UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD REFORM -- grant of new lease -- calculation of premium -- Leasehold Reform, Housing and Urban Development Act 1993 schedule 13 paragraph 4B -- assessment of relativity between the value of the freehold with vacant possession and the value of the extended lease -- substantial part of property over-sailing an excluded basement area

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

BETWEEN **WOLFART GUNNAR HAUSER** **Appellant**

and

HOWARD DE WALDEN ESTATES LTD **Respondent**

Re: 11 Harley Place
London W1G 8QE

Before: His Honour Judge Huskinson and P D McCrea FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 13, 14 and 20 November 2013

Christopher Heather, instructed by Quastel Midgen LLP on behalf of the appellant
Michael Pryor, instructed by Boodle Hatfield LLP on behalf of the respondent

The following cases are referred to in this decision:
Arrowdell Ltd v Coniston Court (Hove) Limited LRA/72/2005 at paragraph 39
Earl Cadogan v Erkman [2011] UKUT 90 (LC)
Cadogan v Sportelli and others [2007] 1 EGLR 153

DECISION

Introduction

1. This is an appeal from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 23 January 2012, as amended by a correction certificate dated 22 February 2012, whereby the LVT determined that the price payable by the appellant to the respondent for the grant of a new lease of 11 Harley Place ("the subject property") assessed in accordance with schedule 13 to the Leasehold Reform Housing and Urban Development Act 1993 was £343,786.

2. For the purpose of assessing the price payable various matters had been agreed between the parties prior to the LVT hearing. These matters included the valuation date and also the freehold vacant possession ("FHVP") value of the subject property at the valuation date, these being respectively 1 April 2011 and £1,980,000. One of the values which was not agreed and which it was necessary to determine for the purposes of calculating the price payable (and in particular the marriage value) was the value of the extended leasehold interest of the subject property at a peppercorn rent and upon the terms and conditions of the agreed draft lease for a term of 137.98 years. While there were other matters in dispute before the LVT, there is no appeal by either party in respect of any matter decided by the LVT save only the LVT's decision that the value of the extended lease should be assessed as 99% of the agreed FHVP value of the subject property, i.e. £1,960,200.

3. Accordingly the only issue before the Upper Tribunal in this appeal is as to the relativity between the value of the extended lease and the FHVP value of the subject property at the valuation date. The appellant contends that the LVT was wrong and that the relativity should be 95%. The respondent contends that the LVT was right and that the relativity should be 99%. It was in respect of this issue that the Upper Tribunal (George Bartlett QC, President) granted permission to appeal. He ordered that the appeal was confined to this issue and should proceed by way of rehearing. It is accepted by the parties that the Upper Tribunal is not limited to deciding that the relativity should either be 95% or should be 99%, but is instead entitled to decide upon the appropriate relativity having regard to the evidence and the arguments adduced in this case.

4. An important feature to note in respect of the subject property is that it cannot constitute a house for the purposes of the Leasehold Reform Act 1967 (and accordingly the appellant is unable to require the sale of the freehold of the subject property) because, while viewed from outside the subject property superficially looks like a house with ground and two upper floors and basement, in fact the area of the footprint of the basement is substantially smaller than the area of the footprint of the ground and upper floors. This is because the title to an L-shaped piece of land (see the plan on page 38 of the bundle) is in a separate title and is not part of the demise of the subject property but is instead demised as part of the building in Harley Street onto which the subject property backs.

5. Before the LVT the parties were represented by the same advocates and called evidence from the same witnesses as appeared before us. In summary before the LVT the respondent’s experts gave evidence of the virtual nonexistence of freehold properties available for sale on the respondent's

estate, that long leases were considered the next best thing to freehold, that they would be priced at more or less the same figure as if they were freehold, and that over a substantial period the experts could not recollect ever agreeing relativity for a term as long as 138 years at less than 99% of the FHVP value. In summary before the LVT the appellant's expert gave evidence that it was obvious that, in respect of a house as opposed to a flat, a hypothetical purchaser would prefer to buy a freehold rather than a long leasehold; that the subject property was in effect a house; that with houses there is a choice between leasehold and freehold (there being no such choice with flats); and that the differential between the long lease value and the FHVP value of a house must be greater than the differential between the long lease value and the FHVP value of a flat. The LVT dealt with this argument in paragraph 15 of its decision in the following terms:

> "15. Once again, the resolution of this difference between the parties is a question of individual impression based on experience, rather the application of any particular scientific formula. The Tribunal takes the view that one factor moves the argument more in favour of the Applicant than the Respondent. This is that both hypothetically, and in the real world, freehold interests are simply not available within the Applicant's estate, and accordingly the hypothetical buyer does not have the kind of choice postulated on behalf of the Respondent. It is true that there are broadly comparable properties in some of the adjoining Central London estates which may be freehold, but often they will not have quite the cachet in terms of location enjoyed by the De Walden estate, and will not be entirely helpful comparables. Whilst recognising the intellectual force of the Respondent's argument, the Tribunal prefers the market experience supporting the Applicant's approach and considers that the relativity as between freehold and the extended lease is indeed 99% as argued for on behalf of the Applicant. This produces an extended lease value of £1,960,200."

6. At the hearing before us we received evidence from the following witnesses:

   (1) On behalf of the appellant Mr Heather called Karolina Tolgyesi MRICS of Beckett and Kay. She gave evidence upon the following topics: the availability of freehold houses for purchase on the respondent's estate; an analysis of market transactions involving 42 sales within 10 years of the valuation date of either a freehold or long leasehold house on the respondent's estate; an analysis of certain relativity graphs and of the research paper produced by the RICS Leasehold Relativities Group in October 2009; an analysis of the open offer made by the appellant to the respondent for the purchase of the freehold of the subject property; and an analysis of the difference which a hypothetical purchaser would perceive between a long leasehold house and a freehold house. Her evidence is summarised in greater detail below. She concluded that a relativity of 95% was correct.

   (2) On behalf of the respondents Mr Pryor called Chris Carter-Pegg BSc (Hons) MSc MRICS of Gerald Eve and Kevin Patrick Ryan FRICS of Carter Jonas LLP. In summary Mr Carter-Pegg gave evidence upon the following topics: the basis for the assessment of the FHVP value of the subject property (which he contended was a value recognising that the subject property was effectively a flat rather than a house); an analysis of the various relativity graphs (all of which he contended suggested a relativity of 99%); and an observation that when it had come to agreeing the deferment rate for the calculation of the price payable the appellant's agent Ms Tolgyesi had agreed a rate of 5% (which is the rate applicable to flats and which is more favourable to the appellant than the 4.75% applicable to houses). Mr Ryan gave evidence upon the following topics: his experience

of his practice as an estate agent since the 1970s, much of which had been spent practising in this area of London; his experience of dealing with sales of long leases of houses at dates prior to the Commonhold and Leasehold Reform Act 2002 when there was no right to enfranchise such houses under the Leasehold Reform Act 1967 having regard to the residence requirement and also to rateable value limits; and also an analysis he had made of the sales of two similar properties, one in Cambridge Square (freehold) and one in Oxford Square (leasehold) which he submitted supported a conclusion that the relativity should be 99%. The evidence of Mr Carter-Pegg and Mr Ryan is summarised in greater detail below. They concluded that a relativity of 99% was correct.

Statutory provisions

7. The price to be paid for an extended lease granted under the 1993 Act is to be assessed in accordance with section 56 and schedule 13. For the purpose of calculating marriage value under paragraph 4 of schedule 13 one of the values which has to be assessed is the value of the interest to be held by the tenant under the new lease. It is provided that this value is to be determined in accordance with paragraph 4B which is in the following terms:

"4B.—

(1) Subject to the provisions of this paragraph, the value of the interest to be held by the tenant under the new lease is the amount which at the relevant date that interest (assuming it to have been granted to him at that date) might be expected to realise if sold on the open market by a willing seller (with the owner of any interest superior to the interest of the tenant not buying or seeking to buy) on the following assumptions—

(a) on the assumption that the vendor is selling such interest as is to be held by the tenant under the new lease subject to the inferior interests to which the tenant's existing lease is subject at the relevant date;

(b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;

(c) on the assumption that there is to be disregarded any increase in the value of the flat which would fall to be disregarded under paragraph (c) of sub-paragraph (1) of paragraph 4A in valuing in accordance with that sub-paragraph the interest of the tenant under his existing lease; and

(d) on the assumption that (subject to paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which any interest inferior to the tenant's existing lease at the relevant date then has effect.

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made in relation to particular matters 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 interest to be held by the tenant under the new lease might be expected to realise if sold as mentioned in that sub-paragraph."

The evidence

8. We now summarise the evidence given to us by the expert witnesses.

Evidence for the appellant

Ms Tolgyesi

9. In her expert report dated 17 September 2013 Ms Tolgyesi contended that the appropriate relativity of the value of the proposed extended lease of the property of 138 years to the value of the notional freehold interest with vacant possession was 95%. She considered that the property was effectively a house and would be perceived as such by the market. Her evidence comprised six elements which (following alterations made during the hearing) were as follows.

10. First, Ms Tolgyesi considered whether the "no Act world" meant that the 1993 Act did not apply *solely to* the subject property, or whether the Act did not apply to *any* property – meaning that evidence of transactions under the Act had also to be disregarded. She contended that Schedule 13 of the 1993 Act was to be read that the Act was only to be disregarded in respect of the subject property. In other words the assumption to be made was that the subject lease was incapable of enfranchisement but that long leases of other properties – on the respondent's estate and elsewhere - were susceptible to enfranchisement.

11. She said that Mr Ryan's evidence at the LVT was that there were virtually no freehold houses on the Howard de Walden estate ("the estate") – and that the LVT took this point as part of their decision. Ms Tolgyesi said that her researches showed that there were "at least" 107 freehold houses on the estate. The respondent had, following an order from the Tribunal, produced a schedule of 107 properties, She considered there were at least 107 because the respondent had only provided evidence of houses purchased by enfranchisement and that there may be others that had been sold voluntarily. In giving evidence, she said that of the 107 houses, 32 have been enfranchised as part of a block, leaving 75 in single ownership. Of those, Ms Tolgyesi estimated (using a variety of methods including promap and Google street view) that 43 appeared to be less than 2,500 ft^2 in size. In order to estimate how many of those houses would have been available on the market at the valuation date, Ms Tolgyesi adopted a percentage of 12% (after adjusting for the non-mortgage dependent nature of the PCL market in comparison with a published average national figure of 9% in 2008/09). She therefore estimated that there would have been approximately 6 houses available on the estate to the hypothetical purchaser of the subject property at the valuation date. In cross-examination she accepted that this figure would more likely fall in the range of 2 to 3.

12. Widening her search to PCL, she carried out a "Lonres" search (accepting in cross examination that Lonres would feature the vast majority of houses available) and considered that there would have been approximately 40 houses available to the hypothetical purchaser at or around the valuation date.

13. Secondly, Ms Tolgyesi considered sales of freehold and long leasehold houses within the estate. Appendix G to her report was subject to alteration during the hearing, but the final version comprised a schedule of 37 properties within the estate that had been sold between December 2000 and May 2012 – 15 freehold and 22 long leasehold. Some properties had been sold more than once during that period and consequently the total number of transactions during that period was 42.

14. Ms Tolgyesi made various adjustments to her schedule. For each of those properties that benefited from a garage, she deducted a spot figure of £75,000 but she accepted in cross examination that there was an inconsistency created by making this deduction but then dividing the resultant net figure by the gross internal area of the property including that of the garage. There were subsequent adjustments ranging from -5% to +10% for condition and +5 to +15% for additional features such as terraces or a swimming pool.

15. Using the Savills prime central London index, each transaction was then adjusted for time, resulting in fully adjusted sales rates per ft^2 on a long leasehold and freehold basis. The average relativity of long leasehold to freehold was 101.77%.

16. Ms Tolgyesi originally made subsequent adjustments by excluding outliers, although she accepted during cross examination that this was inappropriate with the exception of those for size. After excluding the two largest and two smallest properties, the relativity reduced slightly to 101.2%. She then reduced the table to include only those ten transactions that were within 12 months before and after the valuation date of April 2011 which resulted in a lower overall relativity of 91.86%. Ms Tolgyesi then made a further reduction by removing the largest and smallest property to arrive at a relativity of 87.44% - from a pool of eight properties equally divided between freehold and long leasehold. Following this exercise, Ms Tolgyesi considered that the fully adjusted long leasehold relativity range lay at 87.44% - 100.2%.

17. Thirdly, Ms Tolgyesi considered a "principled approach" to leasehold relativity. This approach had been developed by the partners of her firm and the principle behind the approach was to construct a graph by using two fixed data points being 0% relativity at zero years' lease length and 98% relativity at a lease length of 100 years (which Ms Tolgyesi considered to be the generally accepted level as set out by the Tribunal in *Earl Cadogan v Betul Erkman* [2011] UKUT 90 (LC)), and using a constant decay rate (or discount rate) over the term. Using a generally adopted net present value-type formula, these parameters resulted in a decay rate of 3.99%.Whilst in her expert report Ms Tolgyesi said that the principled approach could be used for any given lease length, she said during cross examination that this was only the case for unexpired terms of up to 100 years. Beyond that, she adopted the Tribunal's approach in *Erkman*.

18. Fourthly, Ms Tolgyesi considered the "Gerald Eve graph". This was created in 1996 by the firms John D Wood and Gerald Eve to assist in advising on proposed lease extension premiums. The Gerald Eve graph (as it was known following John D Wood's withdrawal from the joint graph and subsequent publication of their own graph) formed part of the RICS publication "Leasehold Reform: Graphs of Relativity" (the RICS Report) published in October 2009 in response to the Tribunal's comments in *Coolrace Ltd & Others* [2012] UKUT 69 (LC). It is not in dispute between the parties

that the graph is based upon some 200 data points with over 90% being in respect of houses but that there was no house settlement evidence at leasehold terms of over 90 years. Ms Tolgyesi compared the Gerald Eve graph with her own principled approach and said that they were closely matched until a lease length of around 65 years following which the Gerald Eve graph has various breaks whilst the principled graph rises smoothly. Ms Tolgyesi said that if the Gerald Eve graph was internally consistent it would produce relativity of 94% or thereabouts at 100 years unexpired term.

19. In evidence, Ms Tolgyesi confirmed that she had used the principled graph and commented on the Gerald Eve graph as a result of the respondent's valuers using it at the LVT hearing. However she confirmed to the tribunal that these graphs were of secondary use, as a cross-check, and that market evidence was more reliable in determining relativity.

20. Fifthly, Ms Tolgyesi considered the offer made by the appellant to purchase the freehold interest. This was an open offer of £400,000 in March 2012, subsequent to the LVT determining the long leasehold extended premium at £343,781 (sic – actually £343,786) but whilst the subject appeal to the Tribunal was live. The offer was refused but Ms Tolgyesi considered a reasonable explanation of the offer was that the value to the respondent of the freehold interest following lease extension exceeded £56,219 (based on her £343,781); alternatively that on the respondent's valuation the appellant had offered 70.70% of the marriage value or, on her own figures, virtually the whole of the marriage value. Ms Tolgyesi said that as a percentage of the freehold interest, the amount offered of £56,219 (based on her £343,781) represented a difference of 2.84% on the Respondent's figures and 4.84% on her figures. She concluded that the offer suggested a relativity range of 94.32% to 97.16%, depending upon whether the uplift of £56,219 represented 50% or 100% of the available marriage value.

21. Finally, Ms Tolgyesi considered a common sense approach to the difference between a freehold house and a long leasehold house. She contended that the market would always expect flats only to be available on a long leasehold basis but that in respect of houses many purchasers would expect that the property would be available on a freehold basis. Ms Tolgyesi outlined the more extensive obligations that run with a leasehold property than with a freehold, she said that a leasehold investment is a wasting asset whereas a freehold is not and that many buyers would have emotional or psychological considerations which may deter them from purchasing a long leasehold property rather than a freehold. She said that the majority of buyers in prime central London were overseas buyers and that to them the concept of having a landlord would imply a blemish on their ownership.

22. In summary Ms Tolgyesi accepted that there was scope for debate about exact arithmetical differences and that whilst she considered that 1 to 2% (as a reduction from the freehold value to reflect long leasehold) was commonly accepted for flats, her instinct was that for houses she would deduct 5% to provide 95% relativity.

23. At the end of her evidence Ms Tolgyesi was asked certain questions in relation to flying freeholds. She said that she was aware that flying freeholds were thought of as quite risky (because of the potential difficulty in dealing with physical problems) and that some purchasers and some mortgage companies would not accept a flying freehold.

Evidence for the Respondent

Mr Ryan

24. In his expert report of 18 April 2013 Mr Ryan referred to his experience as a residential estate agent in the central London market since the 1970s, and commented that he had operated in a pre- and post-1993 Act world. Mr Ryan had maintained a tariff of relativity which he said was similar to the Gerald Eve graph although his document was no longer available. He said that in his experience long leasehold interests with over 75 years unexpired would be marketed and subsequently sold at the same price as a very long lease/freehold on the basis that the market in the central London was wide and even overseas buyers, who may ordinarily be resistant to the principle of leasehold tenure, had to accept it if they want to live in the best central London locations. Mr Ryan made no differentiation between houses and flats.

25. He said that a lease of 138 years or thereabouts would have been considered a very long lease indeed and at the upper end of all leasehold properties available in the market. He considered that this would be priced, and purchased in the market, at more or less the same figure as if it were freehold.

26. Mr Ryan said that he had practised enfranchisement work for the last 14 years and could not recall agreeing relativity, whether for houses or flats, for a term of 138 years at less than 99% of the freehold value. He commented that he could not recall this element of the valuation being an issue and that it was normally one of the easiest "valuation inputs" to agree whether acting for landlord or tenant.

27. Mr Ryan commented that Ms Tolgyesi's case appears to be that a purchaser would be "disappointed" with a long leasehold interest of the subject property (although he accepted in cross examination that this term had not been used). He considered this to be wrong because a purchaser would be likely and willing to invest large sums in acquisition and refurbishment in the safe thought that future appreciation of the value was likely.

28. In respect of his thoughts on the "no Act world" Mr Ryan's written evidence was slightly vague as to whether or not this applied to only the subject property or to all comparable properties but in providing evidence he confirmed that the "no Act world" would only apply to the subject property – a concept he termed the "no Act bubble". On the basis of the "no Act bubble" Mr Ryan remained of the view that a leasehold house with an unexpired term of 138 years would achieve a price that represented 99% of its freehold value. In support of this contention he identified two transactions of what he considered to be comparable properties. These were the sale of 4 Oxford Square W2, and 15 Cambridge Square W2, both on the Church Commissioners' Hyde Park estate.

29. 4 Oxford Square was a house of 2,002 ft^2 built on the roof slab of an underground car park and consequently, like the subject property, was not enfranchisable on a freehold basis. It was sold on a lease of 81.87 years unexpired with the benefit of a notice of claim in February 2011 for £1,610,000, equating to £804 per ft^2. 15 Cambridge Square was a house of 3,328 ft^2 sold on a freehold basis in March 2011 for £2,700,000 equating to £811 per ft^2.

30. In order to analyse relativity Mr Ryan compared the two transactions. 4 Oxford Square was subject to several adjustments: for date by adjusting the sale price using the Savills central houses index which produced an adjusted sale price as at March 2011 of £1,641,128 (£820 per ft^2); for size by 5% to allow for quantum (2,002 ft^2 compared with 3,328 ft^2) to arrive at an adjusted rate, allowing for date and size, of £779 per ft^2.

31. Compared with the sale price of 15 Cambridge Square (£811 per ft^2 on a freehold basis) this resulted in a relativity of 95.99% for the 81.87 year unexpired long leasehold interest of 4 Oxford Square. He noted that, at 81.87 years, the Gerald Eve relativity was 93.43% and the Savills relativity was 92.96%.

32. In cross examination, Mr Ryan accepted that he should have adjusted the rate to reflect that the price paid for the 81.87 years reflected the benefit of rights under the Act and that a notice under section 42 of the 1993 Act had been served – meaning that no marriage value would be payable as part of the enfranchisement calculations. He discussed a range of 5-10% but settled on 5% to reflect both the Act rights and the notice. The total deduction for quantum, rights under the Act and the benefit of the notice was 10%, reducing the adjusted rate to £738 per ft^2 equating to a relativity of 91%.

33. In his expert report Mr Ryan undertook a second exercise to consider the relativity following the lease extension of 4 Oxford Square, extending the term to 171.87 years. The price paid for the extended lease was £45,000. Mr Ryan added this to the original purchase price of £1,610,000, and carried out similar adjustments for date and quantum as above to arrive at an adjusted rate of £801 per ft^2 which when compared with the freehold price of £811 per ft^2 represented a relativity of 98.67%. He said this was in line with the Gerald Eve and Savills graphs for a term of 171.87 years, each of which showed a relativity of 99%. In cross examination, he did not consider it appropriate to make any adjustment to the price of 4 Oxford Square to reflect the benefit of the Act when considering the 171.87 year lease.

34. During examination in chief Mr Ryan was asked to contemplate a scenario where four almost identical adjoining houses were available for sale. One was a conventional freehold; the second was a "flying" freehold as a result of being in part undersailed by an adjoining property; the third was a conventional long leasehold with 138 years unexpired; and the fourth was a long leasehold, again 138 years unexpired, but in part undersailed by an adjoining property. In respect of value, Mr Ryan said that he would expect, on a rate per ft^2 basis, that the conventional freehold would sell for 100%, and that the other three would each sell for 99%. In respect of timing, he expected the conventional freehold so sell first, the "flying" freehold would sell next, the conventional long leasehold to sell third, and the undersailed long leasehold to sell last. During cross-examination, he went on to say that whilst prospective purchasers of the undersailed and long leasehold properties may initially offer less that 99%, the properties would eventually sell at 99% owing to the scarcity of PCL properties and that the vendor would generally have the "whip hand".

35. Also during cross-examination, he was asked to consider a hypothetical situation involving two identical properties – one freehold and one held on a long lease with 138 years unexpired. If acting

for a purchaser of the long leasehold property, at a purchase price of £950,000, he accepted that a purchaser would be willing to pay a further £40,000 for the freehold property – although he commented that the long leasehold property would also sell for around £990,000 owing to the general demand for property

36. In summary he could think of no reason why the extended lease value of the subject property should be anything less than 99% of the agreed unimproved freehold interest value of £1,980,000.

Mr Carter-Pegg

37. Mr Carter-Pegg's first expert report was dated 18 April 2013 and was supplemented by a second report dated 25 October 2013 (amended during the course of the hearing).

38. In his first report, Mr Carter-Pegg noted that the Tribunal's decision in *Erkman* included the following:

> "In our opinion the following range of relativities is appropriate: leases with unexpired terms of 100 to 114 years - 98%; 115 to 129 years - 98.5% and above 130 years - 99%."

39. He said that *Erkman* made no distinction between houses and flats and that the Tribunal's approach is supported by his own firm's relativity graph. Applying the guidance to the subject case, Mr Carter-Pegg noted that a relativity of 99% should be adopted for the calculation of the long leasehold value for a term of 137.98 years.

40. Mr Carter-Pegg submitted a copy of the RICS Report, and said that it included (among others) "no-Act world" graphs of relativity in respect of transactions within Prime Central London (PCL) maintained by a number of highly regarded specialist firms. Each firm's graph had a similar curve, starting at 0% relativity for zero years unexpired, and rising in a convex curve towards 100% at 100 years unexpired and greater. Mr Carter-Pegg admitted that the graphs were a line of best fit and that individual data points may be slightly above or below that line.

41. Some of the graphs had been updated since their publication in the RICS Report. Mr Carter-Pegg commented on the various graphs as follows.

42. In respect of the W A Ellis graph, originally published in 2001, the data used was in respect of transactions from the mid-1980's onwards of approximately 200 houses in Mayfair, Belgravia, Knightsbridge and Kensington & Chelsea. Relativity at 100 years was shown as 97%. Mr Carter-Pegg produced a graph showing that an extrapolation of the unexpired term to 137.98 years would produce a relativity of at least 99%.

43. The Knight Frank graph adopted data from 2002 onwards comprising settlement evidence, LVT and Lands Tribunal decisions, in respect of both flats and houses over 75% from PCL. The Knight Frank graph indicated that the appropriate relativity at 100 years unexpired was 99%. Mr Carter-Pegg commented that the Knight Frank graph was updated in June 2011, and the relativity at 100 years remained at 99%. He concluded that the relativity at 137.98 years would be at least 99%.

44. Cluttons were the only firm that produced separate graphs for houses and flats. Their graph for houses has been maintained since 1997 and their most recent graph showed settlement evidence for approximately 150 houses in NW8, W9, St John's Wood and Maida Vale. The graph extended to 94 years where relativity is shown as 96%. Mr Carter-Pegg had extrapolated the graph to show that relativity for an unexpired term of 110 years and above would be at least 99%.

45. Like Ms Tolgyesi, Mr Carter-Pegg explained the background to the John D Wood/ Gerald Eve graph, and noted that the version of the graph within the RICS Report only showed unexpired terms up to 100 years. Mr Carter-Pegg submitted the data behind the graph which showed that the relativity for a term beyond 130 years would be 99%.

46. John D Wood's graph for PCL was published in 2004, covering transactions, settlement evidence, LVT and Lands Tribunal Decisions in respect of 930 flats and houses from 1978 to 2004. The firm concludes that the relativity for a term of 100 years unexpired was 100%.

47. Charles Boston's graph used data from 1993 onwards in respect of settlement evidence, transactional data and LVT decisions in respect of more than 120 flats and houses in both PCL and Greater London. The graph shows that for an unexpired term of 95 years, the relativity was 99%. Mr Carter-Pegg concludes that for a term of 137.98 years the relativity would be at least 99%. During cross examination, Mr Carter-Pegg accepted that he had limited knowledge of the data behind many of the graphs, of the split of settlement data to others and of the split of houses to flats.

48. Ms Tolgyesi's firm, Beckett and Kay, was part of the RICS working party and produced a graph for greater London and England which showed a relativity of 97% for unexpired terms in excess of 90 years. Mr Carter-Pegg produced a graph which showed the Beckett and Kay graph overlaid on the PCL graphs. He said that Ms Tolgyesi's contention at the LVT of a relativity of 78.23% for the existing lease (47.98 years) was at a higher point than the majority of the other graphs and that her contention for 95% at 137.98 years was at a lower point. Mr Carter-Pegg said that the notes supporting the Beckett and Kay graph do not suggest that a different relativity should be applied to houses than to flats.

49. Mr Carter-Pegg said that whilst the subject property had many characteristics that are typical of a house, it was a flat for the purposes of enfranchisement legislation and that the unimproved freehold value of the property had been agreed on that basis.

50. Mr Carter-Pegg now considered that the deferment rate of 5% to be incorrect, since the property was unlikely to have any of the management concerns alluded to in *Cadogan v Sportelli and*

others [2007] 1 EGLR 153. However he accepted that a 5% deferment rate had in this case been agreed between the parties, that no change to this deferment rate had been agreed with Ms Tolgyesi and that it was not part of this appeal.

51. Finally, Mr Carter-Pegg produced a Statement of Agreed Facts for an LVT Hearing in respect of 17 Lees Place, W1, where Ms Tolgyesi's firm were acting. He said that 17 Lees Place was similar to the subject property in that it would be a house but for enfranchisement purposes it is a flat since part of the property lies above another property. He said that the position adopted by Beckett and Kay in that case (that the relativities agreed were 98% for a term of 98.16%, 98% for a term of 107.77 years, and 99% for a term of 164.52 years) is inconsistent with Ms Tolgyesi's approach in this case.

52. In conclusion, Mr Carter-Pegg summed up his first report by saying that none of the data produced by the six firms that contributed to the RICS Report indicate that for a term in excess of 130 years the relativity should be less than 99%, and that none of the graphs that provide data from flats and houses suggest that a lower relativity should be applied to houses than flats.
Mr Carter-Pegg's supplementary report was dated 25 October 2013 but was amended during the course of the hearing. He confirmed that the Gerald Eve graph had a lower volume of house settlement data at the upper end of the graph, and that from 90 years there was no house settlement data.

53. Mr Carter-Pegg produced a graph which showed various relativity curves, adopting the principled approach (that a curve could be constructed if two points along it were known and a constant decay rate was assumed). The curves shown were: the Gerald Eve 1996 graph showing a relativity of 99% at 138 years; the Beckett and Kay principled approach showing a relativity of 93.73% at 100 years – then extended using the same decay rate of 2.80%; the Beckett and Kay principled approach showing a relativity of 95% at 138 years; and the Beckett and Kay principled approach showing that if the relativity at 47.98 years was 78.23% (as Mr Carter-Pegg said Ms Tolgyesi was inferring) then at 138 years the relativity would be 98.75% using the same decay rate.

54. Mr Carter Pegg said that if the principled approach was correct, on her own evidence Ms Tolgyesi's contentions were inconsistent – in that if her 95% relativity at 138 years was correct, the interpolated relativity at 47.98 years would be 64.70% (as opposed to 78.23%). Similarly, adopting 78.23% at 47.98 years, and extrapolating to 138 years produces a relativity of 98.75% (as opposed to 95%).
The second element of Mr Carter-Pegg's supplementary report was in respect of the availability of small freehold houses on the estate. He replicated Ms Tolgyesi's search on Lonres over the period September 2010 to the valuation date of April 2011. This produced 116 sales, of which only two were on the estate – 34 Devonshire Mews West and the subject property. He therefore concluded that at the valuation date it would have been unlikely that there would have been more than two small freehold houses available.

Submissions on behalf of the appellant

55. On behalf of the appellant Mr Heather advanced the following submissions, although not in exactly the same order as we summarise them hereunder.

56. He submitted that an important question is whether the subject property is properly to be considered as a house or a flat. He drew attention to section 2 (2) of the Leasehold Reform Act 1967 and pointed out that under that Act the subject property was recognised as a house, but as a house which was excluded from being "a house" for the purposes of that Act, namely it was a house that was not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house. To a hypothetical purchaser of residential property on the valuation date the subject property would appear as a house rather than a flat. The hypothetical purchaser of the subject property would be a purchaser who was looking for a house rather than a flat.

57. Flying freeholds of flats are effectively unobtainable. If a purchaser wishes to purchase a flat the purchaser will need to purchase the lease of the flat. There is no pool of freehold flats for the purchaser to choose from if the purchaser wants to avoid the burdens of leasehold covenants. There are no an open market transactions involving the sale of freehold flats to provide comparable evidence as to the FHVP value of a flat. In distinction to this, freehold houses are readily obtainable. The hypothetical purchaser who is being offered a 138 year lease of the subject property will know that he could instead purchase a freehold house, namely either the freehold of the subject property (if available) or the freehold or enfranchiseable leasehold of some other house on the respondent's estate or nearby. There is thus a real and practical difference and a real choice to be made between a freehold of a house and a leasehold of a house. In respect of flats the only interest effectively available is a leasehold -- such that the difference in value between the FHVP value of a flat and the very long leasehold value of a flat is a notional figure which it is understandable is fixed at a sum such that the very long leasehold value of the flat is 99% of this FHVP value of the flat. In contrast, there is a real (not notional) difference between the FHVP value of a house and a very long leasehold value of a house.

58. There was debate at the hearing as to the number of freehold houses (or long leasehold houses with the potential for enfranchisement) available for sale on the respondent’s estate during the period (say six months) leading up to the valuation date. The precise answer to this question does not matter. What matters is that there were freehold houses (or enfranchiseable long leasehold houses) available on the estate, or on neighbouring estates, in the period leading up to the valuation date. The hypothetical purchaser when deciding how much to bid for the 138 year lease of the subject property would therefore know that he had a real option of seeking a freehold house elsewhere. The hypothetical purchaser would therefore diminish his bid for the 138 year lease (i.e. diminish it below the FHVP value of the subject property) to reflect the perceived disadvantages of being a leaseholder rather than a freeholder. The LVT was in error in approaching the matter on the basis that freehold interests were simply not available within the respondent's estate and that the hypothetical purchaser did not have this choice of either buying the 138 year lease of the subject property or buying a freehold (or enfranchiseable long lease) of some other house.

59. Mr Heather drew attention to Ms Tolgyesi's evidence regarding the adverse way in which a hypothetical purchaser would view a lease as compared with a freehold, bearing in mind in particular the extensive and burdensome covenants contained in the 138 year lease. He drew attention to

various covenants including restrictions of a minor but detailed nature (e.g. regarding dustbins and flowerpots), restrictions on where insurance can be placed, restrictions on the creation of derivative interests and a provision requiring the lessee to allow the landlord to enter on the subject property in certain circumstances. Ms Tolgyesi's evidence was that the restrictions and burdens contained in a lease would be seen as disadvantageous by a hypothetical purchaser. That evidence was in accordance with common sense.

60. Mr Heather submitted that the correct approach for the purpose of seeking to assess the relevant relativity figure is to look at market evidence, see *Arrowdell Ltd v Coniston Court (Hove) Limited* LRA/72/2005 at paragraph 39. Graphs must never be a primary valuation approach. The market evidence presented by Ms Tolgyesi in her appendix G was a thorough and compelling approach to the assessment of relativity by reference to actual market transactions. It was true that Ms Tolgyesi had accepted that she had been in error regarding her treatment of garages by failing to deduct the floor area of the garage from the GIA before dividing the GIA into the sale price (after deduction of the spot figure of £75,000 for the garage), but he pointed out that the correction of this error (so he was informed by Ms Tolgyesi) would only alter the relativity figure she obtained by about 0.3%. He submitted that Ms Tolgyesi's preparedness to agree that the outliers in value should not be excluded from appendix G confirmed her reliability as an expert witness. He submitted that Ms Tolgyesi was correct to limit the comparables being considered to those within one year of the valuation date because the greater the time span the less reliable the adjustment. On this basis a relativity of 91.86% (or 87.44% if the outliers for size were excluded) was obtained, which supported her case. If an average between the figure given by the whole table (101.2%) and the 87.44% was taken, the result was close to her 95%.

61. Mr Heather drew attention to Mr Ryan's evidence regarding the example of four effectively identical properties (save that two of them included an element which oversailed another property) and his evidence that property A (the freehold without oversailing) would sell first at effectively 1% above the price of the others, and that the others (property B the freehold with oversailing, property C the long lease without oversailing, and property D long lease with oversailing) would sell for the same price, but in the order first B then C then D because the attractiveness would diminish from B through C to D. He submitted that this evidence was unpersuasive because it seemed to involve the same value being given to properties which, on Mr Ryan's own appraisal, were of different attractiveness to the market. Mr Heather also drew attention to Mr Ryan's evidence where in cross-examination he agreed that if he were advising a client who was choosing between two identical houses, one offered for sale freehold and the other on a very long lease, he would advise his client that the freehold was more attractive and that, supposing that the leasehold was priced at £950,000, the client would (or at least might) pay an extra £40,000 or £50,000 to get the freehold (although Mr Ryan added in his evidence that someone would then come and pay the same amount for the house on the very long lease). Mr Heather submitted that this recognition that a substantial extra amount would be paid for the freehold reflected reality and was an important point in support of the appellant's case.

62. As regards the use of graphs:

(1) He repeated his submission that the use of graphs could only be as a secondary rather than a primary valuation approach.

(2) He drew attention to the Cluttons graphs (which he accepted are based upon settlement figures) which include a separate graph for houses. He pointed out that for the entire period for which there was a separate graph for houses and flats the relativity was higher for flats throughout that period (and was 3% higher and widening at the time, namely 75 years, when the graph for flats ceased).

(3) He pointed out that when the Cluttons graph for houses ceased at 90 years the relativity was 94.1%. He submitted that there would be only a modest increase from 90 years to a very long lease such as 138 years (see the measure of the increases recognised by the Upper Tribunal in *Earl Cadogan v Erkman* [2011] UKUT 90 (LC), namely 98% for leases with unexpired terms of 100 to 114 years, 98.5% for 115 to 129 years and 99% above 130 years).

(4) He reminded the Tribunal of Ms Tolgyesi's criticisms of the other graphs. He also reminded the Tribunal of the evidence given by Mr Carter-Pegg before the LVT to the effect that he could not rely upon any of the graphs save only for the Gerald Eve graph. Mr Heather contrasted that evidence with Mr Carter-Pegg's apparent reliance upon graphs in the present appeal. He reminded the Tribunal of Ms Tolgyesi's criticisms of the Gerald Eve graph and in particular the evidence that it did not contain any settlement material regarding houses for lease periods beyond 90 years and that the greater part of the data is settlement data.

63. As regards the pair of properties, one in Oxford Square and one in Cambridge Square, relied upon by Mr Ryan, Mr Heather pointed out that Mr Ryan's result is heavily dependent upon an adjustment by him (i.e. a 5% adjustment to recognise that a higher value per square foot may be applicable for a substantially smaller property), such that, in so far as there is substance in the criticisms by the respondent of Ms Tolgyesi's adjustments in her appendix G, the same criticism can be made against this exercise by Mr Ryan. He also pointed out that these two properties were on a different estate in respect of which Mr Ryan did not claim special knowledge, that Mr Ryan had not made an allowance for the value of the 1993 Act (which must have some value even in respect of a lease whose unexpired term is 171 years), and that in calculating the price for the 171 year lease a sum of £45,000 has been added in respect of the premium paid but there is no information as to the basis of the calculation of the premium.

64. As regards the point as to whether, bearing in mind that the subject property includes a substantial element of oversailing above another property, the hypothetical purchaser might see an advantage in holding the subject property upon the 138 year lease (which includes the grant of easements including rights of entry in respect of the excluded basement area) as opposed to holding it freehold and thereby owning a property which was in part a flying freehold, Mr Heather submitted:

(1) Three experienced valuers had considered this case in detail over a substantial period of time and none of them had raised this point as being relevant to any aspect of valuation. The point had only emerged from a question from the Tribunal. Despite the fact that the respondent now relied upon the point, it could carry little weight because if it had been a point of substance the valuers would have raised it earlier.

(2) In any event the purchaser of the freehold house of the subject property would be advised that the lack of ownership of the excluded basement area (over which the subject property oversails) should not cause any significant problems bearing in mind the provisions of the Access to Neighbouring Land Act 1992.

Submissions on behalf of the respondent

65. On behalf of the respondent Mr Pryor asked the Tribunal to note that the respondent wished to reserve a legal point as to the extent of the disregard to be made in accordance with schedule 13 paragraph 4B(1)(b), but he accepted that for the purposes of the present case the Tribunal should proceed upon the basis that the only assumption to make was that the 1993 Act conferred no right to acquire any interest in or new lease of the subject property, such that the valuation exercise fell to be performed recognising that the 1967 Act and the 1993 Act did operate in respect of other properties on the respondent's estate and elsewhere. Having reserved this point, Mr Pryor advanced the following submissions.

66. He drew attention to the fact that, while the subject property may look like a house, there is in fact this overhanging by a substantial proportion of the ground and upper floors above property which is not within the title of the subject property. In effect the subject property includes a substantial element of flying freehold. This feature is fundamental to the present case and justifies the assessment of the subject property as in effect constituting a flat rather than a house normally so called. The FHVP value of the subject property has been agreed and is the value for this property as it is -- i.e. recognising that it includes a flying freehold. Bearing in mind that the subject property does include a substantial element of flying freehold, it is more appropriate for it to be treated as a flat and offered to the market on a long lease (including the easements in respect of the excluded basement area) rather than being offered freehold. The easements contained in the lease give the owner of the lease clear and more easily exerciseable rights than would be enjoyed by a freehold owner of the subject property who, if some problem arose in connection with the excluded basement area, would have either to come to some agreement with the owner of the excluded basement area or would have to rely upon the Access to Neighbouring Land Act 1992. Reliance upon this Act is complex and requires application to the court with potential liability for costs.

67. Mr Pryor accepted that none of the three valuers had considered in their reports whether concern regarding a flying freehold might point towards there being an element of advantage for the owner to hold the subject property on a lease (with the grant of easements) rather than as a freehold. However he submitted that this was a consideration that was clearly in the mind of the respondent's experts.

68. He accepted that the proper approach is to accord primacy to market evidence, but this is subject to the qualification that such an approach depends upon whether the market evidence is of sufficient quality to justify this. The two main categories of market evidence presented in the present case were Ms Tolgyesi's appendix G and Mr Ryan's matched pair of properties.

69. As regards Ms Tolgyesi's appendix G he submitted that such substantial criticism can properly be made of this that it can carry little weight namely:

(1) Substantial adjustments have been made by Ms Tolgyesi to many of the transactions in order to allow for the differences between the properties. Her comment in paragraph 3.2.3 of her statement is important:

> "Of course, it is possible that some of my adjustments are too conservative or too generous. However, considering the overall mass of the data, these possible errors probably even out at the end when averaging them."

This comment may be justified when viewing the total transactions in appendix G. However when so viewed appendix G gives a relativity of over 100%, thereby supporting the respondent's case rather than the appellant's.

(2) Appendix G only gives a figure substantially lower than the 99% contended for by the respondent once Ms Tolgyesi's final adjustment is made, namely removing all transactions save those within one year of the valuation date. However this results in only 10 transactions remaining, in respect of which her comment that errors in the adjustments "even out" over the mass of the data can no longer properly apply. Mr Pryor relied upon Mr Ryan's evidence that if seeking to extract information from only 10 transactions it will be necessary to examine each transaction in much greater detail in order to justify the making of substantial adjustments based upon personal judgement.

(3) The Tribunal should find unimpressive the fact that Ms Tolgyesi abandoned one of the principal adjustments she made (namely exclusion of outliers on the basis value) and that her exclusion of outliers on the basis of size left in certain properties which were further removed in size from the subject property than some that were excluded. The Tribunal should also be concerned by the erroneous approach made by her in respect of an adjustment for garages.

(4) The figures for relativity obtained by Ms Tolgyesi after making her adjustment for time did not in any event support her case -- they showed a relativity of 91.86% or 87.44% which were substantially removed from 95%.

70. As regards Mr Ryan's pair of properties, he submitted that this was a useful exercise and involved only one substantial adjustment, namely that to allow for the difference in size between the two properties (an adjustment which it may be observed Ms Tolgyesi did not make in appendix G). This exercise showed a relativity of 98.67%, supporting the respondent's 99% and contradicting the appellant's 95%.

71. As regards the use of graphs, Mr Pryor accepted this could not properly constitute the primary valuation approach. However the following points could be noted from the graphs:

(1) All of the graphs in effect supported the respondent's contention of a 99% relativity rather than the appellant's contention of a 95% relativity. The graphs all showed a

relativity higher than 95% at 100 years, and there could be no suggestion that relativity actually decreased as the lease length became longer than 100 years.

(2) In so far as weight was placed upon the Cluttons graph for houses, this was 94.1% at 90 years and 96% at 94 years, which is as far as the graph extends. A sensible extrapolation of this graph leads to a conclusion of a relativity of about 99% at 138 years.

(3) The Tribunal was invited to find unimpressive Ms Tolgyesi's apparent support for what she called the "principled approach" of creating and extending graphs at any lease length in paragraph 1.5.4 of her statement, when compared with her evidence (not foreshadowed in her statement) that the principled approach could not operate beyond 100 years.

72. No reliable assistance could be obtained from analysing the appellant's offer for the freehold of the subject property, bearing in mind it was made in circumstances where it was known that the respondent would not sell the freehold and it was also known that the parties were involved in a case which would be coming up before the Upper Tribunal.

73. As regards Ms Tolgyesi's evidence in Part 7 of her statement regarding the perception of the hypothetical purchaser, Mr Pryor pointed out that (as observed by Mr Ryan) the market is made up of numerous potential purchasers with differing approaches. While it is possible some persons may take the unenthusiastic view described by Ms Tolgyesi, others will not do so and it will be from within those others that there will be found that person who makes the highest bid and becomes the successful purchaser.

74. Mr Pryor commended to the Tribunal Mr Ryan's evidence regarding his experience as an agent practising in the market for many years including many years prior to the 1993 Act and prior to the enlargement of the scope of enfranchisement under the 1967 Act. Mr Ryan could never remember agreeing a sale of a very long lease of a house at less than 99% of the price that the house would have commanded freehold. It is true that during that period there was a genuine no Act world and that there may have effectively been almost a complete unavailability of freeholds on an estate such as the respondent's. However Mr Ryan's view remained valid for the purposes of the present valuation exercise.

75. As regards how many freehold (or enfranchiseable long leasehold) houses were in fact available at around the valuation date, Mr Pryor submitted that the information obtained by Mr Carter-Pegg from Lonres was the most reliable and showed that only two houses on the respondent's estate were available within the six months before the valuation date. Accordingly the hypothetical purchaser when negotiating the price of the 138 year lease of the subject property was not in the position of being able to use as a negotiating tool the existence of a large pool of available alternative freehold (or enfranchiseable) houses so as to seek a reduction in the price.

Discussion

76. We consider that it is of central importance in the present case to have the following matters firmly in mind:

(1) We are not concerned with a general question regarding the relativity between the FHVP value of a standard house (i.e. a house with no oversailing and hence no element of flying freehold) and the long leasehold value of such a standard house. Instead the relativity we are concerned with is the relativity between the FHVP value of the subject property and the value of the 138 year lease of the subject property.

(2) The subject property includes a substantial element of over-sailing, which is not what one would expect to find in a standard house.

(3) The FHVP value of the subject property at the valuation date has been agreed in the sum of £1,980,000. This is the agreed FHVP value of the subject property as it existed at the valuation date and it therefore takes into account the fact that the freehold includes a substantial element of flying freehold (i.e. the part of the subject property which over-sails the excluded part of the basement).

(4) It therefore follows that in so far as the inclusion within a freehold title of a substantial element of flying freehold is an unattractive element as compared with the freehold of a standard house (where there is no flying freehold and the owner is effectively master of the entire footprint of the building) this has already been allowed for in the agreed FHVP value.

77. We observe that the foregoing is a point which was raised by Mr Carter-Pegg in his original statement at paragraph 5.2 when he stated that if the subject property had not been under-sailed by another property then the agreed FHVP value would have been higher. We accept that if the subject property had not involved this element of over-sailing then the FHVP value would have been higher than the agreed figure of £1,980,000. It is not necessary for us to make a finding as to how much higher it would have been. We record however that Mr Ryan in his evidence, when dealing with his example of four effectively identical properties (see paragraph 33 above) gave his opinion that a freehold house without any element of flying freehold would fetch 1% more than an effectively identical freehold house but with an element of flying freehold.

78. Bearing in mind that the subject property includes the substantial element of over-sailing and that the agreed FHVP value already reflects the disadvantage of comprising a substantial element of flying freehold, we consider that it would involve an element of double counting to apply a relativity to this agreed FHVP value which was a relativity derived from a comparison between the FHVP value of a standard house and the long leasehold value of a standard house. This is because the agreed FHVP value of the subject property already takes into account the fact that, by reason of the flying freehold element, the owner of the freehold of the subject property faces such potential problems as are inherent with flying freeholds and does not enjoy such unfettered control over the subject property as would be enjoyed by the owner of the freehold of a standard house with no element of flying freehold.

79. We are unpersuaded by Ms Tolgyesi's argument that the hypothetical purchaser of the 138 year lease would decrease his bid substantially downwards from the agreed FHVP value to reflect the perception of being more restricted and being less a master of his own property than with a freehold. We take this view for the following reasons:

(1) Her analysis appears to us to be based upon a comparison between the relative freedoms/restrictions enjoyed by the freehold owner of a standard house (with no element of flying freehold) as compared with a long leasehold owner of such a standard house.

(2) It is true that under the 138 year lease the owner of the subject property will in some respects be subject to significantly greater control and enjoy less freedom than the owner of the freehold of the subject property. However where, as here, the property involves a substantial element of over-sailing we consider that there is a countervailing real advantage in a leasehold structure as opposed to a freehold. Flying freeholds are unusual and in general are less attractive to the market than an effectively identical property but without the element of flying freehold. A hypothetical purchaser of the subject property can be assumed to be someone who would take proper advice including legal advice. We conclude that such advice would point out that, bearing in mind that there was this over-sailing, there was an element of advantage in having a lease structure and the express grant of easements (see page 135 of the bundle) in respect of the excluded basement area rather than having to rely upon the Access to Neighbouring Land Act 1992 in the event that some problem arose in relation to the excluded basement area.

(3) We see force in Mr Ryan's evidence namely that the market for the long lease of the subject property at the valuation date is made up of a wide spectrum of potential purchasers. Some of these potential purchasers may, in agreement with Ms Tolgyesi, be concerned at the extent of the covenants and restrictions in the lease and the extent to which the owner will not be master of his own house. Such potential purchasers may in consequence substantially reduce their bid. However other potential purchasers will take a different view. It is from the latter pool of potential purchasers that the successful hypothetical purchaser will come.

(4) We agree that the LVT was in error in concluding that freehold interests "are simply not available" within the respondent's estate. However we note that ultimately all valuers agreed (and if they did not agree, we find) that there would only have been a limited number of freehold or enfranchiseable leasehold houses available for sale on the respondent's estate in the six months leading up to the valuation date namely between one and three. Accordingly this is not a case where the hypothetical purchaser would have been able to use as a powerful negotiating tool the argument that unless the price of 138 year lease was reduced he would and could without difficulty purchase a house elsewhere on the estate.

80. We accept that, as both the appellant's and respondent's experts agreed, the Tribunal should as a primary approach seek assistance from market evidence in so far as the quality of that evidence can properly assist. Accordingly we now examine what assistance can be obtained from the market

evidence which was laid before us, namely Ms Tolgyesi's appendix G and Mr Ryan's pair of properties.

81. Ms Tolgyesi has relied upon market transactions and has provided in her appendix G an analysis of some 42 transactions, 25 of these transactions involving the sale of a long lease of a house and 17 of these transactions involving the sale of the freehold of a house. We accept that in principle information obtained from a reliable analysis of truly comparable market transactions is the best evidence to guide this Tribunal in the relevant valuation exercise. However there are major difficulties with Ms Tolgyesi's analysis. It is necessary once again to remember exactly what it is that this Tribunal is seeking to identify, namely whether the relativity between the value of the 138 year lease of the subject property and the FHVP value of the subject property at the valuation date was 99% or 95% or somewhere in between. Ms Tolgyesi has sought to adjust information she has for the various transactions so as to give a value per square foot for each transaction adjusted to the valuation date and adjusted for differences perceived by her between the relevant comparable and the subject property. Her purpose is then to examine the value per square foot, so adjusted, for houses sold on a very long lease as compared with the value per square foot, so adjusted, for houses sold freehold so as to obtain a figure for relativity. However bearing in mind the precise nature of what is being attempted to be studied, namely a difference between a 95% and 99% relativity, it will immediately be apparent that the making of adjustments to each comparable transaction can have a critical and indeed determinative effect upon the answer. Thus the adjustments made by Ms Tolgyesi are made in 5% increments -- in some cases no adjustment is made but in others a 5% adjustment in others a 10% adjustment and in some a 15% adjustment is made. It will be seen that the size of the adjustments is greater than the difference (i.e a difference between 95% and 99%) which Ms Tolgyesi is seeking to measure. While this would not necessarily of itself prevent reliance upon such an analysis as Ms Tolgyesi seeks to perform, it would in our view prevent any significant weight being placed upon such an analysis unless there was clear evidence that the adjustments made by Ms Tolgyesi were soundly based and were not so coarsely grained as to obscure and influence (if not indeed provide) the answer which is sought to be found rather than reliably to reveal that answer.

82. Ms Tolgyesi has made adjustments for time (based on Savills' index for PCL houses), for garages (or lack of them), for condition, and for special features. As regards the adjustments for garages Ms Tolgyesi herself accepted that an error had been made in appendix G in that she had deducted a spot figure of £75,000 from the sale price of a property if it had a garage but had then, when seeking to work out what she described in column 14 as the raw rate per square foot, divided the sale price so reduced by a gross internal area which still included the area of the garage. Leaving that error on one side, we can see some substance in her comments in 3.2.3 of her statement when considering the results shown by the entirety of the comparables contained in appendix G, namely:

> "3.2.3 Of course, it is possible that some of my adjustments are too conservative or too generous. However, considering the overall mass of the data, these possible errors probably even out at the end when averaging them."

83. Thus it may well be that when looking at the totality of the 42 transactions this comment by Ms Tolgyesi is well made and any errors in the making of adjustments even out across this substantial number of transactions. However when the totality of the 42 transactions are examined this gives a relativity is of 101.77% -- i.e. much greater than the figure Ms Tolgyesi contends for and greater than

that contended for by the respondent. We note that one of the refinements which Ms Tolgyesi originally considered appropriate to make, namely the removal from appendix G of the outliers (as she described them -- i.e. the two highest and two lowest figures for both leasehold houses and freehold houses) she has now abandoned as being unjustified. The relativity only comes down to a substantially lower figure (indeed lower than the 95% contended for by Ms Tolgyesi) when the final adjustments as referred to in paragraph 3.2.8 of her statement are made. This involves examining either 10 properties (which gives a 91.86% relativity) or 8 properties (which gives an 87.44% relativity). However when one is looking at as few as 10 properties we consider that the effect of the adjustments made by Ms Tolgyesi and the question of whether they are truly justified becomes critical, because otherwise the end result will be substantially generated by the adjustments rather than by the true market evidence. On this point we observe that Ms Tolgyesi has not made a detailed external inspection of each of the comparables, she has adopted a spot figure for an adjustment for a garage, and she has used spot figures by way of adjustment for condition (depending as we understood it on whether the estate agents had described the property as improved or highly improved) rather than a figure based upon an actual appraisal of the state of the property and the attractiveness of its location and of any special features it may possess.

84. We accept Mr Ryan's criticism of appendix G, based upon his knowledge of many of the properties identified, from which he observed that the attractiveness of the locations stated varies, with some in quieter or more desirable areas than others. Whilst it is possible that location went some way to determining the price paid, the schedule would have been more reliable had there been an adjustment for location.

85. A further difficulty with appendix G is that there was no evidence before us to the effect that any of the transactions therein recorded involved houses with a substantial element of over-sailing. Thus the best that could be hoped from appendix G is that it would give an indication as to the relativity between the FHVP value of a standard house and the long leasehold value of a standard house. That however, as pointed out in paragraph 75 above, is not what we are concerned with. For the foregoing reasons we conclude that very limited assistance can be obtained from appendix G. We consider that some limited weight can be placed upon the figures shown on appendix G as a whole (i.e. taking into account all of the 42 transactions), but this supports the respondent's figure of 99% rather than Ms Tolgyesi's figure of 95%. We do not consider that any significant weight can be placed upon the figures obtained from appendix G after the number of comparables being considered has been narrowed down to only 10 or less.

86. As regards Mr Ryan's comparison between a pair of properties one in Cambridge Square and one in Oxford Square, we see force in Mr Heather's criticism of this comparison (see paragraph 62 above), especially the criticism that the answer obtained from the exercise greatly depends upon the correctness of the allowance made by Mr Ryan for size. This piece of evidence we find of limited weight, but it is some limited evidence supporting the respondent's case.

87. We note Ms Tolgyesi's reliance upon the open offer by the appellant to purchase the freehold. We do not consider that any significant weight can be placed upon this evidence. The offer was made in circumstances where (so we are satisfied) there was effectively no prospect that the offer for the freehold would be accepted (because it is not the policy of the respondent to sell the freehold unless

compelled to do so) and where it was known to the appellant that there was or was about to be a live dispute between himself and the respondent in proceedings in the Upper Tribunal as to the price payable for the extended lease. Ms Tolgyesi seeks to rely upon the amount of the appellant's offer for the freehold as evidence tending to demonstrate a lesser value for the 138 year lease -- thus if her argument were successful the appellant, by making this offer (which was never going to be accepted) would have improved his position by depressing the value of the 138 year lease. We do not consider that this offer by the appellant provides any sound guidance as to the value of the 138 year lease assessed in accordance with paragraph 4B of schedule 13.

88. We note the extent of Mr Ryan's experience as an agent in the market from the 1970s including practice within the area with which the present case is concerned. His experience includes a lengthy period of practice at a time when there was in reality a no Act world, because the 1993 Act and the 2002 Act had not been passed. We consider of importance his evidence that a lease of 138 years would have been considered a very long lease indeed and would have been priced at more or less the same figure as if it were freehold. We also consider of importance his evidence that he has practised enfranchisement work for 14 years and cannot recall agreeing relativity, whether for houses or flats, for a term of 138 years at less than 99% of the freehold value. We consider his evidence to carry weight and to give substantial support to the respondent's case that a 99% relativity is the appropriate figure.

89. The various graphs of relativities to which reference has been made in the evidence are only published for periods from 0 to 100 years, although information as to relativities beyond 100 years are available from Gerald Eve (bundle page 619) showing a relativity of 99% at 130 years and upwards. However the question in issue is in effect a question as to the limit value for this relativity as the lease becomes very long. We do not consider that any substantial direct assistance to this question can be obtained from these graphs. It is not merely a question of reading a figure from the very edge of a graph, it is a question of surmising what the figure would be if the graph was extrapolated to periods it does not purport to cover.

90. We do however accept that the graphs may be of some secondary assistance, by way of a check, once an appropriate relativity has provisionally been identified through some other methodology. We consider that Mr Ryan's evidence does provisionally identify an appropriate relativity of 99%. We accept Mr Pryor's submission that the graphs support a conclusion that 99% is the correct relativity and do not support a conclusion that 95% is the correct relativity, see the evidence summarised in paragraphs 40 to 46 above.

Conclusion

91. For the reasons set out above we prefer the evidence and arguments presented on behalf of the respondent to those presented on behalf of the appellant. We are unable to accept Ms Tolgyesi's evidence that the correct relativity between the FHVP value of the subject property and the 138 year lease value of the subject property is 95%. We remind ourselves that we are not confined to finding that the relativity is either 95% or 99%. It would in theory be open to us to find that the relativity lay somewhere between these figures. However we find that the evidence and arguments on behalf of the

respondent leads us to the conclusion that 99% is the correct relativity. This is the relativity which was adopted by the LVT in its calculation of the premium to be paid.

92. In the result therefore we dismiss the appellant's appeal.

Dated 28 November 2013

His Honour Judge Huskinson

P D McCrea FRICS