UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 68 (LC)
LC Case Number: LRA/135/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – whether owner of an intermediate leasehold could withdraw an agreement that the interest was to be acquired by the nominee purchaser – assessment of price – existence of substantial value in ability to develop building back to a single house – whether the assumptions required under Leasehold Reform, Housing and Urban Development Act 1993 schedule 6 para 3 prevented the owners of either of the intermediate leasehold interests from enjoying any of the development value – consideration of* Earl Cadogan v Sportelli [2010] 1 AC 226 *– assessment of the value of the potential development – appeal allowed in part - price determined at £6,856,500

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

BETWEEN CRAVECREST LIMITED Appellant

and

(1) THE SIXTH DUKE OF WESTMINSTER, THE EARL OF HOME AND JEREMY MOORE NEWSUM
(Acting as the Trustees of the Will of the Most Noble The Second Duke of Westminster)
(2) VOWDEN INVESTMENTS LIMITED (in Administration) Respondents

Re: 38 Wilton Crescent,
London, SW1X 8RX

Before: His Honour Judge Nicholas Huskinson
Paul Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 21, 22 and 23 February 2012

Thomas Jefferies, instructed by Maxwell Winward, on behalf of the appellant
Antony Radevsky, instructed by Boodle Hatfield, on behalf of the first respondent
Timothy Dutton, instructed by Walker Morris, on behalf of the second respondent

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The following cases are referred to in this decision:
Earl Cadogan v Sportelli [2010] 1 AC 226
Pledream Properties Limited v 5 Felix Avenue London Ltd [2010] EWHC 3048 (Ch)
Becker Properties Ltd v Garden Court NW8 Property Co Ltd [1998] 1EGLR 121
Sinclair Gardens Investments Kensington Ltd v Eardley Crescent No.75 Limited [2006] EW Lands LRA/77/2005.
James v United Kingdom (1986) 8 EHRR 123
Cadogan v McGirk [1996] 4 ER 643
Methuen-Campbell v Walters [1979] 1 ALL ER 606, [1979] QB 525
Jones v Wrotham Park Settled Estates [1979] 1 ALL ER 286 at 295, [1980] AC 74
Manson v Duke of Westminster [1981] 2 ALL ER 40 at 48, [1981] QB 323
Chelsea Properties v Cadogan LRA/69/2006 (LT)
Van Dal Footwear v Ryman [2009] EWCA Civ 1478
Grosvenor Estate Belgravia v Klaasmeyer [2010] UKUT 69 (LC)
Laura Investment Co Ltd v Havering LBC [1992] 1 EGLR 155
13 Eaton Place SW1 (LON/OOBK/OCE/ 2011 0058)
Westminster City Council v CH 2006 Limited [2009] UKUT 174 (LC)
Themeline v Vowden Investments Ltd [2011] UKUT 168.
Forty Five Holdings Ltd v Grosvenor (Mayfair) Estate [2010] L&TR 21
31 and 37 Cadogan Square Freehold v Cadogan [2010] UKUT 321 (LC).

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the London Rent Rent Assessment Panel ("the LVT") dated 12 September 2010 whereby the LVT determined the price to be paid by the appellant, as nominee purchaser, to the respondents upon the collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) in respect of 38 Wilton Crescent, London, SW1X 8RX (the property). The second respondent (hereafter referred to as Vowden) holds a long leasehold interest in the third floor of the premises, being an interest which was treated by the LVT as an intermediate leasehold interest which was to be acquired by the appellant. The first respondents are concerned with the enfranchisement in two respects, namely they own the freehold of the premises and Grosvenor Estate Belgravia (GEB) holds a long lease of the entire property (together with extensive other property) from the freeholder. As will be seen below, the first respondents are principally concerned with the position of GEB and the price to be paid to GEB for the acquisition of GEB's intermediate leasehold interest. Part III of Schedule 6 to the 1993 Act makes provision for the price payable for intermediate leasehold interests.

2. The LVT decided that the total price to be paid by the appellant upon the collective enfranchisement was £6,927,728 made up as follows:

Freeholder:	£ 2,190
GEB:	£3,741,005
Vowden	£3,184,533

3. The present appeal to the Upper Tribunal raises two issues:

   (1) Whether Vowden is entitled to assert that its lease should not, after all, be acquired as part of the collective enfranchisement, such that Vowden's lease will remain in Vowden's hands; and

   (2) What is the proper price to be paid on enfranchisement for the GEB lease and (if the Vowden lease is also to be acquired) for the Vowden lease.

4. The nature of the disputes upon these two issues can be briefly summarised as follows:

   (1) As at the date of the section 13 notice by the qualifying tenants of a claim to exercise their right to enfranchisement (13 March 2009) the Vowden lease constituted an overriding lease of the third floor flat in the premises, being a lease which was superior to other interests including the lease held by a qualifying tenant (which was in fact Vowden itself) of the third floor flat. Accordingly as at that date the Vowden overriding lease (which was throughout the hearing referred to as "the ORL" and which is hereafter so referred to) was a leasehold which could be acquired by the appellant under section 2 of the Act. The right to acquire the ORL was expressly admitted in the

counter-notice. The matter at all times proceeded, until January 2012, on the basis that the ORL would indeed be acquired as part of the collective enfranchisement by the appellant. The matter proceeded upon this agreed basis before the LVT. The LVT heard evidence as to the proper price to be paid for the ORL and made a determination upon this point. The matter proceeded to appeal before the Upper Tribunal with an exchange of statements of case and valuation evidence, all of which proceeded so far as the ORL was concerned on the basis that the ORL would indeed be acquired. However on 9 January 2012 a decision of a Leasehold Valuation Tribunal was given in the case regarding *13 Eaton Place, SW1* (LON/OOBK/OCE/2011 0058) which alerted Vowden to the possible argument that, bearing in mind that a few days after the date of service of the section 13 notice the inferior interests in the third floor flat terminated such that the ORL thereafter carried a right of possession, it might be that the appellant, as nominee purchaser was not entitled after all to insist upon the acquisition of the ORL. Accordingly under cover of a letter of 7 February 2012 Vowden applied to the Tribunal for permission to amend its statement of case so as to take the point that the ORL should not be acquired. This application was opposed by the respondents who argued that Vowden had irrevocably agreed that the ORL should be acquired and that it was too late to seek to go back upon that.

(2) As regards issue (2) above the principal dispute regarding price arises in the following manner. It is common ground in the present case that the property is substantially more valuable for development back into a single dwelling house than it is if it is to remain configured as flats. The participating tenants' leases had only a few days left to run as at the valuation date, namely 12 March 2009. Accordingly if as at the valuation date GEB's lease and the ORL were treated as a single merged interest, then the owner of this interest would have been able almost immediately after the valuation date to enjoy vacant possession of the property and the ability to seek to develop it back to a single dwelling house, such that the owner of such merged interests could have required the price to be paid (i.e. as calculated in accordance with Schedule 6 of the 1993 Act) to reflect this development value. However, it is argued by the appellant that separate valuations must be performed in respect of the GEB lease and the ORL and that as a result of the provisions of paragraph 3 of Schedule 6, especially the bracketed words in paragraph 3(1) which require that it must be assumed that no person who falls within sub-paragraph (1A) is "buying or seeking to buy", the price to be paid must be calculated on the basis that such development value is not available to either GEB or to Vowden and that their interests must both be valued on the basis that the property will continue to be configured as flats. The LVT considered this argument by the appellant and rejected it. The LVT in calculating the price to be paid took into account the additional value in the property flowing from the ability to develop it back to a single house.

5. The parties have prepared two agreed statements of fact from which the following may be taken to explain the tenure of the property and the various flats within it:

(1) The freehold interest is owned by the first respondents;

(2) There exists a head leasehold interest in the whole building (together with other extensive property in Belgravia) which is held by GEB. The lease expires on 25 March 2184.

(3) The second and third floors are the subject of the ORL which is an overriding lease dated 23 December 2005 for a term commencing 25 December 2005 and expiring on 21 March 2130 at a peppercorn rent.

(4) There is an "enforcer lease" dated 22 December 2005 granted by GEB to Belgravia Leasehold Properties Limited for a term expiring 26 March 2009 in respect of the entire premises.

(5) There is an intermediate lease of the property dated 2 August 1967 for a term expiring on 25 March 2009. This property was, until its expiration, held by Rainer Kahrmann. The rent was £446 per annum.

(6) There were underleases of the individual flats as follows:

(a) Basement and ground floor flat (Flat 1): an underlease held by Rainer Kahrmann, the contractual term date of which was 15 March 2009 at a rent of £200 per annum. Mr Kahrmann is a participating tenant in respect of Flat 1.

(b) First floor flat (Flat 2): an underlease held by Jacamar Investment & Properties Limited the contractual term date of which was 15 March 2009 at a rent of £100 per annum. Jacamar is a participating tenant in respect of Flat 2.

(c) Second and third floor flat (Flat 3): an underlease held by Vowden, the contractual term of which was 15 March 2009 at a rent of £150 per annum. Vowden is not a participating tenant.

6. So far as is presently relevant the nature of the interests in the property can be summarised in diagrammatic form as shown below:

<table>
<tr><td>Flat 1
LG/G</td><td>Flat 2
1st Floor</td><td>Flat 3
2/3 Floor</td></tr>
<tr><td colspan="3">Freehold
Duke of Westminster</td></tr>
<tr><td colspan="3">"GEB Lease"
Dated 27 March 1984, granted to Grosvenor Estates Belgravia ("GEB") for a term of 200 years from 25 March 1984, expiring 25 March 2184</td></tr>
<tr><td></td><td></td><td>Flat 3 Overriding Lease
23.12.2005 exp 21.3.2130
Vowden Investments Ltd</td></tr>
</table>

<table>
<tr><td colspan="3">“the Enforcer Lease” dated 22 December 2005 granted by GEB to Belgravia Leasehold Properties Limited (“BLP”) for a term expiring 26 March 2009</td></tr>
<tr><td colspan="3">An intermediate lease of the Property dated 2 August 1967 for a term expiring on 25 March 2009
Rainer Kahrmann [Participating tenant in respect of flat 1]</td></tr>
<tr><td></td><td>Lease dated 10 July 1981 for a term of 28 years less 10 days expiring 15 March 2009
Jacamar Investments and Properties Ltd [participating tenant]</td><td>Lease dated 17 September 1982 for a term of 27 years less 10 days expiring 15 March 2009.
Vowden Investments Ltd [Non participating tenant]</td></tr>
</table>

7. The agreed statement of facts records that the following vacant possession values have been agreed for the individual flats:

Flat 1: Freehold £2,050,000

Flat 2: Freehold £700,000

Flat 3: Freehold £2,200,000 (excluding any additional value attributable to the potential to develop a fourth floor).

The value of the residue of the participating tenants’ existing leases was agreed as nil for the purposes of assessing marriage value.

8. The freehold vacant possession value of the property for conversion to a house, including the potential to extend into a fourth floor is £7,000,000. The freehold vacant possession value of the property for conversion to a house with the fourth floor extension completed is £7,350,000. These agreed vacant possession values account for any risks associated with the conversion of the building, as currently arranged as flats, to a single house, including those risks relating to obtaining any relevant planning consent.

9. Accordingly it can be seen that the sum total of the freehold vacant possession values of the property configured as three separate flats is £4,950,000, whereas the freehold vacant possession value of the property as a building available for conversion to a house is £7,000,000. It is this substantial potential development value which is at issue in the parties’ approaches. The appellant says that no part of this potential development value can be properly reflected in the price to be paid for either the GEB lease or the ORL – alternatively the appellant says that the value attached to this development potential was substantially over-estimated by the LVT. The respondents say that in assessing the value of the GEB lease and the ORL it is permissible to have regard to the potential unlocking of this development value. They further argue that the risks of achieving this development value are substantially less than those contended for by the appellant, such that only a modest deduction should be made for these risks.

10. At all material times the premises have been configured as a property on five floors, with a basement, ground and three upper floors. It is agreed between the parties that there is potential to develop the roof space above Flat 3 so as to provide a fourth floor for the building. It is agreed that the "site value" of the roof space and the air space above, with vacant possession and assuming the grant of a 121 year lease (so as to match the duration of the ORL) is £455,000 on the valuation date. As at the valuation date there existed the grant of full planning permission and listed building consent (both subject to conditions) for the erection of a mansard roof extension at fourth floor level, the replacement of windows in connection with existing third floor and the installation of railings to existing terrace.

11. Permission to appeal was granted by the LVT in respect of the following matters, being the matters which the appellant sought to raise on the appeal, namely whether the development value was payable as part of the price under Schedule 6 and, if so, the amount of the development value payable to GEB and the amount of the development value payable to Vowden. The appeal has proceeded by way of a rehearing.

12. At the hearing it was agreed between the parties that the Tribunal's decision upon the amendment point (see paragraph 4(1) above) should form part of the Tribunal's final reserved decision. It was agreed it was not necessary for the amendment point to be decided before the calling of the expert witnesses, because in so far as it was decided that Vowden should be allowed to raise the point by way of amendment, this would make no or no significant difference to the valuation of the GEB lease. Bearing in mind all three experts were available to give evidence, we decided to proceed in this manner rather than rise to consider the point and then give an interim decision on the amendment point and thereby risk finding there was insufficient time available to conclude the hearing of the expert evidence.

13. The following evidence was called before us:

(1) The appellant called Michael R Lee BSc (Hons) MRICS of Shaw & Company (Surveyors) Ltd

(2) The first respondents called Julian Mansfield Clark BSc MRICS of Gerald Eve.

(3) The second respondent called Tom Power BSc MRICS of CBRE Limited.

In each case their written reports were treated as their evidence in chief and the witnesses were then subject to cross-examination.

14. All parties agreed it was not necessary for us to view the premises.

Statutory Provisions

15. So far as concerns the argument regarding Vowden's application to amend the following provisions of the 1993 Act are relevant:

(1) Section 1(2)(b) and section 2 make provision for the acquisition, as part of the collective enfranchisement, of leasehold interests including under section 2(2)

> "the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat contained in the relevant premises"

(2) Section 13 makes provision for the service of a notice by qualifying tenants of a claim to exercise the right to collective enfranchisement. By section 13(3)(c) this notice is to specify any leasehold interest proposed to be acquired under or by virtue of section 2(1)(a) or (b).

(3) Section 21 makes provision for the service of the reversioner's counter-notice. Schedule 11 provides that any counter-notice given to the tenant by the competent landlord must specify the other landlords on whose behalf he is acting (paragraph 5) and provides that a notice given by the competent landlord to the tenant shall be binding on the other landlords (paragraph 6). Section 21 requires the reversioner to give a counter-notice which (if it admits the right to collective enfranchisement) states certain matters as required in sub-section 21(3) including stating which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which are not so accepted.

(4) Schedule 11 paragraph 7 allows other landlords to require, by notice, that (inter alia) they be allowed to be separately represented in any legal proceedings relating to the determination of the price payable.

(5) Section 24 of the Act provides as follows:

"24. Applications where terms in dispute or failure to enter contract

"(1) Where the reversioner in respect of the specified premises has given the nominee purchaser—

> (a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or
>
> (b) a further counter-notice required by or by virtue of section 22(3) or section 23(5) or (6),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute.

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the nominee purchaser.

(3) Where—

> (a) the reversioner has given the nominee purchaser such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b) all of the terms of acquisition have been either agreed between the parties or determined by a leasehold valuation tribunal under subsection (1),

but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6), the court may, on the application of either the nominee purchaser or the reversioner, make such order under subsection (4) as it thinks fit.

(4) The court may under this subsection make an order—

(a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);

(b) providing for those interests to be vested in him on those terms, but subject to such modifications as—

(i) may have been determined by a leasehold valuation 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; or

(c) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6);

and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above.

(5) Any application for an order under subsection (4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).

(6) For the purposes of this section the appropriate period is—

(a) where all of the terms of acquisition have been agreed between the parties, the period of two months beginning with the date when those terms were finally so agreed;

(b) where all or any of those terms have been determined by a leasehold valuation tribunal under subsection (1)—

(i) the period of two months beginning with the date when the decision of the tribunal under that subsection becomes final, or

(ii) such other period as may have been fixed by the tribunal when making its determination.

(7) In this section "the parties" means the nominee purchaser and the reversioner and any relevant landlord who has given to those persons a notice for the purposes of paragraph 7(1)(a) of Schedule 1.

(8) In this Chapter "the terms of acquisition" , in relation to a claim made under this Chapter, means the terms of the proposed acquisition by the nominee purchaser, whether relating to—

(a) the interests to be acquired,

(b) the extent of the property to which those interests relate or the rights to be granted over any property,

(c) the amounts payable as the purchase price for such interests,

(d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e) the provisions to be contained in any conveyance, or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of section 1(4) or 21(4)."

(6) Section 38 contains various interpretation provisions for the purposes of Chapter I including in section 38(4) the following:

"Any reference in this Chapter to agreement in relation to all or any of the terms of acquisition is a reference to agreement subject to contract".

(7) Section 91 provides that any question arising in relation to certain specified matters (including the terms of acquisition relating to any interest which is to be acquired by a nominee purchaser) shall in default of agreement be determined by a leasehold valuation tribunal.

16. So far as concerns the arguments regarding the proper basis for the assessment of the price to be paid the following provisions are of relevance:

(1) Schedule 6 paragraphs 2 and 3 (so far as presently relevant) provide as follows:

"2.—
(1) Subject to the provisions of this paragraph, where the freehold of the whole of the specified premises is owned by the same person the price payable by the nominee purchaser for the freehold of those premises shall be the aggregate of—

(a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3,

(b) the freeholder's share of the marriage value as determined in accordance with paragraph 4, and

(c) any amount of compensation payable to the freeholder under paragraph 5.

(2) Where the amount arrived at in accordance with sub-paragraph (1) is a negative amount, the price payable by the nominee purchaser for the freehold shall be nil.

Value of freeholder’s interest

3.—

(1) Subject to the provisions of this paragraph, the value of the freeholder’s interest in the specified premises is the amount which at the the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls within sub-paragraph (1A) buying or seeking to buy) on the following assumptions—

(a) on the assumption that the vendor is selling for an estate in fee simple—

(i) subject to any leases subject to which the freeholder’s interest in the premises is to be acquired by the nominee purchaser, but

(ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the nominee purchaser;

(b) on the assumption that this Chapter and Chapter II confer no right to acquire any interest in the specified premises or to acquire any new lease (except that this shall not preclude the taking into account of a notice given under section 42 with respect to a flat contained in the specified premises where it is given by a person other than a participating tenant);

(c) on the assumption that any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and

(d) on the assumption that (subject to paragraphs (a) and (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the conveyance to the nominee purchaser of the freeholder’s interest is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to Schedule 7.

(1A) A person falls within this sub-paragraph if he is—

(a) the nominee purchaser, or

(b) a tenant of premises contained in the specified premises, or

(ba) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 1(2)(a), or

(c) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 2(1)(b).

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made as to the matters specified in paragraphs (a) to (d) of that sub-paragraph does not preclude the making of assumptions as to other matters

where those assumptions are appropriate for determining the amount which at the relevant date the freeholder's interest in the specified premises might be expected to realise if sold as mentioned in that sub-paragraph."

(2) Part III of Schedule 6 makes provision for the price to be payable for intermediate leasehold interests. Paragraph 6 and paragraph 7 (so far as presently relevant) are in the following terms:

"Part III Intermediate Leasehold Interests
Price payable for intermediate leasehold interests
6.—
(1) Where the nominee purchaser is to acquire one or more intermediate leasehold interests—

(a) a separate price shall be payable for each of those interests, and

(b) (subject to the provisions of this paragraph) that price shall be the aggregate of—
(i) the value of the interest as determined in accordance with paragraph 7, and
(ii) any amount of compensation payable to the owner of that interest in accordance with paragraph 8.

(2) Where in the case of any intermediate leasehold interest the amount arrived at in accordance with sub-paragraph (1)(b) is a negative amount, the price payable by the nominee purchaser for the interest shall be nil.

Value of intermediate leasehold interests

7.-
(1) Subject to sub-paragraph (2), paragraph 3 shall apply for determining the value of any intermediate leasehold interest for the purposes of paragraph 6(1)(b)(i) with such modifications as are appropriate to relate that paragraph to a sale of the interest in question subject (where applicable) to any leases intermediate between that interest and any lease held by a qualifying tenant of a flat contained in the specified premises.

(1A) In its application in accordance with sub-paragraph (1), paragraph 3(1A) shall have effect with the addition after paragraph (a) of –"(aa) an owner of a freehold interest in the specified premises, or."

ISSUE 1: Vowden's proposed amendment

17. As already noted above, the matter proceeded from original section 13 notice through counter-notice, LVT hearing, statements of case for the purposes of the appeal, and expert evidence, all on the basis that it was agreed between all relevant parties that Vowden's ORL would be acquired by the appellant as nominee purchaser. Vowden did exercise its right under Schedule 11, paragraph 7 to be separately represented at the LVT hearing and advanced arguments throughout on the basis that Vowden's ORL would indeed be acquired. It was only shortly before the hearing before the Upper

Tribunal, namely in early February 2012, that for the first time Vowden sought to argue that it was entitled to withdraw its agreement to its ORL being acquired. Vowden wishes to argue that, upon the coming to an end of all interests in Flat 3 inferior to the ORL, Vowden became in right of the ORL a qualifying tenant and that therefore the ORL should not be acquired. As to whether this is a good argument (supposing that the argument is permitted to be taken by Vowden) is not entirely straightforward and would depend upon the matters analysed by the LVT in the case of *13 Eaton Place*. The arguments (if permitted to be taken) may turn upon whether the extent of the interests to be acquired are to be decided by the situation at the date of the original section 13 notice or at some subsequent date. We are not concerned with the merits of such argument, supposing it were allowed to be taken. It was common ground between all parties that if this argument were permitted to be taken it would be necessary for there to be a separate hearing after the matter had been fully researched and prepared. No party asked that the matter be dealt with at the present hearing, which had been specifically set for the purpose of receiving valuation evidence so that the substantive appeal from the LVT could be decided upon such evidence and upon legal argument directed towards the proper assessment of the price payable under Schedule 6 for the GEB lease and Vowden's ORL.

18. On behalf of Vowden Mr Dutton advanced the following arguments:

(1) He accepted that there was agreement between all parties before the LVT that Vowden's ORL would be acquired by the appellant and he accepted that no indication of any endeavour by Vowden to withdraw such agreement was made until about early February 2012 (when Vowden applied for permission to amend its statement of case to the Upper Tribunal).

(2) However Vowden has now made clear it withdraws its agreement, so far as it is entitled to do so, and it asserts that the question of whether the ORL is to be acquired by the appellant is now in dispute.

(3) If there is a dispute as to whether the ORL is to be acquired by the appellant then this question will have to be determined before the matter can proceed under section 24 – this determination would be the subject of the separate hearing as contemplated above.

(4) The crucial matter to note is that there are three types of agreement contemplated by the Act:

(i) A binding contract incorporating the agreed terms as contemplated in section 24(3);

(ii) An agreement regarding the terms of acquisition which falls within the expression "finally so agreed" in section 24(6)(a); and

(iii) An agreement that does not fall within either paragraphs (a) or (b) above and which therefore is merely an agreement subject to contract as contemplated in section 38(4).

(5) There is no suggestion that any binding contract has been entered into as contemplated in category (i) above.

(6) The scheme of the Act is that various time limits are set down for steps to be taken under section 24. Section 24(6) defines what is meant by "the appropriate period", and this is a period of 2 months beginning with the date when all the terms of acquisition have been "finally so agreed" between the parties or, where all or any of the terms have been determined by a leasehold valuation tribunal, then a period of 2 months beginning as provided in section 24(6)(b). It is accordingly of importance to know the precise date when the appropriate period begins.

(7) For the purposes of section 24(6)(a) the terms will have been "finally so agreed" once it becomes clear that negotiations have been completed and a final agreement on all the terms of acquisition has been reached, see *Pledream Properties Limited v 5 Felix Avenue London Ltd* [2010] EWHC 3048 (Ch).

(8) Until something that can be properly called final agreement has been reached, any agreement is merely subject to contract. The expression "subject to contract" has a well recognised meaning and means no more than an agreement in principle which either party is at liberty to retreat from.

19. Mr Dutton accepted that it is open to parties, when they are seeking to agree the terms of acquisition under section 24, to apply to a leasehold valuation tribunal to determine certain points on the basis that there exist certain further points, which are not yet agreed, but which the parties reserve their position on and reserve the right to restore the application to the leasehold valuation tribunal for further argument and a further determination on these points if they ultimately cannot be agreed. Subject however to points being laid on one side for a restored application to a leasehold valuation tribunal, Mr Dutton argued that parties must proceed on the basis that the application to the leasehold valuation tribunal is an application to determine all the matters in dispute. Mr Dutton accepted that the agreed parts of the terms of acquisition, which were not referred to the leasehold valuation tribunal for determination, cannot be the subject of a withdrawal of agreement after (at latest) the leasehold valuation tribunal has received all submissions and has reserved its decision. Accordingly if for instance parties are agreed upon points A, B and C and they make an application to the leasehold valuation tribunal to determine points D and E, and if the matter proceeds before the leasehold valuation tribunal throughout on this basis and if the leasehold valuation tribunal reserves its decision on the basis that points A, B and C are agreed, then neither party can thereafter seek to withdraw agreement as to all or any of points A, B or C. Mr Dutton accepts that, viewing the matter as it stood before the LVT, the foregoing is in fact what happened. He therefore accepts that in so far as the LVT's decision stands it is not open to Vowden to withdraw its agreement that the ORL shall be acquired from it. However Mr Dutton submits that in so far as the LVT's decision is quashed or otherwise interfered with then the LVT's decision no longer stands and the matter reverts to being as it was during the course of the proceedings leading up to and at the hearing before the LVT and the right to withdraw agreement to matters which have been agreed (but only agreed subject to contract) again exists.

20. Mr Dutton drew attention to the potential problems which might arise if there was some fetter on this ability to withdraw agreement in cases where agreement had been obtained by misrepresentation or fraud (although no such allegations are made in the present case). In summary Mr Dutton argued that any agreement regarding the fact that Vowden's ORL should be acquired was merely an agreement subject to contract; that therefore the agreement was of a type that

Vowden could withdraw; that having fought the case before the LVT on the basis that it was agreed the ORL should be acquired, it is accepted that the agreement cannot be withdrawn so long as the LVT's decision stands; but that as soon as the LVT's decision is interfered with by the Upper Tribunal the ability to withdraw the agreement (which still is only subject to contract) is resurrected. Accordingly if this Tribunal in any way upsets the LVT's decision there will thereupon become disagreed the question of whether Vowden's ORL is to be acquired. This disagreed point will need to be determined. This follows as a matter of necessity from the statute. Thus Mr Dutton submitted that the question for this Tribunal was simply: was it an agreed term of acquisition that Vowden's ORL should be acquired. Vowden asserts it is not agreed and has withdrawn its previous agreement on the point. Accordingly as a matter of fact the point is no longer agreed as at the date of the hearing before the Upper Tribunal. The only question is whether Vowden is allowed to withdraw its previous agreement on the point. Mr Dutton submitted Vowden was entitled to do so.

21. On behalf of the first respondents Mr Radevsky indicated that he primarily left the argument upon the amendment point to Mr Jefferies on behalf of the appellant. Mr Radevsky indicated that the first respondents' case was that permission to amend should not be granted. However he also indicated that, if Vowden was ultimately allowed to withdraw its agreement and to argue that the ORL should not be acquired, the first respondents would support that argument as being (so the first respondents would contend) correct in law.

22. Mr Radevsky submitted that what is required for an agreement under section 24 is not entirely clear. He pointed out that section 24(6) uses the expression "agreed" and "finally so agreed" and does not make clear what is meant by the latter expression. The former expression means agreement subject to contract, see section 38(4). Mr Radevsky drew attention to the Lands Tribunal decision in *Becker Properties Ltd v Garden Court NW8 Property Co Ltd* [1998] 1 EGLR 121 where the Tribunal had allowed a party to argue at the appeal for a different yield rate from that which had been agreed between the parties before the LVT. However Mr Radevsky pointed out that permission to argue this point was only granted on the basis that the other party would not be unduly prejudiced. Mr Radevsky pointed out that in the present case:

(1) GEB was awaiting the payment of what on any basis was a large amount of money as the price for the collective enfranchisement, being a price which falls to be assessed having regard to values pertaining at 12 March 2009 but being a price in respect of which no interest is payable. Accordingly delay works harshly against the respondents.

(2) The matter has progressed throughout on the basis that the ORL will be acquired and time and trouble have been spent by the parties, including the first respondents, in dealing with the proper valuation of the ORL lease, which would become an irrelevant point if it is not to be acquired.

Mr Radevsky argued that if litigants go before the court or a tribunal on the basis that certain things are agreed, they do not have an absolute right thereafter to withdraw the agreement. He submitted that it became irrevocably agreed between the parties that the ORL should be acquired by at latest the LVT reserving its decision. Vowden cannot now go back on that.

23. On behalf of the appellant Mr Jefferies advanced the following arguments that Vowden should not be allowed to amend their statement of case and argue that the ORL should not be acquired by the appellant:

(1) He submitted that the section 13 notice expressly stated that the tenants claimed to purchase the ORL (see paragraph 6.3 of the notice). In the formal counter-notice given by the reversioner (on behalf of and so as to bind Vowden) the reversioner accepted the proposals in paragraph 6.3 (see paragraph 2.2 of the counter-notice – thus it was expressly accepted that Vowden's ORL should be acquired). Vowden cannot not go back on this.

(2) The Act contemplates that certain matters may become agreed (i.e. agreed subject to contract see section 38(4)) and that merely some of the terms of acquisition (i.e. those which have not been so agreed) will remain in dispute and capable of being the subject of an application for determination to the leasehold valuation tribunal. It is therefore clear that a subject to contract agreement is sufficient to constitute a term as "agreed" for the purposes of section 24.

(3) It would result in chaos under section 24 if it were open to a party at any time prior to the commencement of the period referred to in section 24(6) to withdraw an agreement (albeit a subject to contract agreement) which had previously been made and on the basis of which everyone has proceeded. If there was the power to withdraw such an agreement, the only sensible course for a party to take would be to ask the leasehold valuation tribunal to decide all of the terms of acquisition – then at least there would be a determination of them and no question of anyone being able to withdraw an agreement.

(4) As regards Mr Dutton's argument that, while Vowden cannot withdraw the agreement so long as the LVT's decision stands, the matter becomes at large again before the Upper Tribunal if the Upper Tribunal interferes with the LVT's decision, Mr Jefferies advanced the following argument. He pointed out that the Upper Tribunal's powers are limited to those available to the LVT, see section 175(4) of the Commonhold and Leasehold Reform Act 2002. Accordingly if (as Vowden appears to accept) the LVT had no jurisdiction to decide whether the ORL should be acquired (for the simple reason that this point was agreed before the LVT rather than in dispute before the LVT) then similarly the Upper Tribunal also has no jurisdiction to decide at this point.

(5) As regards Mr Dutton's arguments based on the need to be able to withdraw agreements so as to avoid difficulties where agreement has been induced through fraud or misrepresentation, Mr Jefferies drew attention to the wide powers under section 24(4)(b) which enables an order to be made modifying the terms of acquisition which are required by change of circumstances since the time when they were agreed or determined.

(6) Mr Jefferies supported Mr Radevsky's argument that, if the matter rested upon the question of the exercise of any discretion by the Upper Tribunal, such discretion should be exercised against allowing the amendment. Vowden was represented before the LVT by experienced solicitors and counsel; if the point were ever to be

taken it could have been taken long ago; the argument sought to be raised involves potential difficult points which will require a separate and delayed hearing; the hearing of this appeal before the Upper Tribunal has been set for 21 February 2012 and following for a long time; the appellant should not be put to the extra time and cost of this late point being raised.

Conclusions upon Vowden's amendment argument

24 The Act contemplates (see section 24(3) and (6)) that the parties may reach a finally concluded position as to what are the terms of acquisition prior to any binding contract incorporating these terms being entered into.

25. Such finally concluded position may be reached either (a) by the parties agreeing all the terms of acquisition, or (b) by the parties agreeing some of the terms of acquisition and a leasehold valuation tribunal determining the remaining terms, or (c) by the parties agreeing none of the terms of acquisition and a leasehold valuation tribunal determining all of the terms. Save in cases falling within category (c), this finally concluded position will include terms of acquisition which have been "agreed" between the parties.

26. We respectfully agree and adopt the analysis in *Westminster City Council v CH 2006 Limited* [2009] UKUT 174 (LC) that, notwithstanding that section 38(4) states that agreement in relation to all or any of the terms of acquisition is a reference to agreement subject to contract, it is open to the parties to reach an agreement on all (or some) of the terms of acquisition which is nevertheless final and binding for the purposes of section 24. We also agree with Her Honour Judge Robinson that for such an agreement to be binding (rather than merely a tentative agreement contingent upon the satisfactory resolution of other matters):

> "… it must be clear that negotiations have been completed and final agreement has been reached, either orally or in writing, on a specific term or terms that is not in any way contingent on agreement or determination of some other term or terms."

It may be noted that in *Pledream Properties Ltd v 5 Felix Avenue London Limited* [2010] EWHC 3048 (Ch) Lewison J approved this citation as a workable test.

27. In the present case we note that prior commencement of the hearing before the LVT:

(1) The section 13 notice had expressly specified that it was proposed that Vowden's ORL was to be acquired and the counter-notice had expressly accepted this proposal.

(2) Vowden had given notice of separate representation in any legal proceedings and was separately represented before the LVT.

(3) Prior to the hearing before the LVT a draft form of transfer had been agreed, which expressly provided for the purchase of Vowden's ORL – and it may be

noted that the LVT was informed of this agreement regarding the terms of the transfer (see paragraph 5 of its decision where it expressly refers to this point).

(4) All three parties had prepared argument and valuation evidence upon the basis that Vowden's ORL was indeed to be purchased and that therefore a price must be determined for its purchase in accordance with Schedule 6.

28. Having regard to all the foregoing points we conclude that, in so far as concerns the question of whether the appellant was to acquire Vowden's ORL, agreement had been reached of a type contemplated in *Westminster City Council v CH 2006 Ltd.* Final agreement on this point had been reached in writing being an agreement that was in no way contingent on agreement or determination of some other term or terms. It is therefore not necessary for us to consider the separate point raised by Mr Jefferies to the effect that once the counter-notice had expressly accepted the proposed acquisition of Vowden's ORL this point could never thereafter be disputed. It is sufficient for us to find, as we do, that by at latest the commencement of the hearing before the LVT this point had been finally agreed and agreement upon it could not be withdrawn.

29. We are confirmed in this conclusion by the following separate way in which the matter may be analysed. It is a fundamental basis of the LVT's determination that Vowden's ORL is to be acquired by the appellant – the LVT determined a price to be paid by the appellant to Vowden for the ORL. Accordingly, supposing (contrary to our foregoing analysis) it could properly be said that it had not become finally agreed between the parties prior to the commencement of the LVT hearing that the appellant was to acquire Vowden's ORL, then it can properly be said that the LVT has determined that the terms of acquisition should include terms whereby the ORL is acquired by the appellant and the appellant pays a certain price to Vowden. There was no application by Vowden (nor could there have been) to appeal against this determination by the LVT that the appellant was to acquire the ORL. The only appeal is by the appellant regarding part of the terms of acquisition namely the price to be paid. Upon this analysis the LVT's determination that the terms of acquisition shall include the purchase of Vowden's ORL therefore stands. If Vowden's application to amend its statement of case is to be taken as an application for permission to appeal out of time against this part of the LVT's determination we refuse permission for the reasons mentioned in the next paragraph.

30. We refuse Vowden's application to amend its statement of case on the basis of our conclusion that Vowden has agreed that the ORL shall be acquired by the appellant; that Vowden is not entitled to withdraw that agreement; and that therefore the proposed amendment would merely seek to assert a point which is not open to Vowden. If the foregoing analysis is incorrect and if the matter stands instead on the basis of whether this Tribunal should, in its discretion, allow Vowden to amend its statement of case we conclude we should refuse such amendment. Vowden has joined with the other parties in litigating the entire case right down until February 2012 on the basis that the ORL shall be acquired from it. Valuation evidence has been directed at the LVT towards the valuation of, inter alia, the Vowden ORL and valuation evidence has been prepared for this Tribunal on that basis. A hearing has been set before this Tribunal for the hearing of the present appeal at a date for the three valuers to give evidence. The point that Vowden seeks to raise is one which could give rise to substantial argument and would of necessity involve a further hearing and delay. GEB is being kept out of a substantial purchase price fixed by reference to March 2009 values with no interest being

payable. The appellant would also be prejudiced by being placed at this very late stage with potential substantial further argument and delay. Vowden was separately represented before the LVT. If this point were ever to be taken (and supposing but without in any way deciding that the point could be taken by Vowden despite the terms of the counter-notice) the point should have been taken before the LVT. The LVT's decision is dated 12 September 2010. An application so fundamentally to change Vowden's case made in February 2012, shortly before the hearing of the appellant's appeal, is an application made much too late; it is an application which if granted would cause prejudice to the other parties, and the application must be refused.

31. As regards Mr Dutton's argument based upon the problems which might emerge if an agreement were preceded by misrepresentation or fraud there is no suggestion in the present case that Vowden's agreement upon this point was so obtained. However if in another case some term of acquisition becomes agreed through misrepresentation or fraud we consider that such problem could be cured by resort to the common law or to the Misrepresentation Act 1967 or to section 24(4)(b). The potential difficulties which might arise in another case upon such considerations do not lead us to doubt the conclusion we have reached, which is that Vowden is not permitted now to assert that there exists no agreement that the ORL lease shall be acquired.

ISSUE 2: Evidence of the valuers

32. In the light of the LVT decision, Mr Lee, for the appellant, said that he had been instructed to prepare valuations on the assumption that GEB and Vowden are not prevented from claiming that the value of their interests include development hope value in either or both of the following circumstances:

(a) the owner of the GEB lease granting a lease of the fourth floor airspace to the owner of the Vowden lease to allow flat 3 to be extended

(b) the hope of reaching an agreement which would result in one party buying all the interests to convert the property into a house

In so doing, he said he had had regard to the possibility, as the LVT appeared to have accepted, that the buyer of one interest could subsequently buy the other interest or that there could be an agreement by the buyer of one interest with the owner of the other interest to grant a lease of the whole to a third party buyer.

33. He provided three valuations in his report of 7 February 2012. The first was on the basis that development hope value either for the fourth floor extension, or for conversion to a house was not permissible, and those figures were agreed with the respondents' valuers. The second being as flats with the hope of extending upwards by the provision of a fourth floor and the third as a house with the ability also to create a fourth floor roof extension. He explained that the key difference between his own conclusions and those promulgated by Mr Clark and Mr Power under these scenarios was that, taking account of the fact that because of the statutory hypotheses set out in the legal arguments he is to assume GEB and Vowden do not get together and two separate transactions are to be assumed to have to occur before the development value

can be realised, account needs to be taken of the increased risks that entails. He accepted that if it could be assumed GEB and Vowden would get together and the acquisition could be made in a single transaction, then the risks would be minimised. It was common ground between the valuers that, unless there was a legal reason for excluding it, the possibility of realising the development value was something that affected the value of both the GEB and Vowden leases.

34. There being agreement on the first valuation, no further record of the evidence relating to that scenario is required. As to the second, Mr Lee explained that whilst it had been agreed that the site value for a 121 year lease of the roof and air space over the third floor flat for development was £455,000, the second statement of agreed facts dated 22 March 2010 had failed to record that it was necessary to make a discount from this figure to reflect planning risk. The planning consent was due to expire 10 days after the valuation date, and it was common ground that there was no realistic prospect of the tenant (Vowden) commencing works to trigger the existing permission during that time as landlord's consent (which was not to be unreasonably withheld) had not been even been sought. Whilst there was no doubt that the consent would be renewed, especially as this was the only property in the block that had not yet had a roof extension built, it was agreed that, as with all planning matters there was an element of risk (cost, delay and possible problems with English Heritage as it was a listed building), and that an appropriate allowance would be 5%. However, whereas both Mr Clark and Mr Power had simply deducted 5% from the agreed value (giving £432,500) and had not allowed for any other risks, Mr Lee said that said that there were a number of other risks that would affect the development hope value of both the GEB and Vowden interests, and in respect of planning, he had added 5% to each of the composite discounts he considered appropriate for each.

35. Regarding GEB's development hope value, Mr Lee said that the prospective purchaser of the GEB lease would be aware that Vowden's interest was under the control of the bank and, in the light of the depressed state of the market at the time, there was a risk that they might not want to deal and would prefer to sit the market out and wait for better times. The buyer thus faced uncertainty and delay, and with the prospect of doing a deal being entirely at the whim of the bank, it was appropriate to make an additional allowance to cover this specific risk – for which he applied an additional 5% discount. Any delay could, in this market, result in falling values and a further 5% was appropriate to cover this. Finally, there was, of course, the risk of no deal being brokered, and of the third floor flat being refurbished as it is, having already been stripped out for that purpose. A further 10% should be added for this risk, making a total of 25%. Applying that discount to half the site value (£227,500) leaves £170,000 for GEB's development hope value.

36. As to Vowden's prospect for obtaining development hope value Mr Lee said he thought that the obstacles were far greater, and the above 25% (which would also apply in this case) was just a starting point. As GEB own the airspace from which the development potential is to be unlocked, any opportunity would be lost if their agreement was not forthcoming, for instance, if they decided to await the termination of the lease, or if GEB were to demand a greater share than 50% of the development value – although he accepted in cross-examination that, as Mr Clark had explained, GEB had been prepared to do a deal in similar circumstances in 2006 at a 50/50 split of development hope value. Nevertheless, Mr Lee said, the purchaser of the Vowden interest could find himself in a weak position especially as the accommodation that Flat

3 contains is already stripped out and currently uninhabitable. In his view, a further 25% discount should be applied to this interest making a total of 50% creating development hope value of £113,750 for the Vowden interest.

37. In connection with his third valuation, where the potential gain was £1,595,000 for the freehold and £1,580,000 assuming the grant of a 175 year lease, Mr Lee acknowledged that the vacant possession values that had been agreed took account of all the risks associated with the conversion to a house (to include a fourth floor), including planning risks, developer's profit and, as this was to be a two stage transaction, short term market sentiment. However, as with his second valuation, the risks associated with there being no guarantee on the first purchase that the second vendor would "play ball", there were additional risks to take into account. He did not agree with the respondents valuers' opinions that there would be nil or only negligible extra risk. The first purchase would be entirely speculative, and whilst it was accepted by Mr Lee, in answer to a question from the Tribunal, that the prospect of the substantially increased value would be likely to mean that the second party would be keen to do a deal, the risks associated with the fact it has to be assumed the parties have not reached agreement before the first purchase is effected cannot be ignored. It was, he said in cross-examination, the valuations under the statutory hypotheses that had been agreed, and it was right, in his view, to make the further allowances that he was arguing for in the exercise that he had been asked to conduct – which reflected reality.

38. Mr Lee said that he had to assume that the buyer (who he accepted was most likely to be a developer, although not necessarily so) was prudent but not rash, and would take a prudent view of the risks. Those risks, he said, could be identified as:

1. The other (second) owner may not want to deal
2. The other owner may not agree the capital values
3. The other owner may not agree the development value
4. The other owner may hold out for more than 50%

Whilst it has to be assumed that the seller of each interest is willing when valuing that interest under Schedule 6, Mr Lee said that that there was no statutory requirement to assume that the owner of the other interest was willing or reasonable. Although the valuations had been agreed under the statutory basis, in the real world many negotiations fail because values cannot be agreed, or, subject to the strength of each party's negotiating position, it might not be possible to agree a 50/50 split of the potential profit.

39. Because the parties were in different positions, the adjustments for risk would, Mr Lee said, be different in each case. In assessing the development hope value of the GEB interest, the purchaser would make enquiries as to the potential availability of the Vowden interest. An inspection of the title Register would reveal that the property had been charged to Bank of Scotland at the top of the market, and a further loan had been taken out with Icebank in 2008. With the banks in control, and wishing to avoid crystallising a loss at the bottom of the market, there was a distinct possibility that they would wish to retain the property and hold it until improved trading conditions came along, or would require significantly more than 50% of the

development uplift. Allowing for these risks, some valuation tolerance, delays and the possibility that no deal could be brokered at all, Mr Lee said he would apply an overall risk adjustment of 50% of the potential gain. During the hearing, and following cross-examination, he adjusted this to 40% – ie, £316,000 (GEB's share of £1,580,000 development gain at 50% = £790,000 x 40% = £316,000).

40. The purchaser of the Vowden interest would be in a relatively weak bargaining position in having to negotiate and reach agreement with GEB. As a long term property investor, they may be unwilling to sell at the bottom of the market, or may wish to extract more than 50% of the development value knowing that the flat was currently uninhabitable and the purchaser could not therefore immediately realise a return. Allowing for delays, market volatility, valuation tolerance and the risks of no deal being achievable, Mr Lee estimated the adjustment at 50% of the development profit - £395,000.

41. Resulting from the adjustments he agreed should be made to his risk percentages during cross examination (reducing the risk on the GEB element from 50% of the potential gain (his para 11.11.9) to 40%) Mr Lee produced a final revised valuation on his house assumptions on the second day of the hearing. This produced an enfranchisement price of £5,790,198, and was apportioned as to £2,211 to the freeholder, £3,220,483 to GEB and £2,567,504 to Vowden. The valuation is reproduced at **Appendix A** to this decision

42. It was put to Mr Lee in cross-examination that he was not in a position to make, as he had done, adjustments from agreed values. He argued that in the scenario he had to assume, where the potential for unlocking the development hope value was not all but guaranteed, it was necessary to be realistic and to factor in the risks that would exist. Although he accepted that there was little risk of the falling market affecting values if the purchase of the second interest occurred very soon after the first, if there were any unforeseen delays, this was a factor that would have to be taken into account. On the suggestion that the bank (in the Vowden interest) would be willing to treat, Mr Lees said that he was not aware of any circumstances where banks had traded out at that time – it was their policy to hold and wait out the market – as was confirmed by the commentary in an Estates Gazette article of 7 March 2009 which he had produced as an appendix to his report. As to Mr Lee's concerns that GEB might not want to deal, as they were a long term property investor, he accepted in questioning from Mr Dutton that they had previously agreed to the 4th floor extension (although that was never finalised) and that he had no evidence to suggest that their policy might have changed. He also accepted in response to a question from the Tribunal, that if Grosvenor were prepared to deal, it was not unreasonable to assume that they would accept a 50/50 split. He said that whilst there was no back-up information to the statements made by Mr Clark in section 11.12 of his supplementary report, regarding Grosvenor's past practises and their willingness to co-operate, he did not take issue with what he had said.

43. Mr Clark, for the first respondents, produced three valuations on the same bases as those produced by Mr Lee in his report of 7 February 2012. He also produced, with his supplementary report of 20 February 2012, a fourth alternative valuation on the basis that the Tribunal found in favour of the Vowden's application on issue 1. As the Tribunal has not done

so, no further reference to this additional valuation is required. Mr Clark's principal valuation (JMC 3), on the basis that it was found to be correct that the additional value for conversion to a single house is to be included in the schedule 6 valuation, is appended to this decision as **Appendix B**. The premium of £6,936,200 was apportioned as to £2,200 to the freeholder, £3,745,650 to GEB and £3,188,350 to Vowden.

44. He said that in his view, in valuing the GEB and Vowden interests in this scenario, the freehold value agreed allowed for all matters such as build costs, finance, fees, developers profit and contingency, and there was no reason to allow any other risks, as Mr Lee had done. The only risk allowance he had made was for planning risk in valuation 2 (for renewing the permission for a fourth floor roof extension), but all such risks were covered in the freehold and long-leasehold values that had been agreed (as set out in the agreed statement of facts) in the "house" valuation. In cross-examination, he explained that in preparing his valuation he had assumed that there would be a joint sale of the GEB and Vowden interests – in other words they would join forces in the marketing and sale of their interests. Asked whether he should be allowing for additional risks as it had to be assumed the sales were separate, Mr Clark said that he should not. However, when pressed he accepted that whilst, in the real world, Vowden and GEB would get together in order to realise the development hope value (at a 50/50 split – see the *2 Herbert Crescent* and *Sussex Gardens* LT and LVT cases), there might be some minimal risk if the seller of the first interest (whether GEB or Vowden) did not have a formal agreement and had to sell – most likely to a developer - in a two stage process.

45. He produced a helpful note on day 3 of the hearing summarising his views in tabular form as to the respective positions of GEB and Vowden:

	Sale of GEB Lease Under para 3(1), (1A) & (2)		**Sale of Vowden ORL Under paras 6 & 7**
Date of Sale	12 March 2009		12 March 2009
Characteristics of Vendor	Assumed to be hypothetical willing seller		Assumed to be hypothetical willing seller
Characteristics of Purchaser	Assumed to be hypothetical purchaser (and willing)		Assumed to be hypothetical purchaser (and willing)
Interest to be sold / acquired	Lease of whole of 38 Wilton Crescent to March 2184 with vacant possession of basement, ground and first floors and subject to ORL of the second and third floors held by Vowden as the actual tenant		Overriding lease of second and third floors to March 2130, with vacant possession, with GEB being the actual landlord with a lease of the whole of 38 Wilton Crescent running to March 2184
Underlying value	Vacant possession of basement,		Vacant possession of the second &

	Sale of GEB Lease Under para 3(1), (1A) & (2)		Sale of Vowden ORL Under paras 6 & 7
of interest	ground & first floors for lease with 175 years to run plus reversion to second & third floors &roof space in March 2184 plus vacant possession of the airspace		third floors and roof space for lease with 121 years to run
Potential additional value	(1) Share of site value of 4th floor development valued at £455,000 subject to planning (2) Share of development value for conversion of whole of building to a single house including potential to develop the 4th floor		(1) Share of site value of 4th floor development valued at £455,000 subject to planning (2) Share of development value for conversion of whole of building to a single house including potential to develop the 4th floor
Release of potential additional value dependent on	Co-operation / willingness of the tenant of ORL (actually Vowden) to participate in the release of value by being prepared to sell its interest to the same purchaser as that of GEB lease		Co-operation / willingness of the owner of GEB lease (actually GEB) to participate in the release of value by being prepared to sell its interest to the same purchaser as that of Vowden ORL
Factors affecting sale price	(1) Relevant vacant possession values agreed, so no argument / delays concerning capital values, development value or valuation tolerance (2) Agreed vacant possession values reflect market sentiment accounting for anticipated future changes in the market in the short term (3) Vendor / purchaser of GEB lease will be concerned that Vowden will wish to participate but can be		(1) Relevant vacant possession values agreed, so no argument / delays concerning capital values, development value or valuation tolerance (2) Agreed vacant possession values reflect market sentiment accounting for anticipated future changes in the market in the short term (3) Vendor / purchaser of Vowden ORL will be concerned that GEB will wish to participate but can

	Sale of GEB Lease **Under para 3(1), (1A) & (2)**		**Sale of Vowden ORL** **Under paras 6 & 7**
	reasonably certain they will because:		be reasonably certain they will because:
	(a) This is a one off opportunity for Vowden to share in substantial development value for conversion to a house		*(a) This is a one off opportunity for GEB to share in substantial development value for conversion to a house*
	(b) If Vowden does not act now then GEB is likely to sell long leases of the basement, ground & first floors and the opportunity for conversion to a house will be lost for a long time with additional parties to deal with		*(b) If GEB does not act now then Vowden is likely to sell its interest with or without the potential to develop the 4th floor and the opportunity for conversion to a house will be lost for a long time*
	(c) To the extent that Vowden's interest is subject to a charge to the Bank, then it will be in the Bank's interest to participate since participation is likely to provide greater proceeds than holding on for a later sale in the hope of market appreciation in a weak market		*(c) By its previous conduct, in relation to the 2006 negotiations over the 4th floor, and elsewhere in Belgravia, GEB has shown a willingness to release development value through participation.*
	(4) There is a risk that Vowden will hold out for a greater than 50% share of the development value but this is unlikely as such action would jeopardise the release of value.		(4) There is a risk that GEB will hold out for a greater than 50% share of the development value but this is unlikely as such action would jeopardise the release of value.
	(5) There is a possibility also that the vendor of the GEB lease will hold out for a		(5) There is a possibility also that the vendor of the Vowden lease will hold out for a greater than 50% share of the development value but

	Sale of GEB Lease Under para 3(1), (1A) & (2)		Sale of Vowden ORL Under paras 6 & 7
	greater than 50% share of the development value but this is also unlikely for the same reason as above.		this is also unlikely for the same reason as above.
Conclusion of sale	Likely successful purchaser of GEB lease will be a developer who will also acquire at the same time or shortly thereafter the Vowden ORL with a view to developing the building as a single house for which the value of the 175 year lease with vacant possession is agreed at £6,930,000 including the potential to develop the 4th floor and accounting for all risks including planning. The successful bidder will most likely have made enquiries of Vowden as to its willingness to participate and can be reasonably assured of a positive response. The vendor of the GEB lease (and the purchaser) are likely to agree a price for the GEB lease that reflects GEB receiving 50% of the development value released. The bid of the successful developer purchaser described above is likely to exceed that of: (a) A potential bidder who intends to acquire first the GEB lease and then the Vowden ORL with the intention of selling on immediately to a further purchaser / developer (b) A potential purchaser who has made no enquiries as to		Likely successful purchaser of the Vowden ORL will be a developer who will also acquire at the same time or shortly thereafter the GEB lease with a view to developing the building as a single house for which the value of the 175 year lease with vacant possession is agreed at £6,930,000 including the potential to develop the 4th floor and accounting for all risks including planning. The successful bidder will most likely have made enquiries of GEB as to its willingness to participate and can be reasonably assured of a positive response. The vendor of the Vowden ORL (and the purchaser) are likely to agree a price for the Vowden lease that reflects Vowden receiving 50% of the development value released. The bid of the successful developer purchaser described above is likely to exceed that of: (a) A potential bidder who intends to acquire first the Vowden ORL and then the GEB lease with the intention of selling on immediately to a further purchaser / developer

	Sale of GEB Lease Under para 3(1), (1A) & (2)		Sale of Vowden ORL Under paras 6 & 7
	whether Vowden is willing to participate		(b) A potential purchaser who has made no enquiries as to whether GEB is willing to participate

46. Mr Clark said that if it had to be assumed that there were no discussions between Vowden and GEB prior to the property being marketed (a most unlikely situation), he would not violently disagree with Mr Power's figure of a 15% discount for risk, although he felt more comfortable with "10 to 15%". This would allow for the very remote possibility that the other party might not agree to treat, and for the delay which would be occasioned by it being a two stage process. This figure, he said, included any aspects of the four risk headings that Mr Lee had referred to that might fall outside risks that were already built into the agreed freehold and long-leasehold valuations. He went on to say that if, as it was reasonable to assume, the first seller had taken steps to establish the position of the second seller prior to sale, then the only additional risk that was required to be allowed for (over a prospective joint sale) was 5%. This was because "the door had already been opened", and was purely to allow for the additional time that two separate transactions would take.

47. Mr Power appeared for the second respondent, Vowden, and had been instructed by Bank of Scotland who had charges over Vowden's occupational lease and its overriding lease. His valuation, assuming development value for re-conversion to a house, is at **Appendix C** to this decision. This was made up as to £2,186 to the freeholder, £3,736,360 to GEB and £3,180,716 to Vowden, totalling £6,919,263. He also provided an alternative valuation relating to the provision of a fourth floor extension above flat 3 against which he also (along with Mr Clark) allowed a 5% discount for planning risk.

48. As to the house conversion, Mr Power said that, as at the valuation date, the only two parties who needed to co-operate were Vowden and GEB. In his valuation, he had taken the same stance as Mr Clark, ie, he had assumed that in the real world co-operation would be by way of a joint sale to a developer, or by Vowden acquiring a leasehold interest in the remainder of the building from GEB, or even the freehold from Grosvenor, and immediately selling on. Likewise, since the development opportunity would be unlocking substantial additional value, a prospective purchaser of Vowden's interest would take the view that GEB would be co-operative, providing that additional value was shared equally between them. A prudent purchaser would make enquiries of GEB and, bearing in mind that historically they had been prepared to do a deal on the roof space, it could be expected that they would be willing to deal and to share in all that additional value. Whilst it would not be right to assume that the purchaser would have entered into a binding deal with GEB, the enquiries he would have made would, Mr Power said, have given him sufficient comfort for him to conclude that there was little if any risk of the deal not going ahead on this two-stage process. However, he accepted in

cross-examination that there must be some additional risk over a joint sale situation and said that a 5% discount would be appropriate, although he had not made that allowance in his valuation. All other risks referred to by Mr Lee, he said, were wrapped up in the agreed values, which was the basis upon which he thought the statement of facts was agreed.

49. He said that if it had to be assumed that a purchaser of Vowden's interest had made no enquiries of GEB prior to placing a bid, than a discount for risk of 15% would be appropriate. As to the situation if the purchase procedure were reversed, and it was GEB buying out Vowden's interests, and then selling on, Mr Power said that in his view the value of both interests was broadly similar and thus neither was in a weaker bargaining position than the other.

In summary, the three valuers' assessments of the enfranchisement price on the conversion to a house basis were:

	Freeholder	GEB	Vowden	Total
Lee	£2,211	£3,220,483	£2,567,504	£5,790,198
Clark	£2,200	£3,745,650	£3,188,350	£6,936,200
Power	£2,186	£3,736,650	£3,180,716	£6,919,263

Arguments regarding the valuation principles

50. On behalf of the appellant Mr Jefferies advanced the following arguments.

51. As regards Mr Radevsky's argument based upon Article 1 of First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedom Mr Jefferies contended that the short answer to this argument was to be found in the speeches of Lord Walker and Lord Neuberger in *Earl Cadogan v Sportelli* [2010] 1 AC 226 in paragraphs 48 and 127 respectively. As regards the suggestion that the construction contended for by the appellant in the present case would result in a windfall at the expense of the first respondent, Mr Jefferies observed (a) that any such windfall would be a result of the deliberate decision of the first respondent to grant the overriding lease to Vowden and (b) that in any event the argument regarding windfalls was considered by the European Court of Human Rights in *James v United Kingdom* [1986] 8 EHRR 123 at paragraph 69. The argument did not avail the first respondent then and it cannot avail the first respondent now.

52. As regards Mr Radevsky's argument upon the proper approach to construction based upon extracts from Bennion on Statutory Interpretation 5th edition, Mr Jefferies argued that it would be wrong in the present case to approach the proper construction of Schedule 6 of the 1993 Act with a predilection to construe the provisions if possible so as to ensure that the first respondent obtained sufficiently full compensation so as to avoid any other party making a windfall at their expense. He

drew attention to *Cadogan v McGirk* [1996] 4 ER 643 at page 647j and following where Millett LJ said:

> "Principles of construction – There was some discussion before us of the proper approach which should be adopted to the construction of the 1993 Act. Two particular questions were canvassed. The first was whether the Act, being expropriatory in nature, must be strictly construed. A man, it was said, is not to have his property compulsorily acquired except by plain language. Support for this proposition may be found in the judgments of all three members of this court in *Methuen-Campbell v Walters* [1979] 1 All ER 606, [1979] QB 525, which was a decision on the 1967 Act. This is not, however, the approach which has been adopted since. In *Wentworth Securities Ltd v Jones* [1979] 1 All ER 286 at 295, [1980] AC 74 at 113 Lord Russell said of this point: 'I attribute minimal if any force to this point, and regard only the statutory provisions.' Similarly, in *Manson v Duke of Westminster* [1981] 2 ALL ER 40 at 48, [1981] QB 323 at 332 Stephenson LJ said: 'I would … regard the expropriatory nature of the 1967 Act as of little weight in construing its provisions …' I respectfully agree. 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."

53. Mr Jefferies drew attention to the wording of Schedule 6 paragraph 3 and especially the bracketed words namely:

> "with no person who falls within sub-paragraph (1A) buying or seeking to buy"

He submitted that these words must be given a wide meaning, see per Lord Neuberger in *Sportelli* at paragraph 105.

54. In the light of the foregoing Mr Jefferies submitted that the following were key points which must be noted:

(1) Schedule 6 requires each interest to be valued separately.

(2) In valuing the freehold it must be assumed that neither Vowden nor GEB is buying or seeking to buy.

(3) The freehold must be valued assuming a sale subject to the intermediate leases.

(4) In valuing each of the intermediate leases it must be assumed that neither the freeholder nor any other tenant is buying or seeking to buy.

(5) In valuing the GEB lease it must be assumed that it is being sold subject to Vowden's ORL.

He submitted that the effect of these provisions is to preclude the hope value contended for by the respondents in the present case by reason of the following analysis.

55. The bracketed words "buying or seeking to buy" extend not just to a sale at the valuation date but to any sale in the future, see Lord Walker at paragraphs 37 and 46 and Lord Neuberger at paragraphs 82, 83 and 103 in *Sportelli*. In valuing the GEB interest, for example, it must be assumed that Vowden is not buying it or seeking to buy it at the valuation date or at any time in the future. To give effect to this assumption it must be assumed that Vowden's successors will not be buying or seeking to buy either.

56. As regards the argument that the requirement that the persons mentioned in sub paragraph (1A) are "not buying or seeking to buy" did not preclude the possibility of the persons mentioned in paragraph (1A) in due course selling or seeking to sell their interest, so that for example the purchaser of GEB interest might pay extra for the hope of subsequently buying the Vowden interest and thereby underlocking the development value, Mr Jefferies referred to this as the "marriage by sale" argument. He submitted the "marriage by sale" argument was wrong. To allow such an argument would defeat the purpose of the disregard introduced by the bracketed words. The economic effect of the purchaser of the GEB hoping to sell his interest to Vowden or hoping to acquire the Vowden interest is the same. Both possibilities are excluded. He submitted that if "marriage by sale" was not excluded then the decision in the House of Lords in *Sportelli*, namely that hope value is not payable (save in one respect) could be circumvented by assuming that the purchaser of the freehold could acquire the tenants' leases thereby releasing the marriage value.

57. Mr Jefferies submitted that the "marriage by sale" argument was dealt with in *Sportelli* in paragraphs 65 and 66 of Lord Neuberger's speech:

> "65. Having discussed marriage value and its treatment under section 9(1A), it is convenient to deal with "hope value". If a landlord is selling his freehold interest subject to a lease, at a time when the tenant is not interested in purchasing the freehold, there is no immediate prospect of releasing the marriage value. That is because the only way in which it can be released is either by the tenant acquiring the freehold interest or by the landlord acquiring the leasehold interest. As it is the landlord who is assumed to be selling, the latter possibility could not arise, and the former possibility is excluded by the fact that the tenant is not, on this hypothesis, in the market at the time of the sale.
>
> 66. However, where the landlord is selling his interest when the tenant is not in the market, a potential purchaser may well think that, in addition to its investment value, the freehold interest carries with it the potential benefit of a possible future sale of the freehold to the present tenant <u>or a successor in title (or indeed the acquisition of the leasehold interest)</u>, thereby enabling a release of the marriage value in the future. In such a case, therefore, it can be said that, even though the tenant is not in the market at the time of the sale, the value of the freehold subject to the lease is greater than the aggregate of the capitalised rental stream and the deferred right to possession at the end of the term, and that something should be added for the possibility of a purchaser benefiting from a release of the marriage value. <u>That additional sum is known as "hope value"."</u>
>
> (Mr Jefferies' underlining).

Mr Jefferies argued that the underlined words showed that Lord Neuberger was treating hope value as including the possibility of marriage by sale as much as marriage by purchase. He submitted that the subsequent finding that hope value is excluded from the value of the landlord's interest (save in one respect) included a finding that hope value arising from the possibility of marriage by sale is also excluded (see paragraphs 103 and 115 of Lord Neuberger's speech).

58. Mr Jefferies referred to the Lands Tribunal decision in *Chelsea Properties v Cadogan* (LRA/69/2006) which he argued supported the conclusion that any hope value arising from a marriage by sale argument was excluded.

59. He pointed out the analysis in Lord Neuberger's speech at paragraphs 103-105 where it was found that the bracketed words in paragraph 3(1), even if given a wide meaning, did not exclude the possibility of a tenant of a flat acquiring an interest in a part of the building. He submitted that this justification for cutting down the wide meaning of the bracketed words was found by Lord Neuberger in the provisions of paragraph 3(1)(b). There was nothing to justify the conclusion that the bracketed words in paragraph 3(1) failed to exclude value arising through marriage by sale.

60. Applying these principles to the valuation of the GEB lease, Mr Jefferies argued that Vowden and its successors in title are not in the market at the valuation date or thereafter either as the buyer of the GEB lease or as the seller of the ORL. Thus the purchaser of the GEB lease will bid for it knowing that there are no prospects of being able either (a) to sell the GEB lease on to Vowden (as owner of the ORL) or to Vowden's successors in title or (b) to purchase the ORL at any stage in the future from Vowden or its successors. Valued upon this basis therefore it becomes clear that the purchaser of the GEB lease will realise that the development value (i.e. for the development back to a single house) cannot be unlocked at the valuation date or indeed at any time while the ORL continues, namely until 2130. Similarly applying these principles to the valuation of the ORL, the ORL must be valued on the basis that the purchaser of the ORL will bid for it knowing that there are no prospects of being able either (a) to sell the ORL to GEB (as owner of the GEB lease) or to GEB's successors in title or (b) to purchase the GEB lease at any stage in the future from GEB or its successor. Accordingly the ORL must be valued on the basis that there is no prospect of unlocking the development value.

61. Mr Jefferies also considered various other possibilities which had been raised in argument by the respondents as transactions that could, so it had been argued, be effective without infringing the bracketed words in paragraph 3(1) even if those words were given the wide meaning contended for by the appellant. As regards the possibility of a joint sale of both interests, i.e. the ORL and GEB lease, any argument that this is permitted (on the basis that the owner of one is neither bidding for the other nor selling to the owner of the other) such a transaction must be excluded from consideration for the following reasons:

> (1) The assumed sale of the GEB lease is subject to the ORL (see paragraph 3(1)(a) of Schedule 6). A sale of both together would be inconsistent with this requirement.

(2) A separate price must be determined for each lease (see paragraph 6(1)(a)). A joint sale would produce one price to be divided between the two interests.

(3) The effect of such a joint sale of both interests is that the ultimate purchaser of each interest is the successor in title to the other and thus is excluded from the market. Also the economic effect is the same as one owner selling to the other.

(4) Even if such an assumption of a joint sale of both interests were otherwise permissible despite the foregoing points, such a joint sale impermissibly assumes an agreement prior to the valuation date between the parties that the interests should be so marketed - and such an assumption cannot be made having regard to the decision in *Van Dal Footwear v Ryman* [2009] EWCA Civ 1478, as to which see further below.

(5) Accordingly to value either or both the GEB lease and the ORL on the basis that there would be a joint sale of both interests would contravene the assumptions required in Schedule 6 and would also involve making an impermissible assumption as to the parties having agreed so to proceed. The interests cannot be valued on this basis.

62. A further alternative possibility was put forward in argument namely the possibility that the hypothetical purchaser of one interest and the owner of the other interest would jointly market the property for conversion to a house and would then join together in granting a lease permitting such a conversion to take place and permitting the lessee to enjoy or sell the house once developed. However the sale of both interests to a single third party ultimate purchaser must be precluded because this third party purchaser of those interests is a successor in title to both interests, thus this arrangement involves a successor in title of one lease effectively buying the other, which is excluded by the bracketed words in paragraph 3(1).

63. Also such an arrangement must be disregarded for the same reason as a "marriage by sale", and the economic effect of such an arrangement is substantially the same as one selling to the other and therefore must be disregarded.

64. In summary the proposed development by conversion of the property back to a single house assumes the merger of the GEB lease and the ORL. This is contrary to the requirement that each interest must be valued separately and that the GEB lease should be valued subject to the intermediate leases.

65. Mr Jefferies referred to *Wentworth Securities v Jones* which held that it is not permissible to place a single value upon all the interests superior to the relevant tenant's lease (or here tenants' leases) and then apportion that value between the superior interests. Instead what has to be done is a separate valuation, in the accordance with the statutory assumptions in respect of each of the superior leasehold interests.

66. He also referred to *Grosvenor Estate Belgravia v Klaasmeyer* [2010] UKUT 69 (LC) which he submitted took this analysis one step further in holding that the hope of a merger of the freehold and intermediate lease could not be taken into account because it was inconsistent

with the requirement to ascertain a separate price for each interest and because such an approach effectively treated the interests as merged.

67. He submitted that *Wentworth Securities v Jones* and *Klaasmeyer* could not be properly distinguished by reference to the fact that they were decided under section (1D) of the Leasehold Reform Act 1967 as amended.

68. All of the foregoing authorities and principles show, Mr Jefferies said, that in valuing the existing interests the prospects of a deal with the owner of another interest is to be disregarded. The value which might be released through such a deal is a form of marriage value, which can only be included (if at all) in the marriage value calculation under paragraph 4 of Schedule 6. In an appropriate case development value can form part of this marriage value calculation, see *Forty Five Holdings Ltd v Grosvenor (Mayfair) Estate* [2010] L&TR 21. However this is only permissible if the development value can properly be analysed as forming part of the marriage value, when properly construing that expression in accordance with paragraph 4. Thus marriage value is expressly limited to the increase in value attributable to the potential ability of the participating tenants to have new leases of their flats granted to them. In a case where development value exists but where this development value is not unlocked by the potential ability of the participating tenants to have new leases of their flats granted to them, then the development value cannot be included as part of the marriage value, see *Themeline v Vowden Investments Ltd* [2011] UKUT 168 (LC).

69. Mr Jefferies submitted that for all the foregoing reasons the LVT was in error in concluding that development value could be included as part of the price to be paid. Accordingly the appeals should be allowed and the prices to be paid for the respective interests should be fixed at the sums which are agreed between the parties to be applicable if the development value has to be wholly disregarded.

70. Mr Jefferies then advanced further arguments to the effect that, if the foregoing were wrong and development value can be allowed for within the value of the GEB lease and the ORL, then too great an allowance for such value (or too little risk of failing to achieve such value) has been included by the LVT in its decision:

(1) The agreed values as set out in the agreed statement of facts have not made any allowance for the risk that the hypothetical purchaser of one interest would perceive of failing to be able sufficiently soon (or at all) to purchase the other interest. Also the figures made no allowance for the prospect that the owner of the other interest might demand more than 50% of any development value.

(2) If, contrary to his primary argument, development value arising from the prospects of a marriage by sale can be allowed, then while in respect of, say, the hypothetical sale of the GEB lease it must be assumed that the vendor is a willing seller, there is no equivalent assumption to be made in respect of the owner of the ORL.

(3) Also while the valuers in the present case have agreed the various values for the purpose of the present enfranchisement analysis, the hypothetical purchaser of the GEB lease would not have the comfort of knowing that the owner of the ORL lease took the same view as to values as was taken by the three valuers in the present case. Some allowance therefore must be made for the perception in the mind of the hypothetical purchaser of this risk that not only might the owner of the other interest be unwilling to sell or might demand more than 50% of the development value but also this other owner might perceive the relevant values differently (and more favourably to himself) than the hypothetical purchaser perceived them to be.

(4) In summary Mr Jefferies commended the valuation evidence presented by Mr Lee as being a realistic appraisal of the level of risks which a hypothetical purchaser of one interest would perceive in the ability to do a deal with the owner of the other interest (supposing that the prospects of such a deal do not have to be disregarded under Schedule 6).

71. Mr Jefferies also referred to the Court of Appeal decision in *Van Dal Footwear v Ryman*. He pointed out that at the valuation date there was no agreement in place between the owners of the GEB lease and the owners of the ORL to merge or unite them to allow conversion to a house. Accordingly it should not be assumed (contrary to the facts) that any actual agreement or agreement in principle had been reached by the valuation date between the owners of the two interests that they would cooperate towards a development or that the owner of one interest would be receptive to an approach by a purchaser of the other interest if such purchaser wished to purchase the second interest as well. Mr Jefferies submitted that the *Van Dal* case requires the Tribunal to assume that there were no discussions between the owner of the other interest (i.e. the interest not being valued) and the hypothetical purchaser or the hypothetical vendor of the interest to be valued regarding the possibility of this other owner subsequently being interested in a deal which would unlock development value. Accordingly the hypothetical purchaser must be deemed to be bidding for one interest without any knowledge of (and without having made any inquiry regarding) the attitude of the owner of the other interest.

72. On behalf of the first respondent Mr Radevsky advanced the following arguments.

73. In the real world part of the value of GEB's lease is made up of its inherent development value. It is common ground that substantial development value exists at the property and that in the real world such value attaches to both the GEB lease and the ORL. Development value is a well known part of a valuation. It would be grossly unfair if GEB's interest could be compulsorily acquired without the nominee purchaser (i.e. the appellant) having to pay for a substantial part of the true value of the GEB lease. Mr Radevsky asked rhetorically why should the windfall of development value fall into the nominee purchaser's lap without it having to pay a penny for it.

74. The basic provision in paragraph 3 (applying that with the amendment made by paragraph 7) of Schedule 6 is that one must contemplate a sale on the open market by a willing seller and on the further assumptions set out. A willing seller would not sell its interest for a price that did

not reflect the substantial development value inherent in its interest. Also, viewed from the position of the hypothetical purchaser, if there is a developer who would see development value in an interest then that person would bid more for the interest and be the successful buyer by outbidding persons who limited their bid to a value excluding development value.

75. There is nothing in the bracketed words in paragraph 3(1) that requires that a person who sees development value in the relevant property is deemed not to be buying or seeking to buy. The development value perceived to exist in GEB's lease by such a hypothetical purchaser is properly described as development value – it is not marriage value. It is the prospect of doing a development which adds to the value of GEB's lease. It is not the hope of unlocking marriage value (by the granting of an extended lease to one of the occupying tenants) which gives the extra value.

76. The *Sportelli* case (and the cases considered with it) were all concerned with hope value in the sense of releasing marriage value in due course in a deal done with a tenant. The hope value being considered was a species of deferred marriage value. It was held that under Schedule 6 the price to be paid to the freeholder could not include both actual marriage value and hope value which reflected marriage value (i.e. which reflected the value of the possibility in the future of obtaining marriage value). This was recognised in *Sportelli* as involving double counting. Accordingly hope value was obtainable in respect of the prospect of unlocking marriage value by granting an extended lease to a non participating tenant (because no marriage value was payable in respect of such a tenant) but hope value was not payable in respect of participating tenants (because the price payable reflected actual marriage value with them and so could not also include the hope in the future of obtaining the same thing). Mr Radevsky pointed out that the ultimate decision in *Sportelli* in the House of Lords was not that the proper construction of paragraph 3 excluded all hope value, but was instead that hope value was not excluded as a matter of construction (i.e. the hope of granting an extended lease of a flat to a tenant within the building was not excluded) but that such hope value had to be limited, because of the double counting point, to the hope of transactions with non-participating tenants. Mr Radevsky submitted that if hope value is not excluded by paragraph 3(1) then there is no reason for development value to be so excluded.

77. Mr Radevsky stressed that the question of development value and the question of whether the hope of releasing development value could form part of the value of an interest when valued under paragraph 3 was not at any stage raised or considered in *Sportelli*.

78. He submitted that there was nothing in Schedule 6 or the House of Lords decision in *Sportelli*, or indeed in any other binding authority, to show that the bracketed words in paragraph 3(1), namely "buying or seeking to buy" must be extended so as to require an assumption that no other tenant in the building will at the valuation date or at any stage thereafter be someone who is "selling or seeking to sell" his interest. He submitted there is nothing in the statute or authority to require the exclusion from the pool of hypothetical purchasers of the GEB lease of any person who is a developer and who has in mind the hope of subsequently acquiring Vowden's ORL.

79. As regards *Wentworth Securities v Jones* and *Grosvenor Estate Belgravia v Klaasmeyer* neither of these cases were concerned with development value. Instead they were concerned with the principle that, where there are two or more interests superior to the enfranchising interest to be acquired, then each of these interests must be valued separately. In the present case the respondents are indeed valuing their two interests separately. In the *Wentworth Estate* case all the values were agreed. There is nothing in that case to lay down how each interest was to be separately valued – the crucial point of the decision was that each interest must be separately valued, rather than all the interests in reversion upon the enfranchising lease being valued as a single whole and the value then apportioned between the interests.

80. The decision in *Themeline v Vowden Investments* was of interest in that it concerned the next door building to the property with which the present case is concerned. However the way the case was presented was that it was argued that the development value (which there existed) could be taken into account as part of the marriage value calculation. The Upper Tribunal decided, following *Sportelli*, that development value could not form part of the marriage value because the marriage value had to be calculated in accordance with paragraph 4 and marriage value could therefore only be taken into account in so far as it was attributable to the ability of the participating tenants, through the nominee purchaser, to grant new long leases of their specific flats to themselves. Accordingly there was excluded from marriage value any value arising from the grant to the participating tenants of a lease of the whole building (which is what would be needed if the development value was to be enjoyed). Mr Radevsky emphasised that this case was argued and decided entirely upon the question of whether the development value could, as regards a part of it, be recovered by Vowden through the marriage value calculation i.e. by the development value being included within the marriage value and then an appropriate portion of this allocated to Vowden. The case was not argued on the basis advanced in the present case where it is argued that GEB's lease (and Vowden's ORL) each independently enjoy development value reflecting the hope of an early and profitable development back to a single house.

81. Mr Radevsky drew attention to certain passages in *Bennion on Statutory Interpretation* fifth edition, especially Sections 271 and 278. He referred to a passage at page 828 in the following terms:

> "*Deprivation without Compensation*. An obvious detriment is to take away rights without commensurate compensation. It follows that although the intention to interfere with property or other rights is plain, there may still be a doubt as to whether adequate compensation is intended. A denial of this must be clearly stated."

Mr Radevsky submitted that this was consistent with Article 1 of the First Protocol to the ECHR. He referred to *The Law of Human Rights* 2nd Edition at paragraph 18.124. He accepted that in *James v The United Kingdom* (1986) 8 EHRR 123 the European Court of Human Rights held that the state was entitled to pass the leasehold reform legislation and this constituted a proportionate interference with the landowner's rights and that the compensation code was held to be adequate. However he submitted that in the present case there is no justification put forward regarding why tenants should not have to pay development value. He submitted therefore that the statute should be construed so far as it can properly be so construed to give adequate compensation. Put another way the Tribunal should not (as Mr Radevsky put

it) bend over backwards to attempt to find some construction of Schedule 6 which results in giving the nominee purchaser a windfall. Instead the statute should be construed so far as it properly can be construed in order to give adequate compensation to the respondents. Mr Radevsky also referred to *Laura Investment Co Ltd v Havering LBC* [1992] 1 EGLR 155 which he submitted supported the proposition that, when carrying out a hypothetical valuation, one should depart from reality only to the extent provided for by the statute requiring the valuation to be performed and no further. In the present case development value exists and it should be reflected in the values assessed under Schedule 6 unless excluded. It is not excluded. It should therefore be included.

82. As regards valuation matters, i.e. supposing that development value can properly be taken into account when assessing the value of the GEB lease and the ORL under Schedule 6, Mr Radevsky advanced the following arguments:

(1) He invited the Tribunal to note that Mr Lee, having agreed the vacant possession value of certain matters with the other valuers (see paragraphs 7 and 8 above) has gone on then to seek to justify various substantial discounts from these values when assessing development value. Mr Radevsky submitted that Mr Lee's figures for these discounts were arbitrary and were not based on any other transactions by way of justification. The discounts merely represent Mr Lee's opinion evidence.

(2) Mr Radevsky invited the Tribunal to find Mr Lee's opinion on these points as unpersuasive and to prefer the evidence of Mr Clarke and Mr Power.

(3) When considering the hypothetical sale of GEB's lease as at the valuation date this must be considered on the basis it is a sale by a willing seller on the open market. As at the valuation date there was in fact no agreement in place between GEB and Vowden for any kind of joint sale. Accordingly no such agreement can be taken into account. To this extent Mr Radevsky accepted the submissions made by Mr Jefferies on the basis of *Van Dal Footwear v Ryman*.

(4) However it is necessary to assume a hypothetical sale on the open market and this necessarily brings with it certain standard assumptions as to the nature of this hypothetical sale. He referred to the RICS publication regarding valuation standards and in particular the following:

(a) The definition of market value namely –

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

(b) The provision dealing with the requirement "wherein the parties had each acted knowledgeably, prudently …" This is in the following terms –

"Presumes that both the willing buyer and the willing seller are reasonably informed about the nature and characteristics of the property, its actual and potential uses, and the state of the market as at the date of valuation. Each is

> further presumed to act for self-interest with that knowledge and prudently to seek the best price for their respective positions in the transactions…

(5) Accordingly it can and should properly be assumed that the GEB lease has been properly marketed before the valuation date and that the willing buyer and the willing seller will be properly informed. The assumption that they act knowledgably and prudently requires it to be assumed that they will have made all necessary and sensible inquiries as would in fact be made. In reality any hypothetical purchaser on the valuation date of GEB's lease would be a purchaser who had informed himself of the existence of the development value and of the prospect of its being enjoyed – thus the hypothetical purchaser can be assumed to have made inquiries regarding the likely planning position for any proposed development back to a single house and he can also be assumed to have made the inquiry that any prospective purchaser plainly would make, namely an inquiry of the owner of the other interest in the property (namely Vowden as holder of the ORL) as to what Vowden's attitude would be likely to be if the prospective purchaser bought GEB's lease and then put a proposal to Vowden for the subsequent purchase of Vowden's ORL so as to enable a development back to a single house to proceed. It is no more logical to insist that the hypothetical purchaser would make no inquiries of any kind of the owner of the other interest before making his bid than it would be to assume that the hypothetical purchaser has not even checked the planning position before making his bid. The *Van Dal Footwear* case does not require it to be assumed that the hypothetical purchaser will have no contact at all with Vowden until after he has bought the GEB lease.

(6) If the hypothetical purchaser had made such an inquiry of Vowden then the Tribunal should conclude in the light of the valuation evidence that Vowden's reaction would have been highly favourable in principle.

83. On behalf of the second respondent Mr Dutton advanced the following arguments.

84. The *Sportelli* case was concerned with the interaction between (i) the right to marriage value and (ii) to right to hope value. The principal point decided in that case was that you cannot have both. Accordingly bearing in mind that paragraph 4 of Schedule 6 entitles the landlord to receive a share of marriage value, it would be wrong in principle if the landlord were also entitled to a sum to reflect the hope as at the valuation date of releasing the same marriage value in the future.

85. As regards the proper operation of paragraph 3 of Schedule 6 Mr Dutton submitted:

(1) Paragraph 3(1) requires an assumption that certain classes of people are not in the market to buy the interest being valued.

(2) The paragraph 3(1) assumption extends not merely to whether such people are in the market to buy on the valuation date, but also whether it can be assumed that they will ever be in the market to buy the interest being valued.

(3) Paragraph 3(1) makes no reference to any assumption about whether other interests in the building (i.e. interests other than the one being valued) are on the market on the valuation date, or whether they might come onto the market at a later date. This is because paragraph 3(1) only deals with the question of whether people in the identified classes are in the market to buy – it makes no reference to the question as to whether they may be in the market to sell;

(4) The nature of the hope value being claimed in the present case is not a hope of achieving a subsequent marriage value i.e. a hope of achieving a value which is specifically dealt with in paragraph 4 of the Schedule.

86. Mr Dutton pointed out that the only passage in any of the speeches of their Lordships in *Sportelli* which mentions the possibility of hope value arising from the prospect of a subsequent purchase of a leasehold interest is in paragraphs 65 and 66 of Lord Neuberger's speech. It may be noted that the possibility of "marriage by sale" was mentioned in argument at page 256H but did not form any part of the analysis in the speeches. In paragraphs 65 and 66 Lord Neuberger is merely identifying theoretical circumstances in which hope value can arise. He is not there holding that such hope value, including any hope value from a possible "marriage by sale", has to be excluded.

87. Indeed the actual decision in *Sportelli* under Schedule 6 is not to the effect that hope value of a subsequent deal with a tenant, whereby a tenant is granted an extended lease of his flat in the building, must be disregarded. Instead the decision is to the effect that such hope value is not required, by force of paragraph 3 and the bracketed words, to be disregarded. Thus hope value in respect of non-participating tenants can be included as part of the value of the reversioner's interest. The only reason that hope value from the prospect of a subsequent deal with a participating tenant is excluded is the double counting point, see paragraph 112 of *Sportelli*.

88. In the present case there is therefore no provision requiring an assumption that, when the hypothetical purchaser is notionally bidding for Vowden's ORL, the hypothetical purchaser is doing so on the assumption that the owner of the GEB lease is unwilling and will always remain unwilling to sell the GEB lease so as to unlock development value.

89. As regards the decision in *Chelsea Properties v Earl Cadagon*, this was decided on the assumption that the Lands Tribunal decision in *Sportelli* (regarding hope value) was correct and it was decided in advance of the House of Lords decision in *Sportelli*. The case has been overtaken by *Sportelli*. Also upon the facts of the case no hope value in fact arose having regard to the valuation evidence. Accordingly this case does not assist the appellant.

90. As regards *Wentworth Securities v Jones* this case merely decided it was necessary to conduct separate valuations for each interest. The case did not deal with the valuation assumptions to be made when each separate valuation for each interest was being conducted.

91. *Grosvenor Estate Belgravia v Klaasmeyer* turned upon section 9(1D) of the Leasehold Reform Act 1967 as amended. The second basis for the decision was merely an application of the *Wentworth Securities v Jones* principle and took the matter no further.

92. No disrespect is intended to Mr Dutton if we do not set out at any greater length his arguments because we have already recorded the substance of these arguments when summarising the submissions made by Mr Radevsky.

93. So far as concerns the valuation evidence Mr Dutton advanced the following arguments:

(1) When considering Mr Lee's argument that a discount should be made (supposing that hope value is claimable) for the risk that the owner of the other interest will view the values differently from the agreed values in the present case, Mr Dutton pointed out that all that is known by the Tribunal in the present case is that certain values are indeed agreed between all three valuers. The Tribunal does not know what the position would have been if these values had not been agreed – the Tribunal does not know what the comparable evidence would have been or the extent to which there would have been any realistic scope for disputing in a significant way the agreed values. In the absence of such knowledge there is nothing to enable the Tribunal to assess Mr Lee's assertion that, so far as concerns the owner of the other interest (i.e. the interest not being the subject of the valuation) that owner might take a different view of values. In the position the Tribunal finds itself, with three surveyors agreeing the values and with no background evidence indicating what if any potential there is realistically for a dispute, the Tribunal should proceed on the basis that the agreed figures are soundly based and that no discount should be introduced to reflect some risk that the owner of the other interest will seek to assert different values more advantageous to himself.

(2) The evidence shows that any prudent hypothetical purchaser would make inquiries of the owner of the other interest as to the prospect of that owner being amenable to sell so that development value could be unlocked. The expert evidence indicates that such response would be very positive. There is clearly a self interest for the owners of the two leases, viewing their position separately, each to conclude that it would be wise to enter into a transaction at an early date with the other owner so as to unlock development value, because otherwise such development value may be lost forever. Thus if the owner of the GEB lease is unable to do an early deal to unlock development value such owner is likely to grant new leases of Flats 1 and 2 in the property thereby obtaining a substantial capital sum. Once these new leases have been granted the ability to unlock development value will be lost or greatly impeded. Similarly the owner of the Vowden interest in Flat 3 (which was in a stripped out state at the valuation date) would wish to see some return on its asset unless an early deal involving development could be done – thus the owner of the ORL would fit out flat 3 and sell it (either with or without a fourth floor extension) and once this is done then once again the window of opportunity for a development will be lost or greatly impeded.

(3) Mr Dutton advanced similar arguments to those of Mr Radevsky in respect of Mr Jefferies' argument based on *Val Dal Footwear v Ryman*. Plainly in the real world the

hypothetical purchaser of one of the interests would, before bidding, make himself well acquainted with the facts (in so far as they were ascertainable) touching upon the prospect of being able to secure a development. This would include making basic inquiries of the owner of the other interest as to its general attitude towards a development.

Conclusions on valuation principles

94. It is common ground, as appears from the agreed statement of facts, that as at the valuation date the freehold vacant possession value of the property for conversion to a house (including the potential to extend into the fourth floor) was £7m. This value accounted for any risks associated with the conversion of the property, as currently arranged as flats, to a single house, including those risks relating to obtaining any relevant planning consent. It is also common ground that £7m is the value which would be paid by a developer for the freehold of the property with a view to its conversion to a house. Thus the developer's profit will be available to the developer after he has paid the £7m – the developer's profit does not have to come out of this £7m. So far as concerns the freehold value of the property when still configured as 3 flats the figures are as follows, Flat 1: £2,050,000; Flat 2: £700,000; Flat 3 (excluding any additional value attributable to the potential of building into the fourth floor): £2,200,000. Thus the total value of the building when valued as three freehold flats is £4,950,000. This compares with the £7m freehold with vacant possession for conversion to a house (including the potential to extend into the fourth floor).

95. At the valuation date therefore there existed a substantial and obvious development value in the property.

96. The occupying tenants as at the valuation date only enjoyed a few days left upon their leases. It is agreed that these, and certain other intermediate leases, are of no value. There are three interests of substantive value which fall to be valued for the purpose of ascertaining the price to be paid upon the collective enfranchisement namely the freehold, the GEB lease, and the ORL. There is no significant dispute between the parties regarding the value of the freehold. We are concerned with the dispute regarding the proper approach for valuing the GEB lease and the ORL.

97. In the real world, if for instance the ORL was offered for sale at the valuation date, then the likelihood is that GEB would have purchased it so as to unlock the development value. However GEB is a party who is assumed not to be buying or seeking to buy either at the valuation date or thereafter, either by itself or its successors in title, see *Sportelli*.

98. It is argued by the appellant that the statutory assumptions required to be made under paragraph 3 of Schedule 6, especially the bracketed words:

> "(with no person who falls within sub paragraph (1A) buying or seeking to buy)"

have the result that no part of the large development value can be included as an ingredient in the value of either the GEB lease or the ORL.

99. We have no doubt that in the real world the hypothetical purchaser at the valuation date of the ORL (we will call him X) would not limit his bid merely to the investment value of the ORL exclusive of any development potential. Instead X would increase his bid to reflect the value of the prospect of being able to unlock development value by doing some deal with GEB – e.g. by X purchasing the GEB lease at some early stage after purchasing the ORL. Similarly a willing seller of the ORL at the valuation date would not be prepared to sell the ORL unless the price to be paid included an element which reflected the substantial potential development value in the property. That a willing seller of the ORL and the hypothetical purchaser of the ORL would act in this manner is to our minds obvious – and this obvious conclusion is supported by the valuation evidence of all experts. We do not at this stage discuss the extent of any extra bid which might be made to reflect the development value or the extent of any discount which might be made to that bid to reflect any potential risks of failing ultimately to obtain the development value. At this point we are merely concerned to analyse whether some element of the development value can be included in the prices to be paid under Schedule 6 paragraphs 3 and 7 for the GEB lease and for the ORL. Therefore at this stage we merely note that it is clear that X would pay a substantial extra sum for the ORL to represent the value of the ability, with the cooperation of the owner of the GEB lease, to develop the building back to a single house. We also note that the willing seller of the ORL would expect such a price to be paid and would be an unwilling seller if it were not paid. The analysis is the same, mutatis mutandis, if one considers the sale of the GEB lease.

100. We note that if the ORL did not exist such that there was no substantial interest interposed between the qualifying tenants and the GEB lease, then the position would be as follows. When assessing for the purposes of paragraphs 7 and 3 of Schedule 6 the amount which at the valuation date the GEB lease might be expected to have realised if sold in the open market by a willing seller on all the assumptions in paragraph 3 (including in particular the assumption required by the words in brackets) the value of the GEB lease would include the totality of the development value. In these circumstances the appellant as nominee purchaser would have to pay in full for this development value. There is no indication in the 1993 Act that a nominee purchaser should be spared from having to pay for such development value – it would be surprising if there was any such indication because the nominee purchaser will actually be enjoying this value which would be carried into its hands by the transfer from GEB (assuming no ORL existed).

101. Accordingly the question arises as to whether the assumptions which have to be made when valuing say the ORL, including in particular the assumptions in the words in brackets in paragraph 3, require it to be assumed not merely that neither GEB (nor its successors) are at the valuation date (or in the future) buying or seeking to buy, but also that neither GEB (nor its successors) are at the valuation date (or in the future) selling or seeking to sell their interest. In other words must it be assumed that the ORL and GEB lease will remain owned by different persons forever and that these persons will forever refrain from acting in the manner they would in fact (in the real world) act in their own interests, namely coming together to unlock the large and immediate development value available at the property?

102. In our judgment the assumption that a person (here GEB) is not buying or seeking to buy a particular interest in a property (here the ORL) is a different assumption from an assumption that a person (here GEB) is not selling or seeking to sell a different interest in the property (namely the GEB lease).

103. Apart from authority therefore we would conclude that the assumption which must be made in accordance with the words in brackets does not require that there should be made the double extension of reading buying as including selling and reading a particular interest (namely the ORL lease) as including the GEB lease.

104. The leading authority on the proper interpretation of Schedule 6 is of course the House of Lords decision in *Sportelli*. We accept that the bracketed words in the opening part of paragraph 3(1) should be given a wide meaning and that any cutting down of that wide meaning must be on a principled and clear basis and must be justified by the provisions of Schedule 6, see per Lord Neuberger at paragraph 105. We also accept that the bracketed words should be construed so far as possible to ensure that any benefit which Parliament clearly intended the tenants to have under the Act is not denied them.

105. So far as concerns the references made by Mr Radevsky to the principles of statutory interpretation in *Bennion* and to the Human Rights Act 1998 and Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, we conclude that these matters are of no additional assistance to the respondents' arguments having regard to the analysis in Lord Walker's speech at paragraphs 47 and 48. What is crucial in the present case is the words actually used in Schedule 6. Either they do or do not have the result contended for by the appellant. If, properly construed, they do have that effect then it would be wrong for us to strain to avoid that effect upon the basis of these arguments advanced by Mr Radevsky. However we will go this far with Mr Radevsky on these points namely to agree that if the words on their normal interpretation do not have the effect contended for by the appellant, then we should decline to reach a strained interpretation of such words if the result would be to reach a conclusion which was grossly unfair (as alleged by Mr Radevsky) to the respondent.

106. An analysis of the decision in *Sportelli*, so far as concerns the cases under Schedule 6 of the 1993 Act, shows that the result which was reached (namely that hope value could be included in the value of the landlord's interest so far as it can reflect the hope of granting an extended lease to non-participating tenants) was reached on the following basis:

(1) The bracketed words in paragraph 3(1), when providing that certain persons are not buying or seeking to buy, must include requiring that those persons are not merely out of the market as at the valuation date but will remain thereafter out of the market so far as buying or seeking to buy is concerned.

(2) The prospect of a negotiation between the hypothetical purchaser of the freehold on the one hand and a non-participating tenant on the other hand, whereby the non-participating tenant took an extended lease and thereby

unlocked marriage value, is not a prospect of the non-participating tenant buying or seeking to buy the freehold. As Lord Walker pointed out at paragraph 43 (and see also per Lord Neuberger at paragraph 103) the transaction to which paragraph 3 is by its terms directed is a purchase of the freehold interest in the whole building. If the hope value arising from the possibility of a future negotiated deal with one or more non-participating tenants is to be excluded, then "buying or seeking to buy" the freeholder's interest in the specified premises must be extended, as a process of construction, in two respects: that is so as to include the grant of a new lease, at a premium of one or more flats belonging to non-participating tenants. Lord Walker commented that such a double extension might be fairly easy to make if it accorded with an obvious statutory purpose, but he was not satisfied that it was part of the statutory purpose.

(3) As a result it was therefore not right to exclude the hope value (in so far as the evidence showed there was such value) in the freeholder's interest arising from the prospect of being able in the future to grant an extended lease of his particular flat to a particular non-participating tenant.

(4) As pointed out by Lord Neuberger at paragraph 112, this conclusion in respect of non-participating tenants must equally mean that, apart from the point next mentioned, the hope value of granting lease extensions to participating tenants should also be taken into account. However the point which required this hope value to be excluded arose from the presence in paragraph 4 of the Schedule of the express provision dealing with marriage value and from the conclusion that to allow marriage value expressly under paragraph 4 and also hope value under paragraph 3 could not have been envisaged as it would involve double counting.

107. The following points may be noted from the *Sportelli* decision. None of the cases before the House of Lords was concerned with development value in the sense that it appears in the present case. Also the possibility of hope value arising from what was described as "marriage by sale" was raised in argument in *Sportelli* (see pages 236H and 256H), but had not been referred to during argument prior to the House of Lords. Also, and we consider this of particular importance, none of the learned Law Lords make any express finding to the effect that the bracketed words in paragraph 3 (i.e. "buying or seeking to buy") should be extended to embrace marriage by sale. It is true that Lord Neuberger, when analysing what is meant by the expression "hope value", makes reference to the various ways in which hope value can arise including reference to the possibility of the landlord acquiring the relevant leasehold interest, see paragraphs 65 and 66. However this part of his speech was involved with setting the scene as to what hope value meant and how it might arise. When actually construing what is meant by the bracketed words in paragraph 3 neither Lord Neuberger nor any of their other Lordships decided that it must be assumed not merely that none of the persons mentioned in paragraph (1A) were buying or seeking to buy but also that none of those persons were selling or seeking to sell.

108. We note the concern expressed by Lord Walker as to whether the double extension to the bracketed words could be made (and he concluded it could not be made) so as to read the bracketed words, which require the assumption that no tenant is buying or seeking to buy the freehold interest, as requiring an assumption that no tenant was seeking to take an extended lease of his own flat. We consider that to extend an assumption from assuming that GEB is not buying or seeking to buy the ORL to an assumption that GEB is not selling and will not seek to sell GEB's own interest is also a double extension and is equally impermissible.

109. Development value such as exists in the present case is not marriage value as contemplated by paragraph 4 of Schedule 6. As regards such marriage value, i.e. (in broad summary) the additional value flowing from the ability of a tenant to have a new long lease granted to him at a peppercorn rent, this is required, so far as concerns participating tenants, to be shared 50:50 with the landlord. However there is no intention that development value such as exists here is intended to be shared in this manner with the landlord, nor is there any indication that such development value is intended to be removed from the landlord and given to the nominee purchaser at no cost to the nominee purchaser. The development value which exists here is not hope value in the sense of the hope of unlocking marriage value of the type contemplated by paragraph 4 of Schedule 6 – i.e. of the type dealt with in *Sportelli*.

110. So far as concerns *Wentworth Securities v Jones*, this decides that a separate valuation exercise must be performed in respect of (a) the GEB lease and (b) the ORL lease. It is not permissible to value the two interests together. However it may be noted that in the *Wentworth Securities* case the various values were all agreed. The case does not decide how the valuation exercise in respect of an interest is to be performed. It merely decides that there must be a separate exercise for each interest. Thus when it comes to valuing a particular interest, valuing it separately, there is nothing in this case to require that there must be made the valuation assumptions contended for in the present case by the appellant. The decision of this Tribunal in *Grosvenor Estate Belgravia v Klaasmeyer* involved a case under the Leasehold Reform Act 1967 section 9(1D) and upon the particular words of that subsection, including the reference to:

> "… any marriage value arising by virtue of the coalescence of the freehold and leasehold interest …"

Also on the facts of that case there was no question of any development value – instead the extra value potentially available was value which could only be achieved (so far as option 4 which was there under consideration is concerned) by the merging of the freehold and headleasehold interest. It was the mere fact of the merger which would increase the value (by removing the problems of the escalator clause) – there was no additional external value in the sense of development value. The basis of the decision in paragraph 125 of that case was first that the matter turned on the wording of section 9(1D) and secondly that to accept option 4 would in effect result in a single valuation being performed contrary to the principles in the *Wentworth Securities v Jones*. The case is no authority on the proper construction of the bracketed words in paragraph 3 of Schedule 6 of the 1993 Act.

111. So far as concerns the decision of this Tribunal in *Themeline v Vowden Investments*, this involved the next door building to that with which the present case is concerned and it also

involved a case where there was development value for the purpose of developing the building back into a single house and it involved a case where Vowden Investments Limited, the present second respondent, was a party. The lease structure was not entirely the same in that case. What is of importance however is the basis upon which the decision was reached. It was argued that the development value was available to be taken into account as part of the marriage value. The learned President analysed the *Sportelli* decision and stated:

> "The decision is therefore binding authority, upon paragraph 4(2) marriage value can only be taken into account in so far as it is attributable to the ability of the participating tenants, though the nominee purchaser to grant new long leases of their respective flats to themselves. It therefore excludes marriage value arising from the grant to the participating tenants of a lease of the whole building."

It was this potential grant of a lease of the whole building which was argued to give rise to the potential development value. However in the present case it is not argued by the respondents that the development value is part of some marriage value which falls to be divided between the parties under paragraph 4. The argument is quite different. There is nothing in the *Themeline* decision which decides the point which is before us in the present case.

112. As regards *Chelsea Properties v Cadogan* this is a decision of the Lands Tribunal reached prior to the decision of the House of Lords in *Sportelli*. Also upon the valuation evidence in that case the Lands Tribunal was not satisfied that the claimed hope value existed nor, if it did exist, that it could properly be represented by any particular identifiable sum of money. The case was one under Schedule 13 in relation to the grant of a new underlease of a flat. There is nothing in that decision which suggests that the decision we reach in the present case is wrong.

113. We accordingly conclude that in valuing the GEB lease and the ORL it is proper to include such extra value as the hypothetical purchaser of the relevant interest would be willing to pay to reflect the prospect of being able <u>soon after</u> his purchase of that interest to acquire the other interest and to enjoy in consequence the development value. The LVT was correct in so deciding.

114. So far as concerns the principles to be applied when seeking to quantify this extra value we reach the following conclusions:

(1) *Van Dal Footwear v Ryman* was a case concerning damages for breach of repairing covenant which fell to be assessed in accordance with section 18 of the Landlord and Tenant Act 1927 and the principles set out in paragraph 9 of the judgment of Lewison J (as he then was). The case decided that the judge was wrong to value the property in its dilapidated state on the assumption that there was a contract in place for the grant of a new lease to Ryman because in fact there was no contract for a lease with Ryman in place (paragraph 11) and no prospect of such a contract taking place (per Sir Anthony May paragraph 16).

(2) We agree with Mr Radevsky's submissions in relation to *Van Dal Footwear v Ryman* as summarised in paragraph 82(3) above, namely that in the present case each lease must be valued on the basis that at the valuation date there was no agreement in place between GEB and Vowden for a joint sale nor any agreement in place between the hypothetical purchaser of (say) Vowden's ORL and GEB that GEB would soon thereafter sell the GEB lease to this hypothetical purchaser.

(3) However we also agree with Mr Radevsky's submissions summarised in paragraph 82(4), and (5) which we will not set out again. If the hypothetical purchaser of the GEB lease had made an enquiry of Vowden as to Vowden's preparedness to sell the ORL to enable a development back to a single house to proceed we conclude Vowden's reaction would have been highly favourable in principle. The position would have been the same (mutatis mutandis) in relation to an enquiry made of GEB by a hypothetical purchaser of the ORL.

Valuation conclusions

115. Firstly we just record that Mr Clark made the point in his supplemental report that it was important that the phrase "hope value" should not be used in the context of the potential development value arising in this case, as to do so could cause confusion. The issue here, he said, was the release of development value attributable to combining different parts of the building under the control of different parties. This is not the same as hope value released in the *Sportelli* sense for extending the term of a tenant's interest. We agree (see paragraph 109 above), and adopt the phrase "development hope value" to avoid any such potential confusion.

116. We agree with Mr Lee that there must be an additional element of risk, over and above those otherwise accounted for, where, on purchase, the two interests are not conjoined, and one therefore has to be concluded before the other. However, there are elements to his discounts that cannot, in our view, be justified, such as the allowance for valuation tolerance and the risk of no deal being brokered. As regards valuation tolerance we agree with the argument of Mr Dutton summarised in paragraph 93 above, and as regards the risk of no deal being brokered we think that whichever way around the deal was being structured (Vowden treating firstly with GEB or vice versa) the carrot of the substantial development value that would be unlocked, and the fact that such an opportunity would only be short lived, would be almost certain to result in the owner of the second interest readily agreeing to sell. The valuation date, for the purposes of this exercise, is pre-determined, and it is fair to assume, we think, that the "second deal" would take place almost immediately, thus not requiring any adjustment for time. Also we do not think there is any justification for taking anything other than a 50/50 split of the increased development value.

117. We do not consider that the bank which is in control of the Vowden interest would be reluctant to deal as it would readily see that there is only a very short window during which the opportunity to achieve the substantial additional value would remain open. The Estates Gazette report, referred to by Mr Lee, related to the commercial lending market, and there was no

evidence to suggest that attitudes were the same in respect of their residential mortgage portfolios. Although the report had a commercial focus, it did highlight the fact that "lenders will also get input from professional valuers or accounting firms and will refer to their lawyers" (Mark Jenkins, Nationwide Commercial). The fact is that residential lenders were, as in the recession of the 1990s, disposing of substantial numbers of repossessed properties in collective auctions. We can see no reason why, in this case, the bank to which the Vowden interest was charged would wish to sit on a currently uninhabitable property on which they could get no rental return without significant expenditure. We think that it would seize upon the opportunity that was being offered especially as it would be advised that the additional value would not be likely to be available for long. It is also noted that, as the appellant said in its notice of 16 February 2012, and confirmed in skeleton argument, that Vowden's bankers had expressed their wish to dispose of the interest.

118. There is no doubt in our minds that the buyer of one interest would take all the steps and make all the enquiries that a reasonably prudent purchaser could be expected to take before committing to a purchase. As set out in the RICS Red Book under Valuation Standards at VS 3 "Market Value", para 3.2.8 wherein the parties each act knowledgably and prudently, it is "presumed that both the willing buyer and the willing seller are reasonably informed about the nature and characteristics of the property, its actual and potential uses, and the state of the market at the date of the valuation." We are satisfied, therefore, that the prospective purchaser of the first interest would seek to, and would, obtain from the owner of the second interest, a clear indication as to whether or not they would be prepared to deal once the first purchase had been completed, and for all the reasons rehearsed above, we think that there is a very high likelihood that they would be willing.

119. The evidence does not suggest to us that the risks are any greater whichever way round the transaction proceeds, and we think that Vowden's bankers and GEB would be equally keen to ensure that both parties could benefit from the considerable development potential that existed.

120. Having concluded that Mr Lee's proposed discounts are, in our judgment, overstated we note that, although they have not made allowances in their valuations, Mr Clark and Mr Power agreed that if the matter does not proceed as a joint sale, and the two stage process has to be assumed, but relevant and sufficient enquiries had been made of the other party and/or its advisers, then a 5% discount would be appropriate. We accept their evidence and opinions, and in our view the enfranchisement price should be adjusted to reflect that percentage risk.

121. In his closing submissions, Mr Jefferies requested that if the Tribunal was minded, (as we are), to assume that discussions would have taken place prior to the valuation date, the Tribunal should give an alternative determination on the assumption that no enquiries had been made by one party to the other, and no discussions had taken place. Mr Clark and Mr Power both thought a 15% discount to be appropriate, and we accept their evidence.

122. In the light of these conclusions we invite the three expert valuers to agree, if possible, revised valuations on the third alterative basis incorporating the discounts we have determined i.e. at 5% in the principal scenario, and 15% in the requested alternative. These should be filed and served no later than 3 weeks from the date of this interim decision, following which we shall issue a final decision incorporating the revised enfranchisement prices shortly thereafter. The present decision is, therefore, an interim decision. In terms of matters also to be considered by the valuers, refer also to paragraph 127.

Marriage Value

123. During the course of Mr Jefferies' closing submissions he raised a question concerning marriage value. Discussion upon this point raised the following potential problem, upon which the Tribunal asked for further submissions in writing. The problem is this. Paragraph 4(2) of Schedule 6 of the 1993 Act deals with the amount of marriage value as follows:

> "(2)… marriage value is any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the participating tenants, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value –
>
> (a) which is attributable to the potential ability of the participating tenants, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term; and
>
> (b) which if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price."

124. The question arises as to how this is to be applied in circumstances where, as here, there is perceived to be development value in the superior interests (here the GEB lease and the ORL) when these interests are in the hands of the existing owners. This development value exists while these interests are held by their existing owners. However paragraph 4(2) requires a consideration as to any increase in the aggregate value of these interests when regarded as being interests under the control of the participating tenants, being an increase in value which satisfies sub paragraphs (a) and (b). If these interests were in the hands of the nominee purchaser and if the nominee purchaser did grant new long leases at a peppercorn rent to each of the two participating tenants, then, so Mr Jefferies submits, the aggregate value of the interests acquired by the nominee purchaser would in fact decrease rather than increase. This is because if new long leases are granted separately of Flat 1 and Flat 2, then this will be destructive of the ability in the owner of the interests to be acquired to enjoy development value. Mr Jefferies points out that paragraph 4(3) provides that the value of the freehold or any intermediate leasehold when held by the person from whom it is to be acquired by the nominee purchaser, is to be determined

on the same basis as the value of the interest is determined for the purposes of paragraph 2(1)(a) or paragraph 6(1)(b)(i). Accordingly Mr Jefferies submits that if the GEB lease and the ORL are valued for the purposes of paragraph 6(1)(b)(i) as enjoying development value, then the same value should be taken in part of the marriage value calculation. Thus the higher development value should be taken for the purpose of assessing the aggregate value of the freehold and the intermediate leaseholds in the hands of the existing owners. If this is done then the value of these interests is less in the hands of the nominee purchasers, when assessed in accordance with paragraph 4(2)(a), with the result that the marriage value is negative and therefore £0 is payable as marriage value.

125. This point appears not to have been considered by any of the three valuers in the preparation of their reports. All valuers prepared the marriage value calculation on the same basis and have used as the values of the freehold and the two intermediate leaseholds i.e. (the GEB lease and Vowden's ORL) the value which these interests have without any uplift to recognise any development value. They have done this in all of their alternative valuations, i.e. including the valuations which attribute some development value to the GEB lease and to Vowden's ORL.

126. Mr Jefferies' submission on this point is to the effect that all three valuers have made a mistake and that their agreed basis for assessing marriage value was wrong. We accept Mr Dutton's submissions that if the appellant wanted to make this suggestion it should have raised the point early in the proceedings and certainly in the course of questioning the expert witnesses (its own included). The appellant did not do so. We conclude it is now too late for the appellant to pursue this point as a contested point. That would require the hearing to be reopened and the experts to be recalled to consider whether they had all made a mistake and, if so, how such a mistake should be corrected. Vowden raised too late what we have described above as the amendment point and was not allowed to reopen the question of whether the ORL was to be acquired. The appellant has raised too late this present point regarding the marriage value calculation. We refuse to allow the hearing to be reopened so as to enable the appellant to pursue the point as a contested point.

127. However we observe that neither GEB nor Vowden when responding to this point has given any indication that their respective valuers disagree with this point raised by the appellant. We know that all the valuers who appeared in this case will be aware of their duties to the Tribunal. We rely upon each valuer to consider this point regarding marriage value and to say whether they agree with the appellant and that they have all made a mistake and that of course there should be no marriage value included. If that is their agreed view then we rely upon the parties to correct the mistake and to show no marriage value included within the revised valuation we have invited the three valuers to submit in paragraph 122 above. However if there is disagreement on the point the matter must stand as shown in the existing valuations.

Dated 11 May 2012

His Honour Judge Nicholas Huskinson

P R Francis FRICS

ADDENDUM

128. The valuers have produced an agreed statement incorporating the revised valuations sought. On the basis of a 5% discount for risk, the premium becomes £6,856,500 apportioned thus:

Share to freeholder	£ 2,200
Share to GEB	£3,705,800
Share to Vowden	£3,148,500
Share to Belgravia Leasehold Properties Ltd	£ nil
Share to Mr Kahrmann	£ nil
Premium	£6,856,500

In the alternative, at a discount of 15%, the figures become:

Share to freeholder	£ 2,200
Share to GEB	£3,626,100
Share to Vowden	£3,068,800
Share to Belgravia Leasehold Properties Ltd	£ nil
Share to Mr Kahrmann	£ nil
Premium	£6,697,100

129. In a short supplementary proof that incorporated the valuations on the basis requested by us (and which were agreed by Mr Lee and Mr Power) Mr Clark set out his own comments relating to the marriage value issue referred to in paragraphs 123-127 above in which he concluded that, as a valuer, he was unable to agree with Mr Jefferies' proposition. Mr Power,

in a short supplementary proof of evidence, has also indicated that he does not agree with the proposition.

130. In the light of this, and our conclusion in paragraph 127 above, the valuation basis must stand. We therefore determine the price at £6,856,500 calculated on the basis of a discount of 5%, as set out in Appendix D.

Dated 28 June 2012

His Honour Judge Nicholas Huskinson

P R Francis FRICS