

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2014] UKUT 0087 (LC)  
UTLC Case Numbers LRA/135/2011, LRA/168 /2011, LRA/176/2011 (heard together)

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LEASEHOLD ENFRANCHISEMENT– flats and houses in prime central London – development potential – comparables – adjustments – valuation – development hope value – development value on reversion – appeals allowed in part – s. 9(1C) Leasehold Reform Act 1967 and s. 32 and Sch. 6 Leasehold Reform Housing and Urban Development Act 1993*

**IN THE MATTER OF APPEALS AGAINST THREE DECISIONS OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL**

**BETWEEN**

**(i) LRA/135/2011**

**TRUSTEES OF JOHN LYON'S CHARITY** **Appellant**

**and**

**KAVEH ALAMOUTI** **Respondent**

**(ii) LRA/168/2011**

**TRUSTEES OF JOHN LYON'S CHARITY** **Appellant**

**and**

**RED EARL LIMITED** **Respondent**

**(iii) LRA/176/2011**

**WENDY LYNN ALAMOUTI** **Appellant**

**and**

**TRUSTEES OF JOHN LYON'S CHARITY** **Respondent**

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**Re: (i) 70 Hamilton Terrace,  
London  
NW8 9UL**

**(ii) 110 Hamilton Terrace,  
London,  
NW8 9UP**

**(iii) 106 Hamilton Terrace,  
London,  
NW8 9UP**

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

**Sitting at: 45 Bedford Square, London**

**WC1B 3AS**

**on 9 to 13 December 2013**

*Mr Mark Loveday*, instructed by Pemberton Greenish LLP, for the appellant in LRA/135/2011 and LRA/168/2011 and for the respondent in LRA/176/2011

*Mr Edwin Johnson QC*, instructed by David Conway & Co, for the respondent in LRA/135/2011 and LRA/168/2011 and for the appellant in LRA/176/2011

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The following cases are referred to in this decision:

*Kutchukian v John Lyon's Charity* [2013] EWCA Civ 90

*Kutchukian v John Lyon's Charity* [2012] UKUT 53 (LC)

*Padmore v Official Custodian for Charities* [2013] UKUT 0646 (LC)

*Cravecrest Ltd v Duke of Westminster* [2012] UKUT 68 (LC)

*Earl Cadogan v 2 Herbert Crescent Freehold Limited* (2009) LRA/91/2007

*Cravecrest v Duke of Westminster* [2013] 2 P&CR 16

The following cases were also referred to in argument:

*31 Cadogan Square Freehold Limited v Earl Cadogan* [2010] UKUT 321 (LC)

*Fattal v John Lyon's Charity* [2005] 1 WLR 803 (CA)

*Fattal v John Lyon's Charity* LRA/21/2002

*Pitts and Wang v Earl Cadogan* [2007] RVR 269

*Earl Cadogan v Erkman* [2009] 1 EGLR 87

*Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39

*Dependable Homes Ltd v Mann* [2009] UKUT 171 (LC)

*Chelsea Properties Ltd v Earl Cadogan* LRA/69/2006

*Snook v Somerset County Council* [2005] 1 EGLR 147

*Clinker and Ash Ltd v Southern Gas Board* (1967) 18 P&CR 372

*Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353

*The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Co.* [1903] AC 426

## DECISION

### Introduction

1. These three appeals and two cross appeals against decisions of leasehold valuation tribunals, all of the London Rent Assessment Panel (“the LVT”), concern substantial houses in St John’s Wood, London NW8, Nos. 70, 106 and 110 Hamilton Terrace, each of which is the subject of a separate enfranchisement claim.
2. The claims to enfranchise Nos. 70 and 110 are brought under the Leasehold Reform Act 1967 (“the 1967 Act”) by the owners of the long leasehold interest in each house. The claim in relation to No. 106 is a collective enfranchisement claim under the Leasehold Reform Housing and Urban Development Act 1993 (“the 1993 Act”) brought by a nominee of the leaseholders of three of the four flats into which the house has been divided. In all three cases the owners of the freehold interest are the Trustees of John Lyon’s Charity (“the Landlord”).
3. The principal issue in each of the appeals is the value of the unimproved freehold interest in the relevant appeal property. The valuation dates fall between April 2009 and November 2010, a period which saw the beginnings (at least) of a recovery in the prime central London (“PCL”) residential market following its sharp decline in the wake of the global financial crisis of 2008. The period featured very little activity in the market for comparable houses in the immediate vicinity of the appeal properties. A combination of limited market evidence, prevailing economic uncertainty and particular characteristics of the appeal properties, makes the valuation exercise in these appeals a difficult one.
4. In three separate decisions the LVT reached the following conclusions:
  - (a) In the case of 106 Hamilton Terrace the price payable to the Landlord by the nominee purchaser, Mrs Wendy Alamouti, for the freehold on 14 April 2009, in accordance with section 32 and Schedule 6 of the 1993 Act, was £2,262,528. This price was based on a value of the freehold with vacant possession (“FHVP”) of £9m.
  - (b) In the case of 110 Hamilton Terrace the price payable by the tenant, Red Earl Ltd, for the freehold on 6 October 2010, in accordance with section 9(1C) of the 1967 Act, was £9.2m. The unexpired term of the tenant’s lease on the valuation date was only about six months and it was agreed that the enfranchisement price should be taken to be the FHVP value on the valuation date.
  - (c) In the case of 70 Hamilton Terrace, again in accordance with section 9(1C) of the 1967 Act, the price payable by the tenant, Mr Kaveh Alamouti, for the freehold on 1 November 2010 was £2,582,783. The unexpired term of the tenant’s lease on the valuation date was 37.91 years and the price determined by the LVT assumed that the FHVP value was £9.7m.
5. In the case of 106 Hamilton Terrace the LVT’s decision was given on 17 October 2011 and the appeal is by the tenant, Mrs Alamouti.

6. In the case of 110 Hamilton Terrace both the Landlord and Red Earl Ltd appeal against the decision of the LVT given on 7 September 2011. For convenience when we refer to the appellant we mean the Landlord.

7. The appeals in the case of 70 Hamilton Terrace are against the decision of the LVT given on 19 August 2011 and again are brought both by the Landlord and by the tenant, Mr Alamouti. In this decision the Landlord is again referred to as the appellant.

8. The appeals are brought with the permission of the Tribunal (George Bartlett QC, President) given on 23 December 2011 (No. 70) and 7 February 2012 (Nos. 106 and 110) and have been dealt with by way of re-hearing. In all three cases the Landlord was represented before us by Mr Mark Loveday of Counsel and the tenants by Mr Edwin Johnson QC. We are grateful to them both for their considerable assistance.

9. The hearing of the appeals took place over five days in December 2013 and we conducted an accompanied inspection of Hamilton Terrace on 7 January 2014. Expert evidence was given on behalf of the Landlord by Mr John Philip Hamilton BSc MRICS and Mr James Richard Hyman BSc, both of Cluttons, and on behalf of the tenants by Mr Kenneth Gavin Buchanan BSc MRICS of Knight Frank, Mr Michael Sulkin of Aston Chase and Mr Neil Stone, of Bargets.

### **The uncontentious facts**

10. The relevant facts are not significantly in dispute, although in relation to some of the properties relied on as comparables certain matters of detail are obscure or unknown, and there is considerable disagreement concerning the characteristics and behaviour of notional potential purchasers for the three properties at their respective valuation dates. We will begin by summarising the uncontentious facts as we find them to be from the statements of facts agreed between the parties, from the evidence we heard and from our own observations.

11. Hamilton Terrace is a wide tree lined road which all parties agree is one of the more prestigious addresses in St John's Wood (though not, perhaps, the most prestigious). It was originally developed from about 1820, and mainly comprises substantial detached, semi-detached and terraced houses, with some purpose built blocks of flats of more recent vintage and in a variety of styles. The appeal properties all stand on a section of Hamilton Terrace comprising Nos. 70 to 112 located on its north east side between Hall Road and Abercorn Place, both of which are bus routes. On this section of Hamilton Terrace all of the buildings are detached or semi-detached houses on a grand scale, standing opposite similarly imposing properties. Parking on both sides of the road is restricted to permit holders although the road is sufficiently wide that additional pay-and-display spaces are available in a strip running down its centre. On the same side of the Terrace but on the opposite side of Abercorn Place stands St Marks, a substantial Victorian church which lends visual interest and additional distinction to the general environment of the appeal properties, particularly Nos. 106 and 110.

12. Some of the houses in Hamilton Terrace (including both Nos. 106 and 110) have been converted into flats. In recent years there has been a trend to restore these properties to houses in single occupation and to extend them significantly. That trend has been driven in part by the international taste for substantial houses in PCL, including St John's Wood, which has ensured that the potential to develop suitable properties for that market adds significantly to their value. A particularly striking example of such a development can be found at 100 Hamilton Terrace, which was converted and extended in 2007 and 2008 from four flats of 5,037 sq. ft. in total to create 10,836 sq. ft. of living space on seven levels, including a swimming pool and leisure facilities beneath the rear garden. This style of development was described to us as an "iceberg" design, reflecting (with some exaggeration) the proportion of the total accommodation located below ground level. Other examples can be found at 22 and 60 Hamilton Terrace, while on our inspection we were able to observe the very substantial excavation works now going on at the rear of No. 108.

### *106 Hamilton Terrace*

13. 106 Hamilton Terrace is on the north east side of the Terrace within the St John's Wood Conservation Area, about 50 metres from the junction with Abercorn Place. It is a stucco-fronted, detached house of brick construction, with an agreed gross internal area ("GIA") of 4,250 sq. ft. arranged over five storeys (lower ground, raised ground and three upper floors). It has a small paved front garden and a much larger and longer rear garden, but no off-street parking. It is agreed that at the valuation date there was no prospect of obtaining permission from the local authority (the City of Westminster) for the creation of off-street parking in the front garden.

14. The building is to be valued as seen, there being no relevant tenant's improvements which would be required to be disregarded. The parties' experts nonetheless agree that it would have been a relatively simple matter at the valuation date to obtain planning consent to extend No.106 from its current 4,250 sq. ft. (configured as flats) to create a large single house with a GIA of 10,836 sq. ft. a substantial portion of which would have been at basement and sub-basement levels. The parties do not agree that a development of No. 106 on that scale would have been in the contemplation of the successful purchaser in the open market in April 2009, but they do agree that a purchaser who had wanted to maximise the developed area of No. 106 would have been able to obtain planning permission for such a development.

15. The freehold interest in No.106 which Mrs Alamouti is entitled to acquire is owned by the Landlord, and is subject to a headlease granted on 16 March 1949 which she is also entitled to acquire. The headlease expires on 24 March 2046 and just under 37 years of the original term remained at the valuation date.

16. 106 Hamilton Terrace was converted into four flats by a previous owner of the headlease who let the flats on long underleases. The underlease of one of the flats (Flat 3) was granted in 1983 and expires in 2046. The underleases of the remaining flats were the subject of statutory extensions granted between 2002 and 2005, and are for terms expiring in 2136.

17. At the rear of No. 106 stands a two storey building known as 9/10 Abercorn Close, part of a terrace of mews houses which run behind Nos. 102 to 108 Hamilton Terrace. On the valuation date 9/10 Abercorn Close was in separate ownership from No.106. It overlooks the rear garden of No.106 and has a door which provides access to that garden. It was agreed that the lease under which 9/10 Abercorn Close was demised at the valuation date conferred a right on the lessee to use the whole of the rear garden of No.106 in common with the occupiers of No.106. We were not shown the relevant documents. 9/10 Abercorn Close also has its own small private garden, at the end of the garden of No. 104 Hamilton Terrace.

18. At the valuation date all the leasehold interests in No. 106 (i.e. the headlease and the underleases of the four flats) and in 9/10 Abercorn Close were owned or under the control (by contract) of two experienced property investors. On 14 April 2009 those investors, in their capacity as tenants of two of the flats (Flats 2 and 4), served notice of their intention collectively to acquire the freehold of No. 106 pursuant to the 1993 Act. They proposed a price of £90,000 and nominated 106 Hamilton Terrace Limited as their nominee purchaser. Service of this notice fixed the valuation date for the collective enfranchisement claim as 14 April 2009. The Landlord responded with a counter-notice admitting the nominee purchaser's entitlement to acquire the freehold but proposing a total price of £230,000.

19. On 2 November 2009 106 Hamilton Terrace Limited applied to the LVT for it to determine the price and the terms of the transfer of the freehold. Progress was delayed by County Court proceedings to resolve an issue of interpretation of the user covenant in the headlease of No. 106. The Landlord argued that the covenant restricted the use of No. 106 to four flats only, and prohibited use as a house in single occupation. On 27 January 2011 that issue was resolved by a declaration of the Central London County Court that No. 106 could be used either as four flats or as a house.

20. By the time the enfranchisement claim in respect of No. 106 came before the LVT in September 2011 the nominee purchaser had been replaced by Mrs Alamouti as claimant. She had acquired the headlease and the underleases of all four flats pursuant to an agreement for sale dated 17 March 2010. As part of that agreement Mrs Alamouti became entitled to the benefit of the collective enfranchisement claim, together with the share capital in the original nominee purchaser.

21. By the same sale agreement Mrs Alamouti also agreed to purchase the leasehold interest in 9/10 Abercorn Close. The tenant had previously given notice of a claim to acquire the freehold of 9/10 Abercorn Close under the 1967 Act, and on completion of the agreement Mrs Alamouti acquired the benefit of that claim. On 29 July 2010 (in a decision which is not challenged in this appeal) the LVT determined that the price payable for the freehold of 9/10 Abercorn Close was £359,230. Mrs Alamouti proceeded to complete her acquisition of the freehold of those premises and is now their registered proprietor, as well as of the headlease of No.106 and the under-leases of its four flats.

22. We were informed that the owners of the various leasehold interests in 106 Hamilton Terrace and 9/10 Abercorn Close transferred those interests to Mrs Alamouti for an aggregate price of £6,600,001. The only interest in No. 106 and its former mews which she does not yet control is the freehold of No. 106.

23. The LVT determined the price payable for the freehold to be £2,262,528, based on its assessment of the FHVP value of the unimproved freehold at £9m. Both figures were those spoken to by Mr. Hamilton, the Landlord's expert witness. The LVT rejected the price of £188,143 and the FHVP value of the unimproved freehold of £5.5m which had been the evidence of Mr. Buchanan, the expert witness called on behalf of Mrs Alamouti.

### *110 Hamilton Terrace*

24. 110 Hamilton Terrace is the house next but one to Abercorn Place on the section of Terrace on which all of the appeal properties are located. It is generally similar in style to No. 106 having been constructed as a detached house on five floors with a large rear garden and small front garden and converted into six flats in the late 1940s or early 1950s. It has no garage or off street parking and it is agreed that at the valuation date there was no prospect of obtaining planning permission to provide either of these facilities.

25. No. 110 has a GIA of 6,566 sq. ft. of which 1,669 sq. ft. are the result of tenant's improvements and are to be disregarded when ascertaining the price payable under section 9(1C) of the 1967 Act, leaving an assumed GIA at the valuation date of 4,897 sq. ft.

26. The properties immediately neighbouring No. 110 require special mention. On one side stands 112 Hamilton Terrace, a house in very similar style which must originally have enjoyed the use of a garden of equal or greater depth to that of No. 110. By the valuation date the garden of No. 112 had been divided at approximately half its depth with the nearer portion being retained while the further portion became the site of two new and rather smaller houses, Nos. 2a and 2b Abercorn Place. These have no significant gardens of their own and consequently stand close up to the boundary of the rear garden of No. 110; their living rooms directly overlook the garden of No. 110. The view of these two houses from No. 110 is not significantly obstructed by trees or other obstacles.

27. On the opposite, southern, boundary of the rear garden of No. 110 a large two storey building stood in the rear garden of No. 108 Hamilton Terrace at the valuation date. Referred to as "The Studio", this structure has subsequently been demolished but at the valuation date it was visible from and overlooked the garden of No. 110, although not to the same extent as 2a and 2b Abercorn Place.

28. Along the eastern boundary of the rear garden of No. 110 stands the back wall of a block of three lock up garages to which access is available only from Abercorn Close.

29. The roots of two substantial trees encroach beneath the rear garden of No. 110. The larger of those trees stands in the south eastern corner of the garden at a distance of approximately 25 metres from the rear wall of the house; the other is in the garden of No. 112, close to the boundary and about 5 metres from the north east corner of No. 110. It is agreed that these trees would have to be retained in the event of any development of No. 110, and that their roots would restrict the extent and design of any extension below ground level.

30. The parties agree that at the valuation date planning permission for the conversion of No. 110 back to a house in single occupation would have been granted by the City of Westminster. Planning permission would also have been granted for a significant enlargement of the building, above and below ground, increasing its size to up to 10,376 sq. ft. That increase could be achieved by extending the ground floor of the building to provide a new dining room, by excavating beneath the rear garden and thereby more than doubling the area of the lower ground floor to approximately 3,100 sq. ft providing space for a swimming pool and other leisure facilities, and by creating a new basement of about 1,700 sq. ft. beneath the house and front garden.

31. At the valuation date (6 October 2010) 110 Hamilton Terrace was let on a lease granted in 1950 and expiring on 25 March 2011. The lease was acquired by Red Earl Ltd, a BVI registered company, on 9 November 2007, a few days after the service of an earlier notice claiming the right to enfranchise. That claim was the subject of proceedings before the LVT which, in a decision made on 13 October 2008 determined that the price payable with effect from 2 November 2007 was £9,046,185. The earlier notice was then withdrawn on 23 October 2008 and a further notice giving rise to these proceedings was served on 6 October 2010.

32. The LVT determined that the price payable for the freehold of No. 110 was £9.2m, that being its assessment of the unimproved FHVP value. The Landlord had contended for a figure of £11m, based on the evidence of Mr. Hamilton, while Red Earl Limited had originally argued for a figure of not more than £6.5m, on the basis of Mr Buchanan's evidence.

#### *70 Hamilton Terrace*

33. 70 Hamilton Terrace occupies a substantial corner site on the north-east side of the junction with Hall Road and is the last property on the section of the Terrace with which these appeals are concerned. It is a stucco fronted, detached house of brick construction on lower ground, raised ground and three upper floors, with a front garden, rear garden and off street parking at the front and rear (accessed from Hall Road).

34. As originally constructed, No. 70 comprised a house in single family occupation on lower ground, raised ground and first floor only with no onsite parking. In about 1925 the pitched roof was removed and a second floor added with a flat roof. At some stage before 1950 the house was converted into five flats, but in about 2001 further alterations were completed, restoring it to single occupation. Those works included the addition of a further floor beneath a pitched roof and the excavation of a basement which (although not extending beneath the rear garden) now accommodates a swimming pool, gym, two small self contained flats and other domestic and leisure facilities. In its current extended configuration the house has a gross internal area of 9,591 sq. ft., but disregarding tenant's improvements this is reduced to 4,390 sq. ft.

35. The rear garden (which by some margin is the largest of the gardens of the three appeal properties) slopes upwards and away from the house; it is relatively secluded by the standards of the appeal properties due to its larger garden and the absence of an adjoining property on its southern

boundary. The flank wall of 10 Hall Road adjoins the rear boundary, but there is no real sense of being overlooked in the garden or the house.

36. No. 70 is held under a lease granted in 1950 for a term of 99 years from 29 September 1949 at an annual ground rent of £200. A previous claim to acquire the freehold was withdrawn in July 2009, and the current notice of claim was served on 1 November 2010.

37. The LVT determined a price of £2,582,783 for the freehold of No. 70, which was based on its assessment of an unimproved FHVP value of £9.7m and assumed that the unexpired term of the lease was worth 64% of the value of the freehold. In arriving at its FHVP figure the LVT adopted a position approximately midway between the £11.5m espoused by Mr Hamilton on behalf of the Landlord and the £7.5m spoken to by Mr Buchanan on behalf of Mr Alamouti.

### *The comparables*

38. We were provided with particulars (some more detailed than others) of 10 transactions concerning six substantial houses in Hamilton Terrace (Nos. 22, 38, 68, 98, 102 and 106) between July 2007 and October 2012. We were invited to ignore No. 22 and for reasons that we explain further below we did not find it helpful to consider the sale of No. 106 and 9/10 Abercorn Close in March 2010 (see paragraph 132).

39. Three of the transactions were sales of detached houses suitable for development:

(i) 68 Hamilton Terrace had been sold in July 2007 pursuant to a contract entered into in March 2007 at a price of £8.75m. At the date of sale this house was divided into flats with a GIA of 5,345 sq ft but with planning permission to convert the building back to single occupation and increase the GIA to 6,400 sq ft. After completion of the sale a further planning permission was obtained to increase the GIA to 8,708 sq ft.

(ii) The leasehold interest in 38 Hamilton Terrace with 37 years unexpired was sold for £4.5m in August 2010 with the benefit of a claim to acquire the freehold under the 1967 Act. It had a GIA of 4,288 sq ft and no planning permission had yet been applied for.

(iii) In August 2011, the enfranchisement of 38 Hamilton Terrace having been completed, it was sold again, this time at a price of £7.7m for the freehold interest. Once again no planning permission had yet been obtained but in 2012 permission was granted to increase the GIA by approximately 12% to 4,808 sq ft. In 2013 a larger development was approved, increasing the GIA to 6,274 sq ft.

40. The remaining comparables (Nos. 102 and 98) were sales of houses which had either never been converted to flats or had already been restored to single occupation and modernised:

(i) 102 Hamilton Terrace is a house of 8,084 sq ft. The freehold interest was sold in January 2010 together with the leasehold interest in the adjoining mews house at 6/7 Abercorn Close for

a total price of £16m. Planning permission for a development to 11,030 sq ft was obtained in March 2012.

(ii) 98 Hamilton Terrace was a modernised house of 8,300 sq ft which had been sold in June 2011 for £14.425m. There was some uncertainty about the condition of the property and whether, at the time of its sale, it met the expectations of the market. The vendor had apparently removed kitchen fittings and lighting prior to completion which had resulted in a reduction in the original purchase price. After the sale the purchaser demolished a conservatory and constructed a new extension which did not increase the net floor area.

#### *Agreed valuation inputs*

41. It was agreed that the value of the ground rents receivable by the Landlord for the remainder of the terms should be capitalised at 5%. This resulted in agreed figures of £3,371 for No. 70 and £2,923 for No. 106.

42. The rent receivable by the head-lessee at No. 106 was capitalised at 6% dual rate and was agreed at £703.

43. Deferment rates of 4.75% and 5% were agreed for Nos. 70 and 106 respectively.

44. A relativity percentage of 64% was agreed in respect of the lease of No. 70.

45. It was agreed that the leases of the four flats at No. 106 had a combined value of £3,357,000 at the valuation date.

46. Given the very short unexpired residue of the lease of 110 Hamilton Terrace (less than six months at the valuation date) it was agreed that the enfranchisement price should be taken as the unimproved FHVP value.

47. The experts also agreed that when analysing comparable transactions they would use Savills Prime London Residential Capital Value Index to adjust for changes in value over time. This index is based on valuations of standard notional properties made by Savills' valuers, rather than on market transactions (although obviously the valuations themselves are based on an assessment of market evidence). This choice was made despite the fact that the assumptions on which the index valuations are based include that "the property is not being purchased for development".

#### **The evidence of the market experts**

48. All parties relied upon expert evidence about residential market conditions. Mr Hyman, who gave evidence for the landlords, is a partner in Cluttons' residential agency department, and is responsible for overseeing all of that firm's central London estate agency offices. Ranged against him

on behalf of the tenants were Mr Sulkin of Aston Chase (who had given evidence before the LVT) and Mr Stone, of Bargets, both of whom are selling agents specialising in St John's Wood. It was common ground that Aston Chase and Bargets are two of the three leading firms of estate agents who deal with high value properties in the St. John's Wood area, the other being Mr Buchanan's firm, Knight Frank.

49. Unusually in this case the Tribunal was persuaded at an early stage of these appeals to permit additional expert evidence to be called from two witnesses (Mr Sulkin and Mr Stone) whose expertise was very much in the same field. The respondents supported their application for permission to call two local selling agents by explaining that because the market in development properties was so quiet at the relevant time the value of development properties could not be proved by reference to comparable transactions so evidence of experts with local knowledge was essential to provide the Tribunal with a broader view of the state of the market. The Landlord objected to the application on the grounds that there was a very limited pool of experienced local agents in St John's Wood from whom it could seek evidence to counter that of Mr Stone and Mr Sulkin. The Tribunal nonetheless agreed to each party having the opportunity to call two experts in local market conditions.

50. As matters unfolded at the hearing of the appeal the Landlords' anxiety that they would be at a disadvantage was reflected in the submissions of Mr Johnson on behalf of the respondents. Much was made of the breadth of experience of Mr Sulkin and Mr Stone and of the relative lack of local experience of Mr Hyman. In cross examination Mr Hyman was invited to accept that Cluttons were "a very minor player" in the St John's Wood market behind the leading agents of Knight Frank, Aston Chase and Bargets and he agreed. Although Mr Johnson also suggested that there were other agents who might have been called to give evidence we have no doubt that these too would have been subjected to similar criticism.

#### *The case for the Landlord*

51. Mr Hyman, who described himself as a central London agent rather than a St John's Wood agent, reviewed the St John's Wood market in the context of prime central London as a whole. The market had been stagnant throughout 2008 with the few transactions realising sale prices below the peak levels achieved in August 2007. By April 2009 (the earliest of our valuation dates, at 106 Hamilton Terrace) at the top end of the PCL market Mr Hyman saw "strong indications that the market was making a recovery". 2010 began buoyantly and prices reached the high levels last seen in mid-2007, but the market then hesitated (due, at least in part, to the volcanic ash cloud and a general election) and fell back by 5% to 10% by May 2010. Market momentum returned by the end of August and continued until the end of the year, with a strong price rise from the end of October onwards (at or around the valuation dates for Nos. 70 and 110 Hamilton Terrace). By the end of the year prices were above their 2007 peak.

52. Mr Hyman supported his treatment of St John's Wood as part of the broader PCL market by reference to graphs produced by Cluttons showing the movement in PCL prices for flats and houses from 1995 onwards. He said that the Central North West region of PCL, which included St John's

Wood, had moved broadly in line with the other three regions. This confirmed his experience that the market for high value residential properties was “a common one” across the whole of PCL.

53. Mr Hyman explained that the strong market in 2010 was led by a large pool of cash rich overseas investors attracted to the PCL market by its reputation as a safe haven. They were driven by access to the right type of property rather than by price. There was also strong interest from domestic buyers wishing to invest in PCL as an alternative to the financial markets. Mr Hyman said that the restrictions on lending imposed by the banks at this time did not affect the type of purchaser looking for a property in Hamilton Terrace.

54. Mr Hyman considered that a prospective purchaser of 110 Hamilton Terrace would have been interested in extending it by creating subterranean floorspace. Such developments were commonplace in St John’s Wood and PCL generally. He did not think that the lack of off-street parking would have a major impact upon the FHVP value of Nos. 106 and 110, although it would reduce the number of interested parties and thereby affect the overall marketability of the properties. In support of this assessment he noted that 38 Hamilton Terrace had been sold without off-street parking in August 2010 and again a year later.

#### *The case for the respondents*

55. The first of the respondents’ selling agents, Mr Sulkin, had been a director of Aston Chase since 1997. He had personal experience of selling properties in St John’s Wood and identified five sales in Hamilton Terrace with which he had been involved between 2007 and 2011 (four of which were of houses and the other of a ground floor flat). Three of those sales had taken place after the financial crash of 2008, including the sale of No. 102 in January 2010 and of No. 98 in June 2011. Mr Sulkin explained that as a result of a lack of funding following the collapse of Lehman Brothers in September 2008 development opportunities in St John’s Wood had been curtailed and planning permissions had gone unimplemented, as they had in other parts of PCL. There had been “a lack of appetite” amongst developers at the valuation dates with which these appeals are concerned.

56. Mr Sulkin emphasised a number of locational factors which he considered held back values in Hamilton Terrace, including its mixed residential nature, and other features of particular relevance to the appeal properties. The lack of off-street parking at Nos. 106 and 110 was a serious problem. Purchasers in St John’s Wood expected off street parking and its absence had a “very important effect” on value by restricting the size of the potential market. It was Mr Sulkin’s view that on the sale of any St John’s Wood house off-street parking was worth “at the very least” £1m. He gave 16 Cavendish Avenue, St John’s Wood as an example of a nearby property that had failed to sell because there was no interest once potential purchasers were told that it had no off-street parking.

57. Mr Sulkin said that before the financial crash of 2008 the practice of developers had been to maximise the square footage of a development project, although he found them now more circumspect. In his opinion “bottom heavy” properties with a lot of subterranean floorspace were less valuable than properties with the same GIA but less space underground. As a rough guide he thought that space below ground was worth as much as 50% less than above ground accommodation. He

cited 15 Acacia Avenue, St John's Wood as an example of a newly built property that had not sold since its completion in 2009 because it was overpriced for a house that had approximately 40% of its GIA underground.

58. Mr Sulkin qualified his evidence by making it clear that he deferred to Mr Buchanan on matters of valuation and he rather defensively emphasised that his evidence was "not intended to replace or contradict Mr Buchanan's evidence". Nonetheless he reached conclusions of his own on each of the appeal properties. He considered that a knowledgeable buyer of No. 106 in April 2009 (whom he had been instructed to assume was a professional developer) would not have paid more than £5m for the unimproved freehold. In October 2010 such a buyer would not have paid more than £5.5m for the unimproved freehold of No. 110, and the following month No. 70 would not have achieved a price of more than £7.5m in an unimproved condition.

59. Mr Stone has worked in the residential sales market in St John's Wood since 1979 and is the proprietor of Bargets which is fairly prominent at the upper end of the market in the area. His firm had acted in the sale of four houses in Hamilton Terrace between 1998 and 2011 including a sale of No. 70 in January 1998. None of those sales had occurred in the period from July 2007 and November 2011.

60. Mr Stone's report followed a similar pattern to that of Mr Sulkin and expressed the same conclusions about market conditions, off-street parking and subterranean development. He too said that his evidence was "not intended to replace or contradict" Mr Buchanan on valuation issues. The figures to which he spoke in the conclusions to each of his reports were the same as Mr Sulkin's for No. 106 ("no more than £5m") but were a little more flexible at No. 110 ("a figure in the region of £5.5m") and offered a range for No. 70 ("a figure in the region of £7m.-£7.5m").

61. In cross-examination Mr Loveday suggested to Mr Stone that there were "striking similarities between his and Mr Sulkin's report" both as to style, structure and content. Mr Stone acknowledged some similarities which, he said, were due to the two experts having the same opinion about the same subject matter and because both had once worked for the same firm of surveyors (Lassmans). Mr Stone said that he had not seen Mr Sulkin's report before he prepared his own.

62. In his closing submissions Mr Loveday submitted that the basic structure and content of Mr Sulkin's and Mr Stone's reports were so similar as to suggest collaboration between them. Mr Sulkin had appeared before the LVT and had been consistent in his evidence (for instance in taking an allowance of £1m for the absence of off-street parking). Mr Loveday suggested that Mr Stone appeared simply to have adopted Mr Sulkin's evidence. Collaboration between the two experts went to their independence and Mr Loveday submitted that minimal weight should be attributed to Mr Sulkin's and Mr Stone's evidence except where it was supported by other evidence.

## *Conclusions*

63. We have carefully considered the evidence of the expert marketing witnesses but in the end we have not found it to be of significant assistance except on some points of tone or background. All three were at a disadvantage in describing the market in Hamilton Terrace in the relevant period because, as demonstrated by the evidence of two of the three most active local agents, Mr Sulkin and Mr Stone, there was so little activity in that market.

64. Mr Hyman's experience was not directly related to St John's Wood, nor was it based upon personal involvement with relevant sales in the area. His was a largely managerial role in a firm that he accepted was only a minor player in the St John's Wood residential market. His evidence was helpful as a broad overview of market conditions in PCL but we do not place weight on his specific observations about St John's Wood or Hamilton Terrace.

65. In describing the appeal properties and Hamilton Terrace in general Mr Sulkin and Mr Stone each went to some lengths in their written evidence to accentuate the negative. Mr Stone was, we think accurately, described by Mr Johnson in his closing submissions as "a feisty character"; his evidence from the witness box was emphatic and intolerant of challenge and we had no confidence in his objectivity or neutrality. Mr Sulkin's evidence was more expansive and in some respects more useful to us, but in one case (his description of a property he had sold at 15 Cavendish Avenue) his factual evidence about the balance of above and below ground space was substantially contradicted by his own firm's sales particulars. We were left with the same conviction, as with Mr Stone, that Mr Sulkin was a team player in the respondents' interest rather than an independent commentator on whose objectivity we could safely rely.

66. Although Mr Johnson invited us to dismiss the suggestion of collusion between Mr Sulkin and Mr Stone with the same contempt it had received from Mr Stone, we could not fail to note the similarities in their written reports. We accept that there may be, without fault, a certain editorial resemblance between two expert reports prepared for the same party on the same subject matter and where the experts share the same opinion about the issues raised. But in our opinion the resemblance in this case was, to use Mr Loveday's expression, strikingly similar: both thought that the redevelopment of No. 100 Hamilton Terrace had been "conceived in a [very/completely] different market"; both had detected the same "lack of appetite" amongst developers; both thought the absence of off-street parking worth "at the very least, £1m" and so on. Mr Loveday was also able to point to numerous examples of similarities between the points made in the two reports and the order in which they appeared. We see no reason to doubt Mr Stone's assertion that he did not see Mr Sulkin's report before he wrote his own. It seems to us more likely that both reports were either written to such a prescriptive brief or were subjected to such a rigorous editorial process by the respondents' legal team (or both) that they assumed a strikingly similar form. Whatever the true explanation for the similarities of expression, layout and conclusions between their reports, having considered the respondents' market evidence as a whole, we have no confidence that it was prepared with the necessary independence and objectivity to enable us to place significant weight upon it. It provides us only with a useful background to local market conditions based upon the personal experience of two active participants in the local market.

## **An overview of the valuation evidence**

67. At this point it is convenient to describe in general terms the approach of Mr Hamilton and Mr Buchanan to the task they were asked to undertake. We start by expressing our surprise that there was such a difference of opinion between the two valuation experts regarding the analysis of the same comparables. As will be seen the experts at times produced figures which differed by 100%. We accept that there is clear scope for difference between experts when considering the type of market evidence before us in these appeals, but the stark contrasts in their conclusions means that we have reservations about the objectivity of their opinions.

68. We are also particularly conscious that the same witnesses have given evidence on the same issues in LVT hearings concerning the three appeal properties on four previous occasions. They were no doubt as familiar with the relevant evidence as any expert could hope to be, but that familiarity and their repeated experience of being cross examined (often by the same counsel) seemed to us to have taken a toll on their capacity to reflect dispassionately on that evidence. We were particularly struck by the determination with which both experts resisted propositions put to them in cross examination, only for them willingly to accept the good sense of the same point when asked about it by the Tribunal. We do not doubt the sincerity of the views which Mr Hamilton and Mr Buchanan expressed, but we did not find either of them wholly convincing.

69. One particular theme in the valuation and agency evidence concerned the identity of the participants in the market for development properties in Hamilton Terrace at the valuation dates. The respondents considered that the market would have been composed exclusively of professional developers for whom procuring finance was difficult in the credit crunch of 2007-2010. Two sales of a development property at 22 Hamilton Terrace were thought by Mr Buchanan to exemplify the change in the market between 2007 and 2010. The Landlord argued that there was no reason to limit the potential market to professional developers and pointed to the fact that the purchasers of comparable development properties in Hamilton Terrace had often been high worth individuals who would not rely upon the loan market; examples included Mr Shipman at No.68, Mr Lyons at No.100, Mrs Alamouti at No.106 and Mr Musa at No.108.

70. We have not found it necessary to reach a conclusion on this issue. The parties' agreement that the appeal properties would have been sold to a developer, and their further agreement that sale prices should be indexed by reference to the Savills residential index (despite the cautionary note by the compilers of the index that it does not include development properties) seem to us to render their disagreement over the identity of the purchaser largely redundant.

71. The valuation experts relied upon two types of comparables, or methods of analysis, which were referred to as "bottom up" and "top down".

*"Bottom up" comparables*

72. These were comparables comprising un-modernised freehold houses which had been sold as being ripe for redevelopment. They included Nos. 38 (two sales) and 68 Hamilton Terrace. In addition Mr Hamilton provided an alternative analysis of 102 Hamilton Terrace on this basis.

73. Mr Hamilton's approach to the "bottom up" comparables was to divide the sale price of each comparable by the GIA for which planning permission had existed at the date of the transaction or for which it had subsequently been granted. This gave a capital value per sq ft of assumed development which Mr Hamilton adjusted for time and other factors. He then applied the resulting rate per sq ft to the maximum GIA of the appeal properties for which it was agreed planning permission was likely to be granted (Nos. 106 and 110) or to the existing GIA (No. 70). Mr Hamilton's underlying hypothesis was that the FHVP value of the appeal properties was represented by the value of their maximum developable area calculated at a rate derived from the sales of similar un-modernised houses.

74. Mr Buchanan did not rely upon the July 2007 sale of 68 Hamilton Terrace which he considered to be too historic to be of assistance and which took place in what he referred to as an "overheated market". Nor did he analyse 102 Hamilton Terrace as a bottom up comparable, as he considered that it was not sold for development, having already been substantially modernised. Of the "bottom up" properties Mr Buchanan relied only upon No. 38 which he took as one of his two main comparables. He averaged the prices paid for No. 38 on the two sales in August 2010 and August 2011 and adjusted the resulting figure for time. Mr Buchanan then used the adjusted figure as a direct comparable to value Nos. 106 and 110. In both cases Mr Buchanan said that the appeal properties had "similar development potential" to No. 38 irrespective of their actual size. Mr Buchanan also used the sales at No. 38 to value 70 Hamilton Terrace but made additional adjustments for site size, location and off-street parking.

*"Top down" comparables*

75. The other category of comparable transactions were those which lend themselves to a "top-down" analysis. These were freehold houses sold after having been redeveloped. They include No. 98 (to which Mr Buchanan gave considerable weight) and No. 102 (relied on by Mr Hamilton).

76. The analysis of such comparables began with the adjustment of the sale price for time to give a value for the comparable as at the valuation date. This was then expressed as a rate per square foot to which various further adjustments were made to reflect the differences between the comparables and the appeal properties. The value of each appeal property was found by applying a percentage to this adjusted rate to reflect the fact that on the valuation date the appeal properties were not fully modernised. The parties agreed that the appropriate percentage to apply to comparables that were fully modernised was 50%. Mr Buchanan adopted this percentage when analysing both Nos. 98 and 102. Mr Hamilton took 66.7% (two-thirds) when analysing No. 98 because it "was not in the best condition". He also took 66.7% when analysing the first (2007) sale of No. 102 but 50% when analysing the second (2010) sale. This reduced rate per square foot was then multiplied by a GIA

which was assumed to represent the successful purchaser's optimum development scheme for the appeal property to give its FHVP value at the valuation date.

### *Contentious Valuation adjustment*

77. Apart from adjusting for the date of sale by using Savills' Prime London Residential Capital Value Index the valuation experts also made adjustments for a number of other factors which were not agreed. Two were relevant only to the valuations of Nos. 106 and 110, namely:

(i) *Off-street parking.* To reflect the absence of off-street parking at Nos. 106 and 110 Mr Hamilton made a 5% deduction from the value of comparables which had such parking (Nos. 68, 98 and 102 Hamilton Terrace). Before the LVT Mr Buchanan had adopted the same approach but his evidence to us was that irrespective of size or value a fixed reduction of £1m should be made as an allowance for the absence of off-street parking. He explained that he had revised his view as a result of discussions with Mr Sulkin and Mr Stone.

(ii) *Planning.* In their statement of agreed facts signed two days before the hearing Mr Hamilton and Mr Buchanan agreed (as they had before the LVT) that when analysing a comparable that had planning permission a deduction of 5% should be made because there was no planning permission at Nos. 106 and 110. In his evidence Mr Buchanan made a further allowance of 5% from the value of the comparable at 38 Hamilton Terrace for the risks associated with the need to obtain planning permission to convert Nos. 106 and 110 from flats to houses.

78. When valuing No. 110 Mr Buchanan made three further adjustments to the comparables:

(i) *Overlooking.* Mr Buchanan allowed a 5% reduction from the value of the comparables because the rear garden of No. 110 was directly overlooked from two sides.

(ii) *Tree roots.* Mr Buchanan allowed a 5% reduction from the value of the comparables when valuing No. 110 because its development was inhibited by the presence of tree roots.

(iii) *Development potential.* Mr Buchanan allowed a 2.5% reduction from the value of 102 Hamilton Terrace to reflect its greater development potential compared with No.110.

79. Mr Buchanan made three specific adjustment to the comparables when valuing No. 70:

(i) *Location.* Mr Buchanan allowed a 5% reduction from the value of the comparables because he considered that No.70 was in a poorer location.

(ii) *Subterranean accommodation.* In valuing 70 Hamilton Terrace Mr Buchanan allowed a 12.5% reduction from the value of No. 102 because No.70 had a sub-basement and a greater basement area.

(iii) *Plot size and access.* Mr Buchanan added 5% to the value of Nos. 38 and 98 because No.70 had a greater plot size. Mr Hamilton added 5% for the larger plot size and better access

of No.70 compared with No.68 and 2.5% for the same factors by comparison with Nos. 98 and 102.

80. Having set the scene we will now consider the evidence and arguments concerning the three appeal properties in turn. Although chronologically 106 Hamilton Terrace is the first of the three valuation dates it raises specific legal issues which we prefer to deal with after considering the valuations of Nos. 70 and 110, where the valuation dates are close to each other towards the end of 2010.

## **70 Hamilton Terrace**

### *The evidence for the appellant*

81. Mr Hamilton's view was that the enfranchisement price of 70 Hamilton Terrace should be £3,061,749. This figure aggregated the agreed capital value of the ground rent (£3,371), the unimproved FHVP value of £11.5m deferred at the agreed discount factor of 0.1722 (£1,980,127), and 50% of the marriage value (£1,078,251).

82. His primary comparables for an unimproved FHVP value of £11.5m were the sale of the freehold interest in 68 Hamilton Terrace in July 2007 for £8.75m and the 2010 sale of the freehold interest in 102 Hamilton Terrace in January 2010 for £16m (which included the leasehold interest in the two mews houses at 6/7 Abercorn Close).

83. No. 68 already had planning permission to increase its GIA from 5,345 sq ft to 6,400 sq ft when it was sold for £8.75m in July 2007 but the purchaser then obtained a further permission for a development of 8,708 sq ft. Mr Hamilton assumed that the purchaser had the larger development in mind when he bought the property which allowed him to analyse the sale as showing a capital value of £1,004 per sq ft. Applying this rate to the agreed achievable GIA of No. 70 (9,519 sq ft) gave it a capital value of £9,557,076. Adjusted for time and by 5% because of No. 70's larger plot and better side access this gave No. 70 an adjusted FHVP value of £11,370,276

84. At 102 Hamilton Terrace Mr Hamilton attributed £1,981,093 of the £16m sale price to the two mews houses, leaving a net sale price of the main house of £14,018,907. He assumed that in January 2010 the purchaser had had in mind a development of 11,030 sq ft for which planning permission was subsequently obtained in March 2012 and analysed the net sale price as giving a comparable FHVP value of £1,271 per sq ft. Adjusted for time and increased by 2.5% for No. 70's larger plot and better side access gave No. 70 an adjusted FHVP value of £13,113,374.

85. In addition to his primary comparables Mr Hamilton relied on the following additional evidence: the earlier sale of No. 102 in 2008 which he analysed on a top down basis; the two sales of No. 38 in 2010 and 2011; and the sale of No. 98 in 2011 analysed on a top down basis. The average FHVP value of No. 70 based on these five comparables was just over £11.39m.

86. In the light of all the evidence Mr Hamilton adopted a FHVP value for No. 70 of £11.5m.

*The evidence for the respondent*

87. Mr Buchanan considered that the enfranchisement price of No. 70 should be £1,997,000 comprising the ground rent (£3,371), an unimproved FHVP value of £7.5m deferred at the agreed rate (£1,291,284), and 50% of the marriage value (£702,672).

88. Mr Buchanan placed weight on both bottom up and top down comparables. For the bottom up approach his main comparables were the two sales of No. 38 and the leasehold sale of No. 106 and 9/10 Abercorn Close in March 2010.

89. No. 38 was Mr Buchanan's preferred comparable. He combined the price of £4.5m paid for the leasehold interest in No. 38 in August 2010 with the £1.65m which the purchaser subsequently paid to acquire the freehold reversion to give a FHVP value of £6.15m which he adjusted for time to £6.24m.

90. The freehold of No. 38 was resold in August 2011 for £7.7m which Mr Buchanan adjusted for time to £6.78m. He then averaged the time adjusted values for the 2010 and 2011 sales to give £6.51m as the FHVP value of No. 38 at the valuation date. Mr Buchanan derived a FHVP value of £1,516 per sq ft using the original floor area of No.38 of 4,288 sq ft.

91. Mr Buchanan's evidence was that because the GIA of No. 38 was comparable to the original size of No. 70 disregarding tenant's improvements (4,390 sq ft) it was appropriate to assume that the two properties would have a similar development potential. He therefore multiplied the original GIA of No. 70 by the £1,516 per sq ft derived from the sales of No. 38 to give a FHVP of £6.65m. No. 70's larger site but poorer location than No. 38 were self cancelling but Mr Buchanan added £1m for the absence of off street parking at No. 70. Based on No. 38 he concluded that the FHVP value of No. 70 was £7.65m.

92. Mr Buchanan also relied upon the sale of the leasehold interests in 106 Hamilton Terrace and 9/10 Abercorn Close in March 2010 for a combined price of £6.6m, both properties being the subject of enfranchisement claims (see paragraphs 20 and 21 above). This sum had been apportioned by the vendor as to £5.4m for No. 106 and £1.2m for 9/10 Abercorn Close and Mr Buchanan adopted these figures in his analysis. The LVT had determined that the freehold interest in 9/10 Abercorn Close was worth £358,000 and Mr Buchanan considered that the enfranchisement price of the freehold of No. 106 should be £230,000. Combining these figures gave a FHVP value for No. 106 and 9/10 Abercorn Close of £7.188m which Mr Buchanan adjusted for time to £7.484m.

93. Mr Buchanan said that No. 106 and 9/10 Abercorn Close, taken together, had a similar development potential to No. 70. He therefore took the figure of £7,484,000 and made the same adjustments for plot size and location as he had for No. 38, the net effect of which was a nil

adjustment. Both No. 106 and 9/10 Abercorn Close and No. 70 had off-street car parking so no adjustment was required for this factor so he concluded that the FHVP of No. 70 was £7.484m.

94. After considering but rejecting the sales of 22 and 68 Hamilton Terrace (the first because of its complex circumstances and the second as too historic) Mr Buchanan concluded that the FHVP value for No. 70 using the bottom up approach was the average of the values derived from Nos. 38 and 106, namely £7.56m.

95. Turning to the top down approach, Mr Buchanan relied upon two comparables: 102 Hamilton Terrace and 6/7 Abercorn Close, and 98 Hamilton Terrace (see paragraph 40 above). Both properties had been refurbished and improved.

96. The freehold interest in No. 102 was sold together with the leasehold interest in 6/7 Abercorn Close in January 2010 for a combined price of £16m. The leasehold interests had unexpired terms of approximately 18 years and Mr Buchanan used Savills' graph of relativity of enfranchisable leases to estimate their relativity at 80% of FHVP. He estimated that the FHVP value of the two mews houses was £2m. 80% of this value was reflected in the purchase price of £16m and so he added the remaining 20% (£0.4m) to give a figure of £16.4m as the combined FHVP value of No. 102 and the mews houses. Adjusting this figure for time gave £17.358m or £2,145 per sq ft, based on a GIA of 8,084 sq ft.

97. Mr Buchanan then compared the amount of basement and sub-basement floor-space in No. 102 and No. 70. No. 102 had no sub-basement and its basement floor-space was approximately 15% of the total. No. 70 had a sub-basement of 823 sq ft and combined basement and sub-basement space amounting to approximately 35% of the total. Mr Buchanan's view was that basement and sub-basement space was less valuable so he made an adjustment of 12.5% to reflect the greater amount of such space in No. 70. He made a further deduction of 5% to reflect No. 102's better location. This produced a revised capital value of £1,770 per sq ft which Mr Buchanan applied to the agreed GIA of 9,519 sq ft to give an improved FHVP value for No. 70 of £16,848,885.

98. Mr Buchanan said he would normally discount the capital value of an improved house by 50% to arrive at an unimproved site value but he reduced that figure to 45% in the case of No. 70 because of its sloping site and the consequent need for additional excavation works and landscaping. Applying this discount to the improved FHVP of No. 70 derived from the sale of No. 102 gave an unimproved FHVP value for No. 70 of £7.58m.

99. The second of Mr Buchanan's top-down comparables was the freehold sale of 98 Hamilton Terrace for £14.425m in June 2011. Although No. 98 was a modernised house of 8,300 sq ft. Mr Buchanan understood that the condition of the property did not meet "2012 standards" and that the vendor had removed kitchen equipment and light fittings prior to completion which had resulted in a reduction in the purchase price. The purchaser then obtained planning permission to demolish a conservatory and construct a new extension. This did not increase the floorspace but brought the accommodation up to 2012 standards. Mr Buchanan estimated that the cost of these works would have been some £1.5m and that the fully improved FHVP of No. 98 should therefore be taken to be

£16m as at June 2011. Adjusting for time gave a revised value of £14.218m or £1,725 per sq ft. Applying this rate to No. 70 gave an improved FHVP value of £16.42m. Adjustments for the larger plot size and poorer location of No. 70 were neutral, and no adjustment was necessary for parking. Mr Buchanan finally discounted the improved value by 45% (for the same reasons as with No. 102) which gave an unimproved FHVP value for No. 70 of £7.39m.

100. The average of the two top down comparables was £7.484m. This compared with a figure of £7.56m for the bottom up comparables and led Mr Buchanan to conclude that the unimproved FHVP value of No. 70 was £7.5m.

#### *Submissions for the appellant*

101. Mr Loveday submitted that there was no real dispute between the experts on the broad pattern of the market for development properties over time in Hamilton Terrace. The differences between them concerned only three factors: market conditions and the identity of the hypothetical purchaser; the valuation of basement accommodation; and the importance of off-street car parking.

102. *Market conditions and the identity of the purchaser:* Mr Loveday submitted that the respondent was wrong to insist that the market for development properties in Hamilton Terrace was exclusively composed of professional developers reliant on the availability of commercial funding. The purchasers of Nos. 68, 100, 106 and 108 had all been high worth individuals who would not rely upon the loan market. Such evidence as there was of loan financing did not assist the respondent; at 38 Hamilton Terrace there was no charge against the property in favour of the lender and at No. 106 no loan was referred to in the Charges Register. The sales of No. 22 relied on by Mr Buchanan were complicated by very special circumstances (including receivership and litigation) and provided no useful information about market trends.

103. The respondent had made much of the failure of Mr Lyons to sell the freehold of 100 Hamilton Terrace following its redevelopment. Although an explanation for this failure might be a change in market conditions as suggested by the respondent, it was more likely that it was simply being marketed at too high a price. The asking price of £3,284 per sq ft was significantly higher than the price of any other property in Hamilton Terrace and the failure of No. 100 to sell said very little about market conditions.

104. *Basement accommodation:* Mr Loveday submitted that there was no evidence to support the respondent's case that basement floor-space is worth 50% less than ground level accommodation. Mr Sulkin's evidence about 15 Acacia Road, which was said not to have sold because it was "bottom heavy", and 15 Cavendish Road, which had sold and which did not have significant amounts of basement space was insubstantial and tainted by Mr Sulkin's omission to produce the sales particulars of 15 Cavendish Road showing that it had lower ground space and was subject to a proposal for a substantial amount of underground development in the manner of Nos. 100 and 110. The failure of 72 Carlton Hill to sell, which had been relied on by Mr Buchanan was of no evidential value since one could only speculate why it had not been sold.

105. The evidence of planning applications produced by Mr Hamilton demonstrated an appetite for below ground development in this location over the relevant period. The fact that these development projects were only now being undertaken was not a valid criticism since the purchasers had bought with the potential for development in mind and had paid for that value whether or not they carried out the works immediately.. Any decrease in the value of basement space would be compensated by an equal increase in the value of ground floor space because less valuable uses would be housed below ground thereby releasing more living space at ground level.

106. Mr Buchanan's only use of an allowance for basement floor-space was in his analysis of the 2010 sale of 102 Hamilton Terrace when used as a comparable to value No. 70. The development potential of both sites from their unimproved condition involved the provision of basement floorspace but most of the new accommodation at No. 70 was a side extension. Mr Loveday submitted that there should be no allowance for basement floorspace.

107. *Off-street parking:* The principle of an allowance to reflect the absence of off-street parking was agreed and Mr Hamilton had been consistent in making a 5% deduction to reflect this. Mr Buchanan had taken a range of views: in the 2008 LVT hearing into No. 110 he had valued parking spaces at £125,000 each; before the LVT in this case he had described a 5% allowance as "conventional" and had adopted it; he said he had changed his approach to an allowance of £1m having considered Mr Sulkin's opinion, but that had first been expressed at the LVT where Mr Buchanan did not adopt it. Mr Loveday submitted that Mr Buchanan's figure of £1m was not based upon the cost of providing a parking space, was not supported by any evidence and was pure conjecture. There were viable alternatives to off-street parking which would cost far less than £1m, including buying or renting a garage, or employing a chauffeur.

108. Mr Loveday submitted that the evidence showed that the absence of off-street parking was not a deal-breaker and did not necessarily discourage purchasers. 38 Hamilton Terrace had twice been sold as a development site and yet it had no off-street parking

109. *FHVP value:* Mr Loveday suggested that the fundamental difference between the parties' FHVP valuations lay in their assessment of the development potential of the comparables and the appeal properties. Was it better to estimate such potential or to adopt the GIAs for which planning permissions had been obtained?

110. Mr Loveday submitted that using planning permissions as the basis of GIA avoided subjective judgments about tree roots, development potential, sub-basements etc, and was more accurate and objective. Analysis and valuation needed to be done consistently. The parties had agreed the potential planning permissions for each of the appeal properties and these should be compared with the permissions known to have been obtained for the comparables. This reflected what purchasers actually did because purchasers would pay for the space they thought they could achieve.

111. Mr Buchanan had taken existing GIAs and made his own assessment of the equivalence of the development potential of the comparables and of the appeal properties. That, Mr Loveday suggested, was a subjective and inaccurate approach.

### *Submissions for the respondent*

112. Mr Johnson submitted that, as the LVT had found, the market for 70 Hamilton Terrace at the valuation date would have comprised developers who would not use their own money to fund a project but would have borrowed. If finance was not available then the development would not proceed. At the valuation date finance was difficult if not impossible to obtain due to what Mr Hyman had described as “prevailing economic circumstances”. The only substantial development in progress at the valuation date was at 100 Hamilton Terrace which had been conceived in an entirely different market.

113. Mr Johnson criticised Mr Hamilton’s assumption that the development potential of the comparables was reflected in the planning permissions obtained for them. He had not considered the possibility that a purchaser might choose not to develop a property to its maximum potential. The effect of Mr Hamilton’s approach was to distort the value of the comparables by limiting their development potential to that of the planning permission. In the case of 38 Hamilton Terrace, one of Mr Buchanan’s preferred comparables, this approach led Mr Hamilton to assume that its development potential was limited to the 6,274 sq ft for which planning permission was obtained in 2013. The unimproved floor-space of No. 70, at 4,390 sq ft was very similar to that of No. 38, at 4,288 sq ft. The fact that the purchaser of No. 38 decided to proceed with a development limited to 6,274 sq ft should not be taken to mean that it had a lesser development potential than No. 70 which had already been extended to 9,591 sq ft in the year 2000. By limiting the development potential of the comparables in this way Mr Hamilton derived rates of capital value per square foot that were unrealistically high.

114. Mr Johnson said that 38 Hamilton Terrace also illustrated that purchasers of houses do not necessarily develop them immediately. The freehold of No. 38 was sold in August 2011 but planning permission for 6,274 sq ft was not obtained until 2013. Other examples included Nos. 68 (sold in July 2007) and 102 (sold in January 2010 as a fully modernised house) which were only now being redeveloped. An owner occupier purchasing No. 70, which comprised five flats in its unimproved state, would not have had that flexibility and would have needed to commence redevelopment immediately as they would not have been able (or willing) to live in a flat. A developer would not acquire the property only to sit on it for several years.

115. The hypothetical purchaser of No. 70 was buying at the valuation date subject to the planning and development risks that existed at that time. That is unlike a person who buys a property, subsequently applies for planning permission and then redevelops at a time of his choosing. The development process for such a person was risk free because they had already purchased the property.

116. Mr Johnson also criticised Mr Hamilton for discounting by only one third to get from the improved value of 98 Hamilton Terrace to its unimproved value. This adjustment was clearly wrong because it implied that the cost of putting No. 98 into a fully modernised condition from its already improved state would be £578 per sq. ft. That figure was unrealistically high and Mr Hamilton had erred by adopting too low a discount, unsupported by any independent evidence.

117. Mr Johnson pointed out that Mr Hamilton's reliance upon the sale of 68 Hamilton Terrace in July 2007 was inconsistent with his rejection of the sale of No. 98 Hamilton Terrace as a comparable to value No. 106. The sale of No. 98 took place 26 months after the valuation date for No. 106 and was rejected by Mr Hamilton for that reason, yet the sale of No. 68 took place 40 months before the valuation date in the appeal for No. 70.

#### *70 Hamilton Terrace: conclusions*

118. We comment below on each of the comparables referred to by the experts in their valuation of 70 Hamilton Terrace, starting with the four bottom up comparables.

119. *22 Hamilton Terrace.* Neither party relied on the two sales of this property as providing useful comparable sales evidence. Mr Buchanan said that they "clearly illustrate the change in the nature of the development market between 2007 and 2010" but we find no such clarity. Any market trend that may have existed was disguised by the specific factors complicating these transactions and which, in our opinion, render them valueless as comparables.

120. *38 Hamilton Terrace.* The leasehold interest in No. 38 was sold in August 2010 for £4.5m and the freehold interest was acquired subsequently for £1.65m making a total of £6.15m (Mr Hamilton took £6.1m). The freehold was sold again in August 2011 for £7.7m.

121. The experts do not agree about the development potential of No. 38. Mr Buchanan says that it has the same potential as No. 70, based upon the similarity of their existing unimproved floorspace. The experts agree that No. 70 has a development potential of 9,519 sq ft. but after the sale of the freehold of No. 38 in August 2011, the owner obtained planning permission for a redevelopment to only 4,808 sq ft (2012) and later to 6,274 sq ft (2013). Consistent with his assumption about the parity of the development potential of the two properties Mr Buchanan says that the owner of No. 38 did not seek to maximise the development potential of the site. That, he says, does not mean that further such potential did not exist. Mr Hamilton takes the view that the development potential of No. 38 is best reflected in the planning permissions which have been obtained for it. But he acknowledges that as evidence of No. 38's development potential this is open to question when he states at paragraph 14.6 of his expert report:

"The extension for which consent has been obtained is relatively modest compared to the potential at No. 70 and as a result I place less weight on the sales at No. 38."

122. This difference in approach taken by the experts produces substantially different results when analysing No. 38 and valuing No. 70. Mr Buchanan takes the average of the time adjusted sale prices of the two sales of No. 38 (£6.51m) and derives a rate per sq ft for the unimproved floorspace (£1,516) which he then uses to capitalise the unimproved floorspace of No. 70 (4,390 sq ft). This gives a FHVP value for No. 70 (before further adjustments) of £6.65m. Mr Hamilton analyses each sale of No. 38 in two ways, once based on the 2012 planning permission and once based on the 2013 planning permission. This gives a rate per sq ft in each instance which he then applies to the agreed

development area of No. 70 of 9,519 sq ft. The result is a range of four figures for the FHVP value of No. 70 (before further adjustments), the lowest of which is £9.39m and the highest £12.65m, i.e. 41% and 90% higher respectively than Mr Buchanan's figure.

123. We are surprised that experts taking an independent and objective approach should produce such widely differing valuations based upon the same comparable sales.

124. The history of the first sale of No. 38 was not clearly narrated in the evidence but can be pieced together from the documents. It appears that a Mr Hunt owned a leasehold interest in the property and that he enfranchised the freehold interest on 28 February 2011 for £1.65m. He had previously entered into a contract on 6 August 2010 with Barrimoss Limited for the sale of the freehold interest (a unilateral notice of a charge to this effect is shown in the Charges Register for the Freehold Title No. NGL 916630) for £4.5m. The transfer of the whole of the freehold title was duly completed in this sum on 14 March 2011 (in the agreed sales schedule the experts state that the *leasehold* interest was sold on 6 August 2010 for £4.5m).

125. On 11 February 2010 Mr Hunt submitted, via an agent, a planning application for an extension of No. 38 to include a lower ground floor extension, a double-height glazed conservatory and alterations to the roof to provide two bedrooms and a bathroom at third floor level. This application was withdrawn on 10 May 2010, the day before the local planning authority was due to consider it. The agent, Mr Peter Crawford, in the email withdrawing the application, noted that "you [the local planning authority] have kindly offered to put your design requirements in writing to me." This suggests to us that the local planning authority may have been proposing to refuse the application, but there is no evidence, such as the planning officer's recommendation, to confirm this.

126. No. 38 was then sold to Barrimoss Ltd in March 2011 and, according to the agreed sales schedule, the freehold was sold again in August 2011 for £7.7m. The purchaser was not identified in the evidence but we note from the subsequent planning application dated 13 February 2012 that the applicant's reference was given as Maison Anley Property Nominee [Ltd]. The beneficial owner was not identified, although in his evidence Mr Stone said that he had been told that the purchaser "is an intended owner-occupier". That planning application, which was granted on 22 May 2012, included the erection of a full width rear extension to all floors and "the excavation to lower floor level at existing lower ground floor level" and new rear and front light wells. The previous proposal to develop a new third floor level was not pursued. The parties agreed that the total GIA of this planning permission was 4,808 sq ft.

127. A further planning permission was granted in January 2013 which the experts agree had a GIA of 6,274 sq ft. No details of this planning permission were adduced by either party apart from Mr Hamilton's comment that it "included a basement floor".

128. There have been three planning applications (two of which were granted) since February 2010. It seems to us that these applications explored the development potential of No. 38 in some detail. We conclude the following from these applications and our on site observations:

(i) It was unlikely that the property could be reconfigured to allow a third-storey to be constructed in the roof space because the height of neighbouring properties and the existence of a conservation area acted as constraints.

(ii) The presence of a large rear extension to 40 Hamilton Terrace along the boundary with No. 38 probably acted as a physical constraint on the extent and type of redevelopment achievable at the rear of No. 38.

(iii) No. 38 was sold to a company, Barrimoss Limited, in March 2011. Mr Sulkin described this sale as being to a “professional developer”. Thereafter it was sold again in August 2011 with at least one of the two subsequent planning applications being made in the name of a nominee company. It seems likely that these sales were to parties who were either developers or interested in pursuing a development.

(iv) It is a non sequitur that, because historically Nos. 38 and 70 had similar floorspace, they now have equal development potential.

129. We also consider that the absence of off-street parking would significantly diminish the size of the market for No. 38 as a development opportunity. A developer would be discouraged from developing a top specification building which did not have off-street parking and which might not attract buyers who could obtain it in other nearby developments in Hamilton Terrace. We share Mr Hamilton’s view that the planning permission obtained in 2013 was “relatively modest” and we think that there was scope for a larger development at No. 38 although not of the same size as at No. 70. On balance we consider that the development potential of No. 38 was 7,500 sq ft and we have adopted this figure in our analysis.

130. We also agree with Mr Hamilton that the two sales of No. 38 were distinct transactions which should be analysed separately and not “blended” (averaged) as Mr Buchanan has done. In any event the first transaction was a leasehold rather than a freehold sale. We consider that Mr Hamilton was correct, given the various uncertainties surrounding the transactions at No. 38, to be cautious about the weight that should be given to this comparable.

131. *68 Hamilton Terrace*. This property is the most comparable to No. 70 in terms of its location, being situated at the south eastern corner of the junction of Hamilton Terrace and Hall Road, directly opposite No. 70 on the north eastern corner. The problem with the use of No. 68 as a comparable is the date of its sale. The freehold was sold in July 2007, well over three years before the valuation date for No. 70 (November 2010). That is a long period over which to index a transaction in a stable market, but in this case the period between the sale of No. 68 and the valuation date saw several significant market movements: a rise in value between July 2007 and December 2007 followed by a sharp fall to March 2009 and then a consistent recovery up to and beyond the valuation date. Indexation in such a volatile market over so long a long period is not reliable. The authors of Savills’ Research Prime London Residential Statistical Supplement for Quarter 3, 2012 (submitted by Mr Loveday as an agreed document) note:

“We would attach less weight to values of comparables that have been arrived at [through] indexing a historic sale price than to contemporaneous comparables, and would be particularly cautious where

the index has been applied over longer periods of time or during shorter periods of extreme price movements and/or significant variation between property type.”

In our opinion the sale of No. 68 in March 2007 is too historic to be of assistance in the valuation of No. 70 and we give it no weight as a comparable.

132. *106 Hamilton Terrace.* The leasehold interest in this property was sold together with 9/10 Abercorn Close in March 2010 for £6.6m. To be of assistance as a comparable in the assessment of the FHVP value of No. 70 it is necessary to add the enfranchisement prices of the separate freeholds in 9/10 Abercorn Close and No. 106 to the combined leasehold value. The enfranchisement price of Nos. 9/10 was determined by the LVT in another hearing and was not appealed but that of No. 106 is in dispute and is to be determined by this Tribunal. That being so the use of No. 106 as a comparable becomes circular because one assumes what is to be determined: it is necessary to know the enfranchisement price of No. 106 before its unencumbered FHVP value can be determined and used as a comparable, but it is necessary to know the FHVP value in order to calculate the enfranchisement price. Mr Buchanan assumes the cost of acquiring the freehold of No. 106 would be £230,000 but that is challenged before us by the appellant and the assessment of FHVP is complex. Under these circumstances we do not consider that No. 106 is of assistance as a comparable to value No. 70 and we give it no weight.

133. We turn next to the two “top down” comparables relied upon by the experts.

134. *98 Hamilton Terrace.* No. 98 was sold for £14.425m in June 2011 as an improved freehold property with a GIA of 8,300 sq ft. The experts differed in their assessment of the quality of the accommodation and how it should be analysed to give an unimproved value. It is not disputed that the vendor removed (unspecified) kitchen equipment and light fittings before completion of the sale which resulted in a reduction of the purchase price. Mr Buchanan also argues that the property was in need of “a cosmetic restoration” to bring it up to 2012 standards. The purchaser subsequently obtained planning permission to demolish the existing conservatory and construct a new rear extension and ancillary works. Mr Buchanan allows for this by assuming it would cost £1.5m to undertake the works and he adds this to the purchase price to give a rounded total of £16m. He adjusts this for time and takes 45% to represent the site value. He takes 45% rather than 50% because of the additional excavation works required to develop the sub-basement due to the sloping site at No.70.

135. Mr Hamilton takes two thirds of the sale price of £14.425m as representing site value because No. 98 “was not in the best condition.” This gives a figure of £9.62m for its unimproved value (before time adjustment). As Mr Johnson pointed out this implies that the FHVP value of No. 98 when in the best condition would be twice its site value or £19.24m (since Mr Hamilton accepted that the usual discount from an improved building to its unimproved site value was 50%). Mr Johnson said that this meant the cost of putting the property into its best condition was some £580 per sq ft. which did not make sense. We agree that Mr Hamilton’s approach produces a figure for the unimproved value that is too high.

136. Mr Buchanan's approach on the other hand depends upon his estimate of improvement costs of £1.5m for which there is no supporting evidence. He also discounted the improved value by 55% to reflect what he considers to be the problems of a sloping site at No. 70. That is effectively a 10% reduction in the value of the unimproved site. We do not accept that adjustment. Having observed the scale of excavation that the creation of basement space in this locality involves, we consider that dealing with a gently sloping site would represent no extra civil engineering challenge or additional cost and that both would be compensated by the fact that No. 70 is less constrained than No. 98 by proximity to neighbouring properties and easier access.

137. On balance we accept Mr Buchanan's approach to the analysis of the sale of No. 98 and we adopt his figure of £16m for the improved FHVP value of that property. His estimated cost of the extension and other refurbishments to bring the house into a fully modernised condition does not seem unrealistic despite the absence of firm evidence. But we then apply a discount of 50% to give an unimproved value, before time and other adjustments, of £8m.

138. *102 Hamilton Terrace.* The freehold of this property was sold together with the leasehold interest in 6/7 Abercorn Close in March 2008 for £12.7m and again in January 2010 for £16m. Both experts concentrate upon the second sale. We consider that the first sale was too historic to be of assistance for the reasons that we have already given.

139. According to the sales particulars, at the date of the second sale in January 2010 No. 102 had been "newly refurbished". The GIA of No.102 was 6,204 sq ft and that of the mews house 1,880 sq ft. In March 2012 planning permission was granted for a redevelopment to provide a total of 11,030 sq ft which apparently excluded the mews. This increase of more than 75% of the GIA is attributable to the creation of a new basement and an extended lower ground floor. This planning permission was amended (as a non-material change) in June 2012 to allow a "reduction of extent of subterranean development", but both experts take 11,030 sq ft as the GIA for No. 102 and we adopt this figure.

140. The 2010 purchase price of £16m included the leasehold interest in 6/7 Abercorn Close. Mr Buchanan analysed the leasehold value of these mews houses in two different ways. In his expert report for 110 Hamilton Terrace (at paragraph 10.36) he took a figure of "not less than £2m" as the value of the existing *leasehold* interests in the mews houses in January 2010. In his expert report for 70 Hamilton Terrace (at paragraph 11.3) he assessed "the combined *freehold* market value of the mews property at £2.0m (£1.0m each) and the existing leases at £1.6m." He estimated the leasehold value of the mews houses at £1.981m as at January 2010 in his expert reports for both Nos. 70 and 110.

141. When valuing No. 70 Mr Buchanan analyses the 2010 sale of No. 102 by adding the freehold value of the mews houses to the freehold value of No. 102. He then adjusts this figure for time and other factors and derives a capital value per sq ft using the combined area of 8,084 sq ft. He then applies that rate to the agreed floor area of No. 70 to give an improved value for No. 110 which he then reduces by 55% to give the unimproved value.

142. When valuing No. 110 Mr Buchanan adopts the freehold value of No. 102 excluding the freehold value of the mews houses. He adjusts this figure for time and other factors including an allowance of 2.5% to reflect No. 110's lesser development potential compared with No. 102. The resultant figure is taken by Mr Buchanan as being directly comparable with the freehold value of No. 110. He then takes 50% of the figure to give the unimproved value.

143. There are two inconsistencies in Mr Buchanan's analysis. Firstly, we consider that the mews houses should either be included or excluded from the analysis of the sale of No. 102. We can see no reason why they are included in the analysis used to value No. 70 but are excluded from the analysis used to value No. 110. Secondly, when valuing No. 70 Mr Buchanan analyses the sale of No. 102 by using the then existing floorspace of 8,084 sq ft described in the sales particulars as "newly refurbished." That is a top down approach and it is appropriate to apply a percentage reduction to obtain the unimproved value. But in his valuation of No. 110 Mr Buchanan refers to the potential to increase the floorspace of No. 102 and states:

"No. 102 clearly had an improved value based on the existing area but the purchaser believed that the potential to increase the area and carry out further works would enhance the value of No. 102."

He derives a capital value after adjustments which reflects this potential for further development but then proceeds to discount it as though that potential had already been realised following construction of the works. In other words he treats a bottom up potential development as though it were a top down completed development. In our opinion that approach is wrong.

144. Mr Buchanan's valuation of 6/7 Abercorn Close is also inconsistent, as we have indicated above. We prefer Mr Hamilton's analysis of their leasehold value which we round to £2m. Adopting a relativity of 80% gives a freehold value for 6/7 Abercorn Close as at January 2010 of £2.5m. We therefore take the combined freehold value of No.102 and the mews houses as £16.5m as at January 2010.

145. Mr Hamilton analyses the 2010 sale of No. 102 by excluding the mews houses. He takes the purchase price net of the leasehold value of 6/7 Abercorn Close (just over £14m) and divides this by the existing area of No. 102 (6,204 sq ft) to give a rate per sq ft which he then adjusts for time before discounting by 50% to give an unimproved site value rate which he uses to value No. 70 (with adjustments). As an alternative Mr Hamilton undertakes a bottom up analysis. Again he excludes the value of the mews houses and divides the net price attributable to No. 102 (just over £14m) by the area for which planning permission was obtained in 2012 (11,030 sq ft). He derives a rate per sq ft which he adjusts for time and size/access and then applies to the agreed GIA of No. 70. He uses the same methods of analysis when valuing No. 110. (In our opinion Mr Hamilton should also have allowed for planning when analysing the January 2010 sale of No. 102 on a "bottom up" basis, since No. 102 did not have planning permission for the larger development at the date of sale.) Mr Johnson asked Mr Hamilton (in the context of the appeal at No. 110) why the 50% deduction had "disappeared" in the analysis of the 2010 sale of No. 102 which used the proposed GIA of 11,030 sq ft. Mr Hamilton replied that the purchaser had treated the purchase as a development opportunity and had stripped out the existing building (notwithstanding its "newly-refurbished" condition).

146. There is no evidence that 6/7 Abercorn Close has been sold separately following its joint sale with No. 102 in 2010. In our opinion the mews properties add to the value of the whole since they afford further off-street parking and provide accommodation for staff and/or guests. We note that No. 100 has also been marketed with the benefit of a mews house and we consider that any analysis of No. 102 should include 6/7 Abercorn Close.

147. In summary, we gain no assistance from the comparables at Nos. 22, 68 or 106 Hamilton Terrace. We rely upon the comparables at Nos. 38, 98 and 102 Hamilton Terrace, placing most weight upon No. 102.

148. We turn next to the adjustments that need to be made to the three comparables upon which we rely.

149. *Off-street parking.* No adjustment is required for this factor for either Nos. 98 or 102 since, like No. 70, they both have off-street parking. No. 38 does not have off-street parking; following our inspection we consider Mr Sulkin's suggestion that it might be possible to provide a vehicular access to the rear via the private access to Scott Ellis Mansions as wholly unrealistic.

150. Mr Hamilton makes no adjustment for the absence of off-street parking at No. 38. No reason is given and it may have been an oversight. Mr Buchanan makes an allowance by adding £1m to the adjusted value of No. 38.

151. We are satisfied that off-street parking is a substantial advantage in this location and that a significant adjustment should be made to reflect its absence. Mr Buchanan previously agreed with Mr Hamilton that a percentage adjustment of 5% was appropriate, but now argues for a "very minimum figure of £1m." He does not vary this figure in his analysis of the comparables, regardless of their FHVP value. An allowance of £1m represents 15% of the time adjusted FHVP value of No. 38 adopted by Mr Buchanan, i.e. three times the allowance made by Mr Hamilton. In the analysis of Nos. 98 and 102 which he undertook when valuing No. 110, Mr Buchanan also adopted £1m as the appropriate allowance, being 7% and 6.8% respectively of their time adjusted FHVP values - less than half of the allowance made at No. 38. In our opinion a consistent percentage adjustment is more appropriate than a fixed lump sum.

152. The appellant's suggested solutions for properties without their own off-street parking included the employment of a chauffeur, off-site garaging and on-street residents parking. We are not satisfied that any of these would realistically mitigate the purchaser's requirement to have his own off-street parking. The absence of such a facility in this prime location would undoubtedly reduce the number of perspective purchasers and lead to a significantly lower sale price. We do not consider that an allowance of 5% of the FHVP value is adequate and we adopt a figure of 10%.

153. *Planning.* Neither party makes any adjustment for planning when analysing the three comparables upon which we rely.

154. *Location.* Mr Buchanan considers that Nos. 38, 98 and 102 are all in a better location than No. 70 and he makes a 5% allowance in each case to reflect this. Mr Hamilton makes no allowance for location.

155. Nos. 70, 98 and 102 Hamilton Terrace all lie within the block of properties between Hall Road and Abercorn Place. No. 38 is further to the south in what in our opinion is a less attractive section of Hamilton Terrace. The only locational disadvantage of No. 70 is that it adjoins the traffic light controlled junction of Hamilton Terrace and Hall Road. Traffic therefore stops immediately outside the house on a regular basis and inhibits free entry and exit to and from the off-street parking area at the front of No. 70. But the location also means that no house adjoins No. 70 to the south which gives the property a more open aspect. On balance we consider that there is no reason to make any adverse allowance for the location of No. 70.

156. *Site size and slope.* The plots of Nos. 38, 98 and 102 are approximately the same depth as that of No. 70 but No. 70 is significantly wider, giving it a relatively open aspect and room to extend on either side of the building as well as to the rear. Mr Buchanan allows a 5% increase in the FHVP values of Nos. 38 and 98 to reflect the larger size of No. 70 (although he would take 15% for No. 38 were it not for the similar development potential and the sloping site of No. 70). He makes no addition to the FHVP value of No. 102 because it “clearly has greater development potential and is situated on a level site.” Mr Hamilton adds 2.5% to the FHVP value of all three comparables to allow for the larger plot and side access at No. 70.

157. We do not accept that No. 102 should be treated differently from the other comparables for this factor. The development potential of Nos. 70 and 102 is reflected in the square footage of the respective developments used in their analysis and valuation. We have already explained that we do not consider the sloping site at No. 70 to be material. There is nothing exceptional about No. 70’s topography. The photographs of No. 102 following its first re-development show that here too there was considerable excavation, re-levelling and terracing of the site to allow open and direct rear access to the lower ground level conservatory. We consider the larger site of No. 70 to be a significant advantage which we reflect in a 5% increase in the FHVP value of all of the comparables.

158. *Subterranean accommodation.* Mr Buchanan compares the amount of basement (lower ground) and sub-basement space at No. 70 with that of No. 102 as at the date of the latter’s sale in January 2010. The figures are 35% (as shown in the agreed statement of facts) and 15% (not agreed by the experts) respectively. Mr Buchanan says that this difference warrants a 12.5% reduction in the FHVP value of No. 102. Mr Hamilton makes no such adjustment.

159. Mr Buchanan said of the grant of the March 2012 planning permission for the redevelopment of No. 102:

“It seems clear that the price paid in 2010 for 102 Hamilton Terrace must have reflected the potential for further development even though the amount was unknown.”

The planning permission of March 2012 was for the:

“Excavation beneath the dwellinghouse and rear garden to create a sub-terranean extension, lower ground floor rear extension, replacement front boundary, air-condenser units, replacement front entrance stairs and associated works.”

The floorspace of the March 2012 planning permission is agreed at 11,030 sq ft, i.e. 4,826 sq ft more than already existed at No. 102. Nearly all of the additional space appears to be at basement and sub-basement level. In our opinion the proposed proportion of subterranean space in No. 102 was likely to have been as great, if not greater than that at No. 70. The prospect of development, as Mr Buchanan recognises, was reflected in the January 2010 sale price. Under these circumstances we can see no justification for Mr Buchanan’s adjustment of 12.5%.

160. The results of our analysis of the comparables at Nos. 38, 98 and 102 Hamilton Terrace are shown in Appendix 1. They are summarised below:

<b>Comparable</b>	<b>FHVP Value of No. 70</b>
No. 38 (bottom up)	£ 9.91m
No. 98 (top down)	£ 8.62m
No. 102 (top down)	£ 10.79m
No. 102 (bottom up)	£14.155m

In our opinion this analysis supports an FHVP value of £10.75m for 70 Hamilton Terrace. For the reasons we have already explained we are cautious about the weight to be given to No. 38. We are also wary of the bottom up analysis of No.102 for a number of reasons: first, because it is so significantly higher than the other comparables, secondly because, having already been very substantially improved, it is a poor subject for a “bottom up” analysis, and finally because the analysis depends on the unproven assumption that the March 2012 planning permission was contemplated by the purchaser in January 2010.

### **110 Hamilton Terrace**

161. The valuation experts agreed that the enfranchisement price of No. 110 should be the same as its FHVP value at the valuation date of 6 October 2010. For the appellant Mr Hamilton considered that the FHVP value was £11m. For the respondent Mr Buchanan believed that the FHVP value was £5.5m.

162. The evidence and submissions in this appeal were generally the same as those in the appeal at 70 Hamilton Terrace, with the valuation experts relying on the same comparables with only minor changes to the indexation because of the different valuation date. For the reasons we have given in respect of No. 70 we only give weight to the comparables at Nos. 38, 98 and 102 Hamilton Terrace when valuing No. 110. We do not repeat our general discussion of those comparables but focus instead on the bearing they have on the major issues at No. 110 which may be summarised as follows:

- (i) the absence of off-street parking at No. 110;

- (ii) the overlooking of No. 110 by adjoining properties;
- (iii) the design constraint on the provision of basement accommodation at No. 110 created by the presence of trees roots;
- (iv) the prospective purchaser's development intentions in light of the agreed maximum potential GIA of 10,376 sq ft; and
- (v) the absence of planning permission at the valuation date for the redevelopment of No. 110 as a single house.

163. *38 Hamilton Terrace*. No. 38 is the only direct comparable with no off-street parking so no adjustment is required for this factor when valuing No. 110. We consider the absence of parking to be a material disadvantage to the value and marketability of this type of prestigious property.

164. Mr Hamilton made no other adjustments and calculated a rate per sq ft to apply to No. 110 by dividing the time adjusted 2010 and 2011 sale prices of No. 38 by 4,808 sq ft (the GIA of the 2012 planning permission) and 6,274 sq ft (the GIA of the 2013 planning permission) respectively. This gave a range of rates from £982 per sq ft to £1,406 per sq ft which he then applied to the agreed maximum GIA for No. 110 (10,376 sq ft).

165. Mr Buchanan assumed that the development potential of Nos. 38 and 110 was similar. The planning permission which had been granted for the redevelopment of No. 38 was not indicative of its full development potential; nor did the fact that No. 110 *could* be developed to 10,376 sq ft mean that it necessarily *would* be so developed. He felt that the average of the 2010 and 2011 sale prices of No. 38 could be used as a direct comparable to value No. 110.

166. The two sales of No. 38 took place either side of the valuation date for No. 110. The difficulty of using No. 38 as a comparable lies in assessing whether the planning permission obtained in 2013 for 6,274 sq ft is representative of its full development potential. We have previously concluded (paragraph 129) that the 2013 planning permission did not maximise the development potential of No. 38 but that for the reasons given such potential would be limited to 7,500 sq ft. The presence of tree roots at No. 110 dictates that the achievement of the maximum GIA would require an elongated and unbalanced sub-surface development. Given this constraint and the absence of off-street parking we accept Mr Buchanan's view that the development of No. 110 would be unlikely to extend to the full 10,736 sq ft agreed by the parties' architects to be achievable, but for which no planning permission existed. Mr Buchanan said at the end of his oral evidence that he accepted that No. 110 could sensibly be redeveloped with a GIA of 9,000 sq ft and we adopt this figure as being reasonable.

167. Mr Buchanan makes three further adjustments to the comparable at No. 38. First, he allows 5% for the risk that planning permission might not be obtained to restore No. 110 from flats to a house. There is no evidence that this would be a material planning risk and, in agreement with the LVT, we consider it negligible and make no allowance for it.

168. Secondly, Mr Buchanan makes a 5% allowance because No. 110 is overlooked by neighbouring properties. Although the studio at No. 108 has been demolished since the valuation date, the extent of the overlooking on the opposite side was obvious on our inspection and we accept Mr Buchanan's allowance.

169. Thirdly, Mr Buchanan allows 5% because of the problems with tree roots at No. 110. The GIA of 9,000 sq ft which we have adopted already reflects the design difficulties associated with the tree roots and we make no separate allowance for this factor.

170. *98 Hamilton Terrace.* Mr Hamilton adjusts the £14.425m sale price of No. 98 in June 2011 by 5% for the lack of off-street parking at No. 110 and by a further 5% because No. 110 did not have planning permission for re-development at the valuation date. After these adjustments and indexing for time Mr Hamilton derives a rate per sq ft for No. 110 as improved. He then obtains the unimproved rate per sq ft by discounting this figure by a third rather than a half because although No. 98 had been fitted out in the late 1990s it did not meet current standards.

171. Mr Buchanan also adjusts for planning at 5% and makes his standard allowance of £1m for No. 110's lack of off-street parking. In addition he allows 5% each for the fact that No. 98 is not overlooked and does not have tree root problems. He makes these deductions from an adjusted sale price for No. 98 of £16m (see paragraph 99 above) which he indexes for time to give £14.25m. The improved FHVP value after the adjustments is then discounted by 50% to give the unimproved FHVP value for No. 110. This methodology assumes that Nos. 98 and 110 have similar development potential and therefore Mr Buchanan makes a direct comparison between the properties and does not derive a rate per sq ft for No. 98.

172. We prefer Mr Buchanan's analysis of the sale of No. 98 and we accept that the purchase price should be adjusted to £16m to reflect its value in a fully modernised condition. We allow 5% for lack of planning, 10% for no off-street parking and 5% for overlooking. We make no separate allowance for tree roots for the reasons stated above. The total allowance (deduction) is therefore 20% from the FHVP value of No. 98.

173. *102 Hamilton Terrace.* Mr Hamilton deducts the leasehold value of the mews houses from the January 2010 sale price of £16m to give a net figure for the FHVP value of No. 102 of some £14.02m. He then adjusts for time and derives a rate per sq ft excluding the mews houses. He deducts for planning (5%) and no off-street parking (5%) to give an adjusted rate for the improved property of £2,142 per sq ft. He discounts this figure at 50% to give an unimproved rate which he then applies to the agreed maximum potential GIA for No.110 (10,376 sq ft) to give a FHVP value of £11.113m. He also undertakes a bottom up analysis of No. 102 based on the March 2012 for 11,030 sq ft which, with adjustments for time and off-street parking (but not for planning since planning permission for the larger development of No.102 was not granted until after the sale) gives an FHVP value for No. 110 of £13.188m.

174. When valuing No. 110 Mr Buchanan begins his analysis of the sale of No. 102 by deducting the leasehold value of the two mews houses to give a price for No. 102 alone of £14m. He adjusts this

figure for time and then makes five further adjustments (all deductions) for No. 110's smaller development potential (2.5%), lack of planning (5%), tree root problems (5%), overlooking (5%) and lack of off-street parking (£1m). This gives what Mr Buchanan treats as an improved FHVP value for No. 110 of £11.06m which he then discounts at 50% to give an unimproved FHVP value of £5.58m.

175. We have already noted the inconsistencies of Mr Buchanan's analysis in paragraph 143 above. We do not accept that No. 102 can properly be analysed on a top down basis by reference to a planning permission (March 2012) that had not been implemented (or even granted) at the sale date. We prefer Mr Hamilton's approach to the analysis of the 2012 planning permission which analyses the January 2010 sale on a bottom up basis. We differ from Mr Hamilton by using the combined purchase price of No. 102 and 6/7 Abercorn Close and their total GIA.

176. We make no separate allowance for the smaller development potential of No. 110 compared with No. 102 or for tree roots. We allow for overlooking at 5% and off-street parking at 10%. We make an allowance of 5% for planning when analysing the sale of No. 102 by reference to its existing floorspace but make no deduction when analysing the sale by reference to the subsequent 2012 planning permission (see paragraph 145 above).

177. The results of our analysis of the comparables at Nos. 38, 98 and 102 are shown in Appendix 2 and are summarised below:

<b>Comparables</b>	<b>FHVP value of No. 110</b>
No. 38 (bottom up)	£ 7.705m
No. 98 (top down)	£ 6.185m
No. 102 (top down)	£ 7.735m
No. 102 (bottom up)	£10.295m

In our opinion this analysis supports a FHVP value of £7.75m for 110 Hamilton Terrace.

### **106 Hamilton Terrace**

178. Mr Buchanan considered that the price payable on the collective enfranchisement of No. 106 should be £188,143. Mr Hamilton thought that the appropriate figure was £2,262,528.

179. The circumstances of the appeal at 106 Hamilton Terrace differ from, and are more complex than, those at Nos.70 and 110 and it is necessary for us to preface our consideration by referring to the statutory valuation criteria applicable to a collective enfranchisement.

*Relevant statutory provisions*

180. The price to be paid by a nominee purchaser on a collective enfranchisement falls to be determined under Part II of Schedule 6 to the 1993 Act, applied by section 32. Under paragraph 2(1) of Schedule 6 the relevant price is the aggregate of three sums, namely: (a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3; (b) the freeholder's share of the marriage value as determined in accordance with paragraph 4; and (c) any amount of compensation payable to the freeholder under paragraph 5.

181. The value of the freeholder's interest is to be determined in accordance with paragraph 3, which provides as follows:

“Value of freeholder's interest

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

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

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

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

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

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

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

The persons falling within sub-paragraph (1A) who are to be assumed by paragraph 3(1) not to be “buying or seeking to buy” include the nominee purchaser, any tenant of premises contained in the building, and any owner of an interest which the nominee purchaser is to acquire.

182. The valuation date for the collective enfranchisement of No. 106, 14 April 2009, is the earliest of the three with which we are concerned. As with the other properties the FHVP value forms the

starting point of the valuation and is very much in dispute, but the exercise is also complicated by the existence of the headlease, by the four underleases of individual flats and by the shared garden (as we have described in paragraphs 19 to 21 above). This appeal therefore raises particular valuation issues and differences of approach between Mr Buchanan and Mr Hamilton which do not feature in the other appeals.

183. Before considering those issues it is necessary to recall that the underleases of three of the flats at No. 106 have been the subject of statutory extension and to highlight the effect of section 61 of the 1993 Act in those circumstances.

184. The new underleases granted pursuant to section 56 of the 1993 Act are for terms expiring 90 years after the term dates of the original underleases which they replaced, which will therefore expire in 2136. The new underleases are at peppercorn rents and include the term provided for by section 57(7)(b) which reserves to the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with section 61 of the 1993 Act.

185. Section 61 enables the immediate landlord (or the superior landlord where there is an intermediate lease) of a lease granted under section 56 of the 1993 Act who wishes to redevelop the flat in question to apply to the court for an order declaring that the landlord is entitled as against the tenant to obtain possession of the flat, and giving the tenant an entitlement to compensation for the loss of the flat in accordance with Schedule 14 of the 1993 Act. An application for such an order may be made at any time during the period of 12 months ending with the term date of the original lease (section 61(2)(a)).

186. If in due course the court makes an order under section 61, the new underleases of the three flats would come to an end and compensation would be payable to the tenants under the provisions of Schedule 14 of the 1993 Act. The date of termination would be fixed by the court on an application made by either landlord or tenant; it cannot be before the term date of the original underleases, and must be after the amount of the compensation has been fixed, either by agreement or by the LVT. If the tenants did not admit that the landlord had the necessary intention, it would be necessary for the Landlord to prove that intention to the satisfaction of the court.

187. In *Kutchukian v John Lyon's Charity* [2013] EWCA Civ 90 the Court of Appeal held that, in a situation where there are both freehold and headleasehold interests in a property divided into flats, the rights under Section 61 are available to the freeholder. It also held that the compensation payable to tenants pursuant to Schedule 14 is confined to the values of their flats and does not include any share of the uplift in the value of the property as a whole which would be realized on the freeholder securing vacant possession of the individual flats. The Court of Appeal held (reversing the decision of the Tribunal on this point in *Kutchukian v John Lyon's Charity* [2012] UKUT 53 (LC)) that the statutory valuation exercise had to be conducted on the basis that these conclusions about the effect of section 61 and Schedule 14 were not matters which could be treated as uncertain in the mind of the purchaser at the valuation date.

188. In this case, where the original underleases of the three flats were for terms expiring on 21 March 2046, the freeholder will enjoy a statutory right to terminate the new underleases on that date if it can demonstrate a sufficient intention to demolish or reconstruct the whole or a substantial part of No. 106 or to carry out substantial works of construction which could not reasonably be done without obtaining possession of the flats. An intention to undertake the type of conversion and extension projects which have recently been implemented at other substantial properties in Hamilton Terrace would seem very likely to satisfy the requirements of section 61.

189. The outcome of the statutory procedures for early termination of an extended lease are not entirely free of uncertainty and potential for delay if the freeholder wished to terminate the flat underleases in 2046. Nonetheless, it will be remembered that both the underlease of the remaining flat and the headlease of No. 106 will also expire in 2046. As at the 2009 valuation date with which we are concerned, a well advised purchaser of the freehold interest in No. 106 would therefore have been aware of the opportunity which section 61 creates for it to acquire possession of all four flats in or around 2046 in order to undertake a substantial redevelopment of the building. That opportunity, and the effect it has on the value of No. 106, is thus of significance in this appeal.

190. With that introduction it is now possible to describe the respective contentions of the parties.

191. The reasons for the significant difference between the experts' positions on the price payable for the freehold interest (£243,801 as against £2,262,528) are two-fold. First there is a fundamental disagreement over the FHVP value which mirrors the disagreement in the other two appeals. Secondly, the experts take radically different views of the attitude which a prospective purchaser of the freehold of No. 106 would adopt to the risk that the opportunity to maximise the value of the property by redeveloping and extending it might never be capable of being taken advantage of, or might be realised only after significant delay.

#### *FHVP value*

192. Mr Buchanan said that the FHVP value of No. 106 as flats, but with the potential to convert to a house, was £5m. Mr Hamilton said that the FHVP value of No. 106 was £9m.

193. Mr Buchanan said that the best evidence for the FHVP value of unimproved houses were the sales of Nos. 38 and 106 Hamilton Terrace. We have already rejected the use of No. 106 as a comparable because of the circularity of the analysis (see paragraph 132). Mr Buchanan also relied upon the sales of Nos. 98 and 102. Mr Hamilton relied upon Nos. 38, 98 and 102 as comparables as well as No. 68. We rejected the sale of No. 68 as being too remote from the valuation dates of 70 and 110 Hamilton Terrace, but the valuation date of No. 106 is some 18 months earlier (14 April 2009) than the other two appeal properties. In this case the date of sale of No. 68 is only 21 months earlier than the valuation date. The second sale of No. 38 (1 August 2011) and the sale of No. 98 (28 June 2011), both of which are relied upon by the valuation experts, are 27 months and 26 months after the valuation date respectively. In our opinion it is reasonable to take account of the sale of No. 68 as a comparable for the valuation of No. 106, although we give it less weight because of the turbulence in the market between the date of its sale and the valuation date.

194. We first consider the two bottom up comparables at Nos. 38 and 68. We only consider the second sale of No. 38 in August 2011 for the reasons given in paragraph 130 above. Neither No. 38 nor No. 106 had off-street parking and so no adjustment is required for this factor. Mr Buchanan makes a 5% deduction for the lack of planning permission at No. 106. We do not consider that such an adjustment for the lack of planning permission to convert flats into a house is justified for the reasons stated in paragraph 167 above.

195. In our opinion the most significant difference between Nos. 106 and 38 (and the other comparables) are the rights that the lessee of 10 Abercorn Close had over the back garden of No. 106. This went beyond the overlooking of the rear of No. 106 and extended to the shared use of the entire garden. Mr Buchanan said in his report that the shared garden was “an important factor which would be considered by a hypothetical purchaser of the freehold interest in the Property at the Valuation Date.” He continued “... I consider that this factor alone (the problem of the shared garden use) amply justifies a separate discount of 30%.” Mr Buchanan applies this discount as one of the risks when considering the possible future exercise of section 61/Schedule 14 rights by the purchaser under the 1993 Act (see paragraph 232 (ii) below).

196. Mr Hamilton makes a fixed deduction of £170,000 from each of his comparables to allow for the rights of the lessee of 10 Abercorn Close over the rear garden of No. 106. Mr Hamilton said that there had been a sale of 9/10 Abercorn Close in June 2009 for £900,000 which he adjusted for time to March 2010 to give £1,028,216. According to the Land Registry the sale price of £6.6m for No. 106 and 9/10 Abercorn Close in March 2010 had been apportioned as to £1.2m for the mews houses. Mr Hamilton took the rounded difference between £1.2m and £1.028m as being “the value the vendors put on the value of the garden rights.”

197. In our opinion Mr Hamilton has approached this adjustment in the wrong way. What matters is not just the value that the leasehold owners of 9/10 Abercorn Close may place upon their garden rights but also the effect of those rights on the value of No. 106, viewed as a building suitable for conversion to a house. As flats, No. 106 would have a shared garden in any event and the fact that the mews house at the end of the garden also had such rights would not have been so significant. But the effect on No. 106 viewed as a house is very different as the occupier of so substantial and prestigious a property simply would not countenance a garden sharing arrangement. In our opinion the most likely solution would be for the owner of No. 106 to transfer part of the rear garden to the owner of 9/10 Abercorn Close in return for the extinguishment of the rights over the remaining garden of No. 106. That would create a separate garden for the mews house similar to that already behind 9 Abercorn Close, and would provide a real benefit to both parties. Nonetheless the risk that the lessee of 9/10 Abercorn Close would not reach a satisfactory agreement regarding the exclusive use of the garden by the owner of No.106 would undermine the project to restore No. 106 to a single house and in our opinion a prospective purchaser of No. 106 would make a significant discount from the purchase price to reflect that risk.

198. Quantifying this discount is a difficult exercise because, in reality, a purchase of this type would be undertaken on the basis of an option or conditional contract, but no such device is available on the statutory assumption of a simple sale in the open market. The LVT allowed the sum of £250,000 “to properly reflect the amount which would persuade the owner of 10 Abercorn Close to release the

easement.” We do not consider that this fully reflects the risk to the purchaser of No. 106. In our opinion an appropriate allowance for this risk would be 25% of the difference between the FHVP value of No. 106 as a house (as derived from each comparable) and the agreed FHVP value of the four flats (£3.7m). This adjustment reflects the risk that the enhanced value of the conversion of No.106 to a house (which would be affected by shared garden rights) might not be realised and that the value of No.106 would then be for its continued use as flats (which would not be affected by shared garden rights).

199. The experts agreed that planning permission similar in scope and nature to that granted for 100 Hamilton Terrace be expected to be granted for No. 106, i.e. for a GIA of 10,836 sq ft. Mr Buchanan did not accept that this necessarily meant that a development of that scale would actually be in the mind of the successful purchaser and he preferred to make direct comparisons between the adjusted sale prices of the comparables and No. 106 rather than apply a derived rate per sq ft. In our opinion, given the lack of physical constraints at No. 106 such as tree roots, it is reasonable to assume that a development of similar size to No. 100 would take place at No. 106. We therefore adopt a GIA of 10,836 sq ft.

200. The other bottom up comparable is No.68. Mr Hamilton deducted 5% from the value of No.68 to reflect the fact that, unlike No.106, it had planning permission for redevelopment when it was sold. He also allowed for off-street parking which we take at 10%. In addition we make the 25% adjustment in respect of garden rights as described in paragraph 198 above. Mr Buchanan did not rely upon No. 68 as a comparable.

201. No. 68 had a GIA of 5,345 sq ft when it was sold in July 2007 with planning permission for redevelopment to 6,400 sq ft. Planning permission was subsequently granted in January 2008 for a redevelopment of 8,708 sq ft. We accept Mr Hamilton’s opinion that it is likely that the purchaser had in mind this larger development when purchasing the property and we adopt the higher figure of 8,708 sq ft in our analysis.

202. Mr Hamilton indexes No. 68 for time by reference to the date of the exchange of contracts in March 2007. Consistently with other comparables we prefer to index the price from the date of completion of the sale in July 2007.

203. There are two top down comparables: 98 and 102 Hamilton Terrace. Both experts made deductions from the value of No. 98 for planning and off-street parking. We take 5% and 10% respectively and also allow 25% for garden rights as explained at paragraph 198 above. We adopt the same approach to the analysis of this comparable as we used in the valuation of Nos. 70 and 110.

204. Similarly we adopt our previous approach to the analysis of the sale of No. 102 by analysing the combined sale of the house and the mews properties at 6/7 Abercorn Close. As before we analyse the sale of No. 102 on both a top down and a bottom up basis. When analysing on the former basis we deduct 5% for planning, 10% for off-street parking and 25% for garden rights as explained at paragraph 198 above. When valuing on the latter basis we make no deduction for planning.

205. The results of our analysis of the comparables at Nos. 38, 68, 98 and 102 Hamilton Terrace are shown in Appendix 3. They are summarised below:

<b>Comparable</b>	<b>FHVP value of No.106</b>
No. 38 (bottom up)	£ 6.86m
No. 68 (bottom up)	£ 6.72m
No. 98 (top down)	£ 5.73m
No.102 (top down)	£6.945m
No. 102 (bottom up)	£8.905m

In our opinion the sale of No. 68 is the most helpful comparable, and this analysis supports a FHVP value of £6.75m for 106 Hamilton Terrace.

#### *Development hope value*

206. The element of value attributable to the potential to redevelop No. 106 into a larger and more valuable single residence was referred to in argument as “development hope value”. The same expression has recently been adopted by the Tribunal in similar cases (*Padmore v Official Custodian for Charities* [2013] UKUT 0646 (LC) at paragraph 3, and *Cravecrest Ltd v Duke of Westminster* [2012] UKUT 68 (LC) in particular at paragraph 115) to refer to the premium which it was assumed that a purchaser of an interest in a building subject to collective enfranchisement would pay because of the prospect of being able soon after the purchase of that interest to acquire other interests in the building and to enjoy in consequence a significant development value. Mr Loveday also drew our attention to the decision of the Lands Tribunal (His Honour Judge Huskinson and Mr A J Trott FRICS) in *Earl Cadogan v 2 Herbert Crescent Freehold Limited* (2009) LRA/91/2007 which describes the relevant actions and thought processes of hypothetical purchasers contemplating a bid for the freehold of a building with development potential:

“71. Such hypothetical purchasers will accordingly recognise, when deciding how much to bid for the freeholder’s interest, that there may be a justification to bid more for the freeholder’s interest than the sum which represents the value of the freeholder’s interest calculated on the basis that the Building will remain as flats. In deciding whether in fact to bid more in this manner a hypothetical purchaser would be likely to seek advice as to the risks that the hypothetical purchaser might not be able to carry out the proposed redevelopment at the end of the headlease because of identifiable potential problems, these here being the risk of being unable to obtain vacant possession of one (or both) of the Basement Flat and Flat 1 at the end of the headlease or within a reasonable time thereafter and the risk of having to pay to the lessee of Flat 1 compensation which included a ransom value, and also the risk of being unable to obtain any necessary planning permission.”

207. Where development hope value was assessed, as it was by Mr Buchanan, on the basis that it would be capable of being realised only at the expiry of the leases to which the freehold interest was subject, it was referred to before us as “development value on reversion”. We adopt that expression

as a helpful shorthand in preference to other candidates which were mentioned in argument (including “*Kutchukian* value”, or “section 61 value”, neither of which we find attractive).

208. The major obstacles to any redevelopment of No.106 at the valuation date were the fact that a purchaser of the freehold interest would not acquire vacant possession but would be subject to the headlease and the underleases of the four flats and, moreover, would find that the use of the garden was shared with the owners of 9/10 Abercorn Close. When quantifying development hope value Mr Buchanan took the view that a purchaser would have regarded these obstacles as insuperable in the short term; while a purchaser would have had in mind the potential to redevelop No. 106 it would have been assumed that the earliest opportunity at which that potential could be realised would not arrive until 2046.

209. Mr Hamilton attributed much greater significance to development hope value than Mr Buchanan. He assumed that a hypothetical purchaser would contemplate negotiating (after the acquisition of the freehold) to buy in all the necessary leasehold interests significantly earlier than 2046, either within a period of five years or immediately. It was acknowledged that this approach might be complex and expensive, and that the headlessee and the underlessees of the four flats would expect to be paid some share of the development uplift to co-operate with a scheme promoted by the hypothetical purchaser. Nevertheless at the valuation date all of the leasehold interests in No.106 and in 9/10 Abercorn Close were owned or under the control of two experienced property investors and (whether this fact was known or not) it would have been obvious, Mr Hamilton suggested, that an opportunity for a relatively early realisation of the development potential of the property presented itself. If such a scheme was viable a hypothetical bidder who took too pessimistic an approach to the prospects of achieving it, and who assumed that a development project could not be implemented until 2046, would be likely to be outbid by one who took the view that it could be carried out within a much shorter timescale.

210. Mr Hamilton considered three alternative valuation hypotheses, two of which assumed an acquisition of the freehold by a purchaser intent on an early development of No.106 while the third was similar to Mr Buchanan’s approach being based on the development value on reversion in 2046.

211. On the assumption that a hypothetical purchaser would intend to buy in the necessary leasehold interests as opportunities arose in the relatively short term, Mr Hamilton determined a price for the freeholder’s interest of £2,538,699. This figure (which he referred to as Valuation 1) represented the value of the property for conversion less the costs of acquiring vacant possession (as it was assumed that a deal would be done with the leaseholders at a relatively early stage for them to surrender their interests, it was not necessary to take into account the benefit of the rental income which the hypothetical purchaser would become entitled to).

212. Both of Mr Hamilton’s development hope value assessments assumed an FHVP value for No.106 of £9m, which is considerably higher than the figure we have settled on. In his Valuation 1 he deducted from the FHVP value a cost of securing vacant possession of £4.68m, that being the sum which Mr Hamilton considered would be required to buy in the headlease and the underleases of the four flats. The figure of £4.68m was itself based on the price of £6.6m actually paid by Mrs Alamouti

to acquire those interests in March 2010 (together with the leasehold interest in 9/10 Abercorn Close). In order to arrive at a figure for the value of No. 106 alone at the date of Mrs Alamouti's contract Mr Hamilton took the sum of £900,000 which had been proposed by Mr Buchanan in his evidence to the LVT and accepted by it as the value of 9/10 Abercorn Close in June 2009 and adjusted it for market movement to March 2010, before deducting it from the price paid by Mrs Alamouti for the combined interests at that date. That process enabled Mr Hamilton to arrive at a figure of just over £4.3m as representing the net value of the freehold interest in No.106 after the acquisition of the leasehold interests.

213. The figure of £4.3m was then discounted by Mr Hamilton by 25% to reflect the hypothetical purchaser's assessment of the risks associated with the purchase of the freehold in the expectation of being able to deal with the leaseholders. He explained the basis of his assessment of that risk in paragraph 15.5 of his report, as follows:

“Although at the valuation date two underlessees were prepared to sell, the hypothetical purchaser could not be certain that all interests could be obtained immediately. I therefore assumed that it might take five years to acquire all the interests although all those interests were sold within about a year of the valuation date. The hypothetical purchaser would incur a risk that it might take longer and cost more to acquire the leasehold interests and I allowed 25% for risk to the hypothetical purchaser even though the cost I have allowed of £4.68m is well in excess of the agreed existing lease values....”

214. It can be seen that Mr Hamilton had well in mind the willingness of the owners of the leasehold interests to dispose of them, as demonstrated by the agreement for sale which they entered into with Mrs Alamouti eleven months after the valuation date. His assessment also depended on values derived from Mrs Alamouti's own purchase. On reflection Mr Hamilton stated in cross examination that he was uncomfortable in using those figures as a primary element in his valuation as they could not have been known to a purchaser in April 2009. He therefore suggested that his Valuation 1 should be used only as a check.

215. Mr Hamilton's alternative assessment of development hope value was contained in his Valuation 3 (as revised and dubbed 3A in a supplemental report dated 5 December 2013) and was said to have been based on the approach adopted by the Tribunal in *Cravecrest*. It proceeded on the assumption that a purchaser of the freehold interest in No. 106 would expect to acquire the leasehold interests as soon as possible after acquiring the freehold. The catalyst for that expectation was the knowledge that the leasehold interests in the building were controlled by two property investors who, on the statutory assumption required by paragraph 3(1) of Schedule 6 to the 1993 Act, were not themselves interested in acquiring the freehold reversion. Valuation 3 therefore assumed that the owners of all of the relevant interests in the property (i.e. the hypothetical purchaser of the freehold, the two property investors who owned or controlled the leases at No. 106, and the owners of 9/10 Abercorn Close who would be required to give up their interest in the garden) would collaborate and would agree an equal three-way division of the development uplift to be achieved by the merger of their various interests.

216. Mr Hamilton deducted from his FHVP value of £9m the sum of £3,290,203 in respect of the value of the headlease and the leasehold interests in Flats 1 to 4. (In our opinion the correct figure should be £3,357,703, being the agreed value of those leasehold interests at the valuation date.) Mr

Hamilton also deducted his assessment of the value of the freeholder's interest disregarding the potential for immediate development but assuming a development opportunity in 2046 (£649,264). This produced a figure of £5.06m as the uplift attributable to the immediate development opportunity. The resulting figure was then apportioned equally between the three interested parties to produce a profit of £1.686m for each of them. This, Mr Hamilton explained, was not because he envisaged a joint venture between the various owners for the development of No. 106, but because in calculating what he would be willing to pay for the freehold the hypothetical purchaser would take into account the need to buy out the leasehold and garden interests and would anticipate the need to share the development profit equally in order to reach agreement.

217. In his original and supplemental valuation reports Mr Hamilton considered that, in purchasing No. 106 in the expectation of acquiring the interests of others and so releasing the development opportunity, a hypothetical purchaser would incorporate an allowance for risks of 5%. He explained the basis of that allowance in paragraph 15.14 of his original report, as follows:

“The purchaser would be risking the possibility that the owners of the leasehold interests and the owner of the rights over the garden might demand more than an equal share in the uplift from conversion. The risk is in part balanced by the possibility that the lessees might accept a smaller sum (as in fact they did). I think it unlikely that they would be unreasonable in their demands as to do so would put their own investment in buying the leasehold interests at risk. The only way they can realise a profit on their investment is by selling.”

218. Deducting the allowance of 5% from the hypothetical purchaser's share of the development profit left (in round terms) a figure of £1.6m. When the value of the freeholder's interest disregarding the potential for conversion was added back to this figure it produced an enfranchisement price of £2,251,766. This figure was not significantly different from the price of £2,538,699 produced by Mr Hamilton's Valuation 1 hypothesis, which he considered encouraging.

219. Mr Hamilton's attribution of an allowance of only 5% for risks was the subject of sustained criticism by both Mr Buchanan and Mr Johnson QC. The same allowance had been made by the Tribunal in *Cravecrest* on the basis of agreement between the experts that it was the appropriate allowance for risk on the facts of that case (see paragraph 120). As Mr Buchanan pointed out, the facts of *Cravecrest* were very different and the development opportunity which was being assessed was impeded by occupational flat leases which had only a few days to run at the valuation date. Mr Buchanan suggested that the opportunity for collaboration between the owners of the superior leasehold interests and the hypothetical purchaser of the freehold was much greater, and the risk of disruption by the flat leaseholders was much lower than was the case at No. 106.

220. In cross examination Mr Johnson pointed out, and Mr Hamilton agreed, that if he was right that the value of the landlord's interest assuming development in 2046 was £649,264, a purchaser paying £2.25m for the freehold interest was risking £1.6m on the willingness of the owners of the other relevant interests to cooperate. If Mr Buchanan was right about the value of the landlord's interest the sum at stake was closer to £2 million. Even if it was assumed that the hypothetical purchaser was aware of the ownership structure of the various interests (which Mr Johnson did not accept was a legitimate assumption as Mr Hamilton had not been aware of those details when he gave his evidence

before the LVT in 2012) in the real world a purchaser would never take the risk Mr Hamilton was assuming but would proceed on the basis of an option or a conditional contract for the acquisition of the freehold rather than gambling so substantial a sum. Mr Hamilton stoutly resisted Mr Johnson's proposition that 5% was a wholly inadequate allowance for risks and in answer to the telling question whether he would advise a bank to lend £2.25 million on such a project he said (after rather a long pause for reflection) that he thought he would for three reasons: the fact that the owners of the leasehold interests were known to be property investors; the fact that those investors were to be assumed not to be in the market to purchase the freehold of No. 106; and the fact that the development opportunity was intrinsically such an attractive one, as witnessed by the development of similar houses in the immediate vicinity.

221. Mr Hamilton's determination to maintain his 5% allowance for risk in the face of Mr Johnson's questioning evaporated in response to questions from the Tribunal. He acknowledged that the property investors who owned the interests which had to be acquired were knowledgeable and would be expected to seek to maximise the return to them. In April 2009 the market was very depressed and investors might be disinclined to sell into such a market; indeed, they might view an approach at that stage as unattractively opportunistic. On reflection, and after only the most gentle coaxing, Mr Hamilton agreed that an allowance of 20% or 25% might be more realistic. Having reached that conclusion Mr Hamilton later produced a revised version of his Valuation 3A incorporating an allowance of 25% for the risks associated with buying in the necessary interests. This had the effect of reducing the development hope value, or the sum which a hypothetical purchaser would be willing to pay in the expectation of early release of the development opportunity, to £1.265m and the price payable to the freeholder for the £1,914,398.

222. Mr Loveday acknowledged in his closing submissions that a key assumption which underlay Mr Hamilton's assessment of development hope value in this case was knowledge on the part of the prospective purchaser that the leasehold interests in the flats and the headlease were under the control of two property investors acting in concert. The relevant facts concerning the ownership of the various interests were recorded in paragraph 15.12 of Mr Hamilton's report. Each of the four flats was registered in the name of a different owner. The leaseholders of two of the flats (Flats 1 and 3) had separately entered into contracts to sell their interests to a Mr Brooks, who was the registered proprietor of the leasehold interest in Flat 2. The contract in relation to Flat 3 had subsequently been varied to provide for a sale to a subsidiary company of Dorlake Ltd, which was itself the registered proprietor of Flat 4. Dorlake Ltd and Mr Brooks were shareholders in 106 Hamilton Terrace Management Ltd, which owned the headlease. Mr Hamilton considered that these facts would become known to a prospective purchaser making enquiries in anticipation of making a bid to acquire the freehold interest in No. 106.

223. In its decision in *Cravecrest* the Tribunal said, at paragraph 118, that the hypothetical purchaser would take all the steps and make all the enquiries that a reasonably prudent purchaser could be expected to take before committing to a purchase. On the facts of that case the Tribunal was satisfied that the purchaser would have obtained a clear indication from the owner of the only other interest in the property which had to be acquired in order to release development value, as to whether or not they would be willing to sell their interest once the freehold had been acquired. On the facts in *Cravecrest* (which crucially included a very short window of opportunity for the owners of the necessary interests to share in a substantial development uplift before their interests expired) the Tribunal took the view

that there was a very high likelihood that the owner of the other interest would be willing to cooperate and would inform the hypothetical purchaser. The Court of Appeal subsequently endorsed the Tribunal's approach in *Cravecrest v Duke of Westminster* [2013] 2 P&CR 16 at paragraph 79 and emphasised that the enquiries which a purchaser would make, and the answers it would have received, are partly matters of fact and partly matters of expert evidence.

224. We agree that the hypothetical purchaser would make such enquiries as a reasonably prudent purchaser would make in the circumstances, but we are much less confident that such enquiries would have left the purchaser in possession of all of the information Mr Hamilton assumed. On consulting the proprietorship registers for each of the registered titles of the flats, the purchaser would discover that they were registered in four separate names. We were not provided with any evidence that it was apparent from the registered titles that two of those proprietors had contracted to sell their interest to a third, nor were we shown the contracts themselves. Even if we assume that the lessees of each of the flats would have been receptive to enquiries regarding their interests and intentions, we are not convinced that a reasonably prudent purchaser would have succeeded in tempting them into a deal at that point in the market. We think it likely that the owners of the leasehold interests would have been happy to wait until the market improved before disposing of their interests, or at the very least would have insisted on favourable assumptions being made concerning the value of their interests as the price of their agreeing to sell them at such an unfavourable time. In *Cravecrest* there was an immediate and wasting opportunity to amalgamate the various interests in order to take advantage of a valuable development in the very short term. No such wasting opportunity existed on the valuation date in the case of No. 106, and the only incentive which the purchaser would have been able to offer to the owners of the leasehold interests to secure their cooperation would be a more favourable price than they might have expected at a later date.

225. Nor do we accept that a reasonably prudent purchaser would have been prepared to acquire the freehold interest in No. 106 without a very much greater assurance of the cooperation of the owners of the other interests than can be assumed to have been available. The statutory valuation hypothesis does not permit the assumption that the purchaser would already have entered into binding arrangements with those owners before agreeing to acquire the freehold for a substantial sum, yet that is how such a transaction would be likely to be structured in reality. We therefore agree with Mr Buchanan and Mr Johnson that a prospective purchaser would see very considerable and unquantifiable risks that the various interests might not be capable of being bought in after the acquisition of the freehold, or might not be acquired at the sums which the price paid for the freehold had assumed. The allowance of 5% which Mr Hamilton originally attributed to those risks is clearly inadequate, and we have no confidence that the alternative figures of 20% or 25% would be adequate either.

226. The conclusion we have reached, in agreement with Mr Buchanan, is that no reasonably prudent purchaser would have been prepared to acquire No. 106 in April 2009 at a price which was dependent on the achievement in the near future of an agreement with experienced property investors for the acquisition of the headlease and the leases of the four flats, as well as for the release of the rights which the owners of 9/10 Abercorn Close enjoyed over the garden of No. 106. The prospect of achieving the necessary agreements was too speculative and the potential for ransom too great for there to be any realistic prospect of a bank or institutional funder being prepared to back such a scheme at a time of such extreme economic uncertainty; nor would a developer have been willing to

stake his own capital on such a venture. For these reasons we reject Mr Hamilton's development hope value valuations.

227. We see no inconsistency between this conclusion and what is now known to have happened after the valuation date. The contract which Mrs Alamouti entered into on 17 March 2010 was very different in its structure and attendant risks from the arrangements which Mr Hamilton assumed would be in the mind of a hypothetical purchaser. It is true that Mrs Alamouti did acquire the right to all of the interests necessary to achieve the development of No. 106 in the short term, and the willingness of the owners of those interests to sell them is now apparent, but the necessary rights had already been assembled over a number of years and were presented to her as a package. The hypothetical purchaser on the valuation date had no such advantage. The only risks Mrs Alamouti took were over the assessment of the price for the freehold and the outcome of the County Court proceedings to ascertain the meaning of the user covenant in the headlease and she may have taken comfort from knowing that an adverse outcome on the issue of construction would be likely to depress the price payable for the freehold.

#### *Development value on reversion*

228. Both Mr Hamilton and Mr Buchanan considered that a purchaser of the freehold interest in No.106 in 2009 would have been willing to pay more for the property to reflect the development opportunity which may exist in 2046 when the extended leases of the flats will be capable of being determined in reliance on section 61 of the 1993 Act. Such a purchaser would calculate the sum he was prepared to pay for the freehold on the assumption that the property would be held as a long term investment until the original term date of the extended leases and would then be converted and extended to create a substantial house in single occupation. Given the lapse of time before the realisation of that ambition it was common ground that a hypothetical purchaser would heavily discount the anticipated profit from the prospective redevelopment to reflect a number of specific risks, as well as deferring it to reflect changes in the real value of money.

229. The starting point for the assessment of the price would be the FHVP of No. 106 at the valuation date of 14 April 2009, which we have already determined to be £6.75m. Thereafter, both valuers adopted an approach consistent with the decision of the Court of Appeal in *Kutchukian* (in which they had both given evidence to the LVT and the Tribunal). They first deducted from the FHVP an agreed sum representing the compensation for early termination payable under schedule 14 of the 1993 Act to the lessees of the three flats in the event of their early termination under section 61; that sum was agreed to be £2,764,500 (at 2009 values) After deducting the compensation sum from the FHVP the resulting figure of £3,985,500 represents the increase in the value of No. 106 in the event of its conversion from four flats to a house for single occupation.

230. That development uplift will not be available, in reliance on section 61, until 21 March 2046 at the earliest. Mr Hamilton said, and we accept, that the risk of delays in obtaining vacant possession in 2046 should be reflected by adding one year to the deferment period and it is therefore necessary to defer its receipt for 37.94 years to arrive at a net present value of the same sum. The valuers agreed that a deferment rate of 5% was appropriate. The resulting sum is £626,122.

231. The valuers also agree that a purchaser of the freehold interest in No. 106 in April 2009 would discount the development uplift which he hoped to achieve in 2046 for the risk that circumstances may change in the intervening period. Mr Hamilton and Mr Buchanan agreed, as they had in *Kutchukian*, that an allowance of 5% was necessary to reflect the risk that changes in planning policy may make it more difficult to obtain planning permission to return the property to its original configuration as a house in single occupation. They also adopted the allowance of 35% which was found by the Tribunal in *Kutchukian* (at paragraphs 102 to 103) to be necessary to reflect the serious risk that the market's current strong appetite for properties such as these to be returned to single occupation may be diminished or reversed by 2046.

232. Mr Buchanan identified the following additional issues and uncertainties which he considered a purchaser would reflect in the price he would be willing to pay for the freehold interest in No.106 to reflect its development potential in 2046:

(i) The risks and delays associated with employing the section 61 procedure in 2046 to secure vacant possession of the three flats whose tenants have exercised the right to acquire an extended lease under the 1993 Act. He considered that a further discount of 5% was required to take this into account.

(ii) The risk that it might not prove possible to resolve the problem of the shared use of the garden at No.106 with the owners of 9/10 Abercorn Close. If that issue could not be overcome by 2046, the conversion of No.106 back to a house for single occupation would simply not be feasible. Mr. Buchanan considered that this risk justified a further discount of 30%.

(iii) Finally, Mr Buchanan pointed out that it could not be assumed that the tenant of Flat 3 (who had not exercised the right to obtain an extended lease) would willingly vacate at the expiry of the contractual term of his underlease in 2046. There was therefore some risk that that tenant might claim statutory security of tenure as an assured tenant pursuant to Schedule 10 to the Local Government and Housing Act 1989, although Mr Buchanan did not seek to quantify any specific allowance which ought to be made for such a risk.

233. Aggregating all of these risk factors produced a composite allowance for risk of 75% and Mr Buchanan's evidence to us was that a purchaser would therefore make only a modest addition to the price he would be willing to pay for the freeholder's interest in No. 106 at the valuation date to reflect the potential, or hope, of undertaking a substantial redevelopment on the reversion in 2046. Based on his assessment of the FHVP value Mr Buchanan thought that a purchaser would be prepared to enhance the price by only £55,658 to reflect future development potential. When added to the other components identified in paragraph 2(1) of Schedule 6 to the 1993 Act this produced a total price of £243,801.

234. We should add that Mr Buchanan's original view was that a further substantial discount would be required by a purchaser to reflect uncertainty, at the valuation date, over the two legal issues which were later resolved by the Court of Appeal in *Kutchukian* (whether the right of termination under section 61 is available to a freeholder, and whether the leaseholders are entitled to a share in the development value). The Court of Appeal determined both of those issues in favour of the freeholder and in light of its decision Mr Buchanan revised his evidence to reflect the composite allowance for risks of 75% which we have referred to above.

235. Mr Hamilton accepted that some additional allowance was appropriate to reflect the uncertainty and delay which would be encountered in connection with the termination of the extended leases in reliance on section 61. He regarded Mr Buchanan's 5% discount as excessive and preferred to add a further year to the period of deferment of the proceeds of development to reflect the need to secure vacant possession if the leaseholders did not leave voluntarily on the original term date. This was the approach the Tribunal had taken to the same risks in *Kutchukian* at paragraph 106 where it had accepted Mr Hamilton's evidence (at paragraph 96) in preference to the much larger discount for this and other legal uncertainties contended for by Mr Buchanan.

236. In his closing submissions Mr Johnson emphasised the potential for delay and upset which might attend up to three contested applications to the county court under section 61(2). The landlord would have to establish the necessary intention to carry out sufficient works of development, and if he succeeded in doing so he would then face additional delay while the compensation payable to the leaseholders was determined by the relevant tribunal. Against that, as Mr Loveday pointed out, the type of scheme which a purchaser would have had in mind in 2009 would be likely to justify a high degree of confidence in the outcome of any contested application under section 61(2) which it may be necessary to make in 2046. The view we take, on the facts of this case, is that a prospective purchaser would be likely to receive advice that, with an appropriate scheme of redevelopment and proper preparation, there was no significant risk of serious delay in recovering possession in or around 2046. Since the design of the scheme of redevelopment and the energy to be devoted to its implementation would be within the control of the purchaser, the risks would be adequately accounted for by adding one year to the deferment period.

237. As for the additional risk of the purchaser not being able to reach agreement with the owners of 9/10 Abercorn Close for the release of their rights over the garden of No. 106, we agree with Mr Hamilton that this factor is already taken into account in the FHVP and no further allowance is required.

238. We are therefore satisfied that the need to allow for risks in assessing the uplift in the value of the freeholders interest to reflect development value on the reversion is adequately accommodated within the 40% allowance agreed by the experts for changes in the planning regime and changes in the market's preference for houses over flats.

239. The result of applying the same valuation approach to No. 106 taking its FHVP value at our figure of £6.75m is to enhance the enfranchisement price for No. 106 by a further £288,086 as development value on reversion, calculated as shown in Appendix 5.

## **Determination**

240. We determine the appeals and cross-appeals as follows.

*70 Hamilton Terrace*

241. We determine the FHVP value of 70 Hamilton Terrace in the sum of £10.75m and the enfranchisement price as £2,862,260 as set out in Appendix 4. The appellant Landlord's appeal is therefore allowed in part and the respondent's cross-appeal is dismissed.

*110 Hamilton Terrace*

242. We determine the FHVP value of 110 Hamilton Terrace in the sum of £7.75m. The parties agreed that the FHVP value should constitute the enfranchisement price. The appellant Landlord's appeal is therefore dismissed and the respondent's cross-appeal is allowed in part.

*106 Hamilton Terrace*

243. We determine the FHVP value of 106 Hamilton Terrace in the sum of £6.75m and the enfranchisement price as £480,882 as set out in Appendix 5. The appellant's appeal (Mrs Alamoti) is therefore allowed in part.

244. The Landlord requested that if the Tribunal finds, as it has done, that there is no value on the basis of development hope value it should still provide a worked valuation to a nil figure. We agree with the appellant that to provide such a valuation in circumstances where we have found that there is no value on this basis is not appropriate.

Dated 28 April 2014  
QC

Martin Rodger

Deputy President

A J Trott FRICS

**APPENDIX 1**

## 70 HAMILTON TERRACE - ANALYSIS OF COMPARABLES

### 1. 38 HAMILTON TERRACE (Bottom up)

Freehold sale on 1 August 2011:	£7,700,000
Indexation to valuation date (1 November 2010)	
Multiply by <u>172.0</u>	£6,788,314
195.1	

#### *Adjustments*

(i) Off-street parking:	+ 10%	
(ii) Site size:	<u>+ 5%</u>	
	+ 15%:	<u>£1,018,247</u>
Adjusted FHVP value at valuation date:		£7,806,561
Divide by potential GIA of No.38		<u>7,500 sq ft</u>
FHVP value per sq ft		£1,041
Multiply by GIA of No.70:		<u>9,519 sq ft</u>
		£9,909,279
FHVP value of No.70, say		<u>£9,910,000</u>

### 2. 98 HAMILTON TERRACE (Top down)

Freehold sale in June 2011:	£14,425,000
Value as fully modernised:	£16,000,000
Indexation to valuation date (1 November 2010)	
Multiply by <u>172.0</u>	£14,318,418
192.2	

#### *Adjustments*

(i) Site size: +5%	<u>£ 715,921</u>
Adjusted FHVP value at valuation date:	£15,034,339
Divide by GIA:	<u>8,300 sq ft</u>
Improved FHVP value per sq ft:	£1,811
Multiply by GIA of No. 70:	<u>9,519 sq ft</u>
Improved FHVP value of No. 70:	£17,238,909
Unimproved FHVP value @ 50%:	£ 8,619,454
FHVP value of No.70, say	£ 8,620,000

3. 102 HAMILTON TERRACE (Top down)

Freehold sale of No.102 and leasehold sale of 6/7 Abercorn Close in January 2010:	£16,000,000
Add for value of freehold of 6/7 Abercorn Close:	<u>£ 500,000</u>
	£16,500,000
Indexation to valuation date (1 November 2010)	
Multiply by <u>172.0</u>	£17,453,875
162.6	
<i>Adjustments</i>	
(i) Site size: + 5%	<u>£ 872,694</u>
Adjusted FHVP value @ valuation date:	£18,326,569
Divide by GIA of No. 102 and mews houses:	<u>8084 sq ft</u>
Improved FHVP value per sq ft	£2,267
Multiply by GIA of No. 70:	<u>9,519 sq ft</u>
Improved FHVP value of No. 70:	£21,579,573
Unimproved FHVP value of No.70 @ 50%	£10,789,786
FHVP value of No.70, say	<u>£10,790,000</u>

4. 102 HAMILTON TERRACE (Bottom up)

Adjusted FHVP value of No.102 and 6/7 Abercorn Close: as before (Valuation 3):	£18,326,569
Add for planning: 5%	<u>£ 872,694</u>
	£19,199,263
Divide by GIA of No. 102 and mews houses per March 2012 planning permission (11,030 sq ft + 1,880 sq ft):	<u>12,910 sq ft</u>
Unimproved FHVP value of No. 102 per sq ft	£1,487
Multiply by GIA of No. 70	<u>9,519 sq ft</u>
	£14,154,753
Unimproved FHVP value of No. 70, say	<u>£14,155,000</u>

## 110 HAMILTON TERRACE - ANALYSIS OF COMPARABLES

### 1. 38 HAMILTON TERRACE (Bottom up)

Freehold sale on 1 August 2011:	£7,700,000
Indexation to valuation date (6 October 2010)	
Multiply by <u>171.2</u>	£6,756,740
195.1	
<i>Adjustments</i>	
(i) Overlooking: -5%	<u>£ 337,837</u>
Adjusted FHVP value at valuation date:	£6,418,903
Divide by potential GIA of No. 38	<u>7,500 sq ft</u>
FHVP value per sq ft	£ 856
Multiply by GIA of No. 110	<u>9,000</u>
	£7,704,000
FHVP value of No. 110, say	<u>£7,705,000</u>

### 2. 98 HAMILTON TERRACE (Top down)

Freehold sale in June 2011:	£14,425,000
Value as fully modernised:	£16,000,000
Indexation to valuation date (6 October 2010)	
Multiply by <u>171.2</u>	
192.2	£14,251,821
<i>Adjustments</i>	
(i) Planning: -5%	
(ii) Off-street parking: -10%	
(iii) Overlooking: <u>-5%</u>	
-20%	<u>£ 2,850,364</u>
Adjusted FHVP value at valuation date:	£11,401,457
Divide by GIA	<u>8,300 sq ft</u>
Improved FHVP value per sq ft:	£ 1,374
Multiply by GIA of No.110	<u>9,000 sq ft</u>
Improved FHVP value of No.110	£12,366,000

Unimproved FHVP value @ 50%:	£ 6,183,000
FHVP value of No.110, say	£ 6,185,000

### 3. 102 HAMILTON TERRACE (Top down)

Freehold sale of No. 102 and leasehold sale of 6/7 Abercorn Close in January 2010:	£16,000,000
Add for value of freehold of 6/7 Abercorn Close:	<u>£ 500,000</u>
	£16,500,000

Indexation to valuation date (6 October 2010)	
Multiply by <u>171.2</u>	£17,372,694
162.6	

#### *Adjustments*

(i) Planning: -5%	
(ii) Overlooking: -5 %	
(iii) Off-street parking:	<u>-10%</u>
-20%	<u>£ 3,474,539</u>

Adjusted FHVP value @ valuation date:	£13,898,155
Divide by GIA of No.102 and mews houses:	<u>8,084 sq ft</u>
Improved FHVP value per sq ft	£ 1,719
Multiply by GIA of No.110	<u>9,000 sq ft</u>
Improved FHVP value of No.110	£15,471,000
Unimproved FHVP value of No.110 @ 50%	£ 7,735,500
FHVP value of No.110, say	£ 7,735,000

### 4. 102 HAMILTON TERRACE (Bottom up)

Adjusted FHVP value of No. 102 and 6/7 Abercorn Close: as before (Valuation 3):	£13,898,155
Add back deduction for planning:	<u>£ 868,635</u>
	£14,766,790

Divide by GIA of No.102 and mews houses per March 2012 planning permission (11,030 sq ft + 1,880 sq ft)	<u>12,910 sq ft</u>
Unimproved FHVP value of No.102 per sq ft	£ 1,144
Multiply by GIA of No.110	<u>9,000 sq ft</u>

	£10,296,000
Unimproved FHVP value of No.110, say	<u>£10,295,000</u>

**106 HAMILTON TERRACE – ANALYSIS OF COMPARABLES**1. 38 HAMILTON TERRACE (Bottom up)

Freehold sale on 1 August 2011:	£7,700,000
Indexation to valuation date (14 April 2009)	
Multiply by <u>138.8</u>	£5,478,011
195.1	
Divide by potential GIA of No.38:	<u>7,500 sq ft</u>
FHVP value per sq ft:	£730
Multiply by GIA of No.106:	<u>10,836 sq ft</u>
	£7,910,280
<i>Less adjustment for garden rights @ 25% of the difference between FHVP value as a house (£7,910,280) and FHVP value as flats (£3.7m):</i>	<u>£1,052,570</u>
	£6,857,710
FHVP value of No.106, say	<u>£6,860,000</u>

2. 68 HAMILTON TERRACE (Bottom up)

Freehold sale on 26 July 2007:	£8,750,000
Indexation to valuation date (14 April 2009)	
Multiply by <u>138.8</u>	£7,303,067
166.3	
<i>Adjustments</i>	
(i) Planning	-5%
(ii) Off-street parking	<u>-10%</u>
	-15%
Adjusted FHVP value at valuation date:	<u>£1,095,460</u>
	£6,207,607
Divide by potential GIA of No.68:	<u>8,708 sq ft</u>
FHVP value per sq ft:	£ 713
Multiply by GIA of No.106:	<u>10,836 sq ft</u>
	£7,726,068

<i>Less</i> further adjustment for garden rights @ 25% of the difference between FHVP value as a house (£7,726,068) and FHVP value as flats (£3.7m):	<u>£1,006,517</u>
	£6,719,551
FHVP value of No.106, say	<u>£6,720,000</u>

### 3. 98 HAMILTON TERRACE (Top down)

Freehold sale in June 2011:	£14,425,000
Value as fully modernised:	£16,000,000
Indexation to valuation date (14 April 2009)	
Multiply by <u>138.8</u>	£11,554,631
192.2	

#### *Adjustments*

(i) Planning:	-5%	
(ii) Off-street parking:	<u>-10%</u>	
	-15%	<u>£ 1,733,195</u>
Adjusted FHVP at valuation date:		£9,821,436
Divide by GIA:		<u>8,300 sq ft</u>
Improved FHVP value per sq ft:		£ 1,183
Multiply by GIA of No.106:		<u>10,836 sq ft</u>
Improved FHVP value of No.106:		£12,818,988
Unimproved FHVP value @ 50%:		£6,409,494
<i>Less</i> further adjustment for garden rights @ 25% of the difference between FHVP value as a house (£6,409,494) and FHVP value as flats (£3.7m):		<u>£ 677,373</u>
		£5,732,121
FHVP value of No.106, say		<u>£5,730,000</u>

### 4. 102 HAMILTON TERRACE (Top down)

Freehold sale of No.102 and leasehold sale of 6/7 Abercorn Close in January 2010:	£16,000,000
Add for freehold value of 6/7 Abercorn Close:	<u>£ 500,000</u>
	£16,500,000

Indexation to valuation date (14 April 2009)	
Multiply by <u>138.8</u>	£14,084,871
162.6	
<i>Adjustments</i>	
(i) Planning	- 5%
(ii) Off-street parking	<u>-10%</u>
	-15%
	<u>£ 2,112,731</u>
Adjusted FHVP value @ valuation date:	£11,972,140
Divide by GIA of No.102 and mews houses:	<u>8,084 sq ft</u>
Improved FHVP value per sq ft:	£ 1,481
Multiply by GIA at No.106:	<u>10,836 sq ft</u>
Improved FHVP value of No. 106:	£16,048,116
Unimproved FHVP value of No. 106 @ 50%:	£ 8,024,058
<i>Less</i> further adjustment for garden rights @ 25% of the difference between FHVP value as a house (£8,024,058) and FHVP value as flats (£3.7m):	<u>£ 1,081,014</u>
	£ 6,943,044
FHVP value at No. 106, say	<u>£ 6,945,000</u>

5. 102 HAMILTON TERRACE (Bottom up)

Adjusted FHVP value of No.102 and 6/7 Abercorn	
Close as before (valuation 4):	£11,972,140
Add back deduction for planning:	<u>£ 704,244</u>
	£12,676,384
Divide by GIA of No.102 and mews houses for March 2012 planning permission (11,030 sq ft + 1,880 sq ft):	<u>12,910 sq ft</u>
Unimproved value of No.102 per sq ft:	£ 982
Multiply by GIA of No.106:	<u>10,836 sq ft</u>
	£10,640,952
<i>Less</i> further adjustment for garden rights @ 25% of the difference between FHVP value as a house (£10,640,952) and FHVP value as flats (£3.7m):	<u>£ 1,735,238</u>
	£ 8,905,714
Unimproved FHVP value of No.106, say	<u>£ 8,905,000</u>

**70 HAMILTON TERRACE – ENFRANCHISEMENT PRICE**1. **FREEHOLDER'S PRESENT INTEREST**

(i) Capital value of ground rent (agreed):		£3,371
(ii) Reversion to FHVP value:	£10,750,000	
X PV £1 in 37.91 years @ 4.75%:	<u>0.1722</u>	
		<u>£1,851,150</u>
Value of freehold interest		£1,854,521

2. **MARRIAGE VALUE**

FHVP value:	£10,750,000	
Less		
(i) Freeholder's present interest:	£1,854,521	
(ii) Lessee's present interest (agreed @ 64% relativity):	<u>£6,880,000</u>	
		<u>£ 8,734,521</u>
Marriage value:	£ 2,015,479	
Freeholder's share at 50%		<u>£1,007,739</u>
Enfranchisement price:		<b>£2,862,260</b>

**106 HAMILTON TERRACE – CALCULATION OF ENFRANCHISEMENT PRICE****INCLUDING DEVELOPMENT VALUE ON REVERSION**1. **FREEHOLDER'S CURRENT INTEREST**

(i)	Capital value of ground rent (agreed):	£	2,923	
(ii)	Reversion to FHVP of Flat 3:	£850,000		
	x PV £1 in 36.94 years @ 5%:	<u>0.1649</u>		
			£140,165	
(iii)	Reversion to FHVP of Flats 1, 2 & 4:	£2,850,000		
	x PV £1 in 126.94 years @ 5%:	<u>0.00204</u>		
			£ 5,184	
				£148,902

2. **VALUE OF HEADLEASEHOLDER'S INTEREST**

Agreed: £ 703

3. **DEVELOPMENT VALUE ON REVERSION**

Reversion to FHVP house value:	£6,750,000	
Less cost to acquire Flats 1, 2 & 4 (agreed):	<u>£2,764,500</u>	
	£3,985,500	
x PV £1 in 37.94 years @ 5%:	<u>0.1571</u>	
	£ 626,122	
Less value of reversion as flats	<u>£ 145,979</u>	
	£ 480,143	
Deduct 40% for risks (planning policy (5%) and market change (35%)):	<u>£ 192,057</u>	
		£288,086

4. **MARRIAGE VALUE** £NIL

5. HOPE VALUE FOR FLAT 3

FHVP value of Flat 3 (agreed):	£ 850,000	
Less:		
(a) Value of freehold interest:	£140,165	
(b) Head leases interest:	£ 703	
(c) Existing lease value of Flat 3:	<u>£535,500</u>	
		<u>£676,368</u>
Marriage value:	£173,632	
Hope value (agreed @ 25%)	£ 43,408	
Freeholder's share in proportion to value of interests:		<u>£43,191</u>
Total enfranchisement price:		<b>£480,882</b>