UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – marriage value – Leasehold Reform, Housing and Urban Development Act 1993 schedule 6 paragraph 4 – nominee purchaser and both qualifying tenants all the same person – development value from potential to add a storey - whether landlord entitled to a share of such development value as part of marriage value.

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

BETWEEN **FORTY-FIVE HOLDINGS LIMITED** **Appellant**

and

GROSVENOR (MAYFAIR) ESTATE **Respondent**

Re: 45 /46 Adams Row
London W1K 2LB

Before: His Honour Judge Huskinson

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 10 November 2009

Timothy Harry, instructed by Bircham Dyson Bell on behalf of the Appellant
Anthony Radevsky, instructed by Boodle Hatfield on behalf of the Respondent

The following cases are referred to in this decision:

Rye v Rye [1962] AC 496
S*inclair Gardens Investments (Kensington) Limited v Franks* [1997] 76 P & CR 230
Maryland Estates Limited v Abberthure Flat Management Company Limited [1999] 1 EGLR 100.
Ingram v IRC [2000] 1 AC 293
Rowley Homes & Co v Barber [1977] 1 WLR 371

DECISION

Introduction

1. The Appellant appeals from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 10 October 2008 whereby the LVT decided the proper basis for assessment of marriage value in respect of the purchase by the Appellant from the Respondent of the freehold in 45/46 Adams Row. The acquisition is being made by the Appellant as nominee purchaser pursuant to the collective enfranchisement provisions in Part I of the Leasehold Reform, Housing and Urban Development Act 1993.

2. In summary the question for the LVT was whether the potential to add a further storey to 45/46 Adams Row ("the Building") and thereby unlock some development value was a matter which could properly be taken into account when calculating the marriage value and hence the purchase price to be paid by the Appellant on enfranchisement. The LVT decided this point adversely to the Appellant, who had argued that this potential development value could not be reflected in the marriage value. The LVT granted permission to appeal. The matter proceeded before the LVT on the basis that effectively every ingredient in the calculation of the price to be paid was agreed save only for this question of how the marriage value should be calculated. Thus it was agreed between the parties, and it remains agreed between the parties, that if the development value can be taken into account when computing the marriage value then the price to be paid will be £567,550 whereas if it cannot be taken into account the price will be £347,000. Accordingly I am asked to consider whether the LVT was right or wrong in its decision on this point – if I conclude it was right then I confirm the purchase price at the higher of these figures and if I conclude it was wrong I am invited to decide the purchase price should be the lower of these two figures.

Facts

3. As was common ground, and as can be seen from the photograph before me, the Building comprises two mews properties on two floors, with an entrance and garage at ground floor level and with accommodation above. It is agreed that the only reason why these two properties fall to be treated within Part I of the 1993 Act, rather than being self standing houses within the Leasehold Reform Act 1967, is because the two leases do not demise the entirety of a house, but in each case demise something less than that because the entrance and the landing at first floor level is not included in the demises. As a result it is common ground that the Building, ie the entirety of 45 and 46 Adams Row, constitutes premises to which Part I of the 1993 Act applies and constitutes "the specified premises " in relation to which the claim to collective enfranchisement has been exercised under section 13.

4. It must also be noted that each of the two long leases has come into the possession of the same tenant, namely the Appellant. The Appellant therefore constitutes the qualifying tenant and the participating tenant in respect of each of the two separate flats (ie "flats" for the purposes of the 1993 Act, being the property demised by each of the two separate leases). Also

when the Appellant served its section 13 notice it specified that the nominee purchaser was to be itself. Accordingly in the present case the Appellant constitutes:

(a) the qualifying tenant in respect of each flat;

(b) the participating tenant in respect of each flat;

(c) the nominee purchaser.

5. Although at one stage the following point was not accepted by the Appellant, it is now conceded (correctly) that each of the two separate leases demised to the Appellant the roof and roof space and also the air space immediately above the roof.

6. Having regard to the nature of the Building and the buildings immediately surrounding it, it is common ground that if a person owned the freehold of the Building with vacant possession there would be the opportunity, subject to obtaining all the necessary consents (which is expected would be forthcoming) to add value to the Building by developing up into the roof space and creating a further floor. It is agreed that the additional value attributable to this potential to add an additional floor is £472,500. It is also agreed that when calculating under Schedule 6 paragraph 3 of the 1993 Act the value of the freeholder's interest this additional value, ie reflecting the development potential in the roof space, should be taken into consideration. However the value of the freeholder's interest when calculated for this purpose is a value which has to be deferred until the end of the leases which are for terms expiring in 2070.

7. Each of the two leases contains an absolute covenant against making alterations. Accordingly the Appellant, for so long as it holds under the terms of the existing leases, would not be in a position to enjoy any of the development value because it would not be permitted (without negotiating a variation of the terms of the leases) to carry out a development in the roof space. Similarly the Respondent would not be entitled to carry out any development in the roof space until the leases terminate and the properties revert to it. Accordingly as things stand, ie with the existing leases in place, neither the Appellant nor the Respondent has the ability to enjoy the development potential of the roof space.

8. However once the collective enfranchisement has occurred and the freehold has been conveyed to the Appellant it is common ground that the Appellant, who will then own the freehold reversion and the long leases, will enjoy the development value.

9. It is in these circumstances that the question came before the LVT as to whether the development value was something to be taken into consideration when assessing marriage value (with the result that the Respondent effectively enjoyed half of the development value which would be available to the Appellant) or whether the development value should be excluded from the calculation of marriage value (with the result that the Appellant would enjoy effectively the entirety of the development value to the exclusion of the Respondent).

Statutory provisions

10. Section 32 and Schedule 6 to the Act make provision for the calculation of the price to be paid on an enfranchisement. All of the ingredients which make up the calculation of this price have been agreed save only the question of the approach to marriage value having regard to the development potential. I therefore first set out paragraph 4 of Schedule 6 dealing with marriage value:

> "4. (1) The marriage value is the amount referred to in sub-paragraph (2), and the freeholder's share of the marriage value is – 50 per cent of that amount.
>
> (2) Subject to sub-paragraph (2A), the marriage value is any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the participating tenants, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value –
>
> (a) which is attributable to the potential ability of the participating tenants, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term, and
>
> (b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price.
>
> (2A) Where at the relevant date the unexpired term of the lease held by any of those participating members exceeds eighty years, any increase in the value of the freehold or any intermediate leasehold interest in the specified premises which is attributable to his potential ability to have a new lease granted to him as mentioned in sub-paragraph (2)(a) is to be ignored.
>
> (3) For the purposes of sub-paragraph (2) the value of the freehold or any intermediate leasehold interest in the specified premises when held by the person from whom it is to be acquired by the nominee purchaser and its value when acquired by the nominee purchaser –
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> (a) shall be determined on the same basis as the value of the interest is determined for the purposes of paragraph 2(1)(a) or (as the case may be) paragraph 6(1)(b)(i); and
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> (b) shall be so determined as at the valuation date.
>
> (4) Accordingly, in so determining the value of an interest when acquired by the nominee purchaser –
>
> (a) the same assumptions shall be made under paragraph 3(1) (or, as the case may be, under paragraph 3(1) as applied by paragraph 7(1)) as are to be made under that provision in determining the value of the interest when

held by the person from whom it is to be acquired by the nominee purchaser; and

(b) any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser shall be disregarded."

11. Paragraphs 4(3) and (4) make reference to paragraph 2(1)(a) and paragraph 3(1) which are in the following terms:

"2 (1) Subject to the provisions of this paragraph, where the freehold of the whole of the specified premises is owned by the same person the price payable by the nominee purchaser for the freehold of those premises shall be the aggregate of—

(a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3,

(b) the freeholder's share of the marriage value as determined in accordance with paragraph 4, and

(c) any amount of compensation payable to the freeholder under paragraph 5

(2) ……..

Value of freeholder's interest

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

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

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

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

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

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

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

(1A) A person falls within this sub-paragraph if he is –

(a) the nominee purchaser, or
(b) a tenant of premises contained in the specified premises, or
(ba) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 1(2)(a), or
(c) an owner of an interest which the nominee purchaser is to acquire in pursuance of section 2(1)(b).

(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 (d) 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 relevant date the freeholder's interest in the specified premises might be expected to realise if sold as mentioned in that sub-paragraph."

Appellant's submissions

12. On behalf of the Appellant Mr Harry raised two principal arguments which can be summarised as involving the following:

(1) An argument that the cause of the Appellant enjoying the potential development value after enfranchisement was not a matter falling within paragraph 4(2)(a) (ie a matter attributable to the potential ability to enjoy new leases) but would instead be caused by the fact that having regard to the particular circumstances of this case the Appellant would be both freeholder and leaseholder and would have the power to do whatever it wished with the premises (subject to planning consent etc) without any need for any new lease to be granted in order to enable the Appellant to do so. Thus on the facts of the present case Mr Harry argued that the ability to grant new leases or to enjoy new leases once granted did not improve the Appellant's position at all so far as concerns enjoying the development value of the roof space. It is true the Appellant would enjoy the development value in the roof space, but the cause of this enjoyment would not flow from or be attributable to anything which could be taken into account under paragraph 4 when calculating marriage value.

(2) An argument that, even if the foregoing were wrong and it is necessary to look at what if any value is carried into the hands of the Appellant which is attributable to the potential ability for new leases to be granted, then the answer is no such value is attributable because the new leases must be assumed to be on the same terms as the old leases, save only as regards the premium and the length of the term, such that the hypothetical new leases would once again have the absolute prohibition against alterations.

13. Mr Harry developed his first argument (which he called the causation argument) in the following way:

(1) It was necessary to apply the statutory provisions regarding the calculation of marriage value to the particular facts of the case. He emphasised the definite article before the expression nominee purchaser and participating tenants in paragraph 4(2) and contended that it was therefore necessary to have regard to the actual persons there referred to, which of course in the present case were the same person in every case namely the Appellant. In effect Mr Harry argued that (ignoring any reference to intermediate leasehold interests) paragraph 4(2) required consideration of any increase in the value of the freehold in the Building when regarded as being (in consequence of its being acquired by the Appellant) an interest under the control of the Appellant as compared with the value of the freehold when held by the Respondent, being an increase in value which is attributable to the potential ability of the Appellant once the freehold has been acquired to have new leases granted to it without payment of premium or restriction as to length of term.

(2) Viewed in this manner, and even leaving aside the legal point raised in sub paragraph (3) below, it can be seen that while there is indeed an increase in the value of the freehold when it is held by the Appellant (as compared with it continuing to be held by the Respondent) this increase in value is not attributable to any potential ability for the Appellant (which constitutes the participating tenants) to have new leases granted to it by the nominee purchaser (ie by itself). After enfranchisement the Appellant would not be in the least interested in having any new leases granted. Instead the Appellant would merely enjoy the development value by virtue of the fact that it now itself owned all the outstanding interest in the Building and could therefore develop the roof space without having to give any consideration to the grants of new leases.

(3) Separately from the foregoing there is a legal problem in any suggestion that some value is attributable to the potential ability of the participating tenants (ie the Appellant) having a new lease granted. This is because it would have to be the nominee purchaser (ie once again the Appellant) who would grant the new leases to the participating tenants (ie to itself), and having regard to established legal principles, as set out in *Rye v Rye* [1962] AC 496, it is not possible for a landowner to grant a lease to himself, such that once again no increase in the value of the freehold can be attributable to the potential ability of the participating tenants to have new leases granted to them, because on the facts of the present case such new leases simply could not be granted because, if they were granted, this would involve the purported grant of leases by the Appellant to the Appellant.

(4) In summary after enfranchisement, when the freehold is held by the Appellant as nominee purchaser, the Appellant can, as Mr Harry put it, collapse the leases or simply waive the absolute covenant against alterations. It is the unity of ownership which unlocks the development value not the potential ability for the qualifying tenants to enjoy new leases.

14. Mr Harry developed his second argument in the following way:

(1) Quite apart from his causation argument (considered above) he argues that the wording of paragraph 4(2)(a) cannot assist the Respondent. This is because one is directed to assess the increase in value which is attributable to the potential ability of the participating tenant, once the freehold has been acquired,

"…. to have new leases granted to them without payment of any premium and without restriction as to length of term".

(2) Mr Harry draws attention to the fact that two specific attributes are set forth in respect of these potential new leases, namely that they can be granted without payment of premium and without restriction as to length of term. He therefore argues that, bearing in mind the draftsman has specifically drawn attention to two differences between these potential new leases on the one hand and the existing leases on the other hand, one must conclude that these were the only differences the draftsman had in mind with the result that the new leases must be assumed to be granted without premium and without restriction as to length of term, but must otherwise be assumed to be on the same terms as the existing leases.

(3) Accordingly these potential new leases would be new leases which would once again include an absolute covenant against making alterations without consent. The ability to grant such a new lease would not increase the value of the freehold reversion because the lessee under such a new lease would still not enjoy the ability to develop the roof space and thereby unlock the development value.

(4) Mr Harry acknowledged that section 57 of the Act deals with the terms of a new lease which is to be granted if a tenant exercises his right to an extended lease. This section proceeds on the basis that the new lease will effectively be on the same terms as the old lease save with certain specifically permitted departures. However he submitted that any difference in phraseology as between section 57 on the one hand and Schedule 6 paragraph 4 on the other hand did not assist in the proper analysis of the position. Schedule 6 is dealing with valuation assumptions rather than with the terms of a new lease which is actually to be granted. Further and in any event there remains the point that the draftsman has expressly made provision for two departures from the terms of the old lease in paragraph 4(2)(a) and therefore must be taken to have indicated that these were the only departures from the terms of the old lease.

(5) Mr Harry accepted that this would mean that if the terms of the old lease were ill drafted, such that it was clear that on the grant of any new leases to the participating tenants these would be in different and redrafted modern terms, the assumption must still be made that the new leases would be on the old ill drafted terms, even though that might depress the marriage value and even though, as a matter of fact, the nominee purchaser would not reproduce these ill draft terms in any new lease.

(6) Mr Harry drew attention to paragraph 5 of Schedule 6. He did this not because he contended it had any direct application in the present case, but merely because it shows that where the draftsman wishes to make reference to development value the draftsman is well able to do so. Accordingly, Mr Harry submitted, if it was intended that development value was to be brought into account when assessing marriage value one would expect similar provisions to make this clear.

(7) Mr Harry accepted that there are two decisions of the Lands Tribunal which are contrary to the proposition he is here advancing, namely S*inclair Gardens Investments (Kensington) Limited v Franks* [1997] 76 P & CR 230 and *Maryland Estates Limited v Abberthure Flat Management Company Limited* [1999] 1 EGLR 100. However Mr Harry respectfully submitted that these decisions were wrong. The earlier decision was one where the respondent appeared in person and accordingly the Tribunal did not have the benefit of informed argument. The *Maryland* case proceeded on the basis of a concession by counsel (made on the basis of the *Sinclair* case) and accordingly no argument to the contrary was advanced to prevent the Tribunal concluding that one of the factors that can be taken into account under paragraph 4(2) when calculating marriage value is the ability to vary the terms of the leases. Mr Harry submitted that this point could not be taken as having been authoritatively or conclusively determined by the Lands Tribunal and he invited me to uphold his submissions and to depart from these two earlier decisions.

Respondent's submissions

15. Mr Radevsky started with a broad submission before coming to the details of Schedule 6. His broad submission was simply this, namely there was substantial development value which could only be enjoyed if the freehold was married to the leaseholds, as would occur on the enfranchisement by the Appellant. The statute clearly intended that marriage value should be divided between landlord and tenant, hence the express provision for the calculation of and division of marriage value. He submitted that where there obviously was marriage value the Tribunal should not construe the statute in such a way as to find that in fact there was no marriage value payable (or no marriage value reflecting the development value) unless constrained to do so by clear wording of the statute. Mr Radevsky also pointed out that were it not for the curiosity that the entrance hall and landing in the properties were not part of the demised premises, then each of the two units in the Building would constitute houses and would each separately fall within the Leasehold Reform Act 1967 with the result that the Appellant would have to pay a marriage value which could take into consideration the development value in the roof.

16. Before coming to deal with Mr Harry's two specific arguments there was a further point which Mr Radevsky dealt with upon the construction of paragraph 4. He did so at my invitation, because there appeared on the face of it to be a difficulty in faithfully applying subparagraphs (3) and (4) of paragraph 4 when assessing the value of the freehold when acquired by the nominee purchaser. The difficulty is this. Paragraph 4(2) is concerned with

two values (ignoring any question of an intermediate leasehold interest) namely the value of the freehold when held by the person from whom it is acquired and the value of the freehold when acquired by the nominee purchaser such as to be under the control of the participating tenants (being an increase in value which also falls within (a) and (b) of paragraph 4(2)). Accordingly paragraph 4(2) appears to require one of the valuations to be a valuation of the freehold in the hands of the nominee purchaser (and thereby under the control of the participating tenants). However paragraph 3 provides, inter alia, that the value of the freehold when acquired by the nominee purchaser is to be determined on the same basis as is applicable under paragraph 2(1)(a) of Schedule 6. If one goes to paragraph 2(1)(a) this lays down that the value of the freehold is to be determined in accordance with paragraph 3, and paragraph 3 provides that the value of the freeholder's interest is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls within subparagraph (1A) buying or seeking to buy) and on the assumptions set out in subparagraphs (a) to (d). If one applies this literally, then the value of the freehold when acquired by the nominee purchaser would arguably appear to be the amount which the freehold interest might be expected to realise if sold on by the nominee purchaser as provided for in paragraph 3. This would of course have a result contrary to the apparent intention in paragraph 4(2), which is to find an increase in value as there defined by reason of the freehold being in the hands of the nominee purchaser, because far from assessing what the value of the freehold was in the hands of the nominee purchaser one would be assessing what the nominee purchaser could obtain from a sale on to someone else in accordance with the statutory provisions in paragraph 3. If one took into account the ability of the nominee purchaser to grant new leases without payment of premium and without restriction of length to the participating tenants, then the freehold which the nominee purchaser would be notionally selling on in the market would be a highly unattractive package which would no doubt be worth less than the value of the freehold when held by the landlord. In other words such an application of the provisions of paragraphs 4(3) and (4) would produce a nonsense and would almost inevitably result in there being not any marriage value at all in any case.

17. In relation to these points Mr Radevsky accepted that the statutory provisions defining marriage value could properly be criticised and win no prizes for clarity, as recognised in Hague Leasehold Enfranchisement 5th Edition paragraph 27-09 and 27-10. Mr Radevsky submitted that the exercise to be performed under paragraph 4 is clearly directed towards finding the value of the freehold in the hands of the nominee purchaser and therefore cannot require the assessment of how much the nominee purchaser could obtain for the freehold if it sold it on as soon as it had obtained it. Mr Radevsky submitted that the provisions in paragraph 4(4) that "the same assumptions shall be made under paragraph 3(1) …." was a specific reference to the assumptions in subparagraphs (a) to (d) in paragraph 3 and not to the whole of the provisions in paragraph 3 (it may be noted that subparagraphs (a) to (d) are expressly introduced with the words "on the following assumptions"). Accordingly one was merely told to make the assumptions in subparagraphs (a) to (d) and one did not make the further assumption, as contemplated in the opening words of paragraph 3, that the freehold reversion was being offered on the open market by a willing seller with the nominee purchaser and the other persons mentioned in paragraph (1A) not buying or seeking to buy. Mr Radevsky submitted that in assessing the value of the freehold when regarded as being (in consequence of its being acquired by the nominee purchaser) an interest under the control of the participating tenants, one is here directed to consider the value of the freehold to the nominee purchaser and accordingly if any sale on the open market is to be contemplated it

must be assumed that the nominee purchaser would be seeking to buy. Mr Radevsky drew attention to paragraph 4(2)(b) which he submitted confirms that in assessing the increased value of the freehold (ie when in the nominee purchaser's hands) it is right to consider how much the nominee purchaser would bid for the freehold.

18. It is right to record that Mr Harry did not advance any argument based upon some literal construction of paragraphs 4(3) and (4) and did not seek to argue that the value of the freehold, when acquired by the nominee purchaser, should be assessed by the reference to some notional sale on by the nominee purchaser being a sale on fully in accordance with all of the provisions of paragraph 3. In these circumstances I conclude that it is sufficient for me to find (as I do) that subparagraphs 4(3) and (4) do not require the marriage value to be assessed upon a notional sale on by the nominee purchaser with all of the provisions of paragraph 3 applying (with the nominee purchaser etc not buying or seeking to buy). Such a construction would contradict the intention of paragraph 4(2) and undermine the provisions regarding marriage value and be likely to have the results that there would seldom if ever be any marriage value. Having concluded that the provisions do not bring about this plainly unintended consequence (which would have prevented any development value from the roof space in the present case from giving rise to any marriage value) it is appropriate to leave any further consideration of precisely how subparagraphs 4(3) and (4) are intended to operate for a decision in a case where the point arises and is fully argued.

19. As regards Mr Harry's causation argument, Mr Radevsky responded as follows:

(1) He pointed out that under the existing leases the roof and air space are demised but the tenants cannot exploit this air space while the freehold remains unpurchased. This is because of the absolute covenant against alterations.

(2) However once the freehold has been purchased new leases can be granted which do not contain covenants against alterations. This would unlock the redevelopment value in the hands of the tenants. Paragraph 4(2) is concerned with an increase in value "which is attributable to the potential ability" of the participating tenants to obtain new leases. The comparison between how happily placed the tenants are under the existing leases (so far as concerns enjoying the redevelopment value) and how happily placed they would be under hypothetical new leases (without a covenant against alterations) shows a substantial difference in value. The fact that this difference in value might be obtainable in some other way, rather than through the granting of new leases, does not alter the fact that there is this increase in value which is available to the tenants through the potential ability to have new leases (eg for 999 years at a peppercorn rent) granted to them, being leases without the covenant against alterations. Accordingly this increase in value is to be taken into consideration even though the increase in value could also be obtained in some other way, eg by the Appellant (who is the nominee purchaser and also the qualifying tenants and the participating tenants) simply disregarding the leases or treating them as merged or surrendered and by virtue of the Appellant raising no objection qua landlord to itself qua tenant under the existing leases carrying out the development of the roof space.

(3) Paragraph 4(4)(b) provides that "any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser shall be disregarded". Accordingly even if in fact the existing leases will terminate by virtue of merger when the Appellant (as nominee purchaser) acquires the freehold, this factor is to be disregarded. Thus it must be assumed that the leases still continue unmerged. It is consistent with this assumption that one makes a comparison between the ability of the tenants to enjoy the development value in the roof under the terms of the existing (and unmerged) leases and the ability to do so under new leases with no covenant against alterations. Mr Radvesky submitted that the wording of paragraph 4(4)(b) showed the draftsman had in mind a comparison of the value of the freehold on the basis that (a) the existing leases continued and (b) there was the ability to grant 999 year leases at no premium and on new terms. The fact that there might in fact be a termination of the leases through merger is to be disregarded.

(4) So far as concerns Mr Harry's argument based on *Rye v Rye* Mr Radevsky advanced the following submissions:

(a) Paragraph 4(2)(a) clearly contemplates that there does exist a potential ability for the participating tenants, once the freehold has been acquired, to have new leases granted to them. This is a provision dealing with valuation machinery and assumptions. The draftsman cannot have intended that the marriage value machinery should become unworkable by virtue of the chance fact that, in some particular case, the nominee purchaser was unable to grant a new lease to the participating tenants (or at least to one of them). There is an assumption that there exists a potential ability for new leases to be granted and this assumption (made for valuation purposes) is not to be displaced by the particular facts of case.

(b) There is also the point, already mentioned above, based on paragraph 4(4)(b) to the effect that merger is disregarded and "other circumstances affecting the interest on its acquisition by the nominee purchaser" are to be disregarded. These latter circumstances could include circumstances disabling the nominee purchaser (eg on the basis of the *Rye v Rye* principle) from granting the new leases contemplated in paragraph 4(2)(a).

(c) Further it cannot have been the intention of Parliament that the nominee purchaser and participating tenants can avoid having to pay marriage value (at least in part if not wholly) by so arranging their affairs that one of the participating tenants is made the nominee purchaser and is thereby (on Mr Harry's argument) disabled from granting a new lease to himself, such that the ability of that tenant to have a new extended lease is prevented from contributing towards marriage value. Mr Radevsky points out that if Mr Harry's argument based on *Rye v Rye* is correct then not merely does this prevent the Respondent enjoying through marriage value some development value but would prevent any marriage value at all being payable to the Respondent on the facts of the present case where the nominee purchaser and the participating tenants are one and the same as

regards the whole of the Building. Mr Harry's argument would mean that no marriage value could be enjoyed at all, not merely in respect of the development value but also in respect of the ability of the Appellant to enjoy longer leases as opposed to the 60 years odd at present remaining to it.

(d) In any event Mr Radevsky submitted that *Rye v Rye* did not prevent a lease being granted by X to a nominee for X, see *Ingram v IRC* [2000] 1 AC 293 and Megarry and Wade Law of Real Property 7th Edition at page 731. Mr Radevsky also drew attention to Hill and Redman's Law of Landlord and Tenant paragraph A641 at footnote 4 citing *Rowley Homes & Co v Barber* [1977] 1 WLR 371 for the authority that a person may be landlord and tenant in different capacities, for instance as personal representative and on his own behalf. Mr Radevsky submitted that the Appellant as nominee purchaser could grant new leases to itself as qualifying tenant. Alternatively the tenant could at the very lease be assumed to be capable of doing this for the purpose of the valuation exercise under paragraph 4(2) of the 6th Schedule.

20. As regards Mr Harry's argument that the new leases contemplated in paragraph 4(2)(a) were new leases on exactly the same term as the existing leases, save only that they would be granted without premium and without restriction as to length of term, Mr Radevsky advanced the following arguments:

(1) There is nothing in paragraph 4(2) that indicates that new leases must be on the same terms as the old ones. The reference to the new leases being "without payment of any premium and without restriction as to length of term" are merely words indicating how the additional value may arise. They are not intended to be exhaustive of all of the alterations from the old leases.

(2) It would be strange to assume something contrary to reality, where it is clear that the opportunity would be taken to grant new leases on modern and well drafted terms rather than perpetuate the old drafting, which might involve the perpetuation of a plainly ill drafted lease.

(3) The fact that section 57 makes specific provisions limiting the extent to which a new lease granted under section 56 can depart from the terms of the old lease as compared with the fact there is no such limitation in paragraph 4 of Schedule 6 shows that no such limitation was intended.

(4) Mr Radevsky submitted that the Lands Tribunal was correct in the two cases of *Sinclair* and *Maryland* referred to by Mr Harry and that these confirmed that any value from the ability to alter the terms of the leases was to be taken into account.

21. As regards to Mr Harry's argument based upon paragraph 5 of Schedule 6 Mr Radevsky pointed out that there was no reference to development value in paragraph 3 of Schedule 6, but

it was common ground (and well recognised practice) than in assessing the value of the freeholder's interest under paragraph 3 the potential for development was to be taken into consideration.

Conclusions

22. I am unable to accept Mr Harry's submissions. My reasons for so concluding are substantially those advanced by Mr Radevsky and can be summarised as follows.

23. I have already indicated that I conclude paragraphs 4(3) and (4) of Schedule 6 must be construed, so far as concerns the exercise of valuing the freehold when acquired by the nominee purchaser, on the basis of enquiring what is the value of the freehold in the hands of the nominee purchaser rather than the value which the nominee purchaser could obtained by immediately reselling the freehold in the market.

24. As regards Mr Harry's argument that the particular facts of this case, and the identity between the nominee purchaser and the participating tenants, result in any additional value of the freehold in the hands of the nominee purchaser not being value caused by (or attributable to) the matters mentioned in paragraph 4(2), I am unable to accept this argument for the following reasons:

(1) Paragraph 4 of the Sixth Schedule is setting out valuation assumptions and procedures to be followed for the purposes of assessing marriage value. It proceeds on the assumption that there will be a potential ability for the participating tenants, once the freehold has been acquired, to have new leases granted to them. That assumption should continue to be made notwithstanding that, either by chance or deliberate design, the nominee purchaser is identical to one (or perhaps all, as here) of the participating tenants.

(2) I find the provisions of subparagraph 4(4)(b) to be significant. This expressly requires that there is to be disregarded any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser. Thus if in actual fact (by reason of identity between nominee purchaser and participating tenant) there is a merger, this is to be disregarded. The valuation exercise under paragraph 4 is to proceed on the basis that the old leases remained unmerged. Consistently with this if the circumstances are that (by reason of the identity of the nominee purchaser and the participating tenants) the nominee purchaser would not enforce the terms of the old lease against the participating tenants, then I considered these circumstances fall within the words "other circumstances affecting the interest on its acquisition by the nominee purchaser" and accordingly are to be disregarded.

(3) The purpose of paragraph 4 is to assess what increase in value of the freehold is attributable to the matters there mentioned, which involves a comparison between how happily placed the participating tenants are under their old leases

and how happily placed they could become under the new leases contemplated in paragraph (a).

25. So far as concerns Mr Harry's argument based upon *Rye v Rye*, I conclude that this is a matter to be disregarded having regard to subparagraph 4(4)(b). Just as any merger is to be disregarded so is there to be disregarded any difficulty in granting the new leases contemplated in paragraph 4(2)(a), being a difficulty which may arise because of the identity between the nominee purchaser and the participating tenants.

26. As regards Mr Harry's argument that paragraph 5 of the Sixth Schedule assists him, I disagree. I accept Mr Radevsky's argument that there is no need for development value to be expressly recognised as a potential ingredient in marriage value, just as there is no need for development value to be expressly mentioned as a potential ingredient in the value of the freehold reversion in paragraph 3 (where it is accepted that development value can be taken into consideration).

27. As regards Mr Harry's argument that the new leases contemplated under paragraph 4(2)(a) must be assumed to be on the same terms as the old leases save only as regards duration and premium, I reject that argument. The words are perfectly general. What one is concerned with is any increase in value attributable to the potential ability of the participating tenants "to have new leases granted to them without payment of any premium and without restriction as to length of term". If it had been intended to be a valuation assumption that these new leases should be assumed to be on the same terms as the old, then this would need to have been expressly provided for. It would be a remarkable assumption to make, namely to see what value was attributable to the prospect of new leases being granted but being granted upon terms which might well be (indeed would be likely to be) wholly different from the terms on which such new leases would actually be granted. It is unlikely that the new leases would be granted on precisely the same terms as the old in circumstances where the old leases had been granted many years ago and it will be particularly unlikely for this to occur if, for instance, the terms of the old leases were badly drafted and had caused problems over the years. To carry out the valuation exercise under paragraph 4(2) on an assumption that something will happen when it plainly will not happen is something the draftsman could have provided for by express words, but the draftsman should not be assumed to have made such a remarkable provision in the absence of such words. The fact that the draftsman did not intend such a result is confirmed by the fact that the draftsman did make express provision as to the terms of any new lease granted by way of an extension, see section 57, whereas in contrast there is no such limitation on the terms of the notional new leases under paragraph 4(2)(a) of Schedule 6.

28. I respectfully conclude that the Lands Tribunal was correct in the *Sinclair* case and the *Maryland* case in proceeding upon the basis that one of the factors that can be taken into account under paragraph 4(2) of the 6th Schedule when calculating marriage value is the potential ability to vary the terms of the leases.

29. For the foregoing reasons I conclude that the LVT was correct in its decision that the development value should be taken into account when assessing marriage value. It follows

from this and from the agreed basis upon which the case was presented to me that the price to be paid upon the enfranchisement is £567,550.

Dated 16 December 2009

His Honour Judge Huskinson