the tenants had any legal right to use this part of the building in any particular way or for any particular purpose, though some of them had apparently asked for and been given permission to use it for storage. This,

however, did not preclude the clear finding made by the LVT that the area in which the basement office was constructed was nevertheless within, or at least partly within, the common parts of the building. On the evidence before the LVT that finding was, we think, inevitable. As the LVT noted in paragraph 77 of the first decision, at the relevant date the basement was being used in various ways for the shared benefit of the tenants, and its upkeep was funded through their service charges. Not only did it afford space for storage, which tenants could use, and did, with the porters' permission on MBM's behalf, but it was used by the porters who worked in the building, and it accommodated "communal plant". These are facilities typical of the common parts in a mansion block of flats. There is no dispute about that, and no dispute that in this case those facilities survived at the relevant date. Mr Rainey's submission that MBM could at any moment have withdrawn its consent to the tenants storing their possessions in the basement does not in our view affect its status, or the status of the area in which the basement office was created, as part of the common parts of the building, which the participating tenants were entitled to have acquired for them by BHF.

127. Therefore, again for reasons which we have already given and need not repeat, MBM's claim for the leaseback of the basement office was, we believe, rightly refused.

Issue (8) – Was the LVT wrong to grant leasebacks of the O2 premises and the Orange premises?

128. The O2 lease is dated 31 August 2005, and is for a term of 20 years from 24 July 2002. The Orange lease is dated 30 January 2008, and is for a term of 15 years beginning on that date.

129. The demised premises in the O2 lease are the equipment room in the basement of the building and "all those areas for aerials on the roof shown hatched black on Drawing Number L405/01 (including the air space above such areas)". O2 was granted, under Schedule 1, the exclusive use of the equipment room and the right to install, maintain and operate the "Equipment" as defined in clause 3.6, namely a maximum of nine antennae, up to two 600mm microwave dishes, one electricity meter cabinet and one equipment cabinet. On 5 October 2010 heads of terms were agreed for a surrender and renewal of the O2 lease to allow sharing of the equipment rights and the demised area with Vodafone.

130. The demised premises in the Orange lease are described in the "Prescribed Clauses" as "Part of the Rooftop of Barrie House … and shown edged red on Drawings numbered 30/GLN3615B/08F", and in the "Particulars" as "All that land edged red on the Drawing on which the building is situated being land registered at the Land Registry under title number LN8017". We have not seen drawing number 30/GLN3615B/08F. Our difficulty in ascertaining the exact extent of the demised premises is compounded by the fact that Orange removed their equipment from the building in August 2013. Orange also used a vault in the basement on the north side of the building as an equipment room. Although this vault is not included in the definition of the Property in the Prescribed Clauses or in the definition of the Premises in the lease Particulars, it is shown on one of the lease plans (drawing number 30/GLN3615B/04) and the parties have treated it as having been let to Orange on the terms in the Orange lease. Under Schedule 1 to the Orange lease Orange has the right to execute, install, maintain and operate a maximum of three antennae, two transmission dishes and ancillary equipment.

131. In its counter-notice MBM proposed that there should be leasebacks of both the O2 premises and the Orange premises. The proposed leaseback of the O2 premises was for a unit comprising "All

that room on the basement floor of the building and all those areas for aerials on the roof including the surrounding airspace – subject to a lease dated 31 August 2005 and made between Honeysuckle Property Investment[s] Limited (1) and O2 (UK) Limited (2)". The proposed leaseback of the Orange premises was for two units, namely "(iii) Part of the roof top, the aerials affixed to it and the airspace surrounding it – subject to a lease dated 30 January 2008 between Honeysuckle Property Investments Limited (1) and Orange Personal Communications Services Ltd. (2)" and "(iv) All that room on the basement floor of the building occupied by Orange Personal Communications Ltd for use in conjunction with the lease referred to in (iii) above".

132. Before the LVT it was argued on behalf of BHF that the O2 premises were not a unit because they were in two parts and not a separate set of premises. For MBM it was argued that the equipment room in the basement and the space occupied by the aerials on the roof were, together, a set of premises let on a business lease and therefore a unit. The LVT did not find this an easy point. In paragraph 81 of the first decision it said:

> "…The question is not straightforward but, on balance, in our view the basement room and the areas for aerials and the airspace above them form *a separate set of premises let…on a business lease* and together comprise a unit. Since the premises will not at the appropriate time be let to a qualifying tenant they are subject to a leaseback to the landlord at the landlord's option. …"

133. The arguments put forward on either side on the claimed leaseback of the Orange premises were similar. In paragraph 83 of the first decision the LVT said that the question was "not free from doubt", but it concluded that there should be a leaseback of the Orange premises, including "the northern vault" used by Orange for its equipment.

134. In the cross-appeal before us it is common ground that the O2 premises and the Orange premises could not qualify for leasebacks unless, in either case, they comprised a "unit" in the relevant part of the definition in section 38(1) – "a separate set of premises let, or intended for letting, on a business lease" – which was also, as section 36(1) requires, "contained in" the building.

135. In *Cadogan v McGirk* the Court of Appeal had to decide whether the tenant of a flat on the second floor of a mansion block was entitled to have included in a new lease of his flat – for which he had applied under section 42 of the 1993 Act – a storeroom on the sixth floor, which had previously been let to him under a separate lease. When considering whether the storeroom formed part of the flat Millett L.J. said (at p.649b-d) that in his opinion the word "separate" in the definition of a flat as a "separate set of premises (whether or not on the same floor)" in section 101(1) of the 1993 Act suggests both "physically separate" or "set apart" and "single" or "regarded as a unit". The definition was concerned with the physical configuration of the premises. The question was one of fact and degree, and "must largely be one of impression". Millett L.J. concluded that the storeroom on the sixth floor could not be said to be part of the same set of premises as the rooms in the second floor flat. He went on to say this (at p.649d-f):

> "… What is decisive to my mind is the absence of any natural or physical relationship between the flat and the storeroom. The storeroom could equally well have been allocated to and let with any of the other flats; just as any of the other storerooms could equally well have been allocated to and let with the flat. …"

However, the Court of Appeal upheld the decision at first instance that the storeroom was an "appurtenance" of the flat within the meaning of section 62(2) of the 1993 Act, and that the tenant was therefore entitled to have it included in the new lease of his flat. Having traced the history of the concept of an "appurtenance" in various enactments, Millett L.J. considered its meaning in the context of Chapter II of the 1993 Act. In that context section 62(2) provides that references to a "flat" include "any garage, outhouse, garden, yard and appurtenance belonging to, or usually enjoyed with, the flat and let to the tenant with the flat on the relevant date [defined, in this context, in section 39(8)] …". Millett L.J. concluded (at p.651d to p.652c) that to come within this definition the "appurtenance" did not have to be within the curtilage of the flat itself. It could be "contained within the premises of which the flat forms part or … situate within the curtilage of those premises". If it consisted of "land or a building" it "must be within the curtilage of the block but need not be within the curtilage (if any) of the flat".

136. Mr Johnson submitted that those parts of the O2 premises and the Orange premises which were on the roof of the building were within the common parts and could not therefore be the subject of a leaseback. MBM had conceded before the LVT that the roof was a common part. And in its appeal it had not challenged the LVT's conclusion, in paragraph 79 of the first decision, "that the roof, with the exception of the parts of the roof let to O2 and to Orange, is a common part and is not a unit and … cannot be the subject of a leaseback" and that the contrary was "unarguable". The LVT was wrong to make an exception of those parts of the surface of the roof and the airspace above it which were demised to O2 and Orange. The fact that some of the roof had been let to enable telecommunications aerials to be put up did not alter the character and status of the whole roof and its airspace as a common part. The construction of an additional storey of penthouse flats would do that, but not the erection of aerials. Authority for the principle that airspace above a roof can be regarded as part of the exterior of a building, at least where it is necessary to enable the maintenance and repair of the building to be carried out, is to be found in the decision of Warren J. in *Dartmouth Court Blackheath Ltd v Berisworth Ltd* [2008] 2 P. & C.R. 36 (at paragraph 71).

137. Relying on the decision in *Cadogan v McGirk*, Mr Johnson argued that the definition of a "unit" in section 38(1) cannot be stretched to cover either the O2 premises or the Orange premises. A "unit" had to be a single entity. It cannot be composed of two or more separate areas in different parts of a building, even if each of those areas, considered on its own, might be regarded as a separate set of premises. The concept of a unit "contained in" premises means enclosure inside those premises. It cannot include airspace not contained within a building but above its roof. No one would think of a volume of airspace outside a building as comprising a "separate set of premises". In this case the equipment room and the vault in the basement would satisfy the essential statutory criteria. But the aerials mounted on the roof clearly could not. Nor could the combination of these two distinct areas, even though the aerials and the plant were connected by the cables running between them, which were not included in the demise. The airspace above the roof into which the aerials protruded was not included within the demise in either of these leases. It could not be regarded as appurtenant to the equipment room and the vault in the basement in the same way as the storeroom in *Cadogan v McGirk* was an appurtenance of the flat. An appurtenance, at least in the context of the 1993 Act, was something physical, such as a garage or an outhouse. It could not be mere airspace.

138. Mr Johnson said it was misconceived to suggest, as Mr Rainey had, that the equipment room and the vault in the basement were units as defined in section 38(1) of the 1993 Act and that leasebacks of those parts of the building could be granted, together with easements permitting the installation of equipment on the roof. That argument must be rejected, he submitted, for four reasons.

First, in paragraph 5(ii) of its counter-notice MBM had claimed a leaseback of the whole of the O2 premises, not merely the equipment room. Section 21(3)(a)(ii) did not allow a landlord to alter its claim in this way. Secondly, the provisions for leasebacks in the 1993 Act would not have permitted a claim of this kind to be made in the counter-notice, because it would lead to a split reversion, with BHF as landlord of the airspace and MBM the landlord of the equipment room. Parliament could not have intended that a Schedule 9 leaseback would lead to such an arrangement. Thirdly, if MBM was to establish its entitlement to a leaseback it had to show that the O2 premises constituted, as the definition of a unit in section 38(1) required, a "separate set of premises let … on a business lease". The equipment room formed only a part of the set of premises which had in fact been let on a business lease and therefore fell outside that definition. Fourthly, MBM had pursued its claim for a leaseback of the Orange premises in a slightly different way. In its counter-notice it had made separate claims for leasebacks of the vault and the airspace. Before the LVT, however, it had pursued, and BHF had resisted, a leaseback of the Orange premises as a whole. Either way, the claim was bad for the same reasons as that for a leaseback of the O2 premises.

139. Mr Rainey defended the LVT's conclusion that leasebacks of both the O2 premises and the Orange premises should be granted. One of the aims of the statutory provisions for leasebacks was to ensure that a landlord retained the reversion of business leases. Those provisions must permit a leaseback of premises "let … on a business lease" at the relevant date, used for a commercial purpose, and generating income. It would be absurd if they did not apply in a situation such as this, where the "separate set of premises" contained two elements – aerials on the roof and the associated equipment in a room in the basement – which were not only functionally interdependent but also physically joined by cables. Both elements were necessary for the use of the whole. Neither was merely ancillary to the other.

140. Mr Rainey submitted that the airspace over the roof into which the aerials extended had ceased to be a common part when they were put up. This was simply a matter of fact. But the airspace had always been, and remained, a part of the building. It was "contained in" the relevant premises in the sense of section 36. In a claim for collective enfranchisement, if not in every other context, the airspace over a building was truly a part of it. Common sense suggested this. So did Warren J.'s decision in *Dartmouth Court v Berisworth*. And so did the relevant statutory provisions. If the airspace immediately above the roof of a block of flats did not form part of the exterior of a building, tenants seeking to exercise the right to collective enfranchisement would never be entitled to acquire that airspace. If their claim succeeded the landlord would still control the airspace and they would not be able to do anything on the roof of a building in which they had acquired a freehold interest. Parliament could not have intended that. In the same way, if the airspace over a building was not to be treated as being contained in that building the tenants would not be able to acquire a leasehold interest in it as a common part of the relevant premises, under section 2 of the 1993 Act. Parliament could not have intended that either.

141. Another basis for the grant of these leasebacks, said Mr Rainey, was that the airspace above the roof could be regarded as appurtenant to the equipment room and the vault. It was an appurtenance in the sense of paragraph 1(2) of Schedule 9 because it formed part of the demise under the O2 lease, and O2, as lessee, was thus entitled to place aerials within it. The concept of an appurtenance was flexible. In this context, consistent with Millett L.J.'s analysis in *Cadogan v McGirk*, it embraced both the demised premises and what could be done with them to yield value for the lessee. The possibility of a split reversion if a leaseback was only granted of the equipment room could be avoided by the

grant of a leaseback of the whole of the O2 premises as a single unit, including the airspace as an appurtenance.

142. Mr Rainey said there was nothing to prevent a leaseback being granted of a smaller area than a landlord had identified in his counter-notice. MBM could have a leaseback of the equipment room, rather than the whole of the O2 premises. This would be in the spirit of the Court of Appeal's decision in *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2006] 1 W.L.R. 1186, in which Auld L.J. (at p.1189D) referred to the first stage of a claim for collective enfranchisement as an "exchange of notices between the tenants, or their nominee, and the landlord", which "serves as a useful negotiating stage during which any issues may be resolved so as to avoid, if possible, recourse to the second stage, namely application to the court to determine the tenants' entitlement to enfranchisement and/or, as the case may be, to a leasehold [valuation] tribunal to determine the price and/or other terms".

143. In our view the LVT was right to accede to MBM's claim for leasebacks of both the O2 premises and the Orange premises. In each case that claim was, in our view, properly made and properly framed in the counter-notice. And in each case, we believe, the LVT's relevant findings and conclusions were sound. In particular, we support the LVT's finding, in each case, that the demise was of "a separate set of premises let … on a business lease" and thus within the definition of a "unit" in section 38(1). That finding was not based on any misconstruction of the relevant statutory provisions. And it was clearly a finding which was open to the LVT on the facts.

144. As Mr Rainey submitted, the statutory scheme for collective enfranchisement is explicit in its provisions securing a landlord's right to leasebacks of units let on business leases at the relevant date. This feature of the statutory scheme is not only plain from the relevant provisions, but also entirely consistent with its underlying purpose of enabling tenants of flats in a building to acquire the freehold. The question of whether particular parts of a building form a unit or units within the definition in section 38 of the 1993 Act will always be a question of fact. The facts are liable to vary widely. The essential facts here are not controversial. Both the O2 premises and the Orange premises were let by MBM on commercial leases, for a commercial activity. It is clear from the terms of the demise in either case that both MBM as lessor and O2 and Orange as lessees regarded the constituent parts of the premises in the demise as a single entity. In each case the telecommunications equipment was designed, set up, used and maintained as a whole. Although the aerials on the roof were separate from the plant in the basement, the arrangements in each case were a single piece of engineering, with a single function, and connected so as to form a single unit by the cables running between roof and basement. Neither the aerials nor the basement equipment were of any use on their own. They worked together as one. Both functionally and physically, therefore, these were separate sets of premises, properly so described. It seems clear, therefore, that both the O2 premises and the Orange premises were a "unit" within the definition in section 38.

145. We see nothing in Mr Johnson's submissions to the contrary.

146. We accept that the roof of a block of flats will normally be part of the common parts of that building. We accept that the parts of the O2 premises and the Orange premises in which the aerials were erected, and presumably also the areas in the basement where the related equipment was installed, were common parts of the building when that work was done. And we accept that the common parts of the building were modified to that modest extent, without infringing any rights which the tenants then enjoyed and without any other significant consequence for them. Before the

LVT it was not in dispute that the common parts had been modified in this way long before the relevant date. In our view the fact that both the O2 premises and the Orange premises had been taken out of the common parts when the telecommunications equipment was set up inside and on top of the building was no obstacle to leasebacks of those existing units being granted. There is nothing inconsistent here with our conclusions on the previous issues.

147. The circumstances here are not analogous to those in *Cadogan v McGirk*. On their facts the two cases are very different. In *Cadogan v McGirk* the flat and the storeroom evidently lacked the same kind of physical and functional relationship as the equipment accommodated in the basement and the aerials mounted on the roof in this case. As Millett L.J. said, the storeroom could have been let with any of the flats. In this case the aerials and the equipment functioned together.

148. The fact that the aerials went into the airspace above the roof of the building did not, in our view, put these units outside the concept of those "contained in" the building in section 36(1). Seen as a whole, they can only sensibly be considered as units contained in the building, even though, in part, they go into the air above it. For essentially the same reasons as those given by Warren J. in *Dartmouth Court v Berisworth* we accept that, at least in the context of a claim for collective enfranchisement under the 1993 Act, the airspace immediately above the roof of a building can be regarded as being part of the building. We agree with Mr Rainey's submissions on this point.

149. The interesting alternative argument – that the airspace taken up by the aerials was appurtenant to the equipment room and vault in the basement, and that it would be possible to grant leasebacks including that airspace as an appurtenance to those parts of the building – may also be right. We do not think it necessarily goes against the broad understanding of the concept of an appurtenance adopted and applied by the Court of Appeal in *Cadogan v McGirk*. But this is not a point we have to decide in determining the cross-appeal, and we shall leave it moot.

The valuation of the commercial leases

150. Having concluded in the first decision that leasebacks should be granted of both the O2 premises and the Orange premises, the LVT was not invited by the parties to value the O2 lease and the Orange lease to establish the additional premium BHF would have had to pay for those leasehold interests. That exercise is unnecessary for us as well, because we have concluded that the cross-appeal must fail. However, at the parties' request and having heard the evidence of Mr Mark East B.Sc., M.R.I.C.S., a director of Telecoms Property Consultancy Limited, for MBM, and from Mr Tom Bodley Scott M.R.I.C.S., F.A.A.V., a partner in Batcheller Monkhouse, for BHF, we have undertaken the valuation.

151. The provisions of the O2 lease relevant to our valuation are these:

(1) The lease was granted on 31 August 2005 for a term of 20 years from 24 July 2002.

(2) The initial rent was £20,000 per annum subject to five-yearly upward only rent reviews.

(3) The rent payable on review is the greater of the open market rent or the initial rent, adjusted by reference to movements in the Retail Price Index ("RPI") between July 2004 and the month before the relevant review date.

(4) The rent was reviewed to £23,530 with effect from 24 July 2007.

(5) The lease contains a tenant's operational break clause upon 12 months' written notice (or immediately without notice if the tenant fails to obtain any of the "Necessary Consents") and an open break clause upon six months' written notice terminating at any time after 24 July 2007.

(6) Heads of terms for the surrender and renewal of the lease were agreed subject to contract, design approval and client approval, between Mono Consultants Limited (acting for O2) and Telecoms Property Consultancy Limited (acting for MBM) on 5 October 2010. Under these heads of terms Vodafone Limited was to share the equipment for which a sharer's rent of £5,300 per annum was payable subject to review.

152. The relevant provisions of the Orange lease are:

(1) The lease was granted on 30 January 2008 for a term of 15 years from that date.

(2) The initial rent was £18,000 per annum, subject to five-yearly upward only rent reviews.

(3) The rent payable on review is the greater of the open market rent or the passing rent, adjusted by reference to movements in the RPI between the month which is three months earlier than 30 January 2008 or the preceding review date (whichever is the later) and the month which is three months earlier than the relevant review date.

(4) The lease contains a tenant's operational break clause upon not less than three months prior written notice. There are also landlord's break clauses, including the ability to break on the grounds of redevelopment or refurbishment of the building upon not less than 18 months written notice.

153. Orange removed their equipment from the building in August 2013 but have continued to pay rent under the lease.

154. The valuation date is agreed as being 12 January 2011.

155. The experts agreed that the appropriate valuation approach is the investment (income) method, based upon comparable market transactions of telecoms lettings. A schedule of 12 such comparables was agreed and divided between transactions relating to roof-top aerials and transactions relating to "greenfield" sites. The experts did not agree the details or relevance of a number of other comparables nor the weight to be given to those transactions included in the agreed schedule.

156. Mr East valued the landlord's interest in the O2 lease at £315,623 and that in the Orange lease at £202,991, giving a rounded total of £519,000.

157. Mr Bodley Scott valued the landlord's interest in the O2 lease at £174,000 and that in the Orange lease at £110,000, giving a total of £284,000.

158. Neither expert had been able to find any comparable transactions for roof-top sites in central London. Mr East relied on four roof-top transactions outside central London but within the M25.

Three of these were sales in 2007, the latest being in July 2007. The fourth was not a sale but the highest bid at an auction in May 2010, which failed to meet the reserve. The average of the initial yields of the three comparable transactions in which a sale was achieved was 9.9%.

159. In response to the criticism that his yields were out of date Mr East provided details of four further transactions that took place between September 2010 and October 2011. He rejected a fifth because it did not involve a sale. The average initial yield in these transactions was 10.1% which Mr East said showed "that yields between 2007 and 2011 had not softened to any great degree…". These further transaction were all for greenfield sites, only one of which was close to London, and Mr East placed less weight on them than he placed on those for roof-top sites.

160. Mr Bodley Scott relied upon more recent transactions for greenfield sites. He identified four such sites which had been sold within the period from 12 months before the valuation date to six months after it. The average of the initial yields in these four transactions was 13.4%.

161. Mr Bodley Scott set Mr East's three roof-top comparables alongside four sales of greenfield sites in and close to London between October 2006 and February 2007. The average initial yield for the greenfield sites was 9.4%, and for the roof-top sites 9.9%. Mr Bodley Scott concluded that in 2006 and 2007 the initial yields for telecoms investments were similar for greenfield and roof-top sites.

162. We are faced with the difficulty that there is only limited evidence of transactions for roof-top sites. Mr Bodley Scott's greenfield comparables from 2006 and 2007 show yields consistent with those for transactions on roof-top sites at that time. Mr East's greenfield comparables from 2010 and 2011 show yields consistent with those of the earlier transactions for roof-top sites. Mr Bodley Scott's greenfield comparables show higher yields in 2010 and 2011. Mr Rainey invited us to conclude that the evidence does not show that the yields for telecoms investments are "time-sensitive." However, Mr Johnson urged us to accept that in 2006 and 2007 transactions for greenfield and roof-top sites showed similar yields, and that this parity still applied at the valuation date, by which time yields had softened.

163. The experts were cross-examined in detail about their respective comparable transactions. We prefer the evidence of Mr Bodley Scott whose experience and market knowledge we consider to be more relevant, more recent and more extensive than Mr East's.

164. Mr Bodley Scott referred to a third category of site – distinct from roof-top and greenfield sites – which he described as a "third party structure". In third party structure transactions the purchaser buys the mast as well as the income. We accept that this is a different type of transaction. The characteristics of it were explored in depth by Mr Rainey. In our view they plainly can affect value.

165. We also accept Mr Bodley Scott's view that the yields in Mr East's 2010 and 2011 greenfield site comparables reflected the possibility of obtaining further income on two of the sites, including in one instance the prospect of collecting back rent.

166. The experts agreed that between the time of the earlier comparables – in 2006 and 2007 –and the valuation date in January 2011 the telecoms market had seen some consolidation of networks, through the merging of network operators' businesses and the use of site sharing agreements

between operators. We are satisfied that network consolidation contributed to a softening of yields between 2006 and 2007 and the valuation date, a period which also coincided with the start of the financial crisis and the global recession.

167. We accept Mr Bodley Scott's view that the yields on roof-top and greenfield sites were similar in 2006 and 2007, and were likely to have remained so at the valuation date. There was no evidence to support the view that roof-top sites in central London had lower yields.

168. We think Mr Bodley Scott's adopted yield of 13.5% is too high. Unlike Mr Bodley Scott, however, we do not reject Mr East's comparable transactions on greenfield sites in 2010 and 2011. But we give them limited weight. Mr Bodley Scott conceded that the transaction at Rose Villas, Watling Street, Dartford was potentially useful – though he had not seen the lease – and it seems to us to be of some relevance given its location close to the busy M25 at Dartford Bridge. The initial yield for that transaction was 9.7%. Mr Bodley Scott referred in his original report to three other transactions on greenfield sites, which were sold between eight and 10 months after the valuation date. In all three of these comparables the initial yields were less than 13.5%. If these comparables are included in the analysis the average initial yield becomes 12.2%. In our opinion the appropriate initial yield by which to value the landlord's interest in the Orange and O2 leases is 12.5% before adjustments.

169. Mr Bodley Scott took the same initial yield (13.5%) to capitalise the passing rent of both leases. He assumed that the rent from the O2 lease would be receivable into perpetuity while that from the Orange lease would be receivable for the length of the existing lease.

170. Mr East added the anticipated sharer's rent from Vodafone (£5,300) to the rent payable under the O2 lease to give a total of £28,830, which he then capitalised at 8% until the next rent review in August 2015. That rent was index-linked to give a reviewed rent of £31,293 which Mr East capitalised at 8% until the end of the lease. Upon expiry of the lease in July 2022 he capitalises what he describes as the open market rental value (£28,830) into perpetuity at 10%.

171. Mr East valued the Orange lease by capitalising the passing rent of £18,000 at 8% until the next rent review in 2013. He index-linked the rent on review to give £19,732 and capitalised this at 8% until the end of the lease. Finally, he took the open market rental value of £18,000 and capitalised this from the end of the lease into perpetuity at 10%.

172. Mr Bodley Scott said that the telecoms investment market was not sophisticated and that investors simply capitalised the passing rent at an appropriate yield. He did not recognise Mr East's complicated approach as being one which was adopted in the market.

173. We accept Mr Bodley Scott's view that Mr East's approach is not one likely to be found in the market. In our view, however, any valuation method must reflect (1) the risk of the lessee breaking the lease under an open break clause and (2) the prospect of rent increases during the term and upon the expiry of the lease.

174. Mr Bodley Scott's method implicitly accounts for both of these factors in the yield. Mr East explicitly adopted a lower yield to value the lower (safer) passing rent. Neither expert adopted a different yield to account for the fact that the O2 lease contains an open break clause but the Orange lease does not.

175. An analysis of the comparable evidence does not establish a pattern of higher yields where there is a tenant's non-operational, or open, break clause. For instance, although the comparable at Isfield had a tenant's open break clause it had a lower initial yield (12.5%) than the comparable at Norwood Green (13.9%), where there was no such break clause. On the other hand it had a higher initial yield than the comparable at Cullompton (9.6%), which also had no open break clause. Our adopted yield of 12.5% reflects eight comparables, three of which appear to have an open break clause, two of which do not, and for three of which the evidence is inconclusive or contradictory. In these circumstances we do not consider it appropriate to adjust the yield to reflect the presence or absence of a tenant's open break clause.

176. In seven of the comparables there were rent review provisions. It is an axiom of valuation practice that one should capitalise as one analyses. Since the comparable yields have been analysed by reference to the passing rent, the O2 and Orange leases should be capitalised in the same way. It is not necessary to allow explicitly for rental growth as Mr East does because the adopted yield of 12.5%, based as it is upon the analysis of comparables with similar rent review provisions, implicitly reflects the prospect of future rental growth.

177. The experts analysed the comparables by dividing the sale price by the passing rent to give an initial yield. In effect, it was assumed that the passing rent was receivable into perpetuity in every case. But Mr Bodley Scott used such an initial yield to value the rent from the Orange lease until its expiry in January 2023 and assumed that thereafter no further rent would be received. If the comparables had been analysed on the assumption that there would be no income upon the expiry of the leases, lower yields would have resulted. For example, the site at Tarmac Quarry, Worksop was sold in February 2010, for £80,000. The lease was going to expire in 14 and a half years' time. If one assumed that the income would continue into perpetuity, the transaction would have shown a yield of 14.2%. If one assumed instead that the income would cease at the expiry of the lease, the same transaction would have shown a yield – over 14 and a half years rather than into perpetuity – of 11.15%.

178. The other explicit assumption in the analysis of the comparables is that the income will not decline upon the expiry of the lease when any renewal or new letting will be at an open market rent and not a historic initial rent that has been index-linked over the previous lease term.

179. Mr Bodley Scott identified two sales where he said there was the prospect of the income being reduced "dramatically". One was a roof-top site at Wishaw, Lanarkshire, the other a greenfield site at Malpas, Shropshire. The Wishaw site was sold in February 2012 at an initial yield of 17.5%, the Malpas site in October 2013 at an initial yield of 14.6%. These yields are higher than the 13.5% adopted by Mr Bodley Scott. But the transactions occurred some time after the valuation date. One sees here an illustration of Mr Bodley Scott's approach to analysing sales where there is a real prospect of the reduction or cessation of rent at the end of the lease. He did not analyse them over the length of the lease but decapitalised them into perpetuity. We see no reason to do otherwise when valuing the Orange lease.

180. We know now that Orange removed their equipment from the building in August 2013. At the valuation date, however, we are not persuaded that, despite network consolidation, the market would have taken the view that Orange was certain to leave what was a well established prime central London location. In our opinion it is more appropriate to value the Orange rent into

perpetuity at a higher yield to reflect the prospect that the income might cease at the end of the lease. Mr Bodley Scott made a spot allowance of £5,000 as "hope value" for the continuation of income after the expiry of the lease, giving a total capital value of £109,400. This represents an initial yield, assuming an income of £18,000 into perpetuity, of 16.5%. In our view that yield is too high, and we think that a yield of 14% should be used to value the passing rent into perpetuity.

181. Mr East added the prospective sharer's income from Vodafone to the O2 income as though it was a certainty after three months, and valued it into perpetuity. Mr Bodley Scott took no account of the prospective income from Vodafone. In our opinion both of these positions are too extreme. We consider that there was a real prospect, but no certainty, of sharer's income from Vodafone at the valuation date. In our opinion the appropriate way to reflect the potential enhancement in income is to capitalise the rent passing into perpetuity at a reduced yield of 11%.

182. In the light of this analysis we value the landlord's interest in the O2 lease at £213,911 and the landlord's interest in the Orange lease at £128,574. This gives a total value of the landlord's interest in the two commercial leases of £342,485 – say, £342,500 – as is shown in the appendix to this decision.

Conclusion

183. For the reasons we have given in discussing the issues arising in the appeal we conclude that the LVT was right to refuse MBM leasebacks of Flat 1A, the porter's flat and the basement office. The appeal therefore fails.

184. We have said that, in the circumstances, we do not think any consequence for the LVT's valuation of the potential to build Flat 1A flows from our conclusion that there was no actionable interference with a right for the tenants to use the originally designated fire escape route (see paragraph 103 above). If the parties differ from this view, they may submit to the Registrar within 28 days of this decision an agreed alternative valuation for the development value of Flat 1A. Otherwise, the corrected valuation of £434,530 will stand (see paragraphs 102 and 103 above).

185. For the reasons we have given in our discussion of the issue in the cross-appeal we conclude that the LVT was right to decide that leasebacks should be granted of the O2 premises and the Orange premises. The cross-appeal therefore also fails.

186. If we are wrong in our conclusion on the cross-appeal our valuation of the landlord's interest in the two commercial leases is £342,500 as shown in the attached appendix.

Dated 8 December 2014

Sir Keith Lindblom, President

A.J. Trott F.R.I.C.S.

Appendix

Lands Chamber valuation of the commercial leases

O2 Lease

Rent passing at valuation date:	£23,530	
x YP perp @ 11%:	9.091	
		£213,911

Orange Lease

Rent passing at valuation date:	£18,000	
x YP perp @ 14%:	7.143	
		£128,574
Total value of commercial leases:		£342,485
Say:		£342,500