Ref LON/00AW/OCE/2008/0086

LEASEHOLD VALUATION TRIBUNAL
FOR LONDON RENT ASSESSMENT PANEL

DETERMINATION

RE APPLICATION UNDER SECTION 24 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Premises:	Nell Gwynn House, Sloane Avenue, London SW3 3AX		
Applicant:	Nell Gwynn House Freehold Ltd		[*Nominee Purchaser*]
Respondents:	(1)	NGH Properties Ltd	[*Reversioner*]
	(2)	Haruna Trading Ltd	[*Relevant Landlords*]
	(3)	Nell Gwynn House Apartment 2 Limited	
Hearing:	17, 18 & 19 March 2009		
Inspection:	17 (morning) March 2009		

Representative for Applicant:

Mr Philip Rainey of Counsel

with Mr Rupert Rokeby Johnson of Rokeby Johnson Buars LLP
also Mr Bruce Maunder Taylor FRICS MAE

Representative for Respondents (1) and (2):

Mr Anthony Radevsky of Counsel

(1) with Mr Julian Cridge of Denton Wilde Sapte LLP
also Mr Eric Shapiro BSc (Est Man) FRICS IRRV FCIArb

(2) with Ms Nazia Hussain of Teacher Stern LLP
also Mr Colin Perry FRICS
and Mr Derek Lewis Commercial Property Agent

Members of the Leasehold Valuation Tribunal:

Professor J T Farrand QC LLD FCIArb Solicitor [*Chairman*]
Mrs E Flint DMS FRICS IRRV
Mrs L Walter MA (Hons)

Introductory

1) The Description of Premises contained in Mr Shapiro's Witness Statement can conveniently be copied:

> 3.1 Nell Gwynn House comprises a substantial "W" shaped eleven storey block purpose built in the 1930's. The lower ground floor comprises some commercial units affording a 70 space car parking garage and a vehicle repair garage, a vacant former health club, together with ancillary facilities for the main building, including boiler and plant rooms, laundry and the like.
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> 3.2 The ground and nine upper floors comprise 429 purpose built self-contained flats being divided as to 388 studio flats, 22 one-bedroom flats and 19 two-bedroom flats.
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> 3.3 The external walls have a brick outer skin, rendered externally to the lower three storeys, under a mansard design roof. The latter has an interlocking tile covering to the upstands, the flat area not being visible. Windows are of side and top hung opening casements, primarily metal framed, with some having double glazed replacement panes.

2) According to official copies of relevant registers of title:

> 1st) Respondent (1) has been the freehold proprietor of the Premises since 18 July 2000, having paid a purchase price of £25,500,000 (copy dated 30 September 2008). As well as other entries in the charges register, there is a Schedule of 435 Notices of Leases, mostly of flats for terms of 125 years with many dated post-2000.
>
> 2nd) Respondent (2) is the leasehold proprietor of parts of the basement at the Premises, as shown on the filed plan, under a lease for a term of 999 years granted by Respondent (1) on 21 December 2006 (copy dated 30 April 2007).
>
> 3rd) Respondent (2) is also the leasehold proprietor of the airspace above the roof of the Premises, as shown on the filed plan, under a lease for a term of 999 years granted by Respondent (1) on 26 January 2007 (copy dated 5 September 2007).
>
> 4th) Respondent (2) is also the leasehold proprietor of a ground floor office and car parking space at the Premises, as shown on the filed plan, under another lease for a term of 999 years granted by Respondent (1) on 21 December 2006 (copy dated 12 November 2007). As well as other entries in the charges register, there is notice of an underlease of the ground floor office (see below).
>
> 5th) Respondent (3) is the leasehold proprietor of the ground floor office under the underlease for a term of 15 years granted on 21 December 2006 by Respondent (2) (copy dated 12 November 2007).

3) On 4 January 2007, Respondent (1) served a Notice under s.5A of the Landlord and Tenant Act, 1987, of a proposed disposal of the freehold of the Premises at a price of £750,000 and offering, in effect, a right of first refusal to qualifying tenants of flats. This offer was accepted by a listed majority of the tenants

by Notice dated 7 March 2007 but Respondent (1) did not proceed with the disposal, presumably giving due notice of this under s.6 of the 1987 Act.

4) On 27 April 2007, the participating qualifying tenants served an Initial Notice under s.13 of the 1993 Act on Respondent (1) claiming, in effect, freehold enfranchisement of the Premises for a total price of £362,100, including £100 for common parts (namely, front entrance space) and £100,000 for parts of the Premises held by Respondent (2) under the leases dated 21 December 2006 (namely, "night caretakers flat" and rear access to Premises). This Notice named the Applicant as the Nominee Purchaser and claimed the grant of certain specified rights but contained no other proposals as to the terms of acquisition.

5) On 7 September 2007, the Reversioner served a Counter-Notice admitting the entitlement to collective enfranchisement of the Premises and common parts as claimed. However, the claims to the parts of the Premises within the leases dated 21 December 2006 granted to Respondent (2) and to the rights specified were not admitted. Further, the proposed price was not accepted and a counter-proposal was made of £900,000. Also proposals were made as to provisions to be included in the transfer to the Nominee Purchaser.

6) On 29 February 2008, the Applicant applied for determination by the Tribunal of the price payable for the enfranchisement, the terms of acquisition and costs.

7) Respondent (1) was identified in this application as the freeholder owner. In addition, Respondents (2) and (3) were each named as being an "intermediate landlord": technically, they are not landlords with superior leases but persons owning leasehold interests which the Applicant proposes to acquire under s.2(1)(b) and, therefore, each is a "relevant landlord" for present purposes (s.9(2)(b) of the 1993 Act). Respondent (1), as reversioner, became obliged to conduct all proceedings on behalf of all relevant landlords unless any of them gave notice its intention to act independently (s.9(3) and para.7 of Sched.1 to 1993 Act).

8) By virtue of an agreed Order of DJ Lightman in the Central London County Court dated 30 July 2008, amendments were made to the Initial Notice under para.15(2) of Sched.3 to the 1993 Act. These added claims to additional parts of the Premises included in the leases dated 21 December 2006 granted to Respondent (2) (namely, service corridor, toilets and refuse area), to the ground floor toilets within the underlease granted on 21 December 2006 to Respondent (3) by Respondent (2) and also to the airspace above the Premises demised to Respondent (2) by the lease dated (in fact) 26 January 2007. In consequence of these additional claims, the total price proposed was increased to £362,300. However, the relevant date of the Initial Notice remained the same.

9) In pursuance of a term of the Order, an amended Counter-Notice was served by Respondent (1) on 18 August 2008. Not only were the additional claims not accepted but, most significantly, the counter-proposal as to price for acquisition of the freehold of the Premises was increased to £2,327,703.

10) On 19 August 2008, Respondent (2) gave to Respondent (1) notice of its intention to be separately represented in legal proceedings. However, Mr Radevesky was separately instructed to represent each of Respondents (1) and (2). Since Respondent (1) is the reversioner, he was necessarily conducting the proceedings not only on behalf of Respondent (1) but also on behalf of Respondent (3); see s.9(3) of the 1993 Act. Respondent (3), therefore, remains a party to the proceedings although not separately represented.

Agreed Facts

11) The Tribunal was supplied with a Statement of Agreed Facts and Disputed Issues signed on behalf of the Applicant by Mr Maunder Taylor, dated 12 March 2009, and on behalf of Respondents (1) and (2) respectively by Mr Shapiro and by Mr Perry, both dated 13 March 2009. The order adopted in this Statement will be followed by the Tribunal as a convenient structural basis for the Determination. However, all the facts agreed will be stated before the issues disputed are dealt with.

12) The Statement contains the following few unqualified agreements:

1. It is agreed that the valuation date is 27 April 2007 (the date of the Initial Notice).

2. It is agreed that the two schedules attached (one relating to those leases having 91.68 years unexpired at the valuation date and the other with 119.68 years unexpired at the valuation date) are flat-by-flat lists showing the accommodation type and the ground rents payable including the reviews and review dates.

3. The parties are agreed that the average unimproved value of the flats in possession is:

Studio flats:	£323,000
One-bedroom flats:	£434,725
Two-bedroom flats:	£607,500

6. The parties are agreed that there is no marriage value or hope value on non-participating flats.

7 The parties are agreed that there is no other compensation payable under Paragraphs 2(1)(a) and 5 of Schedule 3 of the Act.

13) The Statement also contains this qualified agreement:

4. The parties are agreed on a ground rent capitalisation rate at 6.5% p.a.

However, there is an issue between the Applicant and the First Respondent as to the effect on the capitalisation rate of the business interruption clause referred to in Item 9.

Disputed Issues

Capitalisation Rate

14) The first issue (para.s 4 and 9 of the Statement) follows on from the qualified agreement stated in the previous paragraph. The clause referred to is contained in the lease owned by Respondent (2) of parts of the basement at the Premises. The crucial words, italicised for emphasis, are in parenthesis at the beginning of para.3 of Schedule 2 ('The Exceptions') under the sub-heading 'Access':

3.1 The right for the Landlord and the Maintenance Trustee (*causing as little inconvenience and disruption as possible and making good at the expense of the Landlord any damage or loss occasioned by the exercise of such right*) at any time during the Term (but except in cases of emergency only at reasonable times during normal office hours after giving reasonable prior notice in writing to the Tenant and by prior appointment except where the Tenant unreasonably refuses to make an appointment within a reasonable time of a request from the Landlord) to enter (or in cases of emergency to break and enter) upon the Premises in order:

3.1.1 to inspect cleanse repair amend remove or replace with others the Conduits

3.1.2 to inspect and execute work in connection with any of the easements or services referred to in this Schedule

3.1.3 to view the state and condition of and to repair and maintain any adjoining property where such work would not otherwise be reasonably practicable

3.1.4 to carry out work or do anything whatsoever comprised within the Landlord's obligations contained in this Lease or under any other leases granted within the Building whether or not the Tenant is liable under this Lease to make a contribution

3.1.5 to exercise any of the rights possessed by the Landlord under the terms of this Lease

3.1.6 if necessary to carry out any works of repair maintenance and alteration to any plant and machinery (including any lifts) contained in any areas of the basement of the Building and which serve other parts of the Building and

3.1.7 for any other reasonable and proper purpose

15) As to the dispute, it is first stated:

- The Applicant contends that the valuation effect of that business interruption clause will be to raise the capitalisation rate to 8% p.a., as explained in Item 9 hereof.
- The First Respondent contends that there is no valuation effect.

The explanation in Item 9 (which refers to the same issue but involves Respondent (2)) is:

- The Applicant contends that this basement area contains many service control points, pipes and conduits, all of which will need periodic maintenance, repair and renewals. There will inevitably be an interruption to the business (it is understood that the intention is to use the premises for a gym) from time to time. That business interruption is likely to be significant and, at times, substantial. It is contended that any investor for this freehold interest would reflect that in the capitalisation rate, as it is likely to be from annual income that the investor will make provision for, and payments for, business interruption liabilities.
- The First Respondent contends that this business interruption clause will be of no valuation effect.
- The Second Respondent contends that no Deed of Variation will be agreed which removes the business interruption clause, and there is no valuation effect on its interest.

16) For the Applicant, Mr Maunder Taylor stated: "The main problem will arise when conduits, pipework or access and control points need to be renewed" (Report para.4.5). On such renewal, in his opinion, there would inevitably be a claim by Respondent (2) or successors against the then freeholder for damages because of the loss of business occasioned. On the basis that the freeholder would be unable to insure against such a claim and that any payment "would not be a reasonable cost to set against the service charges of the flats under the terms of their leases", he considered that a lower price would be paid for the investment. Therefore, in his opinion, the value of the ground rent income should be calculated at 8% and not at 6.5% (Report para.4.7).

17) By way of legal support for this opinion, Mr Rainey submitted that the words "damage or loss" in the quoted provision were wide enough to for it to become a business interruption clause. He cited the case of *Greg v Planque* [1936] 1 K.B. 669, where the Court of Appeal had held that the words "making good all damage thereby occasioned", applying to the exercise of a right of entry to execute repairs, were not restricted to structural damage to the premises but were wide enough to cover damage to a tenant's stock-in-trade. She was a court dressmaker and chimney repairs had scattered soot on a number of dresses: Greer LJ spoke of the landlord being obliged to make the damage good "by restoring the frocks to the condition in which they were before the operations began" and, if he could not, having to pay for failing to do so (at p.674). There was no suggestion of damages being payable for any business interruption, although Scott LJ would have included any damage caused which was "incidental" to exercise of the right of entry (p.680).

18) For Respondent (1), Mr Shapiro first asserted that the quoted provision is perfectly standard and not a business interruption clause (Report para.4.5.1) He then referred to clause 6.10 of the lease of the basement granted to Respondent (2):

> "The Landlord shall not be liable to the Tenant for any loss damage or inconvenience which may be caused by reason of the failure stoppage leaking bursting or defect of or in any Conduits or by reason of a breakdown or defect beyond the Landlord's control in any part of the Building the use of which benefits the Premises in common with other parts of the Building except insofar as any such liability may be covered by insurance effected by the Maintenance Trustee pursuant to paragraph 12 or 13 of Schedule 7 or by the Landlord."

Mr Shapiro also asserted that any "any cost of making good or other claim will be part of the costs of carrying out the relevant works of repair etc to the building, which will therefore form part of the of the service charges payable by the lessees in the normal way" (para.4.5.2). Accordingly, he still considered that the appropriate rate of interest is 6.5% for capitalisation of the ground rent.

19) Mr Radevsky similarly submitted that the lease provision was unexceptional and observed (Skeleton para.4): "If it were intended to be a business interruption compensation provision, it would be clearly spelt out, with reference to loss of profit, indemnities etc".

20) In the light of these submissions, the Tribunal has concluded that the case for an 8% capitalisation rate put on behalf of the Applicant is misconceived. As a matter of construction in context, the Tribunal does not accept that the quoted provision contemplates liability for intangible financial losses as opposed to an obligation to "make good" physical damage or loss inflicted on tangible property. Even if this construction is wrong, the Tribunal accepts the point impliedly made by Mr Shapiro that clause 6.10 of the lease effectively negates liability on the part of a freeholder for any loss of business suffered by Respondent (2) or successors occasioned by renewal of Conduits (as widely defined in clause 1 of the lease). It follows that the Tribunal need not consider whether or not recovery of any payments made by a freeholder under this potential liability would be recoverable under the service charge provisions in leases of the flats or in the lease of the basement.

21) Accordingly, the Tribunal has determined that the ground rent capitalisation rate should be 6.5% p.a. as agreed, disregarding any effect of the so-called business interruption clause.

Deferment Rate

22) The next issue (para.5 of the Statement) has the most importance for the valuation. It relates to the deferment rate for calculating the deferred value of the reversion:

- The Applicant contends for 7% p.a. for those leases with 91.68 years unexpired at the valuation date and no reversionary value for those leases with 119.68 years unexpired at the valuation date.
- The First Respondent contends for 5% p.a.

23) The starting point for each side was necessarily the decision of the Lands Tribunal as upheld by the Court of Appeal in *Earl Cadogan v Sportelli* [2007] EWCA Civ 1042. This decision was that the proper deferment rate is 5% for flats in 'Prime

Central London' and that this rate should be treated, in effect, as a binding guideline by LVTs. On appeal, it was accepted that a 'factual precedent' had been set appropriately in the interests of consistent practice and it was not challenged in front of the present Tribunal

24) Instead, for the Applicant, it was stressed that the guideline rate was limited by the evidence considered not only to flats within prime central London but also to leases with unexpired terms of more than 20 years but not of more than 75 years (see para.85 of the Land's Tribunal's decision where it was said: "Beyond 75 years we see no reason on the evidence before us to conclude that that the rate would be either higher or lower.").

25) As the unexpired terms of the leases in the present case all exceed 75 years, Mr Rainey submitted that, by parity of reasoning, the guideline rate also was not a factual precedent but could be displaced by the available evidence.

26) Mr Maunder Taylor had amassed and relied upon a considerable quantity of relevant evidence in support of his opinion that "investors in the market, in the real world, are not prepared to pay for any reversionary interest with unexpired terms of over 100 years" (Report para.5.9). As to the length of unexpired terms affecting the deferment rate, he quoted a sentence from the decision of the Lands Tribunal (HH Judge Rich QC & Mr P H Clarke FRICS) in *Arbib v Earl Cadogan* [2005] 3 EGLR 139 (at para.169):

> "Although it is of less importance in such cases (with unexpired terms of just under 20 years or just over 80 years), we think that there may be reason to increase the deferment rate also where there is more than 80 years unexpired, because of the reduced expectation of realising an early profit.

In the following paragraph (170), the Tribunal stated:

> "Accordingly, we conclude that, although theoretically there is good reason to doubt that a uniform deferment rate is applicable in otherwise similar circumstances, without regard to the length of the unexpired term, we should, on the evidence which has been adduced, make no adjustment in the Cadogan cases."

27) Although Mr Maunder Taylor referred to other matters and transactions as, in effect, cumulatively supporting his opinion that a higher deferment rate was justified, in the opinion of the Tribunal his most persuasive supporting evidence consisted of an Auction Sales Analysis for Unexpired Terms 80 to 125 Years, relating to 25 such sales in the period July 2006 to April 2008 with supporting documentation supplied. This Analysis assumed a capitalisation rate of 6.5% and calculated consequential deferment rates for individual sales ranging from 6.31% to 9.44% and of those freeholds with more than 100 years to the reversion only 2/15 produced any reversionary value at all.

28) Against this, for Respondent (1), Mr Shapiro supplied no valuation or other evidence whatsoever but simply stuck slavishly to the starting point: the 5% guideline rate should apply "to the 91.68 year lease and the 119.68 year leases because there is no reason for changing the established valuation method" (Report para.5.1.3.3). He asserted that Mr Maunder Taylor's evidence, especially as to

auction sales, was unreliable because purchasers were generally ill-informed and lacking expert valuation advice. Essentially, Mr Shapiro's own expert evidence involved an apparently irrebuttable presumption that the guideline rate was correct and then mathematical calculations from that starting point in which he envisaged an abrupt 'cut off' at 80 years, which nobody else had suggested, at which one day the rate would be 5% and the next 7%, with a leap in value which, he asserted, defied logic. He did not seem able or willing to accept the possibility of a graduation in small steps from 5% to 7%. Nor did he appreciate the possibility that the market evidence adduced in support of a higher deferment rate might indicate that the guideline rate was not satisfactorily established, which might not be surprising since it was not derived from such evidence. In addition, ignoring the dicta from *Arbib*, he insisted that increasing the deferment rate because of longer reversions would constitute double counting because of a minimal reduction in the value of ground rents. He evidently regarded the enormous increase in the proposed enfranchisement price purely attributable to his adoption of a deferment rate at a slightly lower percentage as logical and therefore justified. Had he been able to produce details of any comparable transactions in the market which actually 'tracked' the *Sportelli* decision being agreed and completed at a price calculated in accordance with the guideline rate, his Report and oral evidence might have been of constructive assistance to the Tribunal.

29) In support of Mr Shapiro's submissions, Mr Radevsky was able to offer very little more than references to other LVT decisions in which Mr Maunder Taylor's valuation opinions and evidence in the present respect had not been accepted in relation to leases with terms exceeding 75 years.

30) The Tribunal was concerned to consider the expert opinions and valuation evidence presented to it judicially. The easy course would have been to pay duly deferential regard to the guideline deferment rate of 5% for flats decreed by the Lands Tribunal, even though on an entirely non-market evidential basis, and to disregard inconsistent submissions and incompatible evidence as necessarily unsound in methodology and conclusion. However, the Tribunal found this difficult to reconcile with its own expertise, experience and commonsense.

31) On the face of it, Respondent (1) was a company managed and advised by people familiar with the property market. It had been ready, able and willing to sell the freehold of the Premises for sums which even a special purchaser like the Applicant would be prepared to pay. First, a proposed sale at £750,000 was offered then a counter-proposal at £900,000 was made. Instead of accepting this, an amendment of the Initial Notice was, perhaps ill-advisedly, obtained which allowed an amended Counter-Notice. Then Mr Shapiro was instructed as a valuer and the counter-proposed price leapt by almost £2m. Why? As he explained in oral evidence, his was the first valuation properly taking account of the *Sportelli* rate. No evidence was necessary, he appeared to believe, that anyone would really pay such an unexpectedly high amount as his greatly increased valuation. It should be noted that, during the Hearing, he produced an adjusted valuation showing a reduced sum payable for the freehold of £2,056,783.

32) The Tribunal realises that Counsel in *Sportelli* had criticised the Lands Tribunal's decision as irrational in holding that a freehold reversion would sell for a substantially higher price in the no-Act world than if subject to the Act and that this criticism had been rejected. Lord Justice Carnwath pronounced (at para.87 of his judgment): "Unless the comparison is of like with like, the degree of difference cannot itself show irrationality." The Tribunal will not examine this generalisation closely but is also aware that Counsel's later criticism that: "If the decision [of the Lands Tribunal] stands then it will effect a massive nationwide shift of the value in residential property away from tenants to landlords", although manifestly correct, was dismissed as "unjustified" (per Carnwath LJ at para.92). Nevertheless, the Tribunal feels encouraged to adopt a seemingly sensible approach to valuation and evidence by a more recent decision of the Lands Tribunal.

33) In *Nailrile Ltd v Earl Cadogan* (2009) LRA/114/2006, the Lands Tribunal was concerned with the valuation of an intermediate landlord's interest where a new/extended lease was claimed by a sub-tenant. The difficulty with such a valuation is caused by the intermediate landlord's continuing liability to pay rent to the head landlord whilst only receiving a peppercorn rent from the sub-tenant. This negative value would involve payment of a reverse premium to a purchaser. One proposed method of valuation was to calculate the amount of the reducing fund needed by the purchaser to meet its liabilities under the intermediate lease. This amount, calculated logically and mathematically and not by reference to any market evidence, invariably exceeded greatly the total rent liability for the remainder of the term of the intermediate lease. Nevertheless, its adoption had been advocated by expert valuers such as Mr Shapiro in LVTs, sometimes successfully. However, the Lands Tribunal (Mr George Bartlett QC President & Mr Andrew J Trott FRICS) rejected the method in an Interim Decision (para.130; italics supplied for emphasis):

> "We acknowledge the careful thought that [a well known expert valuer] has put into the preparation of the reducing fund approach and the development of its theoretical foundations. But we do not consider that the results it produces satisfy the requirements for determining an open market value on the statutory basis. In our opinion the method does not take adequate, if any, account of the negotiating position of the willing seller and his ability to argue for the option of retaining the intermediate lease. *She has failed to stand back and look at the end results to see whether they are a realistic and reasonable outcome to the required process of a hypothetical "higgling in the market"* and whether they are valid across the range of factual situations that arise in practice when valuing the IL1 after the grant of a new lease. In our opinion they are not and we do not favour this approach."

34) In the same decision, the Lands Tribunal also said (at para.228):

> "Looking at the evidence overall we agree with the comments of the Tribunal in *Arrowdell*:
>
> > 'In such circumstances, in our view, it is necessary for the tribunal to do the best it can with any evidence of transactions that can usefully be applied, even though such transactions take place in the real world rather than the no-Act world. Regard can also be had to graphs of relativity...'

In the absence of any better evidence we think it is right to rely on such transactions and graphs in this instance."

35) The present Tribunal noted that when, the Court of Appeal made it clear in *Sportelli* that the way was left open to further evidence being called as to flats outside prime central London in other cases as to other areas, it was observed (per Carnwath LJ at para.102):

> "The deferment rate adopted by the [Lands Tribunal] will no doubt be the starting point, and its conclusions on the methodology, including the limitations of market evidence, are likely to remain valid."

However, this observation appears illogical: the Lands Tribunal guidance only related to deferment rates for leases with unexpired terms of 20-75 years; the guidance was not as to the methodology to be adopted and especially not as to valuation where there is market evidence; where there is no 'factual precedent' but there is market evidence, it is unclear why an inapplicable rate should still be the starting point and an inappropriate methodology be valid. In particular, the Lands Tribunal itself had actually said:

> 85 Our conclusion is that the deferment rate is constant beyond 20 years. Below 20 years we accept the view of Mr Dumas, Professor Lizieri and Mr Orr-Ewing that the rate would need to have regard to the property cycle at the time of valuation. Beyond 75 years we see no reason on the evidence before us to conclude that the rate would be either higher or lower.

It seems obvious from this that neither the guideline rates nor the methodology should be assumed to be relevant or valid where the unexpired term is shorter than 20 years. There is no suggestion that their validity should be assumed in other cases, such as the present, where the guidelines do not apply.

36) In accordance with the approach indicated in *Nailrile* (see para.s 33 and 34 above), the present Tribunal finds itself persuaded to rely on the evidence provided by Mr Maunder Taylor in this case as to the appropriate deferment rate(s). His evidence may not be overwhelming but it was much better than none. The Tribunal agrees that the reasons for disregarding market evidence given by the Lands Tribunal and accepted by the Court of Appeal in *Sportelli* cannot carry the same weight where the reversions are so distant. Here, there can be no realistic prospect of marriage value for a considerable period of time. The Tribunal considers that Mr Maunder Taylor's evidence was sufficient to show that a deferment rate of 5% would not be appropriate where the unexpired terms of leases are, as in this case, either 91.68 or 119.68 years. Instead, the Tribunal has concluded that the proper deferment rate should be 6.5% for those leases with 91.68 years unexpired and that there is no reversionary value in respect of those leases with 119.68 years unexpired.

Staff Flat

37) This issue arises out of the landlord's covenant in leases of the flats at the Premises to provide "without making any charge by way of rent or premium one flat and four individual rooms for the occupation or use for staff for the benefit of the

building" (clause 4.9 in specimen leases). The Statement of Agreed Facts and Disputed Issues puts it as follows (para.8):

> "There is an issue between the Applicant and the First Respondent over the landlord's responsibility to provide a flat for the residential occupation of staff for the benefit of the building. There used to be such a flat in the basement but it was demolished in 2003/4 (Second Respondent's contention) and the area included within the former basement gym/spa. This is now included in the lease of the basement granted by the First Respondent to the Second Respondent.
>
> - In lieu of the return of the flat, the Applicant contends for a reduction in what would otherwise be payable by £323,000 (the value of a studio flat) in order to purchase such accommodation so that it is able to fulfil its responsibilities under the 430 residential occupation leases of Nell Gwynn House.
> - The First Respondent contends that the liability can be met by converting two store rooms on the fourth floor at a projected cost of £41,390 for which planning consent was granted on 10th July 2008."

38) There was no dispute about the continued existence of a landlord's obligation under the covenant, despite the fact that it had not been fulfilled for a number of years, so that the Applicant would be liable to provide a replacement flat. Nor was there any dispute that the covenant meant residential occupation but the extent and nature of actual residence by staff members was not agreed.

39) Although referred to as if possible, there was no real question of "the return of the flat". Not only did the former basement flat, constructed in 1977 to replace the previous flat staff, no longer exist physically at the date of the Initial Notice, but even if it had existed then or were deemed to be then existing, the Tribunal would inevitably exclude it from acquisition by the Applicant. Essentially this is because such a residential flat could not properly be treated as 'common parts' of the Premises (see the decision of the President of the Lands Tribunal in *Re 29 Eaton Place* (2008) LRA/85/2006).

40) At the Hearing, Mr Shapiro agreed with Mr Maunder Taylor that the projected cost of converting the two storerooms in accordance with the planning permission should be £50,000.

41) For the Applicant, Mr Rainey submitted, in effect, that a replacement flat could not be created so as to satisfy the landlord's covenant by conversion of the two storerooms. He stated in his Skeleton Argument (para.25):

> "The Applicant contends that this is not practicable because the resulting unit would be too small for a permanent home for a resident staff member. Not only does the lease require residence, it is to be anticipated that it will be a condition of the contract of employment that the staff member live there, in order to ensure that he/she is a service occupier; see Woodfall extract."

42) The Tribunal was not prepared to accept this contention. The covenant does not, in terms, require the landlord to provide a flat that is fit to be the permanent

home of one resident member of staff. Nor do the specimen flat leases contain an absolute obligation to provide a resident porter/caretaker: at most, the purposes for which costs may be incurred for service charge purposes include "...to use the Maintenance Trustee's *best endeavours* to keep up an establishment comprising a General Manager, Accounting Secretarial Staff, *a Resident Supervisor*, a Housekeeper, sufficient porters to provide twenty-four hour porterage at the highest practicable level of luxury..." (para.(1) Fourth Schedule; italics supplied; cp clause 5(B) as to discontinuing any purposes thought "impracticable obsolete unnecessary or excessively costly"). It has already been noted that there has not been a resident member of staff at the Premises for some years.

43) Further, however, the Tribunal has inspected the two storerooms and considered the planning permission, dated 10 July 2008, with attached plans for development, described as: "Internal refurbishment of existing redundant storage area at fourth floor level into caretaker's room." An examination of the specimen leases supplied of flats 002 (ground floor) and 111 (first floor) with attached plans and other plans of the interior of the Premises, shows that the conversion will produce accommodation approximating in size and facilities to the studio flats generally demised at the Premises. If the provision of a more spacious flat for staff to occupy had been intended, the Tribunal would have expected this to be expressed in the leases. In the opinion of the Tribunal, the resulting accommodation will be adequate to fulfil the assumed obligation of the Applicant as landlord to provide a flat for residential occupation by a member of staff.

44) Accordingly, the Tribunal determines that £50,000, being the agreed cost of conversion, is the appropriate sum to be allowed for in the valuation.

Air Space

45) The issue here arises because the Initial Notice as amended claimed acquisition of "the lease dated 21 December 2006 of airspace over the premises made between", effectively, Respondent (1) and Respondent (2). The relevant lease was, in fact, dated 26 January 2007, not 21 December 2006 which was the date of the agreement but this inaccuracy would not affect the validity of the Notice (see para.15(1) of Sched.3 to the 1993 Act). Technically, the lease is of part of the Premises, the freehold of which includes the airspace above the roof of the building called Nell Gwynn House. Also the lease is only of part of such airspace as shown by blue edging and hatching on an attached plan of the roof.

46) As will be seen from the Statement of Agreed Facts and Disputed Issues (para.10), there are alternative aspects, acquisition or value, to be considered:

- The Applicant contends that the lease has no market value, notes that a consideration of £1 was paid for it, and that this roof and air space is necessary for the management of the building.
- The First Respondent contends that, whether the Tribunal finds in favour of its acquisition or not, there is no valuation effect on the value of the freehold interest.

- The Second Respondent contends that the air space lease reserves to the freeholders and Maintenance Trustee all necessary permanent rights for the proper maintenance and management of the building. In support of its contention, the Second Respondent points to the substantial building refurbishment works currently in progress and that the main roof top plant areas are excluded from the demise. Whilst £1 was paid for the lease, the agreement for lease contains an overage and clawback provision whereby the First Respondents are entitled to 40% of any development profit for the first 10 years of the term. The entitlement to any overage and clawback payment ceases if the First Respondent disposes of its freehold interest. The Second Respondent contends for a value of £50,000 should the Applicant be entitled to acquire their lease.

47) Acquisition of the lease of the airspace by the Applicant would be by virtue of ss.1(2)(a) and 2(3) of the 1993 Act. In essence, these provisions apply where "the demised premises [ie the airspace] consist of or include...any common parts of the relevant premises [ie Nell Gwynn House]" *and* the acquisition is "reasonably necessary for the proper management or maintenance of those common parts [ie of the airspace itself] on behalf of the tenants by whom the right to collective enfranchisement is executed".

48) There is a statutory definition of "common parts" which applies "in relation to any building or part of a building": the expression "includes the structure and exterior of that building or part and any common facilities within it" (s.101(1) of the 1993 Act). It has been held by other LVTs, after proper consideration of the arguments, that the airspace above a building is part of its exterior and, therefore, within this definition (see, eg, *Buttermore Court Freehold Ltd v Heritage Land plc* (2008) [LON/00BK/OCE/2006/0312] where earlier decisions are referred to). However, the present Tribunal was not required to reconsider this aspect because it was accepted by Mr Radevsky that the airspace would be "common parts" within the 1993 Act (Skeleton para.11).

49) Nevertheless, on behalf of Respondent (2), Mr Radevsky contended that it was "not reasonably necessary for [the lease] to be acquired for the proper management or maintenance of those common parts [ie the airspace]" (Skeleton para.11). He pointed out that the demise did not include the plant room, that extensive rights were reserved to the landlord and that there were enforceable tenant's covenants as to repair and maintenance.

50) This contention had been considered in the earlier LVT decisions and rejected. In substance, the reasons for the rejection appear to be that exercise of the development and other rights in respect of the demised airspace granted by the lease would render it impracticable for the landlord to manage the airspace properly in connection with use of the roof for various possible purposes (see para.49 of the *Buttermore Court* decision). This sort of management would not be sufficiently enabled by the rights of access reserved to the landlord by the lease. Therefore, acquisition of the lease of the airspace is reasonably necessary.

51) Although there may, theoretically, be a need to distinguish strictly between management of the roof and management of the airspace, in practice these must merge: it is impossible to go or put anything on the roof without intruding into the airspace. It follows that it will be necessary for the Applicant also to manage the airspace. Maintenance of the airspace could also be necessary, eg to clear or exclude snow, fumes or birds. Accordingly, the present Tribunal has not been persuaded to reach a different conclusion from those reached in the earlier LVT decisions referred to. In the opinion of the Tribunal, the Applicant is entitled to acquire the lease of the airspace granted to Respondent (2). Consequently, the question arises of the price to be paid for this acquisition.

52) For Respondent (2), Mr Perry's Valuation Evidence stated that an application for planning permission to provide penthouse flats at the Premises had been refused in July 2003 and that an appeal had been dismissed in June 2004. Although he agreed with the Planning Inspector's Determination generally, he stated: "I do not believe the planning appeal refusal would prevent all future rooftop development" (para.7.6). In particular, he considered that a differently designed third storey addition would overcome the planning objections. However, in cross-examination, he conceded that he was not a planning expert.

53) As a valuer, Mr Perry had not provided a residual valuation, based on potential profit, "as this would depend entirely on planning permission being obtained the valuation would be meaningless" (para.7.8). Instead, he simply estimated or guessed a figure of £50,000 "bearing in mind the date of valuation was at the height of the property market" (para.7.9). In support, his only evidence consisted of details of roof spaces being sold at auction in 2006 and 2008 without planning permission to show that they "have a value on the open market" (para.7.10). These details related to roof spaces, not airspaces, and it did not appear that in either case there had already been a seemingly conclusive refusal of planning permission.

54) On behalf of the Applicant, Mr Rainey contended that the airspace lease was of only nominal value. He drew attention to a number of difficulties facing a hypothetical purchaser, which were explained by Mr Maunder Taylor (Part 7.0 of his Report): No lift access; Issues if lifts renewed; Planning consent refused, appealed unsuccessfully; Structure issues; and Capacity of existing services.

55) The Tribunal was not persuaded to share Mr Perry's belief that, despite all the difficulties, this lease of airspace, had any real value in the open market. The qualifying tenants had proposed to pay £100 for it in the amended Initial Notice and, despite the fact that this was not accepted, the Tribunal sees no good reason to differ. Accordingly, the Tribunal determines that the valuation of the enfranchisement price should include £100 for the acquisition of the airspace lease.

Refuse Area

56) The Initial Notice originally proposed to acquire the lease of parts of the basement of the Premises granted by Respondent (1) to Respondent (2) in so far only as it related to a caretaker's flat with access. However, that Notice was amended to add (para.3.1.1): "and insofar as it relates to the service corridor, toilets and refuse

area shown hatched red on the plan numbered 4". This additional claim has given rise to separate issues.

57) As the Statement of Agreed Facts and Disputed Issues explains (para.11):

> "There is an issue between the Applicant and the Second Respondent concerning the former basement refuse area. At the date of the Initial Notice, this area had been included in the basement lease between the First and Second Respondents as the refuse bins were being moved to an area outside the building.
>
> - The Applicant contends that these are part of the common parts to be included in the enfranchisement by the Applicant, are necessary for the management of the building and that they have no value.
> - The Second Respondent contends that the tenants' leases do not specify any particular area as a refuse store and that by the date of service of the Counter Notice suitable alternative arrangements had been made in the form of an external refuse area. There had been a problem of rodent infestation in the building with the former refuse area as it was open fronted. Vagrants had been discovered sleeping in the basement and there was a risk of arson. Should the Applicant be entitled to acquire this area, the Second Respondent contends for a value of £187.50 per ft².

58) For Respondent (2), in his Skeleton Argument, Mr Radevsky elaborated the contention (para.13):

> "Under the Lease [to Respondent (2)] it was envisaged that the bin store would be moved once planning permission was granted ... The collection of rubbish is a service charge item..., but the flat tenants' leases do not give the tenants rights to use, or over, a bin store. The former planning condition regarding an access route for refuse disposal was removed on 4 April 2007, before the relevant date. There is a new bin store. The old one will be part of the health club. It is denied that it is common parts and/or it is denied that acquisition of that part of the basement lease is necessary for the proper management or maintenance of that area. Rights of access are granted to the Landlord (i.e. the Applicant if and when it acquires the freehold)..."

59) For the Applicant, in his Skeleton Argument (para.s 51-53), Mr Rainey particularly stated that the bin store within the basement was a common part when the Initial Notice was given and that the tenants do not (to put it mildly) like the new bin store. He added that the rights of access reserved in the lease to Respondent (2) "do not require [Respondent (2)] to allow the bin store area to be used by the landlord" (para.55). Further, Mr Rainey had already referred generally to the relevant statutory provisions and case law.

60) As with the airspace lease, acquisition of parts of the basement lease would be by virtue of ss.1(2)(a) and 2(3) of the 1993 Act. In essence, these provisions apply here where "the demised premises [ie the parts of the basement demised to Respondent (2)] consist of or include...any common parts of the relevant

premises [ie Nell Gwynn House]" *and* the acquisition is "reasonably necessary for the proper management or maintenance of those common parts [ie of the refuse area itself] on behalf of the tenants by whom the right to collective enfranchisement is executed".

61) As already noted, there is a statutory definition of "common parts" which applies "in relation to any building or part of a building": the expression "*includes* the structure and exterior of that building or part and *any common facilities within it*" (s.101(1) of the 1993 Act; italics supplied for emphasis). This definition has fairly recently been considered by HH Judge Hollis in *Marine Court (St Leonards on Sea Freeholders Ltd v Rother District Investments Ltd* [2008] 02 EG 148), which was cited by Mr Rainey. Specifically in relation to a section of basement, Judge Hollis said (at para.18):

> "This is somewhat more complicated, but it was not pressed for the landlord that the plant equipment and service rooms were other than common parts as defined in the Act. Indeed, I cannot see how they could be regarded as anything other than common parts, providing, as they do, hot water for the building as a whole. This should include the staff quarters in the basement. The staff serve the entire building, especially the residential lessees, there is a caretaker's rest room, a paint shop, and a workshop, each of which, in my view, clearly fall under the definition of "common facilities" contained in section 101(1) and so are "common parts""

62) The Tribunal accepted this passage as of great assistance in understanding what should be treated as common facilities and, therefore, common parts for present purposes. In particular, it was noted that there was no suggestion in the judgment that common facilities were restricted to those enjoyed by tenants by virtue of express provisions in their leases. Instead, as appears from the quoted passage, regard should be had to the factual provision of services.

63) As a matter of fact, as at the relevant date (ie of the Initial Notice: 27 April 2007), the refuse area/bin store was still in the basement being used for the collection of tenants' rubbish and was only subsequently relocated to an outside area at the rear of the Premises, walls being built to enclose the original area (see Witness Statements of Mr Rokeby-Johnson para.26, of Mr Perry para.16 and of Mr Lewis para.21). The new bin store/refuse area is not within the premises demised to Respondent (2).

64) In the light of Judge Hollis's judgment, the Tribunal has no doubt that, at the relevant date, the original refuse area/bin store was a common facility forming part of the common parts of the Premises. It follows that the Applicant will be entitled to acquire the leasehold interest in that refuse area if the acquisition is reasonably necessary for the proper management or maintenance of that area on behalf of the acquiring tenants. The lease held by Respondent (2) does not expressly give the landlord/freeholder rights of access for the purposes of storage of refuse, although it does "for any other reasonable and proper purpose" (para.3 of Schedule 2). That lease also contains this provision (para.7 of Schedule 3; italics supplied):

> "The right (in the event that the Landlord's proposed route for disposing of refuse from the Building (over a route not comprised in the Premises) is not approved in

writing by the Executive Director of Planning and Conservation for the Royal Borough of Chelsea (as is required by condition 12 of planning permission 02/-2568/a dated 15 April 2003)) to make reasonable use of the Refuse Corridor for the purposes of taking refuse to *the bin store serving the Building* PROVIDED THAT the this right shall no longer be exercised at any time after the Landlord's proposed route for disposing of refuse from the Building (over a route not comprised in the Premises) is approved in writing by the Executive Director of Planning and Conservation for the Royal Borough of Chelsea (as is required by condition 12 of planning permission 02/-2568/a dated 15 April 2003 and PROVIDED FURTHER that if the existence of this right shall cause the premium payable for any third party public liability contents or other insurance effected by the Tenant or other occupier of the Premises to be increased the Landlord shall reimburse to the Tenant the additional cost of such insurance"

The lease contains no definition of the italicized words but, construed as at its date of execution, they could only be taken as referring to the then existing bin store. The intention of the parties to relocate the bin store and its subsequent relocation do not appear to affect this construction but no arguments as to this have been put to the Tribunal.

65) The Tribunal agrees with Mr Rainey's submission that the provisions of the lease held by Respondent (2) are not sufficient to enable proper management and/or maintenance of the original bin store/refuse area for the flat tenants and that acquisition of the leasehold interest in that area for those purposes is reasonably necessary. Consequently, the question arises of the price to be paid for this acquisition.

66) For the Applicant, Mr Maunder Taylor simply stated in his Report (para.9.4): "It is my opinion that this area, subject to the rights of the lessees to place their rubbish there, has no value." However, as Mr Radevsky noted, the Initial Notice, as amended, had proposed a price of £100,000 for the leasehold interests in the service corridor, toilets and refuse area in the basement (less, perhaps, £100 for the ground floor toilet), none of which have any value in the opinion of Mr Maunder Taylor (Report para.s 10.5 and 11.4).

67) For Respondent (2), Mr Perry took a different view, stating in his Valuation Evidence:

"6.1a The former refuse area is 683 Sq Ft. My analysis produces a value of £955,000 for the 6,213 Sq Ft vacant gym/spa area equating to £153.71 per Sq Ft. Thus the refuse area has a value of £104,984.

6.2 If the refuse area is acquired it will result in a consequential reduction in the value of the remainder of the area for the proposed extension to the gym/spa as access from the car park staircase will no longer be possible. I consider that this area will have value only as storage space and reduce its rental value by £2.30psf which applying an 8% yield (12.5yp) gives £28.75 per Sq Ft. The area affected is 1,204 Sq Ft (2,015 Sq Ft less 683 Sq Ft & 128 Sq Ft) giving a value of £34,615."

This would result in a total acquisition price of £139,599. However, his starting analysis producing a £955,000 value did not take into account any of the applicable statutory assumptions and he expresses no opinion as to the value of the service corridor.

68) In the judgment of the Tribunal, Mr Maunder Taylor's opinion is correct that the value of the refuse area/store room must be substantially reduced because of the statutory assumption that the sale will, in effect, be subject to the tenants' common facility of storing refuse in the area (see para.s 3(1)(d), 10 and 11 of Sched.6 to the 1993 Act). Mr Perry's valuation disregarded this assumption, which renders it seriously flawed. However, the Tribunal does not agree to his nil valuation for the area if sold in the open market. Further, Mr Maunder Taylor, in his turn, disregarded the statutory provision for compensation for loss, including diminution in value of any interest in other property, to be payable to Respondent (2), which Mr Perry had taken into account (see para.13(2)(a) of Sched.6).

69) This valuation is difficult, especially given the lack of any market evidence. Nevertheless, doing the best it can in the circumstances and on the information available, the Tribunal has concluded that the appropriate sum for the Applicant to pay for acquisition of the leasehold interests in the refuse area/bin store plus the service corridors, but not including the basement toilets, and compensation for any loss is the total sum of £100,000 proposed in the Initial Notice as amended. The service corridors and toilets are the subject of the next two issues but this valuation reflects the Tribunal's decisions as to them.

Basement Toilets

70) The Statement of Agreed Facts and Disputed Issues sets out the issue as to "a former basement toilet area" as follows (para.12):

- The Applicant contends that these are part of the common parts to be included in the enfranchisement by the Applicant, are necessary for the management of the building and that they have no value.

- The Second Respondent contends that the former basement toilets were permanently locked and dilapidated at the date of the initial Notice and understands they had not been used by the maintenance and administration staff since the First Respondents acquired the building. Accordingly, these areas were not common parts. Should the Applicant be entitled to acquire the former basement toilet area, the Second Respondent contends for a value of £187.50 per sq ft.

71) According to Mr Lewis's Witness Statement (para.15), during the whole of 2001-2002 "the WC's referred to were broken and unusable. In fact there was so much debris and building material in front of the WC cubicles that these toilets were inaccessible and the access doors from the then 'service corridor' had been padlocked at least from May 2003." Similarly, Mr Rokeby-Johnson was unable to give any evidence of actual user of these WCs by staff or anyone else as at the relevant time but stated: "It is my understanding that these were demolished in early 2007 at the

same time as other works were taking place in the basement, but I cannot specifically confirm this." (Witness Statement para.10(10)).

72) The specimen flat leases confer no rights of user in respect of the basement toilets.

73) In the light of this factual situation at the relevant date, the Tribunal considers it impossible to regard the basement toilets as then being "common facilities" within the meaning of the statutory definition of "common parts". Accordingly, the Tribunal accepts Mr Radevsky's primary submission that they are not a part of the basement of which the Applicant is entitled to acquire the leasehold interest from Respondent (2).

Service Corridors

74) The Statement of Agreed Facts and Disputed Issues sets out this issue briefly as follows (para.13):

> "There is an issue between the Applicant and the Second Respondent as to various corridors in, the basement serving machinery and plant rooms as well as the refuse area referred to in Point 11 above."

75) In his Skeleton Argument (para.16), Mr Radevsky stated that this issue "refers to various unspecified corridors serving machinery and plant rooms". He then denied that they were common parts or, if they were, denied that acquisition of that part of the basement lease was necessary for the proper management or maintenance of that unspecified area.

76) However, it is clear to the Tribunal that this issue can only relate to "the service corridor" referred to in para.3.1.1 of the Initial Notice as amended which, far from being various or unspecified, was "shown hatched red on the plan numbered 4" attached to the Notice. From this plan it can be seen that this corridor run to and from the refuse area/bin store with doors off to various rooms. In his Witness Statement (para.10(7) and (9)), Mr Rokeby-Johnson referred to the prong of the corridor running from the rear of the Premise as the "services corridor" and to the prong running in the other direction from a staircase and goods lift as the "refuse corridor". He proceeded to describe the functioning of the corridors in the running of the Premises and stated that interferences with the corridors had led to the amendment of the Initial Notice so as to include them in the claim. Mr Lewis's evidence for Respondent (2) did not materially differ from the account given Mr Rokeby-Johnson.

77) In the opinion of the Tribunal, the corridor as identified on the plan attached to the amended Initial Notice was at least as much a common facility forming part of the common parts of the Premises as was the so-called former refuse area. If anything, the corridor was more of such a facility because it also gave access to machinery and plant rooms. The Tribunal has similarly concluded that acquisition of the leasehold in this significant corridor is reasonably necessary for its management and maintenance for the flat tenants.

78) It follows that the Tribunal's decision is that the Applicant is entitled to acquire from Respondent (2) the leasehold interest in the corridor as specified or identified in the Initial Notice. The price payable has been included by the Tribunal

in the round sum of £100,000 determined as appropriate in respect of the acquisition, in effect, of both the refuse area/store and the service/refuse corridor (see para.67 above).

Rear Parking Area

79) According to the Statement of Agreed Fact and Disputed Issues (para.14), this issue between the Applicant and Respondent (2) is "as to the rear car parking and loading and off-loading area and pedestrian means of escape". The respective contentions were stated as follows:

- The Applicant contends that this is part of the common parts, it is necessary for the management of the building, and should be included in the enfranchisement with possession on the basis that it has no value. The Applicant also contends that this rear access is widely used by residents and others, and is not merely a means of escape.

- The Second Respondent contends that the tenants' leases do not grant any rights over this area and Paragraph 3 of Schedule 2 of the Second Respondent's lease reserves to the freeholders and Maintenance Trustee all necessary rights of access for the proper maintenance and management of the building. The car park was not a common part at the date of the Initial Notice and points to the fact that the Maintenance Trustee was renting two car parking spaces. The remainder of the car park area was reserved for the basement gym/spa, areas and the lettings office. The Second Respondent accepts that a pedestrian emergency exit runs between a fire escape door and Draycott Avenue. Should the Applicant be entitled to acquire the car park area, the Second Respondent contends for £240,000.

80) The area in issue had been demised by Respondent (1) to Respondent (2) by a lease dated 21 December 2006, together with a ground floor office, for a term of 999 years at a peppercorn rent, in consideration of an unapportioned premium of £325,000. This area is defined as including "the surface of the car parking spaces but not the structure underneath" (clause 2.2.7).

81) In his Skeleton Argument for the Applicant (para.s 70-73), Mr Rainey submitted that the "parking area" is a common area of "curtilage" over which all tenants have rights: to reach the back door, for unloading and for contractors; also that it is necessarily used by the Maintenance Trustee and staff. He relied on s.62 of the Law of Property Act 1925 for the implied grant of such rights. He also asserted that the reserved rights of access by appointment were "not sufficient for the necessary and actual use".

82) In his Skeleton Argument for Respondent (2), Mr Radevsky denied that that the tenants have anything other than a pedestrian right of way straight across the yard and submitted that the rest of the area is not a common part. He also denied that acquisition of the relevant part of the lease would be necessary for the management of maintenance of the area.

83) The Tribunal did not consider it necessary to decide precisely what, if any, rights in respect of the area had been impliedly granted to tenants by statute. Attention had been drawn at the Hearing to the fact that the two specimen leases

supplied each contain the following regulation to be observed by the tenant: "To ensure that all trade deliveries to the occupants of the Flat are made via the rear entrance to the Building from Draycott Avenue and not via the main entrance from Sloane Avenue" (para.18 of Fifth Schedule). In the light of this, it appears clear to the Tribunal that the area in issue, which enables such deliveries to the rear entrance, should be regarded as "property which any [qualifying tenant of a flat in the Premises] is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises" (ie within s.1(3)(b) of the 1993 Act and, therefore within s.1(2)(a)). As such, the Applicant is entitled to acquire the leasehold interest in respect of it provided the acquisition is reasonably necessary for the area's proper management or maintenance on behalf of the participating qualifying tenants (s.2(3)(b)).

84) The Tribunal has concluded that this common parking area cannot be properly managed and maintained for the flat tenants unless it is acquired by the Applicant. So the question becomes one of valuation.

85) On the one hand, Mr Maunder Taylor's conclusion, expressed in his Report (para.8.8), was as follows:

> "In my opinion, the value of the prospect of receiving some licence fee (which may be periodically reduced or interrupted because of access or other difficulties in actually using a parking space) would be set off by the management difficulties (in terms of time, effort and cost) in maintaining the investment. In my opinion, this area has no value."

86) On the other hand, in Mr Perry's opinion in his Valuation Evidence (para.6.1.e) was significantly different in looking to capital gains rather than income: "The rear car park with 4 car parking spaces at £60,000 each gives a value of £240,000."

87) The Tribunal does not accept Mr Maunder Taylor's opinion that this car parking area has no value: if nothing else, the premium paid by Respondent (2) for the lease in 2006 is evidence of some substantial value, even though no agreed apportionment of the £325,000 paid between this area and the office was made available. The Tribunal agrees with Mr Perry that value of the area can be assessed by reference to the number of car spaces which could be sold but does not agree that there is room for four saleable spaces, particularly bearing in mind its continuing use for deliveries. Nor is the Tribunal able to accept Mr Perry's price of £60,000 (or more) per space in this small and awkwardly shaped rear space: the spaces will not be the easiest to access, there will always be the possibility that on return someone has parked there or is unloading or collecting (many flats are serviced therefore there is need for a constant delivery of linen supplies, maintenance men, cleaning equipment etc etc like a hotel). As a result, the Tribunal's decision is based on three spaces at £40,000 per space, making a total of £120,000 as the price payable by the Applicant to Respondent (2) for the leasehold interest in the rear parking area.

Ground Floor Toilet

88) According to the Statement of Agreed Facts and Disputed Issues (para.15):

> "There is an issue between the Applicant and the Second and Third Respondents concerning one of the ground-floor toilets which has been included in the lease to the Second Respondent and an underlease to the Third Respondent on the ground-floor letting office premises.
>
> - The Applicant contends that this toilet is part of the common parts and is necessary for the management of the building for use by management staff; acknowledging that the letting office staff have also used these toilet facilities and that they may continue to do so on a shared use basis. The Applicant contends that these toilet facilities have no value as part of the common parts of the building.
>
> - The Second Respondent and as far as they understand Third Respondents are happy to formalise the current shared use arrangements on the basis that they retain their current leasehold interests."

89) An underlease of the letting office on the ground floor including the toilet (or "restroom") in issue had been granted on 21 December 2006 by Respondent (2) to Respondent (3) for a term of 15 years for no premium but at a rent of £35,000 pa rising to £50,000 after one year. Respondent (3) was registered as proprietor of the underlease on 12 November 2007. A preliminary point was raised for the Applicant as to the validity of this lease by Mr Rokeby-Johnson in his Witness Statement (para.41) dated 12 March 2009. He contended that the underlease was void because it had been registered after the Initial Notice had been protected on the register of title (30 April 2007), reference being made to s.19 of the 1993 Act. However, the Tribunal dismisses this as a thoroughly bad point. When the Initial Notice was first registered, the underlease had already been granted and no claim was made to acquire the leasehold interest in this toilet. Section 19(1)(a)(ii) prohibits the subsequent grant, not registration, of a lease liable to acquisition. Then when the Initial Notice was amended (by order dated 30 July 2008) so that it actually includes a claim in respect of this toilet, the underlease had not only been registered but is referred to in the Notice (para.3.1.4). Further, the Tribunal agrees with Mr Radevsky's submission that the registration of title to the underlease is conclusive as to its validity unless and until it is rectified: for supporting authority see the express provision to this effect in s.58 of the Land Registration Act 2002.

90) In the view of the Tribunal, there can be no doubt that this toilet, as a communal facility within the Premises, is liable to acquisition by the Applicant if this is reasonably necessary for its proper management and maintenance for the flat tenants. Further, the Tribunal accepts Mr Rainey's submission that the reserved rights of access in the lease and underlease granted to Respondents (1) and (2) respectively are not sufficient to enable proper management or maintenance by the Applicant on behalf of the participating tenants (ie within s.2(3) of the 1993). It follows that the Tribunal has decided that the Applicant is entitled to acquire the leasehold interests of Respondents (2) and (3) relating to the ground floor toilet as identified in the Initial Notice as amended.

91) Although Mr Maunder-Taylor expressed his opinion that the common toilet accommodation had no value for the purposes of calculating the enfranchisement premium (Report para.11.4), the amended Initial Notice had proposed payment of £100 for the acquisition of the relevant leasehold interests.

92) Mr Radevsky, however, made no submissions as to payment but proposed a variation of the terms of the lease and underlease held by Respondents (2) and (3) respectively so as to enable the current shared use arrangements to continue. He cited the decision of the President in *Re 29 Eaton Place* (2008) LRA/85/2006 (at para.30) as authority for there being jurisdiction in the Tribunal to require such a variation when determining the terms of acquisition. Mr Rainey did not object to this proposal.

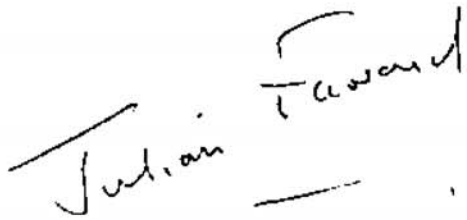
93) In lieu, therefore, of any payment, the Tribunal determines that it shall be a term of this acquisition that the following wording (suggested by Mr Radevsky) be added to para.3 of Schedule 1 of the lease held by Respondent (2): "and at all times to use the two toilets on the ground floor of the Building adjacent to the Premises". This addition will effectively vary the underlease held by Respondent (3), which incorporates by reference the rights granted by the headlease (clause 2).

Costs etc

94) According to the Statement of Agreed Facts and Disputed Issues (para.16): "There are other issues concerning historic service charges, legal costs and costs recoverable pursuant to Section 33 of the Act." Happily, however, these were not dealt with at the Hearing and have not had to be considered by the Tribunal in this Determination.

Valuation

95) In the light of the Tribunal's decisions as to the Disputed Issues, the Tribunal has prepared a Valuation showing a total Enfranchisement Price payable of £1,302,500. A copy of the Tribunal Valuation is appended to this Determination.



CHAIRMAN

DATE 21 April 2000