RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 – SECTION 24

REFERENCE: KH/LON/OOBK/ OCE/2009/0095

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Property: **20 Hamilton Terrace, London, NW8 9UJ**

Applicant Tenant: **Northway Management Ltd.**

Respondent Landlord: **The Keepers of the Possessions Revenues and Goods of the Free Grammar School of John Lyon**
John Lyon's Charity

Intermediate Landlord: **Mr M Hashemi**

Date of Notice of Claim: **30 March 2007**

Date of Counter Notice: **18 June 2007**

Date of application to the Tribunal: 15 December 2007

Date of hearing: **11, 12 and 15 October 2012 and 6 and 7 December 2012**

Date of inspection: **15 October 2012**

Appearances: **Mr P Rainey QC of Counsel**
Mr J Mead, Jaffe Porter Crossick LLP, Solicitors
Mr P Beckett FRICS, Beckett and Kay LLP, Chartered Surveyors
Mr A Garwood Watkins, RJM Ltd.
Mr T Hashemi
For the Applicant

Mr M Loveday of Counsel
Ms K Simpson, Pemberton Greenish LLP, Solicitors
Mr G Coleman, Pemberton Greenish LLP, Solicitors
Mr J P Hamilton BSc MRICS, of Cluttons LLP, Chartered Surveyors
For the Respondent

Date of Tribunal's Decision: 27 March 2013

Members of the Tribunal: **Mrs J S L Goulden JP**
Mr P M J Casey MRICS
Mr N Martindale FRICS

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LON/OOBK/OCE/2009/0095

PROPERTY: 20 HAMILTON TERRACE, LONDON, NW8 9UJ

Background

1.The Tribunal was dealing with an application by the Applicant company, Northway Management Ltd. to determine the price payable to the Respondent landlord, The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon (in the capacity of John Lyon's Charity), for the collective enfranchisement of 20 Hamilton Terrace, London, NW8 9UJ ("the subject property") under S24 of the Leasehold Reform and Housing and Urban Development Act 1993 ("the Act").

2.The Applicant is the Nominee Purchaser. The Respondent is the reversionary freehold owner of No 20 and 13 Hamilton Close, stated to be a mews property at the rear of No 20, comprising two garages and a maisonette. The intermediate leasehold interest is a head lease of both properties expiring 24 December 2054, which was owned at the valuation date by The Trustees of Arrow Film Distributors Pension Fund ("the Trustees"). The Nominee Purchaser holds the underleases of the two maisonettes in 20 Hamilton Terrace and the maisonette at 13 Hamilton Close.

3.By a Notice of Claim dated 30 March 2007, the Applicant, in its capacity as participating tenant of two maisonettes, was named as the Nominee Purchaser of the subject property. The Notice specified that the freehold interest to be acquired was 20 Hamilton Terrace, together with a studio flat and garden, both at the rear of the property, but not the mews.

4.The Respondent's Counter Notice admitting the claim was dated 18 June 2007. In the notice, the Respondent sought a leaseback of the studio flat and to retain the garden area.

5.At the valuation date, the Trustees had entered into a conditional contract dated 22 July 2002 (subject to a substantial variation dated 5 September 2003) for the sale of the entire interest in the head lease to the Applicant.

6. On 8 June 2010, the head lease was sold by the Trustees to Majid Hashemi. Mr Hashemi is the brother of the Applicant's Beneficial Owner.

7.The studio and garden and a garage at 13 Hamilton Close, was, at the valuation date, subject to an agreement for lease dated 28 April 1986 for a term of exactly 21 years in favour of a Mr and Mrs Henderson. The head lease was, and at all material times remains, the qualifying tenancy of the studio.

8.The Applicant applied to the Tribunal to determine the terms of acquisition and the purchase price on 17 November 2007. The matter was heard on 8 and 9 April 2008 and the Tribunal's decision was issued on 16 July 2008 ("the 2008 decision"), in which the Tribunal directed the expert valuers to produce a joint valuation on the basis of its findings. A total price payable for the subject property was agreed at £665,269, being £611,707 for the freehold interest and £53,562 for the intermediate interest. The terms of the transfer were not considered by that Tribunal. The draft Transfer had included a covenant which required the subject property to be used as three flats. This was the basis on which the valuation issues were determined.

9. Both sides sought permission to appeal the 2008 decision, which was refused. Both sides renewed their applications before the Lands Tribunal. Permission was granted to the Applicant against the Tribunal's finding that it was not entitled to acquire the headlease of the studio and garden, on 12 November 2008. The Respondent's application was refused. On 22 January 2010, the Applicant withdrew its appeal.

10. The parties were unable to agree the draft Transfer following the 2008 decision, the dispute primarily relating to the user covenant, and the Applicant applied to restore the LVT application to determine the Transfer terms. The Respondent had contended that it was not open to the Applicant to dispute this issue since the 2008 Tribunal hearing had proceeded on the basis that the covenant be included. The Applicant had contended that the terms of the Transfer could be determined, but that the price had been agreed or determined and was not capable of being re-opened.

11.A further hearing before the Tribunal as to jurisdiction took place on 9 September 2009 and the Tribunal's decision was issued on 30 October 2009 which determined, inter alia, that the terms of the transfer and also their effect on value, could be considered by the Tribunal. The substantive hearing was not restored since the parties agreed to stay the present claim pending the outcome of an appeal on 87 Hamilton Terrace.

12. Following a decision of the Upper Tribunal on 1 March 2012 relating to 87 Hamilton Terrace, the parties before this Tribunal had been able to agree the form of transfer which now does not include any restriction against conversion from flats to a house. It has been agreed that the restrictive covenant will permit use of the subject property as either a single private dwellinghouse or not more than 3 flats.

13.The following matters had been agreed between the parties either before or at the hearing:-

(a) The valuation date is 30 March 2007.

(b) The freehold vacant possession value of the subject property on the assumption that it is ready in all respects to be converted to a house for single family occupation is £4,875,000.

(c) The freehold vacant possession value of the subject property as three flats was £3,171,266 including £350,000 in respect of the studio at the rear of the main building ie the potential development value for conversion to a house is £1,703,734.

(d) The total enfranchisement price, subject to the restriction to use as three flats only, was £665,269 as determined by the 2008 decision being £611,707 for the freehold interest and £53,562 for the intermediate, head leasehold interest.

(e) The terms of the transfer.

14. The sole issue which requires the determination of the Tribunal is what, if any, addition should be made to the agreed enfranchisement price as flats to reflect the prospect of conversion to a house.

15. Costs remain an issue between the parties as at the hearing date. If unresolved, it was agreed by both sides that the assessment of costs can be dealt with by way of written submissions and by way of a paper determination.

Hearing

16. The hearing took place on 11, 12 and 15 October 2012 and 6 and 7 December 2012.

17. The Applicant Nominee Purchaser was represented by Mr P Rainey QC of Counsel and, on 11 October 2012, by Mr J Mead of Jaffe Porter Crossick, Solicitors. Mr M Hashemi attended on behalf of the Intermediate Landlord, but it was not separately represented. Expert evidence for the Applicant was provided by Mr. P Beckett FRICS of Beckett and Kay. Mr A Garwood Watkins, the Applicant's project manager attended on 11 October 2012 but did not give evidence.

18. The Respondent reversionary freeholder and the intermediate landlord were represented by Mr M Loveday of Counsel and, on 11, 12 and 15 October 2012, by Ms K Simpson and on 6 December 2012, by Mr G Coleman, both of Pemberton Greenish LLP, Solicitors. Expert evidence for the Respondent was provided by Mr J P Hamilton BSc MRICS of Cluttons.

19.The salient points of the evidence are set out under the appropriate heads below.

Inspection

20.The Tribunal made its inspection of the subject property, externally and internally, on 15 October 2012, after the close of live evidence .

21.The subject property was a substantial stucco fronted terraced house of brick construction under a pitched slated roof c 1850 near the junction with St Johns Wood Road. The subject property comprised lower

ground, raised ground and two upper floors. At the time of inspection, the property was configured as three flats, being a lower flat on lower ground and raised ground floor level, an upper flat at first and second floor level with an entrance on the ground floor. The third flat (the studio) comprised a single storey building in the rear garden but linked to the main house, and was in the process of substantial refurbishment as at the date of inspection. The front garden was mainly paved. The rear garden was of good size and laid mainly to lawn. At the rear of the garden was a two storey mews house (No 13 Hamilton Close). The mews house is not included in the property being acquired.

Evidence

22. Mr Rainey, for the Applicant, in his opening said that the additional amount, if any, to be paid was in respect of a relatively new concept which had been labelled by the Upper Tribunal as Development Hope Value ("DHV"). He pointed out, however that two recent decisions by the Upper Tribunal had adopted different approaches to this concept. In the case of **Kutchukian v The Trustee of John Lyons Charity [2012] UKUT 53 (LC)** which related to 87 Hamilton Terrace**,** the Tribunal had decided that there was an uplift in the enfranchisement price payable in respect of a similar potential uplift in value arising from the property being worth more as a house rather than its existing configuration as flats, but on the arguments and evidence presented to it, limited this to the value at reversion of the potential uplift adjusted for various risk factors.This approach, Mr Rainey labelled Development Value at Reversion ("DVR") **.**

23. The second case referred to by Mr Rainey was **Cravecrest Ltd. v Duke of Westminster [2012] UKUT 68 (LC)** which related to 38 Wilton Crescent SW1X 8RX. In that case, the Tribunal had decided that an early release of the potential uplift in value in respect of similar circumstances as the Kutchukian case and the issues in the present case, could be considered by envisaging a sale of the relevant interests to the same third party. Mr Rainey labelled this approach DHV. Mr Rainey said that both decisions bound the present Tribunal on questions of law.

24. Mr Loveday, for the Respondent, accepted the use of the expressions DHV and DVR and accepted also the different approaches.

25. The valuers have agreed that the present vacant possession value for conversion back to a house is £4,875,000. At the valuation date of 30 March 2007, planning consent existed for a conversion of the existing three flats to a single house with limited extensions to the link block between the main house and the studio. Shortly after the valuation date, planning consent for a much more extensive scheme, involving a basement with swimming pool under the greater part of the rear garden, had been granted.

26. However, the value agreed between the two valuers for conversion to a house was not dependent on any particular scheme. As Mr Hamilton, for the Respondent, had explained, the comparables they had considered in arriving at this value justified the figure, whether for a minimal conversion or the prospect of a grander scheme. The comparables were not in evidence before the Tribunal and Mr Beckett, for the Applicant, conceded that this was the case.

The Applicant's case on DVR

27. Mr Beckett set out the basis for his view of the hypothetical purchaser's perception of risk, based on his own opinion, previously expressed opinion and the guidance of Upper Tribunal decisions

28.Mr Beckett agreed that there was DVR. His initial approach to this was to follow what he had successfully argued before the LVT in the case of Sussex Lodge London W 2 (LON/ENF/1173/04) which was simply to follow his instinct and add 10% to the value of the freeholder's interest exclusive of the potential to reconvert. He said that there was no science to the approach and the adjustment might be anywhere between 5% and 20%. Thus, in his view, and using a *" stand back and look"* approach, the value of the freehold previously agreed at £423,837 (excluding marriage value) might neatly be rounded to £450,000, £475,000 or £500,000. However, he also produced what he described as an analytical approach to the valuation which produced a figure of £33,985. To arrive at this figure, he took the uplift in value on conversion of £1,703,734 and adjusted this by specific percentages for each of the risks which he saw as being in the mind of the hypothetical purchaser of the freehold interest at the valuation date who he thought would be a long term investor.

29. Having regard to Upper Tribunal decisions, particularly in Kutchukian, his own experience and market sentiment, Mr Beckett identified those risks as being change in planning policy, change in future market, acquisition of the mews, change of estate policy and delays in obtaining vacant possession. He stressed that his adjustments were not a quantification of the risks themselves, but of the effect they would have on the price that an investor would pay, and thus a relatively small risk could have a large effect on value. He referred the Tribunal to the Lands Tribunal decision in **Arrowdell Ltd v Coniston Court (LRA/72/2005)** where his evidence that a small risk of not obtaining planning consent would nevertheless have a 50% impact on value had been accepted by that Tribunal.

30. Mr Beckett, although he accepted that reconversion could take place *"one day"*, said that there were many risks which needed to be taken into account to arrive at the value as at the valuation date of the potential uplift in value. He considered that these risks were as follows:

(a) Although planning consent existed as at the valuation date for a relatively simple conversion to a house and, shortly after the valuation date, consent had been granted for a more elaborate conversion involving extensive excavations, these schemes had not been started and both would have lapsed by the reversion date. By that time, it might not be possible to obtain such consents because of possible changes in planning policy, for example, policies seeking to retain flats rather than permit reconversion to houses. Further, as the subject property is a listed building, it would be more troublesome in that there was no certainty with town planning. He made an adjustment of 50% of DVR to reflect these risks.

(b) Whatever covenants there were on the land would have to be overcome, and in addition, the Estate would have to grant permission for the work to be carried out. He pointed out that whilst planning permission had been granted after the valuation date for the elaborate scheme, it could not now been implemented under the Estate's recent policy guidelines eg full development under the garden is now contrary to policy. He did not, however, ascribe a separate percentage to this risk as he said it was included in his planning risk adjustment referred to in (a) above.

(c) There was also a significant risk of changes in the future market and the possibility that, by the time of reversion date, flats could have become more valuable in relation to houses than was the position as at the valuation date. In Kutchukian, the Upper Tribunal had made an allowance of 35% to reflect the fact that in the future the present gap between house and flat values might have closed or narrowed. In addition, building cost increases might outstrip capital value growth over that period of time, making the economics of reconversion less attractive. He adopted the 35% risk adjustment, following Kutchukian.

(d) Mr Beckett had formed a view that the acquisition of the mews at 13 Hamilton Close would be highly desirable for a successful conversion to a house, and that there was *"a powerful risk"* that at the date of reversion, it would not be possible to buy the mews. He made an adjustment of 30%. In respect of the need for the Mews, he expressed the view that this was critical, although accepted that his understanding was *"slightly tenuous and second hand"* and was based on information from others who were closer to the market. He said that the price achieved for No 22 Hamilton Terrace included a mews house and he considered that the developers would have considered this an important feature. However, he recognised that the freehold vacant possession value which had been agreed in this case was for the house without the Mews and therefore a simple conversion was a possibility. With regard to the planning consent of 18 June 2007, Mr Beckett was of the view that without the mews the basement arrangements were unwieldy compared with the upper floors of the house. He did not think that the reconversion would work well without the mews and he thought that the purchaser would have to buy out all the interests in the mews as they existed on the date of reversion but would also require the Estate's consent to the amalgamation of the mews with the subject property. In respect of the studio, whilst Mr Beckett accepted that it was an advantage, this was primarily in terms of additional GIA and the rather interesting building it represented. It could not take the place of the mews, did not provide the required garaging, may not provide the required accommodation and was an obstacle to the creation of accommodation at basement level.

(e) Mr Beckett said that there was a risk of delay in obtaining vacant possession, and he made an adjustment of 10%, to reflect the risk of a tenant claiming an assured tenancy under Sch 10 of the Local Government & Housing Act 1989 at the end of the term. The Upper Tribunal's adjustment in the case of **Re Clarise**

Properties Ltd [2012] UKUT 4 (LC) was in respect of a house smaller than the subject property. He accepted however that Mrs Henderson's occupation of the Studio would have long since ceased and she would not be an issue in DRV.

31. Mr Beckett said that the sum total of adding his risk adjustments together was 125% *"which of course makes no sense".* He had accordingly carried out a cumulative calculation which produced an adjustment factor of 20.48% which, when applied to the total development value figure of £1,703,734 gave a figure of £348,925 which figure had of course to be deferred to the term date of the leases, giving £33,985.

The Respondent's case on DVR

32.Mr Hamilton said that as at the valuation date, 30 March 2007, the subject property had planning consent (granted in August 2004) for conversion back to a house. Under that consent, the link between the original house and the studio and part of the studio was to be demolished and extensions were to be built at lower ground and ground floor levels, with an increased GIA from 387 sq. m (4166 sq ft) to 422 sq m (4542 sq ft). He thought that these areas had been miscalculated and considered the existing GIA to be 373.73 sq m (4023 sq ft) and the proposed area to be 413.15 sq m (4447 sq ft).

33. In respect of the mews at 13 Hamilton Close, this also had planning consent, dated 25 January 2007, for conversion back to a house as at the valuation date. The proposal included excavating to create a lower ground floor and extending into the rear garden at ground and lower ground floor levels by 5.3m (approximately 17 feet 4 inches) excluding the new retaining wall which would be required.

34. A further planning application had been made in August 2006 prior to the valuation date in respect of No. 20 Hamilton Terrace, but consent had not been granted until 18 June 2007, approximately 3 months after the valuation date. Under that application, the rear garden, including under the studio, was to be excavated to create a kitchen dining room, gym and swimming pool. The development would extend 29m (approximately 95 feet 2 inches) beyond the back wall of No. 20 excluding the new retaining wall that would be required. The length of the garden on the southern side was 36 m (approximately 118 feet 1 inch) so allowing 1.7m (approximately 5 feet 7inches) for the retaining walls to Nos 20 and 13. The two below ground extensions did not overlap. Mr Hamilton had calculated the GIA at 529.78 sq m (5,703 sq ft).

35.The position therefore was that as at the valuation dated, both 20 Hamilton Terrace and 13 Hamilton Close had planning consent for conversion back to house. It was stated that the proposed extension to No 20 was relatively modest but greater with basement excavation at No. 13.

36. Mr Hamilton accepted that the Estate policy would not now allow the works necessary to implement the June 2007 planning consent but repeated that the value of the property as a house at £4.875m was not dependant on that planning consent but related to a simple conversion. He said that the mews at 13 Hamilton Close was irrelevant since it was not being acquired, and in his view the potential to acquire it or not did not affect that value, which he thought had been the basis of the agreement with Mr Beckett. Mr Hamilton had given evidence in Kutchukian but did not think it entirely on all fours with the present case because of issues over S61 and Sch 14 of the Act which were not relevant here. He had agreed in that case with Mr Buchanan, who had been the valuer for the Applicant, a 5% discount for the risks of changes in planning policy, which had been accepted by the Upper Tribunal, but the Tribunal had made a discount of 35% for the risk of adverse changes in the market compared with his opinion that only 10% was justified for both planning risks and market changes. Mr Hamilton remained of the view that his 10% was sufficient, particularly as the Sportelli deferment rate for houses and flats are different and the adoption of those rates by valuers implies that the relative values of houses and flats is likely to be the same at the term date as at the valuation date and therefore does reflect the risk of changes in value between houses and flats.

37.Mr Hamilton's total adjustment of 10% when applied to the value uplift with potential for conversion of £1,703,734 produced a figure of £1,533,361 which, when deferred to the term date at 5%, gave a total uplift in value for DVR of £149,323. Mr Hamilton did not consider that there was any risk of not obtaining vacant possession at the term date, given that these were high value flats owned and let by companies, rather than private individuals. Even if the existing leases were sold in the interim to potential occupiers, the high rents would discourage anyone from seeking an assured tenancy. He made no adjustment in respect of the mews.

38.In cross examination, he accepted that in Kutchukian, the agreed values already reflected a lack of planning permission, and the 5% simply reflected potential planning policy changes, whereas in the present case, there is planning permission but it will have lapsed by the term date. Mr Hamilton conceded that perhaps he should allow an adjustment of 10% for planning risk. He also conceded a possible further 5% for the risk of building cost rises unfavourably affecting the economics of conversion, He also accepted that the Upper Tribunal had rejected his arguments on market convergence in Katchukian.

The Applicant's case on DHV

39. In considering DHV, Mr Beckett said that as he understood this, it related to the possible early release of development value by a third party unconnected with the property coming on the scene and looking to acquire all interests with vacant possession to enable the conversion into a house to take place. Such a purchaser would in all probability be a developer or a potential owner/occupier, but certainly not a long term investor. This potential purchaser would only be interested if he realistically thought he could acquire all interests in a relatively short period of time but if this were possible, all the risk factors he had identified as affecting DVR would disappear. However, in their place would be the difficulties in obtaining vacant possession, especially of the studio occupied by Mrs Henderson, together with the difficulties of trying to reach agreements with all of the parties each with their own separate interests.

40. In the real world, he said that such situations are not unknown whereby conditional contracts are entered into for the sale of various interests at the same time. If the sale does not proceed the potential purchaser loses nothing. Under the Act however, conditional contracts or similar cannot be assumed. What had to be determined is what a purchaser would pay to acquire each interest being valued with no more than the hope that he would be able to acquire all of the other interests.

41.In the Cravecrest case, the Upper Tribunal had decided that DHV was close to 100%, but Mr Beckett said that that was due to the special circumstances of that case and gave no meaningful guidance in the present case.

42. He said that two of the flats were held by lessees with leases having 47.74 years unexpired. There was a head lease encompassing the whole property including the studio flat. The head lease of the studio flat and the rest of the head lease were separate interests. There was the freehold of the mews. There was a leasehold interest in part of the mews. There was a garage associated with the studio in the mews. The association of that garage with the studio was complicated by the presence of the tenancy of Mrs Henderson.

43. In Mr Beckett's view, the obstacles to achieve reconversion, which he described as *"formidable",* were so many in number and the process of overcoming those obstacles so uncertain, difficult and unfamiliar to the likely purchaser of the freehold, that he would expect the level of DHV to be low and required only a small percentage adjustment. He suggested an additional 5% to the value of the freeholder.

44. Mr Beckett also considered DHV and marriage value to be incompatible, and where DHV did not exceed the landlord's share of marriage value (as in his view was the case here) the landlord would have the marriage value, but no DHV. Accordingly no further valuation was provided.

The Respondent's case on DHV

45. Mr Hamilton opined that where there was development potential, this had caused valuation difficulties for some time. He said *"In the real world, if an interest in a property such as 20 Hamilton Terrace was put on the open market potential purchasers would look to buy all the interest and realise the potential. Indeed if an owner of an interest in a property such as No 20 wished to sell their interest they would first see if others in the building wished to buy and if not to see if all parties might sell at the same time so that they all achieved a value greater than that of their interest restricted to its present use."*

46. Mr Hamilton said that the Act placed no restriction on freeholders or lessees selling their interest and this was the only way they could realise the development potential of a property under the Act. He said *"the best way to realise the potential is if all parties having an interest in a building sell at the same time to the same purchaser. In that way, the purchaser acquires the property ready to be converted and will be prepared to pay*

a sum for all the interests that equals the freehold vacant possession value or close to it. That is what properly advised lessees and the freeholder woiuld do so that the potential can be realised in the short term". Valuations based on the assumption that a hypothetical purchaser would buy all the interests enabling conversion potential to be realised in the short term had been approved in the LVT case relating to 106 Hamilton Terrace and an Upper Tribunal case relating to 38 Wilton Crescent SW1 where a 5% discount had been made.

47.Mr Hamilton said that he had adopted the approach as set out in the Cravecrest decision. In apportioning the development value between the various interests, he set out what he saw as each parties' position of strength or weakness. He made no allowance for Mrs. Henderson's occupation because he said that either anything necessarily paid to her for vacant possession would come out of the head leaseholder's share of any development value or, more likely given the history which he outlined, she would have agreed to have moved to somewhere more suitable to her needs.

48.Mr Hamilton's valuations resulted in an uplift to the freehold interest of £974,080 in respect of DHV and £487,040 in respect of the head leasehold interest. Because of the valuation approach which he had adopted, which entailed a development value uplift calculated by reference to the present values of the various interests, he produced a sum greater than that which he had agreed with Mr Beckett and he then added back the amounts previously determined as the marriage value shares attributable to the landlords, although he expressed a doubt as to whether or not this entailed double counting.

Submissions on DVR

49.Mr Beckett's identified risks and the quantum of their effect on value were heavily criticised by Mr Loveday in his closing submissions. Mr Loveday pointed out that Mr Beckett's approach was not one which he had advanced before and his report was "*confused and confusing"*. He contended that Mr Beckett's adoption of a *"building blocks approach"* showed that he was unsure of his ground. Mr Beckett had admitted finding *"some difficulty"* in reconciling the various cases and had used the word *"struggling"* to describe his reaction to the guidance in these cases. He also contended that Mr Beckett had placed risks in the wrong place in that he should only have been considered risk of change happening between the valuation date and the reversion date. Existing risks had been properly reflected in the agreed VP freehold value. Mr Loveday also said that Mr Beckett had a tendency to *"overbake"* things. As an example, his 50% allowance for a possible change in planning policy over the remainder of the term was "*grossly excessive"* and maintained that the Tribunal should prefer Mr Hamilton's approach as being more realistic, based on his experience in previous similar cases where his ideas had been tested by Counsel and challenged by other experts.

50. Mr Rainey criticised Mr Hamilton's evidence. He said that whilst Mr Hamilton confirmed that he had understood the distinction between the discount and the risk itself, he had admitted that he had not carried the distinction through into his report. He repeated the evidence which he had given in the Kutchukian case, but it had been rejected by the Upper Tribunal. The agreed values in that case included a 5% discount for planning permission not having been granted at the valuation date, the 5% decided was for the risk of change and Mr Hamilton had accepted that his planning risk allowance should possibly be 10%. Whilst conceding a possible further 5% for potential movement in building costs, Mr Hamilton had still argued that the risk of convergence was covered by the deferment rate being different for houses and flats, but Mr Rainey contended that the Tribunal was bound by the findings in law in the Kutchukian case that the Sportelli deferment rate did not relate to possible future changes in the market.

The Tribunal's determination

51. This was a complex issue comprising a mixture of fact and law. The Tribunal will accept for the purposes of this Decision the expressions DVR and DHV since they have been agreed by both sides.

52. There is no dispute that the potential uplift in value which would stem from a reconversion of the property to a single house increases the value of the freeholder's reversionary interest. The experts, however, differ markedly in the adjustments they made to the potential uplift in value which they had agreed as at the valuation date to reflect the fact that the reversions do not fall in until December 2054 ie some 47.74 years in the future.

53. Taking the risks as identified by Mr Beckett and set out in the body of this Decision, the Tribunal is of the opinion that Mr Beckett has substantially overstated the risk relating to a change of planning policy between the valuation date and the reversion date. The Tribunal heard no expert planning evidence. In Kutchukian, the experts had agreed 5% for the risk of change and Mr Hamilton accepted that he should add a further 5% because the existing planning consents would have long lapsed. The Tribunal adopts a 10% adjustment. This also encompasses any risks associated with a change in the Estates' management scheme as the uplift in value agreed by the valuers is not dependant on any grandiose scheme entailing large scale excavations.

54.Insofar as the risk that changes in the market in the future might lead to the present gap between house and flat values narrowing, or indeed closing, it is accepted that this is not something covered by the Sportelli deferment rates for flats and houses. Mr Hamilton's adjustment of 5% to reflect possible building cost increases outstripping capital growth over that period of time and thus making the economics of reconversion less attractive is, in the Tribunal's view, an insufficient allowance to cover these convergence risks.

55. Mr Beckett simply followed Kutchukian and, in the absence of any other evidence, whilst the Tribunal accepts it is not bound by the quantum of that decision, sees no reason to depart therefrom, given that the case concerned a property in the same road and with similar factors involved.

56. However, the Tribunal could not understand Mr Beckett's adjustment for risks related to a failure to acquire the mews house. Mr Beckett had agreed that the development uplift was not dependant in any way on the acquisition of 13 Hamilton Close and accordingly, the Tribunal makes no adjustment under this head. Nor, in the circumstances of this case, does the Tribunal see any realistic risk arising from the possibility of not securing vacant possession of the various parts of the subject property on the expiration of the existing leases and again, the Tribunal makes no adjustment in this respect.

57.Accordingly, the potential development value of £1,703,734 should be reduced by 10% to reflect the planning/estate management scheme risks, and by an additional 35% to reflect market convergence/ building cost risks, a total deduction of 45% or £766,680, which results in a figure of £937,054.

58. This sum of course is to be deferred for 47.74 years at 5% which is multiplier of 0.0974. The Tribunal determines the DVR at £91,269, which added to the £611,707 previously determined for the freehold, including marriage value gives a total of £702,976.

Submissions on DHV

59.Counsel for both sides agreed that you could not have both DVR and DHV and whichever was greater would determine who would acquire the interest. It also appeared to be common ground that the concept of DHV envisaged a third party purchaser buying either the freehold or the head leasehold interests in the expectation that he would very soon thereafter be able to acquire all other interests and vacant possession so that the development value could be realised.

60.Mr Rainey said that, as a point of law, there was nothing in the Cravecrest decision, which he said was *"an unusual case"* which permitted DHV in the circumstances of this case. He said that there was nothing in that case which dealt with the possibility of buying interests under Schedule 6 of the Act rather than the interests as set out in the S 13 Notice. It was not authority to include DHV arising from the possibility of buying interests which are not in the S 13 Notice and that applied to both the freehold and leasehold interests. He said *"it was as simple as that"* and was so obvious, that it would have been easy to overlook from Cravecrest decision. He invited the Tribunal, and whether it was determined that he was right or wrong in law, to decide the amount payable in any event.

61.Mr Rainey said that the findings in the Cravecrest case had been unusual in that the occupational leases had all been due to expire a few days after the valuation date, which was unlike the present case. He said that

even if the same entity acquired all the necessary interests, vacant possession could not have been obtained at or shortly after the valuation date since the Applicant's flats were let on ASTs expiring on 30 March and 30 June 2007 and the studio was subject to the rights of Mrs. Henderson. Mr Hamilton's apportionment of 50% to the Respondent was not accepted and the Tribunal should prefer Mr Beckett's conclusion that taking all the risks into account, the DHV which a purchaser of the freehold would be prepared to pay would not exceed the marriage value and therefore there was no need to apportion DHV between the parties. Mr Rainey dismissed Mr Hamilton's argument that the freeholder would have an advantage over the Applicant . He submitted that marriage value was incompatible with DHV as a matter of principle and that the way Mr Hamilton had assessed DHV was a double counting of marriage value and DHV. He also said that Mr Hamilton, again incorrectly, had included DVR in the present value of the freehold, thus double counting DVR.

62.Mr Rainey also criticised Mr Hamilton's DHV valuation as being incorrect in that he had simply taken a 1967 Act marriage value calculation which was wrong, and had brought into account the vacant possession value of the non participating studio which was wrong in law. Mr Rainey contended that the Tribunal should disregard the conditional contract entered into since it was not binding at the relevant time.

63. Mr Rainey said that Mr Hamilton had failed to appreciate the fact that the circumstances in Cravecrest were quite different to those in the present case. There were more interests to acquire, the qualifying tenancies were not for sale at the valuation date and are not assumed to be for sale under Schedule 6, nor was there a willing seller of the studio flat, a deal would have to be done with Mrs Henderson or a purchaser would have to wait for her to leave, the *"short window"* of opportunity identified in Cravecrest did not apply and it would be wrong to assume that a prospective purchaser could obtain the clear indication of willingness identified in Cravecrest from either the Respondent or Mrs Henderson. Mr Hamilton had admitted in cross examination that a purchaser would not commit to a purchase other than simultaneously in respect of all interests and that was not what was hypothosised in Cravecrest.

64.Mr Loveday said that the Tribunal should consider Cravecrest and what was being valued in that case which, he contended, was the same as in the present case and the facts in that case were not so different.

65. He said that DHV was the preferred approach to valuing the development potential for conversion to a house since it produces a higher figure than DVR, so the successful hypothetical purchaser would be the one whose bid was on the basis of DHV. He argued that the advantage of this approach was that a number of risks present in DVR would fall away and it would assumed that deal could be done to acquire all the interests within a relatively short period of time, albeit at a price.

66. Mr Loveday rejected the argument that a hypothetical purchaser would pay a *"deep discount"* for the prospect of achieving a profit from development. In Mr Hamilton's view a 5% discount was sufficient.

67. In his view, with regard to the apportionment of development value, the Tribunal should consider the specific facts and he argued that the interests were not of equal weight and suggest that an appropriate division would be 50% to the freeholder with the remainder being split amongst the leaseholders, with Mrs Henderson not receiving a share of the uplift.

The Tribunal's Determination

68.Cravecrest is binding on this Tribunal insofar as it decided that there is nothing in the Act which precludes consideration of a sale of the interest being acquired to an independent third party by willing sellers. However, Cravecrest did not deal with a situation in which part of the property vital to any conversion to a house, and hence potential development value, is not being acquired under the provisions of the Act. The situation here is that the head leasehold interest so far as it extends to the studio and the garden and with it the potential to obtain vacant possession of the studio are not being acquired by the Nominee Purchaser.

69.Mr Rainey had submitted that, as a point of law, DHV cannot be reflected in the statutory valuations because the valuation to be carried out under Schedule 6 of the Act could not include property interests which were not being acquired, in this case the head leasehold interest in the studio and garden.. The Tribunal agrees. The Tribunal was invited should the Tribunal find against him (which is not the case) and in

any event, to consider what amount of DHV should be included in the two interests being acquired.

70. The valuation evidence on both sides was not helpful. Mr Hamilton, having agreed with Mr Beckett, that the potential development value was £1,703,734 (being the basis on which the Tribunal had understood the case to be before it; to decide what amount if any of that sum is to be added to the values previously determined by the 2008 decision), then proceeded to produce a valuation giving a sum in excess of £2,050,696 for potential development value. This sum clearly includes marriage value from merging all interests yet he adds back the marriage value determined by the 2008 LVT decision. He also includes DVR in his figure for the present value of the freehold. He is clearly wrong in his valuation. This was not the approach adopted in Cravecrest and is therefore rejected by the Tribunal. Mr Beckett simply, it appeared, plucked a figure from the air without evidence in support.

71. In this case, there were also a significant number of different issues arising from those considered in Cravecrest. In Cravecrest, the only two interests necessary to unify the ownership of the property and to achieve vacant possession were the freehold and the head leasehold interests. Both had been included in their entirety in the S13 Notice. The owners of those interests had shown, in relation to a potential third floor addition to the building, a willingness to enter into transactions that would realise development value and both had shown a willingness to share such development value between them. There was also the situation that if development value were not realised swiftly, it would not be realisable until reversion (the short window of opportunity).

72 In the present case, there are three major interests. The occupation of the studio flat by Mrs Henderson on the tag end of a 20 year lease, but with a potentially strong claim to a statutory tenancy as well as arguments that she was entitled to a greater interest than that means that vacant possession would not be readily available. The Applicant's interests in their two flats are not on the market nor can they be assumed to be available for sale by a willing seller under the provisions of Schedule 6 of the Act and the same is true of the head lease of the studio flat and garden. The conditional contract between the Applicant and the Trustees is frozen by the Act and would not in any event be binding on a purchaser of the intermediate leasehold interest.

73. There is no evidence before the Tribunal that any discussions at all have taken place with the freeholder in respect of an early release of development value nor is there any evidence that the Applicant might be willing to dispose of its interest. Thus, someone purchasing the freehold in the hope of very rapidly acquiring all other interests and vacant possession without the benefit of any form of conditional contracts would face substantial risks which would threaten the achievement of his goal. He would however be aware that the head leasehold owner, the Trustees, had shown a willingness to consider selling the entirety of its interest.

74. In such circumstances, the Tribunal considers that a prudent purchaser would make an allowance of £100,000 for difficulties associated with obtaining possession of the studio and a further 50% reduction in the remaining potential development value to reflect the risks of not being able to bring the deal to fruition.

75. This would result in a sum of £766,680 being available for the acquisition of all necessary interests in the property. The Tribunal does not consider that there is any reason why that sum should not be shared equally between the freeholder, the head leaseholder and the Respondent as all three interests are equally vital to the realization of development value. Thus £255,560 should be added to the previously determined freehold value to reflect DHV. This gives a total purchase price for the freehold interest of £867,267.

76. However, this does not give the answer as to what a willing purchaser would be prepared to pay for the intermediate leasehold interest excluding the studio and garden. To simply take the present value of the head lease including the studio and garden, add the share of DHV and then apportion the resulting sum between what is being acquired and the rest would be wrong regardless of Mr Rainey's argument on the wider point at paragraph 60 above. That interest falls to be valued separately under the provisions of Schedule 6.

77. All of the obstacles referred to in the body of this Decision would still face the purchaser of that interest, and whilst the Trustees may well, as evidenced by the conditional contract, be willing to sell the remainder of their interest, the purchaser would face uncertainties in considering the likelihood of acquiring the freehold and the two leasehold flats.

78. The determined value of that part of the intermediate leasehold interest being acquired is only £53,562 including statutory marriage value. Its purchase hardly seems to be the starting point to acquire a property worth £4,875,000. The Tribunal does not think it realistic for anything to be paid in respect of DHV for such an interest. If Mr Rainey is wrong in his contention that DHV is not payable in these circumstances, the amount to be added to the pre determined head leasehold value is nil. If Mr Rainey is correct, nothing is to be paid for the intermediate leasehold interest in any event.

79. Mr Rainey's claim that DHV was incompatible with statutory marriage value was a point raised very late in the day in Cravecrest but the Upper Tribunal refused to consider it as to do so would entail recalling valuation experts. As in Cravecrest however this case has proceeded on the basis of the potential development value being identified by reference to the difference between the value of the property as a freehold house and the value as freehold/999 year leasehold flats. The Tribunal has been asked to determine what, if any, part of this difference should be added to predetermined values incorporating statutory marriage value, ie how much more would a buyer pay for the hope of development value over and above what would have been paid if no DHV existed. There is clearly no incompatibility between statutory marriage value and DHV in such circumstances.

80. Following the conclusion of the hearing in this case, the Court of Appeal issued its decision in the Kutchukian case (87 Hamilton Terrace) and the Tribunal invited further submissions from the parties in respect of this. Having considered those submissions, the Tribunal is satisfied the decision in 87 Hamilton Terrace does not affect the outcome of this case.

81. Accordingly, the Tribunal determines that an addition in respect of DVR is to be made to the value of the freehold interest determined by the 2008 Tribunal decision but not in respect of DHV, and that nothing is to be added under either to the value of the intermediate leasehold interest.

82. The price to be paid by the Nominee Purchaser for the freehold interest is Seven hundred and two thousand nine hundred and seventy-six pounds (£702,976).

CHAIRMAN……

DATE……27.. March…2013……

LEASEHOLD VALUATION TRIBUNALS (PROCEDURE) (ENGLAND) REGULATIONS 2003

CORRECTION CERTIFICATE UNDER REGULATION 18 (7) OF THE ABOVE REGULATIONS

KH/LON/OOBK/OCE/2009/0095

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993-SECTION 24

20 HAMILTON TERRACE, ST JOHN'S WOOD, LONDON NW8 9UG

As Chairman of the Leasehold Valuation Tribunal which determined the above case I hereby correct accidental/clerical errors in paragraph 75 of the Decision of the Tribunal dated 27 March 2013.

I hereby correct those accidental/clerical errors and certify that the Tribunal's Decision should be read and construed as follows:

Paragraph 75 – This would result in a sum of £801,867 being available for the acquisition of all necessary interests in the property. The Tribunal does not consider that there is any reason why that sum should not be shared equally between the freeholder, the head leaseholder and the Respondent as all three interests are equally vital to the realization of development value. Thus £267,289 should be added to the previously determined freehold value to reflect DHV. This gives a total purchase price for the freehold interest of £878,996.

…….
Mrs J S L Goulden JP

8… May…. 2013.....