UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – terms of acquisition – whether restrictive covenant in headlease should be incorporated in transfer – existence of scheme of management – Leasehold Reform, Housing and Urban Development Act 1993 Schedule 7 para 5 – price to be paid – extent of any enhancement in price attributable to potential for development back to a single house in 2046 – extent of risks regarding ability to obtain vacant possession and carry out such development – how hypothetical purchaser would view such risks – section 61 and Schedule 14 1993 Act

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

BETWEEN **ALAN KUTCHUKIAN** **Appellant**

and

THE KEEPERS AND GOVERNORS OF THE POSSESSIONS REVENUES AND GOODS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON (IN THE CAPACITY OF THE TRUSTEE OF JOHN LYON'S CHARITY) **Respondents**

Re: 87 Hamilton Terrace, London, NW8

Before: His Honour Judge Nicholas Huskinson
N J Rose FRICS

Sitting at: 43-45 Bedford Square, London, WC1B 3AS
on 7, 8, and 9 February 2012

Edwin Johnson QC, instructed by David Conway & Co, for the appellant.
Jonathan Gaunt QC and *Mark Loveday*, instructed by Pemberton Greenish, for the respondents.

The following cases are referred to in this decision:
Peck v Trustees of Hornsey Parochial Charities (1971) 22 P&CR 789
Le Mesurier v Pitt (1972) 23 P&CR 389
Moreau v Howard de Walden Estates Ltd (LRA/2/2002)
Cadogan v Erkman [2011] UKUT 90 (LC)
Trustees of Sloane-Stanley Estate v Carey-Morgan [2011] UKUT 415 (LC)
Marten v Flight Refuelling Ltd [1962] 1 Ch 115
31 Cadogan Square Freehold Ltd and 37 Cadogan Square Freehold Ltd v The Earl Cadogan [2010] UKUT 321 (LC)
Cadogan v 2 Herbert Crescent Freehold Ltd (LRA/91/2007)
Higgs v Nieroba (LRA/2/2005)
Office of Telecommunications v Floe Telecom Ltd [2009] EWCA Civ 47

The following further cases were referred to in argument:

Wellcome Trust Ltd v Romines [1999] EGLR 229
2 Hamilton Terrace Freehold Ltd v John Lyon's Charity (LON/OOBK/OCE/2008/0141)
Cadogan v Panagopoulos (LRA/97 & 108/2006)
John Lyon's Charity v Shalson (LRA/54/1999 and LRA/7/2000)
Earl Cadogan v Sportelli (LRA/50/2005 – Lands Tribunal)
British Airways Plc v Heathrow Airport Ltd [1992] EGLR 141

DECISION

Introduction

1. This is an appeal by both the appellant and respondents from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 19 October 2009 (and a correction certificate thereto dated 11 December 2009) whereby the LVT decided the terms of the transfer (so far as concerns in particular the terms of a restrictive covenant to be included therein) and the amount of the purchase price in respect of a collective enfranchisement by the appellant, as nominee purchaser, from the respondents, as freeholders of 87 Hamilton Terrace, London, NW8 ("the property") under the terms of the Leasehold Reform, Housing and Urban Development Act 1993. In summary the LVT decided that a restrictive covenant should be included (not in the terms of the relevant restrictive covenant contained in the head lease but in a different form) and the LVT further decided that the price to be paid was £51,800.

2. As at the valuation date, namely 4 September 2008, it is common ground between the parties that the property was substantially more valuable as a building laid out as flats but ready for conversion into a house rather than a building laid out as flats which was to remain as flats. The former value was agreed at £8,500,000 whereas the latter value was agreed at £5,500,000. It was argued before the LVT that the hypothetical purchaser would increase the price he was prepared to pay for the freeholder's interest in the property (as assessed in accordance with Schedule 6 to the 1993 Act) in order to reflect the prospective profit to be made in due course from obtaining possession of the property and redeveloping the same back into a single dwelling house so as to unlock this additional value. The questions for the LVT, and the question for this Tribunal on appeal, are:

(1) Whether a restrictive covenant (being a covenant which would inter alia prevent the use of the property for any purpose other than four self-contained flats) should be included in the transfer by the respondents as freeholders to the appellant as nominee purchaser; and

(2) If such restrictive covenant is not included, what is the proper assessment of the price to be paid for the freehold in accordance with Schedule 6 bearing in mind the prospect of redevelopment back to a single house.

3. If such restrictive covenant is included in the transfer, then it is agreed between the parties that the enfranchisement price to be paid is £11,655, plus costs under section 60 of the 1993 Act.

4. If such restrictive covenant is not included such that question (2) arises, then various additional questions need to be considered namely:

(1) The question of whether the hypothetical purchaser would in due course be able to recover possession of the various flats in the property from the underlessees having regard in particular to the terms of section 61 of the Act.

(2) The question of whether the terms of Schedule 14 of the Act are such that the hypothetical purchaser would have to pay what would in effect be a ransom or marriage value to the underlessees if he successfully terminated their underleases under section 61.

(3) The question of whether uncertainties regarding what would be the position at the date of the termination of the underleases under section 61 (namely in 2046) in respect of any of the following matters would depress the amount which the hypothetical purchaser would be prepared to pay at the valuation date in 2008 for the prospect of redeveloping the property back to a single house in 2046, namely

(a) whether planning permission would be available for a redevelopment back to a single house;

(b) whether a change in market conditions might have resulted in the value of the property available for redevelopment back to a single house no longer being so much in excess of the value of the property in its present state as four flats;

(c) whether the estate management scheme (as to which see further below) might be amended before 2046 is so as to prevent such redevelopment; and

(d) whether there might have been a disproportionate increase in the costs of such redevelopment so as to make the same less attractive.

5. In summary the appellant contends:

(1) No such restrictive covenant should be included in the transfer.

(2) Section 61 of the 1993 Act is a provision of awkward and uncertain effect where (as here) there exists a head lease with a short reversion between the freehold and the occupying underlessees. It is argued that the difficulty inherent in section 61 is in the present case compounded by the fact that three out of the four underleases do not have included within them a clause complying with section 57 (7) and reserving the section 61 right of termination.

(3) The appellant also argues that, even if the hypothetical purchaser of the freehold were able to terminate the underleases under section 61 in 2046, the true interpretation of schedule 14 (which deals with the compensation to be paid to such underlessees if their underleases are so terminated) will require the hypothetical purchaser to pay to such underlessees not merely the then value of their underleases but also an additional sum to represent the fact that the purchase of their underleases will unlock a redevelopment value (i.e. from a building as four flats to a building as a single house).

(4) The appellant argues, on the basis of the decisions of this Tribunal in *Cadogan v 2 Herbert Crescent Freehold Limited* (LRA/91/2007) and *31 Cadogan Square Freehold Limited and 37 Cadogan Square Freehold Limited v The Earl Cadogan* [2010] UKUT 321 (LC) that this Tribunal should not decide whether the hypothetical purchaser would be able to overcome the potential legal difficulties under section 61 or whether the hypothetical purchaser would be able to avoid having to pay a share of the redevelopment value to the underlessees under Schedule 14; that instead this Tribunal should assess the manner in which the properly advised hypothetical purchaser would have approached these potential future problems when deciding at the valuation date in 2008 how much to bid for the freehold of the property; and that accordingly the Tribunal should decide on a proportion by which the hypothetical purchaser would diminish his bid for the freehold so as to reflect these risks and uncertainties. The appellant argues that this proportion would be substantial. The appellant contends that it would be an error of approach for this Tribunal to decide whether the hypothetical purchaser would ultimately succeed in any litigation regarding these difficulties against the underlessees in 2046 and to conclude (supposing that the Tribunal's conclusion was that the hypothetical purchaser would ultimately succeed) that in consequence the hypothetical purchaser would make no deduction at all for any risks and uncertainties under section 61 and Schedule 14 of the 1993 Act.

(5) The other items of uncertainty, especially that mentioned in paragraph 4(3)(b) above (change in market conditions), are substantial and would require a further significant discount to reflect the risk of these matters proving adverse to the hypothetical purchaser.

(6) Taking into consideration all of the potential future hazards of litigation and the other potential uncertainties of outcome, the hypothetical purchaser would not in fact increase his bid at all at the valuation date to reflect the possibility of a redevelopment back to a single house in 2046.

(7) The hypothetical purchaser would notice the discrepancy in value between the property as four flats on the one hand and as a house on the other hand and would take into consideration the prospect of a redevelopment back to a single house at the termination of the underleases in 2136 (when no problem would arise under section 61 or Schedule 14) – this results in a small uplift in the price contended for by the appellant from £11,655 to £18,524.

6. In summary the respondents contend:

(1) The proposed restrictive covenant should be included in the transfer.

(2) This Tribunal should decide the legal points potentially arising under section 61 and Schedule 14 in 2046 and should reach a decision that these would all be resolved in favour of the hypothetical purchaser.

(3) This Tribunal should in consequence conclude that in fact no legal problems prospectively arise in 2046 for the hypothetical purchaser from section 61 or

Schedule 14 and that the hypothetical purchaser would decide upon the price to be paid under Schedule 6 for the freehold on the assumption that this is indeed so. Accordingly no discount should be applied to the price which the hypothetical purchaser would pay in order to reflect any such hazards of litigation.

(4) The other matters referred to in paragraph 4(3) are minor and only justify a small reduction in the hypothetical purchaser's bid.

(5) If no allowance for the hazard of litigation under section 61 and Schedule 14 is to be made, then a 10% discount upon the hypothetical purchaser's bid, insofar as it reflects the value of the prospective redevelopment in 2046, should be made to allow for these other matters.

(6) If, contrary to its principal argument, a discount needs to be applied for the hazards of litigation under section 61 and Schedule 14, then a further 30% discount should be applied, making a total discount of 40% upon the hypothetical purchaser's bid, insofar as it reflects the value of the prospective redevelopment in 2046.

The Facts

7. The property is on the south west side of Hamilton Terrace almost midway between the junctions with Hall Road and Abercorn Place. It is a detached house of brick construction on lower ground, ground and two upper floors. There is a front garden and a larger rear garden. The property was converted into two maisonettes in about 1952, into a maisonette and two flats in about 1956, and into four flats in 1962. The property is not a listed building but is within the St John's Wood Conservation Area as is the whole of Hamilton Terrace.

8. The freehold of the property is vested in the respondents. The property is let on a headlease dated 24 June 1980 for a term expiring on 29 September 2046 granted to Joseph Kutchukian and Alice Kutchukian at a present rent of £400 p.a. which is subject to review to £1000 p.a. with effect from 25 December 2021. The head lease was at the date of the claim for the freehold in the ownership of the appellant Alan Kutchukian and his wife, Narine Kutchukian. This head lease remains in their ownership. Under clause 2 (18) of this head lease the use of the property is restricted as follows:

> "Will not use the demised premises or any part thereof or permit or suffer the same or any part thereof to be used for any auction exhibition meeting or public entertainment or any unlawful illegal or immoral purpose or for the purpose of any trade or business or use or permit or suffer the demised premises to be used for any other purpose than as four self contained private residential flats (each such flat to be occupied by one family only) and two private garages (each such garage to be used for the purpose of garaging one private motor vehicle only)."

9. Each of the four self-contained flats in the property is subject to a lease the grant of which was pursuant to an individual lease extension claim made under the provisions of the 1993 Act. Each of these underleases expires on 25 September 2136 at a peppercorn rent. The registered proprietors of each of these underleases are (as regards three flats) certain Jersey companies

holding the underleases on trust for members of the Kutchukian family and (as regards one flat) a member of the Kutchukian family. The underlease of the basement flat contains in clause 5.4 (introduced by a rider to the lease) a provision in the following terms:

> "5.4 There is reserved to the Lessor
>
> > 5.4.1 at any time during the period of 12 months ending with the Term Expiry Date of the Existing lease and
> >
> > 5.4.2…the right to apply to the Court for an order that the Landlord may resume possession of the Flat in accordance with section 61 of the Act for the purposes of demolishing or reconstructing or the carrying out of substantial works of construction on the whole or a substantial part of the Building and which the Lessor could not reasonably do without obtaining possession of the Demised Premises"

However there is no such provision in the other three underleases. All four of the underleases commence with certain particulars which include in the box headed LR9 the following text

> "LR 9.3 Landlord's contractual rights to acquire this lease
>
> Section 61 rights of the Leasehold Reform Housing and Urban Development Act 1993 (as amended)"

10. In 1971 pursuant to an order of the High Court a scheme of management was made in relation to the Harrow School Road Trust Estate (hereafter called "the estate management scheme") which it is agreed applies to an area which includes the property. It is agreed that after the transfer from the respondents the provisions of this scheme will apply to the property. The scheme of management contains in paragraph 3 provisions regulating redevelopment in the following terms:

> "3.1 No existing building shall be reconstructed or pulled down and rebuilt and no new building shall be built except in accordance with site plans floor plans elevations and sections and specifications of external materials submitted to the landlord by the estate owner of the property in question and approved in writing by the landlord (and the landlord's reasonable costs and expenses of considering any application for consent shall be borne by the estate owner)
>
> 3.2 in connection with any proposed development the landlord may from time to time if it thinks fit (either generally or in any particular case) in writing prescribe the minimum site area for any property to be developed and the minimum width of frontage for any house or other building to be erected thereon and the minimum floor area for any flat or other unit of accommodation to be comprised in any such building (but compliance with any such requirements shall not preclude the landlord from withholding approval from the plans elevations sections and specifications for the development if the landlord regards them as objectionable in any other respect)"

Paragraphs 4 and 5 provide for the regulation of the user in the following terms:

> "4. Except with the written consent of the landlord
>
> 4.1 no property or part of a property which at the enfranchisement date is used for residential purposes shall be used for the purpose of any trade or business or for any other purpose whatsoever except residential purposes and
>
> 4.2 …"
>
> "5.1 Except with the written consent of the landlord no property or part of a property which at the enfranchisement date consists of or is used or adapted for use as the residence of a single family or household shall be converted (whether or not such conversion involves any structural or other alteration to the fabric of any building) for use as the residence of more than one family or household
>
> 5.2 In connection with any such proposed conversion the landlord may if it thinks fit attach any conditions to the granting of consent to the conversion including (without prejudice to the generality of the foregoing) any condition as to the manner of such conversion the structural and other alterations to be made in connection with it the number of units of accommodation to result from it and the number of persons permitted to occupy any such unit of accommodation"

Paragraph 7 of the scheme makes provision restricting certain further matters including providing that, except with the written consent of the landlord:

> "7.6 Nothing shall be done or omitted or permitted or suffered to be done or omitted on any property which shall be an annoyance or inconvenience to the landlord or the landlord's tenants or the occupiers of any adjoining properties"

Paragraph 13 of the scheme provides:

> "13.1 The landlord shall not unreasonably withhold (or attach any unreasonable conditions to) any consent which is made requisite by any provision in paragraphs 3 4 and 5 above…"

The LVT Decision

11. The LVT considered Schedule 7 paragraph 5 of the 1993 Act and rejected the respondents' argument that a restrictive covenant broadly in accordance with the terms of clause 2 (18) of the head lease should be included. The LVT decided that the respondents were protected under the estate management scheme from undesirable use of the property. However the LVT went on to conclude that a modified restrictive covenant, as advanced by the appellant as a secondary argument, should be included. This was a covenant based upon clause 2 (18) but with an express provision to the effect that use as a single private dwelling house in the occupation of one family or household was also permitted. In paragraphs 28 and 29 of its decision the LVT stated as follows:

"28 All that the Respondent loses under the modified covenant is the ability to use the clause for the purpose of raising a large sum of money for its relaxation. This was described by Mr Johnson as a "ransom clause".

29 The Tribunal accepts that Parliament did not in passing Schedule 7 intend the clause to be used for that purpose but rather for the environmental protection of the area. The modified clause will afford that protection."

12. As regards the price to be paid the LVT followed the approach in *2 Herbert Crescent* and decided that it should make a discount to the price a hypothetical purchaser would pay to reflect the various risks summarised above. It concluded that the appropriate discount was a reduction of 90% to that part of the price reflecting the prospect of a redevelopment in 2046. Having decided certain other points which were then in issue between the parties (but which are not the subject of the present appeal) the LVT determined the enfranchisement price as £51,800.

13. Both the appellant and the respondents applied for permission to appeal to this Tribunal. They were both granted such permission by the President who ordered that the appeals should proceed with the nominee purchaser as the appellant and the freeholders as the respondents. The President ordered that the appeals should proceed by way of rehearing.

The Hearing before the Upper Tribunal

14. At the hearing before us we received evidence from Gavin Buchanan BSc MRICS of Knight Frank on behalf of the appellant and from J.P. Hamilton BSc MRICS of Cluttons on behalf of the respondents. It was agreed between the parties that, having regard to the issues which fell to be decided by this Tribunal, it was unnecessary for us to view the property or its neighbourhood.

15. The restrictive covenant originally contended for by the respondents was one which was not in exactly the same terms as the covenant in clause 2 (18) of the head lease. This gave rise to a subsidiary argument as to whether, supposing that we accepted the respondents' argument in principle regarding the inclusion of the restrictive covenant, the wording of this proposed clause had moved too far away from the wording of clause 2 (18) to be capable of being justified under Schedule 7 paragraph 5(1)(b) as being merely "suitable adaptations." Sensibly, in order to avoid this further potential difficulty, the respondents at the close of the hearing submitted a reworded suggested covenant which adhered very closely to the original wording in clause 2 (18) namely:

"Will not use the Property or any part thereof or permit or suffer the same or any part thereof to be used for any auction exhibition meeting or public entertainment or any unlawful illegal or immoral purpose or for the purpose of any trade or business or use or permit or suffer the Property to be used for any other purpose than as four self-contained private residential flats (each such flat to be occupied by one family only) and one private garage (to be used for the purpose of garaging one private motor vehicle only)."

16. At the hearing the parties agreed that the Tribunal should reach a decision as to the purchase price to be paid upon each of several separate bases:

(1) A price on the basis that the restrictive covenant as contended for by the respondent is included in the transfer. This price is agreed at £11,655. The following further valuations need to be performed in case it is held by the Tribunal (or upon appeal from the Tribunal) that the restrictive covenant should not be included.

(2) The price to be paid upon the approach adopted in *2 Herbert Crescent*.

In case the *2 Herbert Crescent* approach is rejected, a decision needs to be reached on each of the following bases. These assume that the correct approach is for the legal points under section 61 and Schedule 14 to be decided and for the price to be calculated (supposing the points are decided in favour of the respondents) on the basis that the law is definitely as contended by the respondents and no discount should be made to the hypothetical purchaser's bid to reflect any doubt upon the point.

(3) The price to be paid if the section 61 and Schedule 14 points are both decided as contended for by the respondents.

(4) The price to be paid if the section 61 point is decided in a manner adverse to the respondents' contentions. In these circumstances it is agreed that the price should be that put forward by Mr Buchanan as mentioned in paragraph 5(7) above, namely £18,524.

(5) The price to be paid if the Section 61 point is decided as contended for by the respondents, but if it is also decided that the underlessees in 2046 would enjoy under Schedule 14 the right to share in some development value.

[Note: During the course of argument we asked the parties if it was appropriate to consider whether the hypothetical purchaser of the freehold might see additional value in the freehold to reflect the possibility that soon after the purchase he might be able to reach a deal with the headlessee and the underlessees whereby they all cooperated so as to reach an early enjoyment of development value – e.g. by the hypothetical purchaser of the freehold going on to buy these other interests at a price which, though appropriately enhanced to be attractive, still left substantial development value in the hands of the hypothetical purchaser. Mr Johnson pointed out (as was the case) that neither party had at any stage either in their statements of case or valuation evidence raised any such point. He submitted that the respondents were not entitled to pursue the point. Mr Buchanan in his evidence expressed the view that it would be entirely speculative for the hypothetical purchaser to attach any such extra value to the freehold and that he would not do so. On behalf of the respondents neither Mr Hamilton nor Mr Gaunt sought to pursue the point as (respectively) a matter of valuation or a matter of law. Accordingly we say no more about the point].

The Statutory Provisions

17. So far as concerns the question of whether a restrictive covenant, as contended for by the respondents, should be included the relevant provisions are to be found in section 34 and Schedule 7 of the Act. Section 34 (9) provides that, in the absence of agreement to the contrary, any conveyance executed for the purpose of collective enfranchisement shall, as respects the conveyance of any freehold interest, conform with the provisions of Schedule 7. Paragraph 5 of Schedule 7 deals with restrictive covenants in the following terms:

> "5-(1) As regards restrictive covenants, the conveyance shall include –
>
> (a) such provisions (if any) as the freeholder may require to secure that the nominee purchaser is bound by, or to indemnify the freeholder against breaches of, restrictive covenants which –
>
> (i) affect the relevant premises otherwise than by virtue of any lease subject to which the relevant premises are to be acquired or any agreement collateral to any such lease, and
>
> (ii) are immediately before the appropriate time enforceable for the benefit of other property; and
>
> (b) such provisions (if any) as the freeholder or the nominee purchaser may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of any such lease or collateral agreement as is mentioned in paragraph (a)(i), being either –
>
> (i) restrictions affecting the relevant premises which are capable of benefiting other property and (if enforceable only by the freeholder) are such as materially to enhance the value of the other property, or
>
> (ii) restrictions affecting other property which are such as materially to enhance the value of the relevant premises; and
>
> (c) such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which –
>
> (i) will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired, but
>
> (ii) will materially enhance the value of other property in which the freeholder has an interest at the relevant date.
>
> (2) In this paragraph "restrictive covenant" means a covenant or agreement restrictive of the user of any land or building."

It is paragraph 5(1)(b)(i) on which the respondents rely.

18. So far as concerns the issues referred to above regarding potential difficulties under section 61 and Schedule 14, the following provisions need to be noted:

(1) Section 61, dealing with the landlord's right to terminate a new lease on grounds of redevelopment, is in the following terms:

> “61 (1) Where a lease of a flat (“the new lease”) has been granted under section 56 but the court is satisfied, on an application made by the landlord—
>
> (a) that for the purposes of redevelopment the landlord intends—
>
> (i) to demolish or reconstruct, or
>
> (ii) to carry out substantial works of construction on,
>
> the whole or a substantial part of any premises in which the flat is contained, and
>
> (b) that he could not reasonably do so without obtaining possession of the flat,
>
> the court shall by order declare that the landlord is entitled as against the tenant to obtain possession of the flat and the tenant is entitled to be paid compensation by the landlord for the loss of the flat.
>
> (2) An application for an order under this section may be made—
>
> (a) at any time during the period of 12 months ending with the term date of the lease in relation to which the right to acquire a new lease was exercised; and
>
> (b) at any time during the period of five years ending with the term date of the new lease.
>
> (3) …
>
> (4) Where an order is made under this section, the new lease shall determine, and compensation shall become payable, in accordance with Schedule 14 to this Act; and the provisions of that Schedule shall have effect as regards the measure of compensation payable by virtue of any such order and the effects of any such order where there are sub-leases, and as regards other matters relating to orders and applications under this section.
>
> (5) …”

(2) It will be seen that the opening words of section 61 refer to circumstances where the new lease "has been granted under section 56". Section 56 (1) provides:

> "56 (1) Where a qualifying tenant of a flat has under this Chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42 then except as provided by this Chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept --
>
> (a) in substitution for the existing lease, and
>
> (b) on payment of the premium payable under schedule 13 in respect of the grant,
>
> a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease."

(3) Section 40 makes provision as to the meaning of the expression "the landlord" in the following terms:

> "40 (1) In this Chapter “the landlord”, in relation to the lease held by a qualifying tenant of a flat, means the person who is the owner of that interest in the flat which for the time being fulfils the following conditions, namely—
>
> (a) it is an interest in reversion expectant (whether immediately or not) on the termination of the tenant’s lease, and
>
> (b) it is either a freehold interest or a leasehold interest whose duration is such as to enable that person to grant a new lease of that flat in accordance with this Chapter,
>
> and is not itself expectant (whether immediately or not) on an interest which fulfils those conditions.
>
> (2) Where in accordance with subsection (1) the immediate landlord under the lease of a qualifying tenant of a flat is not the landlord in relation to that lease for the purposes of this Chapter, the person who for those purposes is the landlord in relation to it shall conduct on behalf of all the other landlords all proceedings arising out of any notice given by the tenant with respect to the flat under section 42 (whether the proceedings are for resisting or giving effect to the claim in question).
>
> (3) Subsection (2) has effect subject to the provisions of schedule 11 to this Act (which makes provision in relation to the operation of this Chapter in cases to which that subsection applies).
>
> (4) In this section and that Schedule—
>
> (a) the tenant”means any such qualifying tenant as is referred to in subsection (2) and “the tenant’s lease” means the lease by virtue of which he is a qualifying tenant;
>
> (b) “the competent landlord”means the person who, in relation to the tenant’s lease, is the landlord (as defined by subsection (1)) for the purposes of this Chapter;
>
> (c) “other landlord” means any person (other than the tenant or a trustee for him) in whom there is vested a concurrent tenancy intermediate between the interest of the competent landlord and the tenant’s lease.
>
> (5)…"

(4) Paragraph 5 of schedule 14 makes provision in the following terms for the amount payable to a tenant where an order for possession is made against him under section 61:

> “5.—(1) The amount payable to a tenant, by virtue of an order for possession, by way of compensation for loss of his flat shall be the amount which at the valuation date the new lease, if sold on the open market by a willing seller, might be expected to realise on the following assumptions—
>
> (a) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant’s flat or to acquire any new lease;

(b) on the assumption that the vendor is selling—

(i) subject to the rights of any person who will on the termination of the lease be entitled to retain possession as against the landlord, but otherwise with vacant possession, and

(ii) subject to any restriction that would be required (in addition to any imposed by the terms of the lease) to limit the uses of the flat to those to which it has been put since the commencement of the lease and to preclude the erection of any new dwelling or any other building not ancillary to the flat as a dwelling; and

(c) 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 flat will be held by the landlord on the termination of the lease.

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made as to the matters specified in paragraphs (a) to (c) of that sub-paragraph does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the valuation date the new lease might be expected to realise if sold as mentioned in that sub-paragraph."

Restrictive covenant issue - oral evidence

19. We will first consider the evidence of the surveyors concerning the restrictive covenant and we will consider later their evidence concerning questions of price.

20. On behalf of the appellant Mr Buchanan gave evidence in relation to the proposed restrictive covenant to the following effect:

(1) So far as the restrictive covenant prevented conversion from four flats to a single dwelling house the covenant not merely omitted materially to enhance the value of other property, but in fact it diminished the value of other property, because use as a single dwelling house was so much more valuable than use as flats. Mr Buchanan drew attention to the fact that the respondents have, in relation to other properties on the estate, encouraged the conversion of such properties to single dwelling houses. He also said that he was aware of two properties in Hamilton Terrace, namely Nos. 64 and 117, which had been sold on enfranchisement by the respondents without the inclusion of any restrictive covenant such as now argued for.

(2) As regards the first part of the proposed restrictive covenant (see paragraph 15 above), i.e. down to the words "any trade or business", a covenant in these terms was superfluous. This is because paragraph 4 of the estate management scheme confines the use of the property to residential use.

(3) If there was no estate management scheme then a landlord might well wish to continue the covenant in the head lease in order to exercise control. Mr Buchanan recognised

that it was of benefit to a landlord or freeholder to enjoy control and that lack of control could (although he said this was arguable) have an adverse effect on the value of neighbouring property. He thought that in Hamilton Terrace there was little prospect of conversion of the property to an undesirable use which depressed the value of neighbouring property.

(4) So far as concerns the control available to the respondent through the estate management scheme, Mr Buchanan saw no significant disadvantage to the respondents from the wording of the scheme, and in particular from the provisions of paragraph 13.1, which provide that the respondents shall not unreasonably withhold consent under paragraphs 3 4 and 5 of the scheme. Mr Buchanan considered that no competent landlord would wish unreasonably to withhold consent to a proposal. He accepted however that under the estate management scheme there could be an argument and indeed litigation regarding the reasonableness of withholding consent, which could give rise to expense for the respondents.

(5) Mr Buchanan accepted that there may be circumstances where stronger control was provided under the respondents' proposed covenant as opposed to the estate management scheme and that such stronger control may be of benefit. However he did not accept that there were any identifiable circumstances, with some reasonable possibility of occurrence, in which the proposed covenant brought material enhancement to the value of other property in circumstances where the estate management scheme would fail to do so.

21. On behalf of the respondents Mr Hamilton gave evidence to the following effect:

(1) At the outset of his written evidence regarding the restrictive covenant he drew attention to the fact that, if the restrictive covenant was continued by inclusion in the transfer, then the appellant would be prevented from converting the property from four flats into a single dwelling house unless he first obtained the respondents' consent, for which the respondents would be able to seek payment of a substantial premium. In paragraph 5.7 he stated:

> "Continuing the head lease user restriction in the freehold transfer … maintains the Charity's and the claimant's legal entitlement to the potential uplift in value for conversion back to its original use as a house. If the user restriction is not continued the Charity will receive but a fraction of the increase in value from conversion and the nominee purchaser will receive a windfall on the Appellant's approach."

This concentration by the respondents upon the control available to them of preventing conversion to a house, unless paid a suitable premium for release of the covenant, was something which Mr Hamilton accepted had been apparent in his evidence to the LVT. He accepted that one of the purposes of seeking to retain the head lease covenant was so that the respondents could have control over conversion to a single dwelling house and could obtain a premium for the release of the covenant. Mr Hamilton said it was wrong to categorise the respondents' concern to retain the restrictive covenant as being a concern which was solely based upon a desire to be able to charge a premium for consent to such a conversion. Mr

Hamilton did accept, however, that in his evidence to the LVT he did not mention the concerns as to possible disadvantageous users which he now described in for instance paragraph 6.19 of his report.

(2) As regards the property capable of benefiting from the proposed restrictive covenant, this Mr Hamilton said comprised the properties principally between Abercorn Place and Paul Place. The map on page 7 of the bundle showed the properties which were still held by the respondents as shaded and also showed the former boundary of the estate.

(3) Having regard to certain decided cases Mr Hamilton stated he had approached the question on the following basis, namely that material enhancement included the concept of maintaining a value which would otherwise deteriorate; that material enhancement could only realistically be considered in general terms; and that material enhancement was essentially a matter of general impression.

(4) Mr Hamilton stated that a change of use of the property to an inappropriate use could reduce values of other property materially, especially properties closest to number 87. He said that if the restrictive covenant was not included then there would be no restriction on use of the property to prevent user as an "auction exhibition meeting or public entertainment or unlawful illegal or immoral purpose or for the purpose of any trade or business" – and these were uses which at present were expressly prohibited by the terms of clause 2 (18) of the head lease. He similarly expressed further concern that, if the restrictive covenant were not included, the property could be converted into a school, doctors' or dentists' surgery, a clinic for other medical use, more flats, bedsits or a hostel (for students, battered wives, alcoholics, drug addicts etc) or some other inappropriate use for a high-value residential street such as Hamilton Terrace, see paragraph 6.19 of his report. He pointed out that while some of these uses may be prohibited as business uses, the particular value of the restrictive covenant in the head lease was that this provided an absolute restriction to use as four self-contained private residential flats and accordingly the restrictive covenant would prevent all such uses.

(5) Mr Hamilton said that the respondents could not properly rely solely on planning control from the local planning authority for the purpose of avoiding any material diminution in the value of other property.

(6) As regards the estate management scheme Mr Hamilton accepted that it was very unlikely to be changed pursuant to some formal application for a change, but that this was still a possibility. He agreed that the estate management scheme operated to prevent a similar range of uses as were prevented by the restrictive covenant, but he said it was easier for the respondents to be more certain of success in stopping an objectionable use under the covenant, because under the covenant there was no proviso that consent was not unreasonably to be withheld to a proposed use. In summary Mr Hamilton accepted that the estate management scheme provided much the same extent of control except for the point regarding consent which could not be unreasonably withheld under the scheme but could be unreasonably withheld under the covenant.

(7) Mr Hamilton was asked about the nature of the restrictive covenants in properties retained by the respondents and which were therefore still subject to continuing leases. He

was unable to tell us the nature of these covenants. He was also asked about the nature of the restrictive covenants in properties which had been sold by the respondents. He was unable to tell us the nature of these covenants. He agreed that he was not in a position to contradict Mr Buchanan when he told us that 64 and 117 Hamilton Terrace had been sold without any covenants restricting user.

(8) Mr Hamilton agreed that he could not recall any example of an undesirable use being started in Hamilton Terrace or being threatened in Hamilton Terrace since 1999 (the date when he became involved with the estate) which had to be curtailed by reliance upon the restrictive covenant.

(9) Mr Hamilton was asked about the phraseology in several of the paragraphs in his expert report in which he said that certain uses "could" have an adverse effect or "might" have an adverse affect upon the value of other property. He accepted that the phraseology of the last sentence of paragraph 6.34 of his report, where he said that the restrictive covenant "would" materially enhance the value of other property, was not borne out by his earlier text, but he told us that this last sentence did represent his opinion and he adhered to the word "would".

(10) Mr Hamilton appeared to accept that the estate management scheme would prevent the property being converted into a substantial number of small units, see in particular paragraph 5.1 of the scheme.

Restrictive covenant issue – appellant's submissions

22. On behalf of the appellant Mr Johnson advanced the following points.

23. Paragraph 5(1)(b)(i) of schedule 7 is in the same terms, so far as its requirements are concerned, as section 10(4)(b)(i) of the Leasehold Reform Act 1967. In consequence the case law on section 10(4) and (5) of the 1967 Act is of assistance in construing the requirements of paragraph 5(1)(b)(i). The concept of a material enhancement in value can include the concept of maintaining a value which would otherwise deteriorate; see *Peck v Trustees of Hornsey Parochial Charities* (1971) 22 P&CR 789, *Le Mesurier v Pitt* (1972) 23 P&CR 389 and *Moreau v Howard de Walden Estates Ltd* LRA/2/2002. The expression *"suitable adaptations"* is a narrow one; see *Le Mesurier v Pitt* and *Moreau*. It gives a tribunal no general power to modify a covenant. It refers only to adaptations which may be required in order to take account of the rebirth of the relevant covenant as a covenant affecting a freehold, as opposed to a covenant in a lease.

24. Material enhancement in value must be distinctly proved; see *Cadogan v Erkman* [2011] UKUT 90 (LC) and *Trustees of Sloane-Stanley Estate v Carey-Morgan* [2011] UKUT 415 (LC). In the latter of these two cases the Upper Tribunal expressed the matter in the following terms, at paragraph 152 (emphasis added by Mr Johnson).

"For our part we adopt the observations in both the passages we have quoted. Of particular importance is the indication in the Erkman decision that evidence is required to establish that

the restriction *will materially enhance* the value of other property of the freeholder, although quantification of such enhancement in value is not needed. That must, in our view, be the case, and mere assertions by counsel on behalf of the freeholder are not evidence and are not sufficient."

25. While reserving the appellant's position on the following point in case this matter goes further, Mr Johnson accepted that material enhancement does not have to be proved by demonstrating material enhancement in value, in monetary terms, of a specific property. In *Higgs v Nieroba* LRA/2/2005, the Member (Mr. Clarke) put the matter in this way at paragraph 60.

> "In my judgment, and following these decisions, the concept of material enhancement includes both an increase in value due to restrictions and the maintenance of a value which would otherwise deteriorate. The concept is to be applied as a matter of general impression and not by attempting a detailed valuation exercise."

26. In summary as regards these points Mr Johnson argued as follows. The respondents must prove that the restrictions in the headlease covenant are such as materially to enhance the value of other property. The concept of material enhancement can include the concept of maintaining a value which would otherwise deteriorate, but such deterioration must be material. The requirement that the enhancement must be *"material"* does not disappear simply because one is referring to the maintenance of a value which would otherwise deteriorate. Paragraph 5(1)(b)(i) refers to restrictions which *"are such as materially to enhance the value of the other property"*. The reference is not to restrictions which *"might"* or *"could"* materially enhance the value of the other property. Nor does the concept of material enhancement include the concept of maintaining a value which would otherwise be *"in danger of deteriorating"*. The material enhancement in value must be actual, not possible. It is a misconception to suggest that the valuation test for satisfying paragraph 5(1)(b)(i) is not a particularly onerous one. The quality of evidence which is required to satisfy the test of material enhancement in value is best appreciated by reading the evidence which was put in front of the relevant Tribunal in *Peck*, *Le Mesurier* and *Moreau*. In each case the estate landlord adduced very specific evidence of a policy of imposing specific covenants on properties within the estate to avoid specific deterioration of values of properties within the estate.

27. Mr Johnson contended that the present case is unusual for a number of reasons.

(1) There is a remarkable absence of any evidence from anyone within the respondents. There has been no evidence from the respondents themselves as to their policies (if any) in respect of their estate, their experience of uses made of properties on the estate, their experience of the operation of the estate management scheme, or their experience of undesirable uses (if any) of properties.

(2) Mr Hamilton was able to point to only one policy of the respondents, namely the encouragement of the conversion of flats to houses. Although Mr Hamilton was not able to give a clear explanation of the circumstances in which this policy came to an end, it is clear that the reason why it came to an end, and the reason why the respondents now require restrictions to flat use to be carried into transfers of

freeholds, is to preserve the respondents' ability to extract a premium for giving consent to house use.

(3) Mr Hamilton did not know, and thus was not able to tell the Tribunal, what user covenants appear in properties still leased by the respondents, or what user covenants appear in the transfers of enfranchised properties. In fact the only evidence the Tribunal has on this point is the schedule which was compiled by the appellant for the hearing in the LVT. That schedule contains covenant particulars for only nine properties, but it is highly significant that in the case of two of those properties (64 and 117) the freehold transfers contain no restrictions on user at all, but are of course subject to the restrictions on use in the estate management scheme. There is no evidence of there having been any undesirable use of either property. This gap in the evidence is important. The Tribunal is aware, from Mr Hamilton's evidence, that there is no history of undesirable uses of property on the estate. The Tribunal cannot make the assumption that this is the consequence of a scheme or pattern of covenants routinely imposed by the respondents. There is no evidence of any such scheme or pattern of covenants, with the obvious and critical exception of the scheme of covenants in the estate management scheme.

(4) It is not simply the case that there is no evidence on the estate, either past or present, of the undesirable uses listed by Mr. Hamilton in paragraph 6.19 of his report. There was not even any mention of those undesirable uses in the respondents' case to the LVT, let alone any concern expressed in respect of those undesirable uses.

(5) In *Peck*, *Le Mesurier* and *Moreau*, the landlord had applied for an estate management scheme, but had been refused. In those cases, the landlord had no other method of controlling the use of properties than the imposition of the covenants sought by the landlord in each case. In the present case the situation is reversed. The respondents have the protection of the estate management scheme. The grounds upon which approval of the scheme was obtained are irrelevant. What matters is the protection obtained by the successful application for the scheme, namely the scheme of covenants herein.

(6) Mr Hamilton has set out in his report all the advantages that the system of control contained in the scheme has over the system of planning control.

28. A comparison between the restrictions in the headlease covenant and the covenants in the estate management scheme reveals that there is little or nothing, in terms of use, which is permitted by the scheme but could be prevented by the covenant. By contrast, there are things which can be prevented by the scheme which could not be prevented by the covenant. The obvious example is noisy parties, or indeed any other form of anti-social, but not necessarily unlawful activity which causes annoyance and inconvenience to adjoining owners. This is because there is no clause 7.6 of the estate management scheme within the covenant.

29. The reality is that the only difference between the proposed restrictive covenant and the estate management scheme, leaving aside the advantages which the scheme has over the covenant

(eg. clause 7.6 of the scheme), is that the covenants in the scheme (clauses 3, 4 and 5) are qualified. This however is not a difference which will bear the weight of the respondents' case on material enhancement in value. It is most unlikely that those who have a say in the decision on whether or not to grant consent in respect of the relevant covenants in the scheme are going to give their consent to an activity in a property in Hamilton Terrace which might have an adverse effect on the value of other properties in the vicinity. It is equally unlikely that a refusal of consent in such circumstances would be held to be unreasonable. Also the reality is that the restrictions in the covenant are equally vulnerable to assault pursuant to section 84 of the Law of Property Act 1925. In both cases assault in respect of a use adverse to the value of other property is highly unlikely, but the risk is much the same in both cases. Indeed, the circumstances in which a property owner might argue that the respondents could not reasonably withhold consent under the estate management scheme to the use of the property for a proscribed use are likely to be the very circumstances in which an application under section 84 would be likely to succeed.

30. The difficulties with the respondents' evidence on the question of material enhancement in value are reflected in the language used by Mr. Hamilton in his report. The references are to what *"could"* or *"might"* or *"may"* occur, not to what *"will"* occur. If Mr Hamilton was unsure that the covenant would, in fact, produce any material enhancement in value, the same should apply to the Tribunal. The respondents' evidence on the question of material enhancement in value was effectively non-existent in the LVT. The attempts by the respondents in this Tribunal, through Mr. Hamilton, to fill this gap in the evidence have only served to demonstrate how far removed the circumstances of the present case are from the circumstances of *Peck, Le Mesurier* and *Moreau.* The Tribunal should find that the respondents have failed to satisfy the test of material enhancement in value.

31. The Tribunal does have available to it the option of importing the restrictions in the first half of the covenant (see paragraph 15 above) into the transfer. Paragraph 5(1)(b) is concerned with restrictions. The Tribunal is not confined to an ability only to import restrictions as they happen to have been bundled together in the headlease. There is however no reason for the Tribunal to adopt this option. The material enhancement in value test is not satisfied in respect of any of the restrictions in the headlease covenant, whether considered individually, in parts, or as a whole.

32. Quite apart from the foregoing, Mr Johnson advanced a separate argument to the effect that the restrictive covenant proposed by the respondent did not satisfy the words "capable of benefiting other property" in paragraph 5(1)(b). He accepted that this part of the test is not normally a problem for a landlord. The reason for this is that, at least so far as the common law is concerned in relation to restrictive covenants, it will normally be assumed that a covenant which is imposed by a landowner is capable of benefiting the land owned by that landowner; see *Marten v Flight Refuelling Limited* [1962] 1 Ch 115 at 136-137. At this stage, and save in exceptional cases, actual material benefit (material enhancement in value) does not normally have to be proved. However Mr Johnson submitted that the present case is not normal. In the present case the respondents are seeking to impose the restrictive covenant in order to secure a ransom position in respect of the future use of the property as a single house. The respondents have never made any secret of this. It was made clear in the respondents' case to the LVT (see paragraphs 19 and 20 of the LVT's decision), and it has been made clear in the respondents' case to the Tribunal (see paragraphs 5.6 and 5.7 of Mr Hamilton's report to the Tribunal). Whether or not the respondents

can find any other justification for the imposition of the covenant, and the appellant's case is that they cannot, the object of the respondents' covenant is to secure a ransom position in respect of any future use of the property as a single house. This is not the bona fide imposition of a covenant for the intended benefit of other land. A covenant which is imposed for the purposes of securing a ransom position is not a covenant capable of benefiting other land, either at common law, or within the meaning of the relevant wording in paragraph 5(1)(b)(i) of Schedule 7.

Restrictive covenant issue – respondents' submissions

33. On behalf of the respondents Mr Gaunt advanced the following points.

34. As regards Mr Johnson's argument that the covenant is not capable of benefiting other land (see paragraph 32 above) this is obviously wrong. A restriction on uses is a classic example of a covenant capable of benefiting other land. Here the proposed covenant gives the covenantee control over uses that are undesirable in a high-class residential area. The requirement that the covenant must be capable of "benefiting" other land means benefit in the legal sense, not in the sense that it makes the other land more valuable.

35. The proper approach to Schedule 7, para 5 is as follows:

(1) If the conditions in para 5(1)(b) are met and the freeholder requires the continuance of the headlease restrictions in the transfer, it is mandatory to include them.

(2) It is common ground that the power to make "suitable adaptations" does not enable the Tribunal to modify the existing restrictions but it does enable the restrictions to be re-worded, as long as the effect is the same, so as to be adapted to the circumstances – e.g. the fact that there is now only one garage.

(3) The concept of material enhancement includes the concept of maintaining a value which would otherwise be in danger of deteriorating.

(4) Material enhancement requires evidence but does not require a quantified valuation of the effect on other properties.

(5) Any argument based on the fact that the property would be more valuable as a house is nothing to the point. The question is whether the continuance of the restrictions in clause 2 (18) of the headlease would protect the value of other properties. It would do so.

36. As regards the appellant's objection that the covenant does not materially enhance (by maintaining the value of) other land, Mr Gaunt argued that the prohibition on undesirable uses does just that. If there were no restrictions and undesirable uses began to proliferate in the area, then that would affect values. Brothels and bedsits lower the tone, as Mr Buchanan accepted.

Reliance was placed upon Mr Hamilton's evidence as to the effect on the value of other properties if the restrictive covenant was not included.

37. As regards the suggestion that no restrictive covenant is justified under paragraph 5 because the estate management scheme does the same job satisfactorily, Mr Gaunt argued that the scheme has been in place since 1971, well before the 1993 Act came in, and at a time when conversions from flats to houses were rare. It therefore contains restrictions against conversion from houses to flats, but not *vice versa*: see para 5 of the scheme. It was submitted that the scheme does not take things any further because:

(1) The objects of a scheme under the 1967 Act are very different from those of a restrictive covenant. Under clause 14 of the 1971 scheme, the benefit of clauses 4 and 5.1 may be transferred to a local authority or third party. Under the Leasehold Reform Act section 19(10), clauses 4 and 5.1 are treated as a local land charge as opposed to a restrictive covenant. The scheme may be terminated or varied on an application by five estate owners within the scheme area: see clause 15 of the scheme. These are very different to a restrictive covenant.

(2) A similar argument to that relied upon by the LVT was rejected by this Tribunal in *Moreau v Howard de Walden* (2003) LRA/2/2002, LT.

(3) Furthermore, clauses 4 and 5 of the scheme do not provide protection to neighbouring landowners equivalent to the restriction in the headlease. The user restrictions in the scheme are qualified (see clause 13.1), whereas the user restrictions in the headlease are absolute. The respondents can simply object to a use in breach of covenant under the headlease, but they may have to consent to such a use under the scheme. The headlease therefore affords an important extra layer of protection for neighbouring landowners. This could be particularly useful if planning permission had been granted for a use which the respondents objected to. Also the respondents would be less at risk of costs under the covenant as opposed to the scheme. Moreover under paragraph 13 of the scheme the respondents are obliged to consult the St John's Wood Society, so there is an additional party whose views have to be considered, whereas they do not have to be consulted when taking action upon a restrictive covenant.

(4) The list of uses prohibited in clauses 4 and 5 of the scheme are less extensive than those in the headlease.

(5) The scheme only stops "*conversion*" of flats. Clause 2(18) of the headlease prohibits use of any of the flats by more than one family, whether or not that use involves a conversion of the physical fabric of the flat.

(6) The reality is that the rather remote controls offered by the scheme are therefore no substitute for the direct and clear controls offered by the headlease.

38. As regards the question as to whether, supposing that the first part of the restrictive covenant was considered to satisfy the provisions of paragraph 5, it is permissible in effect to

sever the restrictive covenant in clause 2 (18) of the head lease so as to keep a prohibition on unsuitable uses contained in the first part of the covenant but drop the restriction to 4 flats, Mr Gaunt submitted that this would emasculate the covenant and would amount to a major modification of the restrictive covenant in the head lease, which was something that was not permissible under paragraph 5.

Restrictive covenant issue – conclusions

39. We first consider the headlease covenant as a whole, ie without at this stage considering what the position might be supposing it is permissible to break down the covenant into two parts, namely the words down to "trade or business" and the words thereafter (the later words limiting use to four flats). The matter falls to be considered in the light of Schedule 7 paragraph 5 of the 1993 Act.

40. The wording of the covenant as proposed by the respondents (see paragraph 15 above) is in our judgment a covenant which can properly be said to represent the restrictions in the head lease with only "suitable adaptations" – giving that expression the limited ambit which has been accorded to it in the authorities mentioned above. The appellant did not seek to contest this point. In other words it is not argued that the proposed restrictive covenant has moved too far away from the terms of the headlease to be permitted within the expression "suitable adaptations."

41. We do not accept Mr Johnson's argument that the proposed covenant fails to fall within the words "capable of benefiting other property". The proposed covenant is a covenant restricting user and is of a type frequently adopted for the purpose of benefiting retained land. We do not consider that this is an exceptional case, as contemplated by Wilberforce J in *Marten v Flight Refuelling* where the covenant is to be taken capriciously or not bona fide. We consider that the form of covenant proposed is just such a covenant as is capable of benefiting other property.

42. We accept that the concept of a material enhancement in value of other property can include the concept of maintaining a value which would otherwise deteriorate, see *Peck v Hornsey*, *Le Mesurier* v *Pitt* and *Moreau v Howard De Walden*. Material enhancement in value must be distinctly proved, see *Cadogan v Erkman*. However material enhancement does not have to be proved by reference to proving material enhancement in value in monetary terms in respect of some identified property.

43. We find of substantial significance the following matters which arose on the evidence:

(1) Mr Hamilton was unaware of the terms of the restrictive covenants binding those properties which were still part of the respondents' estate and held from them by lessees. Also Mr Hamilton was unaware of the terms of any restrictive covenants contained in transfer of freeholds of properties on the estate which had been

conveyed away by the respondents pursuant to enfranchisement rights. He accepted that there were two properties which had been sold with no restrictive covenants contained in the transfer. Thus the present case is conspicuously not a case where there is evidence that there has been a uniformity of restriction imposed in every transfer and a uniformity of restriction remaining in every lease, such that an omission to include the restrictive covenant sought within the transfer to the nominee purchaser would result in the first chink in an otherwise complete cover of an estate by a set of restrictions.

(2) Mr Hamilton did not give any evidence of any problems of undesirable uses on the estate in respect of which the restrictive covenant (or indeed the estate management scheme) had had to be relied upon by the respondents in order to prevent such use. This is conspicuously not an estate where there is evidence of a history of problems regarding undesirable uses where a restrictive covenant has been made use of for the purposes of preventing such uses.

(3) Mr Hamilton was in our judgment not describing any real and identifiable problems on the estate which had arisen or in respect of which there was a real possibility that they would arise in the future. Instead his evidence was framed on the basis of what might possibly occur in the future.

(4) The estate management scheme will apply to the property after the transfer. It will do so whether or not there is the proposed restrictive covenant in the transfer.

(5) Mr Hamilton accepted that the estate management scheme was in effect as good as the covenant, save for the fact that the restrictions within the scheme are qualified (in the sense that the freeholders are not entitled unreasonably to withhold their consent) whereas the restrictions in clause 2(18) of the headlease and in the proposed covenant are absolute.

44. We conclude that all that has been presented to us by way of evidence are theoretical situations which we consider have no more than a possibility of occurring (e.g. see the uses referred to in paragraph 21(4) above), being situations which, if they did occur, the respondents could control satisfactorily under the estate management scheme. We do not decide the case upon the basis of the turns of phrase which Mr Hamilton has chosen to use in his written evidence – instead we decide the matter on the substance of his evidence. However we conclude that the substance of Mr Hamilton's evidence was such that he did adopt the correct phraseology in his report when he made reference to what "could" or "might" occur, being situations where the proposed restrictive covenant would or might be of value to the respondents. He was only able to describe theoretical possibilities.

45. The evidence presented to us in this case comes nowhere near the compelling nature of the evidence presented to the Lands Tribunal in the cases of *Peck v Hornsey* or *Le Mesurier v Pitt.* Also it may be noted that in neither of those cases was there a section 19 scheme of management in place. We note also that in *Moreau v Howard de Walden* there was once again no section 19 scheme in place and this was a case where the covenants in question had been

included in every transfer on the estate (save with one oversight exception) over a substantial period of time.

46. We accept Mr Johnson's argument that it is an important feature of the present case that there is in existence the scheme of management. We conclude that there is no significant prospect of this being amended adversely to the respondents, so as to allow through some objectionable use which at present is prohibited by the estate management scheme but which was not so prohibited after the amendment. We note Mr Hamilton's evidence that the estate management scheme is effectively as good as the restrictions in the restrictive covenant, save for the fact that the covenants in the scheme were qualified whereas those in the headlease were absolute. However we accept Mr Johnson's argument that this distinction (namely qualified as opposed to absolute) does not bring any significant benefit to the respondents such as to enable them to say that this feature satisfies the words "materially to enhance the value of the other property" in paragraph 5 of Schedule 7. This is because if there was a realistic prospect of some altered use of the property for which planning permission had been obtained and if it would be difficult reasonably to withhold consent to such a use (so as to make difficulties for the respondents preventing such use under the scheme) then this would be just such a use as could become permitted pursuant to an application to this Tribunal under section 84 of the Law of Property Act 1925 (probably paragraph (aa) of subsection (1)), for the modification of the restrictive covenant so as to permit this use.

47. We conclude that the respondents have failed to satisfy us that the restrictions affecting the property as contained in clause 2(18) of the headlease are such as materially to enhance the value of other property. It was for the respondents to prove this and they have failed to do so. However we do not decide the point on the basis of the burden of proof. We find for the reasons set out above that the restrictions in clause 2(18) of the headlease are not such as materially to enhance the value of other property, bearing in mind in particular the existence of the estate management scheme and the lack of any evidence as described above showing any real problems on the estate or any usefulness of the restrictive covenant over and above the terms of the scheme.

48. We reach the forgoing conclusion quite apart from the point next mentioned, which is a point which serves to confirm us in the conclusions we have already reached. We consider the matters referred to in paragraph 21(1) above to be of significance. They show that the respondents' first thoughts regarding the justification for the retention of the restrictive covenant were directed towards the continuance of a restriction against conversion to a single dwelling house so as to enable them to demand a substantial payment for the relaxation of the covenant to permit the beneficial conversion to a single dwelling house (being a use the respondents are entirely happy to see provided only that they get paid what they consider to be an adequate compensation for granting permission for such use). Before the LVT there was no evidence from the respondents expressing anxiety of the type now suggested regarding potential undesirable uses and the need for the retention of the restrictive covenant. Mr Hamilton was quite properly entirely frank about this matter and agreed that one of the reasons for desiring the retention of the covenant was indeed to keep the respondents in the position of being able to charge a substantial sum for a consent to convert the property to a single house. His evidence was however that there were other justifiable reasons – and these reasons he

advanced to us as described above. However we conclude that the potential benefits described by Mr Hamilton as arising for the respondents under the covenant were indeed benefits which "could" or "might" arise – they were theoretical benefits only, being benefits which Mr Hamilton did not seek to suggest there was any real likelihood of being delivered by the covenant but not delivered by the estate management scheme. We conclude that the respondents' principal reason for wanting the inclusion of the proposed restrictive covenant (based upon clause 2(18) of the headlease) is so that they can continue to have what they perceive to be their ransom position so as to enable them (subject to any application made under section 84) to charge the appellant or his successors for consent to convert the property to a single house. This is not such a benefit as falls within the words "such as materially to enhance the value of the other property". Mr Gaunt did not seek to argue that the retention of the restrictive covenant could be justified on the basis of preserving a ransom position to the respondents.

49. Accordingly we conclude that no part of the proposed restrictive covenant (see paragraph 15 above) should be included in the transfer.

50. If we were wrong upon the forgoing analysis and if clause 2(18) of the headlease did materially enhance the value of other property, then we conclude that this would only be so by virtue of the earlier part of the covenant down to the words "trade or business". In these circumstances (which do not arise bearing in mind our principal finding made above) we would conclude that the additional restriction to use as four flats (ie the second part of clause 2(18)) does not materially enhance the value of other property. In these circumstances we would have concluded that it would be appropriate under Schedule 7 paragraph 5 for the first part of clause 2(18) to be included but for the latter part to be excluded. We note Mr Gaunt's argument that this amounts to an impermissible alteration to the existing restrictions. However we consider that the restrictions in clause 2(18) can without violence be divided into these two parts, namely the general prohibitions and then the specific restriction to use as four flats. We do not accept that the effect of paragraph 5 differs depending upon the chance as to whether the draftsman of the restriction chooses to bundle a significant number of separate restrictions into one clause rather than have several separate restrictions in different clauses.

Section 61 and Schedule 14 – appellant's submissions

51. Mr Johnson resisted Mr Gaunt's argument that this Tribunal should decide all of the disputed points of law under section 61 and Schedule 14 and should then assess the price payable under Schedule 6 on the basis of an all or nothing approach, namely that the law was certain and was as decided by this Tribunal. Instead he submitted the proper approach was to form a view as to how the hypothetical purchaser of the freehold under Schedule 6 would have assessed the value of the prospective development rights when contemplating his purchase as at the valuation date in September 2008.

52. In support of this argument Mr Johnson relied upon the reasoning of the Lands Tribunal in *2 Herbert Crescent*, which was followed by this Tribunal in *31 and 37 Cadogan Square*. Paras 44 and 69 of the decision in *2 Herbert Crescent*, which contain the reasoning which Mr Johnson adopted for the purpose of the present case, are in the following terms:

> "44. Mr Radevsky retreated from this initial position after hearing Mr Jefferies' submission. He accepted that, while the Lands Tribunal must of course actually decide any point which arises for the purpose of resolving the dispute between two parties (which would be the case if there was before the Lands Tribunal a tenant claiming compensation under Schedule 14 paragraph 5), the exercise in the present case is at one remove. The Tribunal does not have to resolve the dispute between a freeholder and the tenant of Flat 1 as to whether the freeholder has the right to claim possession under section 61, nor does it have to resolve, on a claim for compensation by a tenant under Schedule 14 paragraph 5, whether that tenant is entitled to a ransom position. Instead the Tribunal is concerned with the assessment of the value of the freeholder's interest in accordance with paragraph 3 of Schedule 6, which involves the valuation exercise there set forth. A person minded to bid for the freeholder's interest as at the valuation date must be assumed to be properly advised, but would not have had the benefit of any court or tribunal decision on the points at issue. Instead, assuming proper advice, the prospective purchaser would have been advised that there was a problem which (depending upon the merits of Mr Radevsky's argument as compared with Mr Jefferies' argument) was properly to be assessed as a minor problem which would little affect the hypothetical purchaser's bid or a major problem which would greatly affect it. In other words Mr Radevsky accepted it is not an all or nothing analysis, but an appraisal as to the reasonably assessed extent of the problems which a hypothetical purchaser would recognise might face him before he could obtain vacant possession and an assessment of how this would in consequence affect the value of the freeholder's interest.
>
> 69. We have already indicated (see paragraphs 44 and 59 above) that it is not appropriate for this Tribunal to reach final conclusions upon all the points of law which the parties contend may have weighed in the minds of the hypothetical purchasers as being potential difficulties which might arise if the successful hypothetical purchaser sought to obtain vacant possession at the end of the head lease. These points do not arise for decision – for instance this is not a case where a landlord is seeking to exercise section 61 against a lessee. It would be inappropriate for us to purport to decide the disputed points of law. Instead it is necessary for us to consider the extent to which the alleged (but disputed) difficulties in the way of a hypothetical purchaser would affect the mind of the hypothetical purchaser when deciding how much to bid for the freeholder's interest in the Building. We are fortified in our conclusion that it is inappropriate for us to purport to decide (or indeed to give some form of advisory opinion upon) the legal difficulties which could face the hypothetical purchaser at the end of the head lease having regard to the decision of the Court of Appeal in *Office of Telecommunications v Floe Telecom Limited* [2009] EWCA Civ 47 where it was stated at paragraphs 20 and 21:

> ‘20. It is the unnecessary nature of the Tribunal’s legal rulings in its judgment that is most troubling. The court itself drew the attention of the parties at the hearing to *R (Burke) v GMC* [2006] QB 27. There are sound reasons why courts and tribunals at all levels generally confine themselves to deciding what is necessary for the adjudication of the actual disputes between the parties. Deciding no more than is necessary may be described as an unimaginative, unadventurous, inactive, conservative or restrictive approach to the judicial function, but the lessons of practical experience are that unnecessary opinions and findings of courts are fraught with danger.
>
> 21. Specialist tribunals seem to be more prone than ordinary courts to yield to the temptation of generous general advice and guidance. The wish to be helpful to users is understandable. It may even be commendable. But bodies established to adjudicate on disputes are not in the business of giving advisory opinions to litigants or potential litigants. They should take care not to be, or to feel, pressured by the parties or by interveners or by critics to do things which they are not intended, qualified or equipped to do. In general, more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute.’”

53. Mr Johnson pointed out that the Tribunal is not, in the present case, being asked to determine in a contested claim what are the section 61 rights or the Schedule 14 rights as between the appellant and the respondents – instead the exercise is at one remove, namely it involves considering how the hypothetical purchaser, who is both prudent and in receipt of sound and reasonable advice, would view the unresolved issues as at the valuation date.

54. Mr Johnson rejected the argument that in adopting this approach the Tribunal would be failing to value in accordance with the requirements of Schedule 6 para 3 of the Act. The Tribunal, he submitted, would be adhering to Schedule 6 para 3, and in particular para 3 (1) (d) (upon which the respondents particularly rely) because the Tribunal would be valuing on the basis that the hypothetical purchaser would possess the right to seek to rely upon section 61 and Schedule 14, but if at the valuation date these rights would be appraised as uncertain then it is necessary to take into account that such uncertainty would prey on the mind of the hypothetical purchaser.

55. If it is appropriate for the Tribunal to decide the legal problems under section 61 and Schedule 14, then Mr Johnson advanced the following arguments.

56. As regards section 61 Mr Johnson argued:

(1) The question under section 61 is: who is referred to in that section as “the landlord”? Is it the competent landlord referred to in section 40(1) or the immediate landlord referred to in section 57(7)? There is an obvious difficulty in taking the reference to the landlord as meaning the competent landlord, ie the holder either of a freehold reversion or a leasehold interest whose duration is long enough to enable that person to

grant a new lease of the flat in accordance with Chapter II of the Act (ie a leasehold of at least 90 years duration). Consider the position where there exists between the freehold and the occupying underlessees a headlease which is of substantial duration but not long enough to qualify the holder as the competent landlord within section 40, e,g. an headlease which would expire, say, 50 years after the term date of the original underlease, i.e. the underlease in relation to which the right to obtain a new lease has been exercised. In such a case the person apparently entitled to exercise the section 61 right would be the freeholder not the headlessee. But the freeholder would have no right to possession of the premises at the relevant date (ie the date at which section 61 confers a right to seek possession for redevelopment purposes) because any entitlement to possession, supposing the underlease was terminated, would be vested in the headlessee. Thus the freeholder could not exercise the section 61 right. However if the expression "the landlord" in section 61 means the competent landlord, then the headlessee would also be unable to exercise the section 61 right because he would not qualify as the competent landlord. Accordingly in these circumstances, even though the premises might be ripe for redevelopment, neither the freeholder nor the headlessee would be able to exercise the section 61 rights – unless of course they came to some deal between them whereby, for instance, the headlease was surrendered.

(2) It therefore makes better sense of the scheme of this part of the legislation to construe the reference to "the landlord" in section 61 as meaning the immediate landlord. Support for this being the intention of the draftsman is to be found in section 57(7).

(3) As regards the further potential problem arising from the omission in three out of the four underleases of an express reservation of section 61 rights as contemplated should be included by section 57(7), it is hard to understand why this provision was included in section 57 if the landlord can simply rely upon the terms of section 61 as the source of his ability to break the new lease. If section 61 is available whether or not there is a reservation of the break provision then it would seem that the presence of the break clause is otiose and section 57(7) has no practical effect. It does not even serve to give a warning to any subsequent purchaser of the underlease of the potential section 61 rights, because this will be apparent anyway to any such purchaser by reason of the provisions of section 57(11) which requires the new lease shall contain a statement that it is a lease granted under section 56. It therefore makes much better sense of the scheme of the legislation to treat the availability of the right to break pursuant to section 61 as depending upon the specific reservation of the right in the lease, rather than as being available under the 1993 Act regardless of whether there has been such an express reservation.

(4) It is suggested in *Hague Leasehold Enfranchisement* 5th Edition para 32-06 that the absence of such a break clause could be cured by rectification. However rectification is an equitable remedy which may or may not be available at the point when the question comes to be litigated – it is most unlikely to be available in 2046.

57. As regards the proper construction of Schedule 14 Mr Johnson advanced the following arguments:

(1) There is no provision in Schedule 14 requiring that the freeholder is to be assumed not to be buying or seeking to buy (compare the provisions of paragraph 3 of Schedule 6 which lay down that certain persons are to be assumed not to be buying or seeking to buy). Accordingly the freeholder is in the market for the underlease when such underlease is notionally offered for sale in accordance with paragraph 5 of Schedule 14.

(2) Bearing in mind the prospective additional value to be unlocked from a development back to a single house the freeholder would see special value to him in the underlease and would increase his bid accordingly. In this manner the underlessee would be able to obtain a share of the prospective redevelopment value.

(3) As regards the provision relied upon by Mr Gaunt, namely paragraph 5(1)(b)(ii), it is true that it is assumed that the vendor (ie the hypothetical vendor of the underlease) is selling subject to certain restrictions as there set out. However the proper analysis of this provision is that the underlease which is being sold is deemed to be subject to restrictions therein (ie in the underlease by way of covenant with the landlord) so as to comply with paragraph (b)(ii) – thus the restrictions to be assumed to be in the underlease may be wider than the restrictions which are actually in the underlease, but the fact remains that these are restrictions in the underlease by way of covenant as between the underlessee and his landlord. They are not restrictions where the covenantee is some third party external to the relationship of landlord and tenant. Accordingly whatever the additional restrictions which have to be assumed under paragraph 5(1)(b)(ii), the landlord when deciding how much to bid for the underlease would know that, having purchased the underlease, these restrictions would be extinguished upon the surrender of the underlease and would not prevent the proposed redevelopment to a single house.

(4) It follows that the underlessees of the flats, in claiming compensation pursuant to Schedule 14, will be able to claim a share of the redevelopment value as part of the compensation payable in respect of each flat.

Section 61 and schedule 14 – respondents' submissions

58. On the question of whether the Tribunal should decide the disputed points of law under section 61 and Schedule 14, rather than merely assess how the hypothetical purchaser of the freehold at the valuation date would view the prospective rights thereunder, Mr Gaunt pointed out that the latter approach had been adopted in *2 Herbert Crescent* in circumstances where it had been conceded by the freeholder that this was the correct approach. Thus although the Lands Tribunal expressed the conclusion that this was indeed the correct approach, such conclusion was reached upon a concession rather than after hearing and analysing argument. Similarly in *31 and 37 Cadogan Square* this approach was adopted by the Upper Tribunal in circumstances where no

argument was advanced to suggest that it should do anything other than follow the approach in *2 Herbert Crescent*. However in the present case the respondents did argue that these points of law should be decided. Accordingly this Tribunal should consider the merits of these arguments rather than merely following *2 Herbert Crescent*.

59. Mr Gaunt drew particular attention to Schedule 6 paragraph 3 and to the provision that the value of the freeholder's interest is the amount which at the valuation date that interest might be expected to realise if sold on the open market by a willing seller upon certain specified assumptions including:

> "(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."

Mr Gaunt argued that it is therefore necessary to identify what are the rights with which the conveyance to the appellant is to be made. The respondents say that the rights include the right as freeholder successfully to establish in 2046 that the freeholder is "the landlord" within section 61 and is entitled to exercise all the rights conferred on the landlord by section 61, including the right to obtain possession upon payment of compensation assessed on a basis which does not allow the underlessee any share of the redevelopment value.

60. Mr Gaunt submitted that the appraisal of the rights which the hypothetical purchaser would prospectively enjoy in 2046 is not a matter of valuation, but is instead a matter of law which turns upon the proper construction of section 61. It is this proper construction which must first be reached and which will then determine the basis of the valuation. Thus the valuation has to be made pursuant to the statutory assumption (ie in accordance with Schedule 6 paragraph 3) and in accordance with the correct meaning of section 61 and such rights as it confers, not according to the market's view as to the chances of section 61 being applicable. Mr Gaunt argued that if it were otherwise, then valuations carried out before and after a conclusive determination of the point of construction by the court would be on quite different basis. Parliament cannot have intended that the price payable to a landlord would depend to a large extent on whether or not there had been at any given moment a definitive ruling by the courts. Parliament must have intended the valuation to be conducted by reference to the correct interpretation of the statute and to be on the same basis in all cases. It was submitted that any other conclusion would be bizarre. Mr Gaunt pointed out that the same problem frequently occurs in rent review cases, where the review clause directs a valuation to open market rental value based on a letting, usually on the terms of the lease, on certain assumptions and disregarding various matters. Issues can arise concerning the meaning of various directions in the rent review clause, which have to be decided by an arbitrator or a court before the valuation can proceed. This is because the valuation is directed to be based on those assumptions and disregards. Mr Gaunt told us that recently in the case of 106 Hamilton Terrace the parties had sought a declaration from the court as to the meaning of the user clause prior to the LVT determining the price to be paid.

61. As regards the proper construction of section 61 Mr Gaunt advanced the following arguments:

(1) In 2046 the flats would (on current assumptions) be held by qualifying tenants. Accordingly section 40(1) applies for the purpose of defining what is meant by the expression "the landlord" in relation to the underleases of the flats in 2046. In the present case there does exist a headlease, which would expire a few days after the original term date of the underleases. However the headlessee would not be the competent landlord as defined by section 40 – instead the freeholder would be the competent landlord and would be the person defined as "the landlord" for the purpose of section 61. Accordingly as at 2046 the freeholder would enjoy the break rights provided by section 61.

(2) There is some support for this in the textbooks. *Woodfall's Law of Landlord and Tenant* paragraph 29.166 states in relation to the word "landlord" in section 61(1) that

> "… it is considered that this means the competent landlord as defined in section 40(1), even though the application is made after the tenant's new lease has been granted"

Also there are cross references to the section 40 definition in the relevant paragraphs dealing with section 61 in *Halsbury's Laws of England* and in *Hill and Redman's Law of Landlord and Tenant.*

(3) If the expression "the landlord" in section 61(1) meant only the immediate landlord, then the break provision in section 61 could not be exercised in any case (which frequently arises) where there is an intermediate lease expiring a few days after the original term date of the underlease. That cannot be right – it is submitted that clear words would be needed to achieve such a result.

(4) Section 56 read together with section 61 provides some support for the foregoing submissions. The opening words of section 61 refer to circumstances where the new lease of a flat "has been granted under section 56". If one then looks at section 56 one finds that this provides for the grant of a new lease of a flat by "the landlord" – who must be the competent landlord, i.e. a landlord capable of granting the new 90 year lease. It would be surprising bearing in mind this cross reference between section 61 and section 56 if the meaning of "the landlord" in section 61 was different from the meaning of "the landlord" in section 56.

(5) Section 61 derives from the ground of opposition to the grant of a business tenancy under section 30(1)(f) of the Landlord and Tenant Act 1954. Under this provision the intention to redevelop is tested at the date of the hearing and the intention to be proved is that of the landlord at the date of the hearing. If the two schemes are analogous, the application under section 61 could therefore be made by the immediate reversioner during the twelve monthly period ending with the original term date, but the intention could be proved by the landlord, who after expiry of the headlease would be the freeholder.

(6) As regards the additional point taken by the appellant, namely that three of the four underleases do not have an express inclusion of a break clause as contemplated by section 57(7), the appellant's argument is submitted to be wrong. Section 61 is entirely independent of the provisions of section 57(7). Section 61 is not expressed only to be exercisable if there is included a contractual break clause in the extended lease and no such limitation can be read into the statute. The only requirement for section 61 to operate is that "a lease of a flat … has been granted under section 56." Thus section 61 provides a statutory break clause that can be exercised by the landlord in any case where an extended lease has been granted – and this is irrespective of whether there is a contractual break clause in the underlease or not.

62. As regards the arguments raised by the appellant under Schedule 14 Mr Gaunt advanced the following arguments:

(1) It may be that the freeholder is not excluded from those potentially bidding for the underlease when it is hypothetically offered for sale in 2046. However neither the freeholder nor anyone else would be prepared to bid anything extra to reflect development value for the following reasons.

(2) Schedule 14 paragraph 5(1)(b)(ii) provides that the vendor is selling subject to a restriction which would limit the use of the flat to use as a flat and would preclude the erection of any new dwelling or other building not ancillary to the flat as a dwelling. Accordingly if the purchaser was bound by this restriction the purchaser would bid nothing extra to reflect any value in redeveloping the flat (together with the other flats) back into a single house because this covenant would prevent any such redevelopment.

(3) As regards the argument that this restriction must be assumed to be a restriction within the underlease itself and only enforceable by the landlord, such that the freeholder on purchasing the underlease would extinguish the underlease and the covenant itself by reason of surrender, this is not what paragraph 5 says. It is to be assumed that the vendor is selling subject to this restriction and that this restriction may be wider than any restriction imposed by the terms of the underlease. There is nothing to say that this assumed restriction is only enforceable by the landlord through the terms of the underlease and only therefore enforceable for so long as the underlease continues.

(4) Quite apart from the foregoing, what would have to be performed under Schedule 14 in 2046 would be four entirely separate valuations of the four underleases. Thus even if the appellant's argument was correct such that the restriction referred to in paragraph 5(1)(b)(ii) would not bind the freeholder if he entered the market and purchased the underlease, the purchase of each of the underleases viewed individually would not unlock any redevelopment value. This is because there would still remain outstanding the other three underleases. Accordingly upon a sale of a single underlease no redevelopment value would be paid.

Section 61 and Schedule 14 – conclusions

63. Although in *2 Herbert Crescent* the Lands Tribunal expressed the view that the approach which both parties conceded should be adopted was indeed the correct approach, no decision to that effect was made after hearing argument. We are not bound by the decision in *2 Herbert Crescent* and we consider the question afresh as to whether the points of law under section 61 and Schedule 14 should be decided and should then be applied in the valuation on the basis that the hypothetical purchaser would proceed on the assumption that such decisions were definitively correct.

64. The question arises as to whether Schedule 6 paragraph 3 requires:

(1) That it should be definitively decided whether the hypothetical purchaser would succeed in overcoming the identified legal problems under section 61 and Schedule 14 in 2046; and

(2) That it should be assumed (if the decision is that the hypothetical purchaser would so succeed) that the hypothetical purchaser would calculate his bid for the freehold upon the assumption that as a matter of certainty he would so succeed.

Unless Schedule 6 paragraph 3 does so require, we conclude that this approach should not be adopted. This is for the simple reason that we are in no doubt that if, as at the valuation date, the freehold had been offered for sale the hypothetical purchaser would not have calculated his bid on this basis. Instead he would have taken advice as to the likely strengths and weaknesses of his position in 2046, both so far as potential legal difficulties are concerned (e.g. section 61 and Schedule 14) and so far as other uncertainties are concerned (e.g. planning, movement of respective values of houses and flats etc) and would have framed a bid on that basis. This would involve identifying the potential gains and the potential difficulties and uncertainties of obtaining these gains and reaching an informed business decision as to how much this chance of a successful redevelopment in 2046 was worth as at the valuation date in 2008.

65. Schedule 6 paragraph 3 requires it to be assumed that the premises are being offered for sale on the assumption that the vendor is selling with the rights subject to which the conveyance is to be made. We accept that if the price which would be paid for the property to be valued would depend upon whether or not there was an existing right (e.g. a second right of way from the property to a highway) at the valuation date, then paragraph 3 would require it to be decided whether such right existed. The property would be valued either on the basis that such right did exist or on the basis that it did not exist, rather than on the basis of the hypothetical purchaser‘s appraisal as to the prospects of this right being held to exist in future litigation. However this example involves the decision of whether at the valuation date a particular right does or does not exist. This is a dispute which could be resolved in court proceedings, pending which the valuation exercise could be adjourned, being court proceedings to which the owner of the land to be valued and the owner of the alleged servient tenement over which it was claimed the right existed were both parties.

66. However in the present case as at the valuation date in 2008 the respondents enjoyed no rights under section 61 and Schedule 14 against anyone, even if their arguments on the true

construction of these provisions are correct. The respondents merely enjoyed the prospective right in 38 years time to seek to operate section 61 and Schedule 14 (supposing they had not been amended in the meantime) against the then occupying underlessees.

67. There appear to us to be at least three types of potential uncertainty:

(1) The question of the true meaning of section 61 and Schedule 14;

(2) The question of how the various underlessees will in fact respond in 2046 to any attempt to exercise section 61 and Schedule 14 rights against them; and

(3) The factual position as at 2046.

68. Plainly no definitive decision can be made as at the valuation date regarding point (3) above. Even if a definitive decision is made as at the valuation date regarding point (1) and even supposing that Schedule 6 paragraph 3 requires it to be assumed that the hypothetical purchaser would definitely win on these points in 2046, there cannot be a definitive decision as at the valuation date regarding point (2) above. This point raises the question of whether the tenants holding the underleases will go promptly and without trouble, such that an additional year's deferment (as allowed for by Mr Hamilton) is ample, or whether the tenants will run arguments, perhaps to appeal, on various points such as the availability of section 61 or the construction of Schedule 14. Such litigation by the tenants, even if one is compelled to assume they would ultimately lose, could well be reasonable so as to avoid an adverse costs order (leaving aside any appeal from a county court or from the Upper Tribunal), see Schedule 14 paragraph 8; and such litigation might cause the date for possession to be greatly deferred, see Schedule 14 paragraph 2.

69. Accordingly even if it is definitively decided as at the valuation date as to how the prospective disputes on construction of section 61 and Schedule 14 will be determined in 2046, this would not leave a clear cut answer as to how happily placed the hypothetical purchaser would actually be in 2046. There would be no such clear cut answer such as would be available in the simple example given above as to whether a second right of way to a highway did or did not exist as at the valuation date. These problems indicate to us that what Schedule 6 paragraph 3 requires is that the price is assessed on the basis that the hypothetical purchaser will acquire on the conveyance of the freehold all of the potential rights which in due course (and absent a change in the law) will arise under section 61 and Schedule 14, such potential rights to be valued for what they are worth at the valuation date with all their respective strengths and weaknesses, rather than the prospective 2046 litigation being effectively decided now by this Tribunal in a decision which will not bind the tenants holding the underleases in 2046. In summary Schedule 6 paragraph 3 does not require the prospective 2046 litigation to be decided definitively as at the valuation date because as at the valuation date no rights existed under section 61 and Schedule 14 – there was merely the prospect of future litigation rather than the presence of existing rights.

70. Accordingly we conclude that the appropriate approach is not for us to decide all the disputed points of law and then assess the price payable under Schedule 6 on the basis of an all or nothing approach, namely that the law was certain and was as decided by us. The appropriate

approach is to assess the price by analysing the hypothetical purchaser's bid in the manner described in the last two sentences in paragraph 64 above.

71. However the foregoing conclusion does not mean that we should decline in the present case to express a view as to the respective arguments advanced under section 61 and Schedule 14. This is because the strength or otherwise of these arguments would be relevant to the well-advised hypothetical purchaser in deciding how much discount to make for the hazard of the prospective future litigation. Also bearing in mind that in this case it has expressly been argued that we should decide these points and bearing in mind they have been fully argued, it is right that we should express our conclusions upon them in case the matter should go further and the approach we have adopted should be found to be wrong. Having considered the matter further we are satisfied we should not refrain from doing so by reason of the passage in paragraph 69 of the decision in *2 Herbert Crescent* and the citation therein from *Office of Telecommunications v Floe Telecom Ltd* (see paragraph 52 above).

72. We conclude that the true interpretation of section 61 and Schedule 14 is as contended for by Mr Gaunt. We reach this conclusion substantially for the reasons which he advances, which we express in our own words as follows.

73. The rights conferred by section 61 are conferred upon "the landlord". Section 40 makes provision for what the expression "the landlord" means in Chapter II. The freeholder will fulfil that definition of "the landlord" at all material times in 2046. Accordingly the starting point must be that in a case such as this, where there is a headlease with a short reversion beyond the original expiry date of the underleases (which have subsequently become extended by renewal), the landlord who is entitled to exercise the section 61 rights is the competent landlord as defined by section 40(1). Also we agree with Mr Gaunt that it would indeed be curious if the expression "the landlord" in section 61 had to be construed in a different sense from the expression "the landlord" in section 56, bearing in mind the opening words of section 61 namely:

> "Where a lease of a flat ("the new lease") has been granted under section 56 but the court is satisfied, on an application made by the landlord…"

Thus section 61 expressly makes a reference back to section 56 which refers to the granting of a new lease by "the landlord", which is a new lease granted by the competent landlord as defined in section 40(1).

74. It is a regular occurrence that there may be a headlease, often of short duration, between the freeholder (or other person who is the competent landlord) and the underleases which have been extended by renewal. An interpretation of section 61 which confines the expression "the landlord" to the immediate landlord would make section 61 effectively of no use in such circumstances, because the immediate landlord, with a short reversion, clearly would not have the necessary intention for section 61 purposes.

75. It is true that Schedule 14 contemplates that the tenant will give up possession to the landlord; and it is true that it can properly be expected that the landlord to whom possession is given up is the person with the immediate right to possession of the premises on the termination of the underlease. However there should be no problem here because the headlease will expire shortly after the original term date of the underleases, whereupon the competent landlord will become the immediate landlord, and Schedule 14 paragraph 2 makes provision for the date for giving up possession being decided upon by agreement (or being fixed by the court) – such date would no doubt be agreed (or fixed) as a date after the term date of the headlease.

76. It is notable that section 45(2)(c) permits a landlord's counter-notice (i.e. counter-notice in response to a tenant's notice under section 42 exercising the right to acquire a new lease) to contain a statement that the landlord intends to make an application for an order under section 47(1) on the grounds that he intends to redevelop any premises in which the flat is contained. Section 47 permits an application by the landlord for a declaration that the right to acquire a new lease shall not be exercisable by the tenant by reason of the landlord's intention to redevelop any premises in which the tenant's flat is contained. The court cannot make such an order unless satisfied inter alia that the tenant's lease of the flat is due to terminate within the period of 5 years beginning with the relevant date (i.e. the date on which notice of the tenant's claim was given to the landlord). Accordingly the statute expressly recognises the ability of the landlord, which in a case such as this with a headlease with a short reversion expectant on the underlease would be the freeholder, that the freeholder as landlord can oppose the grant of an extended lease if, in effect, there is less than 5 years left to run on the existing lease at the relevant date. It would be curious if such a freeholder had this right where there was, say, 4 years and 11 months left on a lease, but if in the circumstances where there was 5 years and 1 month left it was necessary to grant a new lease and if section 61 would be unavailable to the freeholder under this new lease (i.e. would be unavailable because of the existence of the headlease).

77. It may also be noted that Schedule 11 lays down procedure where the competent landlord is not the tenant's immediate landlord. Schedule 11 paragraph 9 makes provision dealing with the situation under section 45(2)(c) and section 47 in such circumstances. Two points may be noted. It is curious that no similar provision has been included in Schedule 11 in respect of section 61. Also, however, the fact that the draftsman thought it necessary to include paragraph 9 of Schedule 11 is in our judgment an indication that, without such provision, section 45(2)(c) and section 47 would have to operate on the basis that "the landlord" meant just the competent landlord as defined in section 40. We view this as confirmation that the expression "the landlord" in section 61 must be interpreted as meaning the competent landlord.

78. The rights under section 61 are not in any way made contingent upon there being included in the new lease a break clause as contemplated by section 57(7). We see no justification in construing the section 61 rights as being dependent upon the inclusion of such a provision.

79. We accept that in a case where there is a long headlease then there may be difficulties of application of section 61 as described in argument by Mr Johnson (see paragraph 56(1)). However in a case where there is a headlease which extends for, say, 50 years beyond the original term date of the underleases the answer to the problem may well be provided by section 57(7) in the

following manner. The headlessee would indeed not enjoy the section 61 rights pursuant to section 61 itself. However if there had been included within the new underlease a break clause as contemplated by section 57(7) then the headlessee (assuming he was the underlessee's immediate landlord) would enjoy section 61 rights not by direct application of section 61 but by the incorporation contractually of such rights in the break clause. In this manner the problems envisaged by Mr Johnson may not arise.

80. It follows from the foregoing that we conclude that the omission to include within three of the underleases a break clause in accordance with section 57(7) might (subject to a rectification claim) affect the rights of an immediate landlord to exercise the section 61 rights. However, the omission of such a break clause does not in our judgment affect the direct rights under section 61 enjoyed by force of statute (rather than by contractual reservation) by the competent landlord.

81. As regards the arguments upon Schedule 14 and whether the freeholder would have to pay compensation which reflected some element of the value of a redevelopment of the property back to a single house, we consider we can shortly state our conclusions in the following way. We agree with the arguments advanced by Mr Gaunt in paragraphs 62(1),(2) and (3) above. The argument in paragraph 62(4) depends upon a valuation appraisal rather than a point of law. There was no valuation evidence directed to this point so, while we see its potential force, we say no more about it.

82. Accordingly:

(1) If the date were now 2046; and

(2) If the law were still as it now stands; and

(3) If no further arguments were raised by the then underlessees (i.e. by the persons who will be the underlessees in 2046) under section 61 or Schedule 14 beyond those arguments now advanced;

(4) If the freeholder could on the facts prove a sufficiently settled intention to carry out significantly extensive works to satisfy section 61;

then we conclude the freeholder would succeed against the underlessees under section 61 and would be required to pay Schedule 14 compensation which would not include an uplift to reflect some element of the value of a development back to a single house.

83. We now turn to the valuation evidence regarding the value of a prospective conversion to a single house in 2046.

Value of prospective conversion to a single house in 2046 - evidence

84. It is agreed that the freehold value of the property, without planning permission but with potential for conversion back to a single house, was £8,500,000. It is also agreed that, on the

respondents' interpretation of section 61 and Schedule 14, the compensation which would be payable to the four lessees in 2046 would be £5,335,000. Thus, the increase in value resulting from the potential to convert to a house is £3,165,000.

85. In his expert report Mr Buchanan expressed the view that a potential purchaser of the freehold on the valuation date would have considered that the risks of not being able to carry out the conversion profitably in 2046 were so great that he would have discounted the potential increase in value by 100%. In other words, he would not have been prepared to pay anything to reflect the prospect of converting the property to a single house. Mr Buchanan identified the following specific risks which he thought the hypothetical purchaser would have taken into consideration: changes in the market, changes in planning policy, uncertainties relating to section 61 and Schedule 14, risks relating to the estate management scheme and changes in the economics of conversion from flats to houses.

86. As far as market changes are concerned, Mr Buchanan said that it was impossible to predict with any degree of confidence whether in 2046 the property would be worth more as a single family house than as flats. It was likely that the difference in value between houses and flats would diminish over time, but this was a matter of speculation. The period between 2008 and 2046 was far too long for an investor to assume that market conditions would remain unchanged.

87. On planning, Mr Buchanan accepted that the local planning authority would have been unlikely to oppose the conversion of the property to a house in 2008, but there was no guarantee that the position would be the same in 2046.

88. Turning to the legal position Mr Buchanan said that a prospective purchaser would have been advised of potentially serious legal difficulties in relation to his ability to invoke the provisions of section 61, including those resulting from the absence of a break clause in three of the four flat leases, and as to the amount of compensation that would be payable under Schedule 14. The uncertainties as to the legal position would have had an impact on the price which a purchaser would be willing to pay for the freehold interest in the property.

89. Mr Buchanan said that a purchaser would also appreciate the need to overcome the restrictions in the estate management scheme in regard to permitted alterations. He would also bear in mind the possibility, over a period of 38 years, of a variation being made to the scheme which would pose an obstacle to the conversion of the property to a single house. Finally, a hypothetical purchaser would take into consideration that the economics of conversion from flats to a house could change so that, by 2046, the cost of the necessary works would be uneconomic.

90. In the course of cross examination Mr Buchanan broke down his 100% risks discount as follows:

Market changes	37½%
Planning	10% (subsequently reduced to 5%)

Legal difficulties	40%
Estate management scheme	2½%
Change in economics of conversion	10%

91. Mr Hamilton thought that these risks justified a total deduction of only 10% (on the basis that the correct approach is as summarised in paragraph 6(2) and (3) above) or a total deduction of 40% (on the basis of *2 Herbert Crescent*). He did not consider that any deduction should be made for the risk of market changes. He pointed out that both he and Mr Buchanan had adopted a deferment rate of 5%, derived from the Lands Tribunal decision in *Sportelli*. It was therefore implicit that the real growth rate for the property over the next 38 years would be the same (2%), whether it was considered as flats or a house and any differences in real growth over the period would have evened out; that the differential in value between flats and a house was expected to be the same after 38 years as at the valuation date; and that the risk that the actual real growth might turn out not to be as expected, whether higher or lower, was reflected in the deferment rate. In Mr Hamilton's view, for the purchaser to rely on the differential between the value as flats and for conversion to a house remaining favourable was no riskier that investing in a flat reversion or a house reversion. That was because the assumed real growth rate was 2% per annum for each.

92. Mr Hamilton considered it most unlikely that there would be an adverse change in planning policy compared with that at the valuation date when, it was agreed, obtaining planning permission for conversion of the property back to a house would be relatively simple. There was a shortage of houses with gardens in Westminster, and the local authority was keen to increase the number of such properties because they encouraged families to stay in the borough and thus reduced pressure on car parking and services. Moreover, buildings such as the property made better family houses than flats. Nevertheless, he thought that the hypothetical purchaser might discount the increase in value from conversion by perhaps 5% to reflect the slight risk that planning policy might change.

93. Mr Hamilton considered that the possibility of adverse changes to the estate management scheme was not a risk that would affect the price paid by the notional purchaser of the freehold interest in the property. Since the existence of the scheme was referred to on the Land Registry it would become apparent to any potential purchaser. The agreed value of £8.5m for conversion back to a house therefore reflected the market's view on future amendments to the scheme.

94. For an estate management scheme to have an adverse impact on the property it would have to prevent conversion from flats to a house and to do so in a way that was absolute. As the scheme was established under the 1967 Act that enabled houses to be enfranchised it was questionable whether it could be altered in a way that affected flats only. Moreover, any proposal to vary the scheme in a manner which would enable the respondents to withhold consent or apply conditions unreasonably was most unlikely to be approved by the High Court.

95. As far as the suggested risk of changes in the economics of conversion was concerned, Mr Hamilton said that this would depend on the future value of flats and houses and building costs. Changes, positive or adverse, in capital values were reflected in the deferment rate and changes in building costs were most unlikely to be of a magnitude that had a serious impact on the economics

of conversion of the property. This was not a serious difficulty but Mr Hamilton thought that the hypothetical purchaser might reflect it by making a discount of 5%.

96. On the basis of the legal advice he had received as to the freeholder's ability to operate section 61 successfully and as to the exclusion of the value for conversion to a house from the compensation payable to the lessee of each flat under Schedule 14, Mr Hamilton considered that no discount was justified to reflect legal uncertainties. He did, however, recognise that there were technical risks associated with making applications to court in 2046 in order to obtain vacant possession. In order to allow for the possibility of resultant delays he added a year to the deferment period.

97. Mr Hamilton also considered the value of the freehold on the basis adopted by the Tribunal in *2 Herbert Crescent.* In his view, a vendor faced with two different interpretations of "the landlord" for the purposes of section 61 would prefer the interpretation which made the section workable in the usual circumstances where, as in the present case, the headlease expired a few days after the underlease. The freeholder would not be "willing" to sell his interest with the right to convert back to the significantly more valuable use as a house unless he received value for this conversion potential. Nevertheless, if the interpretation of section 61 was unresolved it might temper the vendor's expectations of the level of offers he might receive.

98. On the other hand a purchaser who appreciated the potential to convert the property back to a house would realise that he would not acquire the freehold unless he was prepared to pay for the potential as there would be others in the market who would see and act on that potential. That the interpretation was unresolved might temper the bid he would make, but he would realise the strength of the freeholder's case and that a court was likely to interpret the section in a way which made the section work, rather than in a way that rendered it inoperative except in unusual circumstances. Also, he would know that the underlessees may well be unlikely to risk taking the issue to court, involving the danger of being responsible for both parties' costs.

99. In Mr Hamilton's opinion it was logical and fair to exclude the value for conversion from the Schedule 14 compensation payable to the lessees, who had not paid for this potential when taking the lease extensions under the 1993 Act.

100. An investment such as the reversion to the property would appeal to a number of investors who could see the potential for conversion back to a house and were used to weighing up the risks having taken advice. Some might not expect to hold the property until the term date and convert, but to sell on at a profitable moment to those who would hold it as a long term investment. Mr Hamilton considered that there would be a number of investors who understood the market in St John's Wood, and were prepared to take risks and wait to make a profit. In these circumstances the discount which would be made for the risks associated with section 61 and Schedule 14 would be no more than 30%. This would reduce the value of the freeholder's interest to £291,650 and the enfranchisement price to £284,592, allowing for the agreed negative value of the head lessee's interest (- £7,058).

Value of prospective conversion to a single house in 2046 – conclusions

101. By the close of the oral evidence the experts were agreed that the risk of adverse changes in planning policies justified a reduction of 5% from the increase in value attributable to the potential conversion of the property to a house.

102 There was a considerable difference between the experts as to the significance of the risk of future changes in the market. Mr Buchanan thought this risk warranted a deduction of 37½%, whereas in Mr Hamilton's view there was no material risk. We have no doubt that Mr Buchanan's approach to this issue is to be preferred. The entire valuation exercise depends upon the existing relationship between the value of the property arranged as flats and its value for conversion to a house remaining the same for the next 38 years. Any convergence in value would be fatal to the development project because the notional purchaser must, at the very least, pay flat values as compensation in 2046. Put another way, the valuation exercise assumes that the market phenomenon which has existed for the last 30 years or so in Hamilton Terrace, namely houses appreciating in value faster than flats, will not go into reverse over the next 38 years.

103. A risk of that kind was not considered in *Sportelli*, and is not reflected in the deferment rate. It is in our view a serious risk, which would deter a large proportion of investors who would normally be interested in a reversion to a pure house or pure flats. In quantifying such a risk it is in our view appropriate to consider it together with another risk identified by the experts, namely a change in the economics of conversion, since the latter would have a direct influence on the former. In our judgment a total deduction of 35% should be made to cover these combined risks.

104. There was little difference between the experts on the allowance to be made to reflect possible changes in the estate management scheme. We accept Mr Hamilton's opinion that the prospects of success of an application to vary the scheme so as to make conversion to a house more difficult were so slight that they would not materially affect the price paid for the freehold.

105. The final risk whose effect on value must be decided is that relating to uncertainties surrounding section 61 and Schedule 14. We have concluded that the legal advice received by the successful hypothetical purchaser would be that he was likely to succeed ultimately on both points, but there was a substantial prospect of litigation and that the statute was generally considered to be awkwardly drafted in various respects. Bearing in mind that the hypothetical purchaser is likely to be the one who takes the most optimistic approach open to him on competent advice, we consider that Mr Hamilton's 30% allowance is appropriate rather than Mr Buchanan's 40%.

106. We accept Mr Hamilton's opinion that the risk of delays in obtaining vacant possession in 2046 should be reflected by adding one year to the deferment period.

Overall conclusions

107. Our decisions on the first four valuation questions posed in paragraph 16 above are as follows:

1. £11,655
2. £143,497 (see Appendix 1)
3. £284,592 (see Appendix 2)
4. £18,524

108. As for question 5 – assuming the respondents are successful on the section 61 point, but that the underlessees are entitled under Schedule 14 to a share of the development value – there is a real chance that the underlessees, acting together, would argue that there are five parties (themselves and the respondents) who between them could unlock the additional value. In those circumstances, rather than half the profit being afforded to the freeholder each of the five parties should receive 20% of the uplift in value. We do not consider that this is necessarily the approach which would be suggested, still less agreed. But we think it likely that a prudent hypothetical purchaser, upon being advised that he would lose on the Schedule 14 argument, would not bid on a more optimistic assumption than that he might have difficulty in obtaining more than 20% of the development value. It is to the 20% proportion that the further risks identified above – that is planning and market changes – must be applied. On that basis our determination in relation to question 5 is £58,839 (Appendix 3).

Result

109. We determine that no restrictive covenant based upon clause 2(18) of the headlease should be included in the transfer of the property. The appellant's appeal is allowed to that extent. We further determine that the price to be paid by the appellant for the freehold is £143,497 and the respondents' appeal is allowed to that extent. Neither party made any application for costs. We make no order for costs.

Dated: 1 March 2012

His Honour Judge Nicholas Huskinson

N J Rose FRICS

Appendix 1

87 Hamilton Terrace, London, NW8

Determination by Upper Tribunal of price payable

VALUE OF FREEHOLDER'S INTEREST

Term 1	-	agreed	£ 3,595
Term 2	-	agreed	£ 5,864

Reversion

FHVP for conversion to house	£8,500,000	
Less compensation to lessees in 2046 under s61 excluding any share in development value	£5,335,000	
Increase in value for potential to convert	£3,165,000	
Less risk of		
adverse changes in planning policy 5%	- £ 158,250	
adverse changes in market 35%	- £1,107,750	
legal problems 30%	- £ 949,500	
	£ 949,500	
PV £1 in 39.07 years @ 5%	0.1486	£ 141,096

Value of freeholder's interest	£ 150,555
VALUE OF HEAD LESSEE'S INTEREST - agreed	- £ 7,058
ENFRANCHISEMENT PRICE	**£ 143,497**

Appendix 2

87 Hamilton Terrace, London NW8

Determination by Upper Tribunal of price payable assuming the respondents will be entitled to determine the underleases under s61, that the compensation payable under Schedule 14 will exclude any element of development value and no discount should be made to reflect any doubt upon the point.

VALUE OF FREEHOLDER'S INTEREST

Term 1	-	agreed	£ 3,595
Term 2	-	agreed	£ 5,864

Reversion

Increase in value for potential			
to convert to house		£3,165,000	
Less risk of			
adverse changes in planning policy 5%		- £ 158,250	
adverse changes in market 35%		- £1,107,750	
		£1,899,000	
PV £1 in 39.07 years @ 5%		0.1486	£282,191
Value of freeholder's interest			£291,650
VALUE OF HEAD LESSEE'S INTEREST - agreed			- £ 7,058
ENFRANCHISEMENT PRICE			**£ 284,592**

Appendix 3

87 Hamilton Terrace, London, NW8

Determination by Upper Tribunal of price payable assuming the respondents will be entitled to determine the underleases under s61, that no discount should be made to reflect any doubt upon the point, but that the compensation payable under Schedule 14 will include an element of development value.

VALUE OF FREEHOLDER'S INTEREST

Term 1	- agreed	£ 3,595
Term 2	- agreed	£ 5,864

Reversion

Increase in value for potential to convert to house	£3,165,000	
Proportion available to freeholder 20%	£ 633,000	
Less risk of		
adverse changes in planning policy 5%	£ 31,650	
adverse changes in market 35%	£ 221,550	
	£ 379,800	
PV £1 in 39.07 years @ 5%	0.1486	£56,438

Value of freeholder's interest	£65,897
VALUE OF HEAD LESSEE'S INTEREST - agreed	- £ 7,058
ENFRANCHISEMENT PRICE	**£58,839**