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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBK/OCE/2013/0199**
Property	:	**137 Hamilton Terrace, London NW8 9QS**
Applicant	:	**The Keepers and Governors of the Possessions Revenue & Goods of the Free Grammar School of John Lyon within the town of Harrow upon the Hill in the County of Middlesex acting in the capacity of Trustee of John Lyon's Charity**
Representative	:	**Miss E Gibbons, Counsel** **Mr J Lawrence-Smith MA MRICS of Cluttons** **Ms K Simpson, Solicitor with Pemberton Greenish** **Miss S Wilcox, trainee Solicitor with Pemberton Greenish**
Respondent	:	**137 Hamilton Terrace Limited**
Representative	:	**Mr Michael Buckpitt, Counsel** **Mr J Mellor DipSurvPrac with Maunder Taylor Surveyors**
Type of Application	:	**Section 24 of the Leasehold Reform Housing and Urban Development Act 1993**
Tribunal Members	:	**Mr A A Dutton (Tribunal Judge)** **Mr N Martindale FRICS**
Date and venue of Hearing	:	**28th & 29th January 2014**
Date of Decision	:	**20th February 2014**

DECISION

DECISION

The Tribunal determines that the enfranchisement price payable by the Respondents in respect of 137 Hamilton Terrace, London NW8 9QS (the property) is £432,405 as set out on the attached valuation marked DHV.

BACKGROUND

1. This application was made by the Trustees of the John Lyon's Charity, the full title of such body being set out on the first page of this decision. Throughout this application the charity will be referred to as the Applicant. The Respondent is the nominee purchaser, 137 Hamilton Terrace Freehold Limited.

2. The property is a substantial semi-detached period house having lower and raised ground floors and three upper floors. The property has been converted into five flats with one flat per floor. The description of the flats is contained within the statement of agreed facts signed by both Mr Lawrence-Smith and Mr Mellor on 22nd January 2014 and presented to us in the papers delivered prior to the hearing. In fact a good deal of the issues between the parties had been agreed and it is appropriate in due course to record those matters and then set out those issues which we are required to determine.

3. Before we do so it is helpful, however, to set out the present tenure. The property is held on a head lease dated 3rd October 1950 for a term of 99 years expiring on 24th June 2049. The current head lessee is Aldenheights Limited which is "owned" by Ms P M Hawkes who also owns Flat 2 and Mr J Lahoud who owns Flat 5. Flats 3 and 4 are owned by Starlevel Properties Limited, of which company Mr Lahoud is a director, and the ground floor flat, which is non-participating, is held by a Mr K J Kalis. This flat has an unexpired term of 36.18 years due to expire on 15th June 2049.

4. The leases of the other flats have all been extended and are now running for terms expiring on diverse days in June of 2139. At the valuation date, therefore, which is agreed as being 12th April 2013, these extended leases have just over 126 years unexpired.

5. In the statement of agreed matters a number of issues, which have no real bearing on the matters that we are to determine have been agreed. Of particular help is that the enfranchisement premium on an ordinary valuation basis (OVB), an explanation of which we will return to in a moment, gives an agreed price of £286,000.

6. The current freehold value of the property, arranged as five flats, is agreed at £6,074,000 and the freehold value of the property for conversion to a single house is valued at £8,539,215. The deferment rates have been agreed at 5% in respect of the unexpired terms of the leases of 36.18 years and 126.18 years and the deferment rate for a single house is also agreed at 5%. Marriage value is agreed at 50% but is not applicable to the lower ground floor flat as this is non-participating. Neither is it applicable to the other flats as all have unexpired terms of over 80 years. The hope value confined to the lower ground floor flat being non-participating and with an unexpired term of less than 80 years has

been agreed at 10%. The relativity insofar as it is relevant has been agreed at 99% between freehold and existing lease values in respect of the extended leases, at 97% of freehold values and the existing leases with unexpired terms of 90 years and a relativity of 63.1% between freehold value and existing lease value for the unexpired term of 36.18. Both valuers have used the same indices when adjusting for market movements, both for flats and house comparables. The market rent for the ground floor flat has been agreed at being above £25,000 but below £100,000. Although the right of continuing occupancy in respect of the ground floor flat was an issue between the parties, it fell away during the course of the hearing and was not a matter with which we needed to concern ourselves.

7. We spoke earlier of the OVB giving an agreed figure of £286,000. This case centres, however, on whether that sum should be uplifted to reflect what is agreed between the valuers as development value on reversion or development hope value. We will use during the remainder of this decision the abbreviations DVR for development value on reversion and DHV for development hope value. The potential uplift between the value of the property as it is and the property ripe for conversion is agreed at £2,465,215. It is agreed that the hypothetical purchaser (HP) will factor in one additional year of time beyond the term date of the original leases in order to gain vacant possession at the expiry date under the provisions of Section 61 of the Leasehold Reform Housing and Urban Development Act 1993 (the Act). Accordingly the period agreed to allow for vacant possession is 37.2 years. It is agreed that there should be no adjustment to the legal uncertainty in respect of the operation of Section 61 and schedule 14 of the Act, those uncertainties having been resolved by the Court of Appeal in the case of *Kutchukian v Keeper and Governors of the Possessions Revenue and Goods of the Free Grammar School of John Lyon [2013]EWCA Civ90.*

8. The relativity applicable in respect of the DHV scenario is agreed and the uplift in value on conversion is to be divided between seven parties, namely the freeholder (the Applicant in this case), Aldenheights Limited and the five leaseholders.

9. We turn now to the issues that we are required to determine. The Applicant contends that the HP would recognise DHV in the property and seek to strike a deal with the lessees within a five year period. This is not disputed. The Respondent says that the freeholder is entitled to one only, DHV or DVR and not both.

10. As to DVR, we are asked to consider whether an HP would factor into any bid an additional sum over and above the value of compensation required under schedule 14 of the Act. The Applicant says that the HP would only pay the compensation due to the lessee in accordance with schedule 14 with no additional payment, whereas the Respondent contends that an additional sum of 5% of the flat value would be offered in respect of the four extended lease flats, as in effect a payment towards the "hassle value." There are two additional risk factors that we are asked to review, namely whether there would be adverse changes in planning policy before the 2049 reversion date and in addition whether there would be any changes in the market economy, that is to

say difference in value between houses and flats which would impact on the development at reversion. In this regard the Applicant contends that there is a total risk discount of 40% whilst the Respondent contends for a total risk discount of 90%.

11. Insofar as the DHV valuation process is concerned, the risks to be considered, which we will return to in due course, give rise on the Applicant's case of a discount of 25% but on the Respondent's case a discount of 75%.

12. Taking these matters into consideration, and both valuers agreeing that the appropriate valuation should factor in DHV, the Applicant contends for a price of £700,865 and the Respondent for £359,200.

HEARING

13. Just prior to the hearing, literally on the morning, we were provided with copies of reports by Mr Lawrence-Smith and by Mr Mellor together with a file containing the notices, title documentation and the agreed freehold and leasehold transfers and a bundle with various authorities. In addition both Miss Gibbons, Counsel for the Applicant and Mr Buckpitt Counsel for the Respondents, submitted skeleton arguments which we had the opportunity of perusing. Both Counsels dealt with the DVR and DVH issue but Mr Buckpitt in his submission sought to argue that both DHV and DVR were in fact marriage value by any other name. We will return to this theme later in this decision because it was not an argument that was contained in either expert's report. In addition to Mr Mellor's original report, and following discussions with Mr Buckpitt, he produced an addendum on the morning of the hearing which sought to investigate the potential financial costs to be incurred by the HP in proceeding either through the DVR or DHV route.

14. We hope that both experts will forgive us if we do not go into great detail in respect of the matters which are contained in their reports. They are there for the parties to see and it will only unnecessarily extend the length of this decision if we spend much time on setting out that which is in those reports.

15. As we have indicated, both valuers are agreed that the property is ripe for conversion. It is the question of what increase to the OVB should be determined by us.

16. Mr Lawrence-Smith considered that in respect of DVR there was a risk, albeit only 5%, that Westminster may change their present planning policy which is in favour of the creation of a single house from properties that are currently held as flats. It was agreed, we believe, that the new policy came into effect in January of 2011 and was for a 20 year period. The risk, therefore, was in his view after the end of that 20 year period, which of course would be the time at which the reversion would arise and the development of the property could be considered by the then landlord under provisions of Section 61 of the Act. It does not seem to us it is necessary for any debate to take place as to who the landlord would be. That has been considered in Upper Tribunal and Court of Appeal decisions (see Kutchukian v Keeper and Governors of the Possessions etc referred to above). It was not in any event an issue raised in the case before

us. The other area of concern for which a discount of 35% was applied was the possibility that flats may become more valuable than the whole house at some point in the future. Mr Lawrence-Smith, as did Mr Mellor, reviewed the history relating to flat/house values and relied upon the Savills Index and, in the case of Mr Mellor, also on the Lloyds Index. The Savills Index related to what is in effect prime property in north west London whereas the Lloyds Index related to greater London. Mr Lawrence-Smith thought there would be little likelihood of there being convergence between house and flat values in the period for which we were considering the DVR. Insofar as the risk relating to the price to be paid under Section 61 was concerned, Mr Lawrence-Smith thought that by giving an additional year for the negotiations to take place or indeed for the legal works to be concluded, was sufficient and that no additional sums should be allowed in respect of the "hassle value" which we referred to earlier.

17. The potential uplift in value between the houses and flats of £2,465,215 was agreed. By deducting the 40% for planning changes and market economics, he arrived at a potential uplift adjusted for risk reductions of £1,479,129. His calculation then went on to add back the value of the house arranged as flats with the potential uplift adjusted for risk reductions giving a figure of £7,553,129. From this he deducted the compensation to be payable to the lessees in 2049, the date when the original leases would have expired, at £4,000,644. Applying the agreed relativity of 97% gave a figure of £3,048,449 and allowing for the additional year with which to conclude Section 61 negotiations gave a DVR value of £499,116.

18. In respect of the DHV Mr Lawrence-Smith had prepared a separate valuation which started with the agreed freehold vacant possession value for the house ready for conversion at £8,539,215. From this he deducted the £499,116 which was the valuation on the DVR basis and also the head lessee's interest which had been agreed at £1,152. He then deducted the freehold vacant possession values of the five flats as agreed at £5,637,170 which gave an uplift value for conversion of £2,401,777. He then applied the discount at 5% over five years and 25% that he considered to be the risks, which we will deal with in a moment, giving a net adjusted uplift of £1,412,245 which divisible by seven as agreed, gives a figure of £201,749. At this point he added back the DVR figure giving a total enfranchisement price under the DPH procedure of £700,865.

19. Under cross examination it was put to him that he had in fact double counted by including the freeholder's current interest at just under £500,000 in the DHV. Indeed the valuers themselves conducted a re-assessment including just the OVB figure of £286,000 which gave rise to a DHV value of just over £500,000.

20. The question as to inter-relationships between the leaseholders in this case was also discussed and it was Mr Lawrence-Smith's view that this relationship was more of a positive than a negative. Although there was no evidence that the owner of the lower ground floor flat (the non-participating tenant) was interested in selling, he believed the owners of the other flats with the relationships that had been developed in respect of the joint ownership of the head lease and the creation of the limited company, showed that there was a

certain commerciality evident within the occupiers of the property. He thought that the HP would probably make enquiries before the purchase went ahead to see whether a deal could be done, although it was conceded that there was no factual evidence that such discussions had taken place between the leaseholders or indeed any other party. He pointed out that although he was making only a 25% reduction in respect of DHV, taking the discount for the five year period of 5%, in fact gave a total reduction in excess of 40% for the chance of completing the deal within five years.

21. Mr Lawrence-Smith had not considered the question of finance and did not think it necessary to factor this into the scheme for DHV for which a five year period had been agreed. He confirmed in cross examination that he had not given any real thought to potential capital gains tax liabilities of any of the leaseholders nor the costs of a replacement property. He thought, however, the uplift of over £200,000 as shown on his valuation for DHV was sufficient to tempt a leaseholder to relinquish their rights of occupancy and surrender the lease. He did think, however, that the total sum available for potential distribution, namely £1.4m plus, could be re-jigged between the parties so that, for example, Aldenheights Ltd, who he thought might be getting too much, where the value is only £1,152, could be reduced.

22. Under further questioning in respect of DVR, he conceded that this was more risky than DHV and that it would be better to do the deal quickly. He thought the risk factors for DHV were less than DVR because it is within the foreseeable future and had relied upon Upper Tribunal cases to produce the 5% figure for planning and the 35% for the change in the market. He had no independent evidence to rely upon. He reasserted his view when questioned by us that the differential between house and flat values would remain and that the additional year that he had allowed in respect of the provisions for Section 61 under the DVR calculation was enough to reflect any risk. He confirmed that in his opinion Hamilton Terrace was a street where development from flats to houses was taking place.

23. Mr Mellor as with Mr Lawrence-Smith took us through his report and was of the view, which it seems was not wholly contentious, that the freeholder could not have DHR and DVR.

24. Considering the DVR position first, we noted all that was said in his report. In evidence to us he confirmed that he was not aware of any authority that would indicated that the tenant under Section 61 would be able to defend a properly presented case but he did think that the one year delay was insufficient to cover the "hassle value" of obtaining vacant possession without going to court. He also considered that within the risks to be considered under DVR was the small window of opportunity for development which is allowed for in the Act, which also is reflected in his uplift of 5% for the four extended leaseholds. In the addendum he had provided for additional finance costs and allowed that at a market rate of around 7% which included the 5% overbid as a contribution towards moving costs, which he believes would have been budgeted for by the HP. This was allowed for over a period of six months and formed part of the risk discount of 90% that he applied in respect of the DVR.

25. In that regard he concluded that the 5% discount in respect of planning was too low. The 5% figure which appears in the Upper Tribunal decision of 87 Hamilton Terrace was, it seems to an extent, plucked out of the air, it forming part of a 100% discount which had been requested by the valuer but which he, during the course of the hearing, sought to break down. Although Mr Mellor said that the 5% figure was agreed in that case and has been used by Mr Lawrence-Smith it was never properly argued before the Upper Tribunal. He was concerned that there was a real possibility that the planning policy could change before 2049 and that in his view, following Arrowdale, and taking into account the problems that may exist, he believed a discount of 50% was an appropriate amount and included any "hedge" that an HP might wish to factor in.

26. Insofar as the relative value of houses and flats was concerned, the question he had to ask himself was whether this would change by 2049. The 35% figure came from the 87 Hamilton Terrace case and formed part of the 100% figure. Using the Savills Indices he had considered the historic position and in his view the graph showed a state of flux contrary to the impressions given by Mr Lawrence-Smith's graph which showed a fairly continual separation between the relative values of flats and houses. The Lloyds graph he said showed a similar position for Greater London and his opinion was that there was uncertainty that by 2049 there would not be a convergence of prices which would affect the value of the scheme. This uncertainty lead to him to conclude that a risk discount of 70% should be applied which he accepted added to the planning risk was more than 100%. Standing back, however, he concluded that a discount of 90% to reflect the DVR risk was appropriate.

27. As with Mr Lawrence-Smith he had prepared a valuation which was, if we may say so, slightly easier to follow than that prepared by Mr Lawrence-Smith. Taking the agreed conversion price of £8,539,215 he had deducted the agreed discounted compensation figure for the four flats of £4,504,680 and then his 5% cost for moving and legal fees of £225,234 and notional figure of £5,000 for obtaining vacant possession of Flat 1. This gave a figure of £3,804,301 which was deferred to give a figure of £619,492. He then deducted agreed figures in respect of the value of the reversion of the extended leases and the un-extended leases and hope value for Flat 1 which totalled £282,504, leaving a figure of £336,988 to which he applied his 90% risk giving a figure of £33,699. He added this to the OVB of £286,000 giving a figure for the enfranchisement on the DVR basis of £319,699.

28. Insofar as the DHV value was concerned, he sought to distinguish this case from the Court of Appeal matter of *Cravecrest Limited vs 6th Duke of Westminster [2013]EWCA Civ731* on the basis of the numbers of parties, the owner occupiers and the negotiations and enquiries. He did agree, however, that there could be a benefit to an HP if one party owned a number of flats. However, by reference to the date of purchases by the present leaseholders he thought it showed no particular interest in wanting to sell and he did not consider that an incentive of £200,000 was sufficient. After the costs of sale and purchase that could leave only some £50,000 which he did not think would induce a seller to proceed. He argued for a 75% discount in respect of the risks which in his view included the £200,000 uplift. There were also

significant finance costs which on his calculations were in excess of £786,000. Matters could be ameliorated by entering into options or conditional contracts but there was no evidence that that was the case here. The ability to in effect get each leaseholder on board within five years was risky. His assessment of such risk was at 75% and his report explained his reasoning behind this at paragraphs 8.0 through to 8.28.

29. On his calculation he had again started with the house price of £8,539,215, deducted the agreed values of the five flats and the OVB of £286,000, leaving a figure of £2,616,045. Applying the 75% risk to that figure lead to the sum of £654,011 wh8ich discounted over five years, reduced to £512,435 and divided by seven resulted in each party achieving a sum of £73,205, which added back to the OVB of £286,000 gave in Mr Mellor's view the DHV of £359,205.

30. In fact, as with the DVR figure, this had to be slightly amended to take into account the financing costs. The end result, therefore, is that Mr Mellor contended that the DVR figure should be £317,000 and the DHV figure, the one that would be appropriate in this case, £331,900.

31. Under cross examination he accepted that there was development potential and there was a lengthy period of debate between him and Miss Gibbons as to whether or not Mr Lawrence-Smith had adopted a double counting exercise. Mr Mellor's position was that the HP would not pay for both DVR and DHV. Mr Lawrence-Smith's position appeared to be that the minimum figure the freeholder would accept was the DVR value and that there should, therefore, be an uplift on that to reflect DHV which is why there is a difference from just under £500,000 to £700,000 in Mr Lawrence-Smith's calculations. Mr Mellor was then cross examined on the deductions he had made but his view was that the 5% allowance under Section 61 of the Act was a reasonable inducement to get vacant possession without aggravation and dismissed the suggestion that the additional year and compensation was double counting. His view was that an additional year would barely cover dealing with amenable tenants let alone those who decided to take the matter to court. His 5% he said was the incentive for vacant possession. When asked as to the potential entity of the HP he confirmed in his view that it would be the most optimistic but prudent purchaser. He accepted that if there was a change of planning at the end of the current strategy which was circa 2030 resulting in there being less ability to convert flats back to houses that this would result in those houses that were converted having a greater value. He accepted that whilst the graphs tended to indicate that there was an average differential between houses and flats of some 60%, his view was that the graphs showed that the market had at all times been in something of a state of flux, although accepting that houses had a higher value throughout. However, that difference, he said, could change over a period of time. His view was that this was an all or nothing case. Returning to the planning element, his view was that this type of property was perhaps the sort that would not be easily be converted from flats to houses as it can provide five family flats. This was part of his reasoning behind giving the greater discount for planning matters.

32. When questioned about finance he confirmed he had not undertaken structural plans for a developer nor for the banks and that he had been asked to consider

financial costs by Counsel, although he agreed that it was appropriate. In the real world, however, he thought that options and conditional contracts would apply but that he has stood back to consider a fair and reasonable sum trying to replicate what would happen in the markets.

33. In respect of the DHV he has sought to review development value in comparison with mansion blocks in the locality. However, that exercise had not provided any compelling evidence as to whether or not flats in this type of property had an additional value over and above those to be found in a mansion block where conversion to a house would be an impossibility. He confirmed that his 75% discount was not based on strict mathematical adjustments. It was, he said, a weighing up exercise taking into account the various issues. It could be less than 75%, it could be more. He had no particular experience to base the percentage upon. On questioning from the Tribunal he thought the net rental yield for the property would be around 2% giving net finance costs for DHV of some 5%, which is the factor he had included within his addendum.

34. We then invited closing submissions from Counsel. Mr Buckpitt asked us to determine the legal issues but whatever the case may be to prepare valuations on the basis of DVR and DHV. He criticised Mr Lawrence-Smith's valuations as it assumed that a developer would pay value for what he was not getting, that is to say, something both for DVR and DHV. Mr Buckpitt then addressed DVR and the factors relating to Section 61, planning divergence of the market and financial costs. He accepted that as a result of the Kutchukian case the issues surrounding Section 61 are no longer a problem. The purchaser will know he can get vacant possession but will have to satisfy the requirements of the Act and there could be a change in the cost regime. The 5% allowed by Mr Mellor, therefore, was a sensible figure avoiding potential costs. He considered that the adjustments made by Mr Mellor in respect of the planning risk and the divergence of values were reasonable and the 90% risk that Mr Mellor achieved by standing back to review matters was wholly appropriate.

35. The DHV value is a hypothesis that appears to have come to light recently and taken on more force since the Cravecrest case. He asked the rhetorical question if the DHV valuation was such a good idea why didn't the Applicants seek to do this. There was, he said, no market evidence of outside dealing and although the valuers had agreed a split of profit between the parties, in the real world he asked if this would this happen. There was no evidence of any discussions and the intention to move forward and although he accepted the three flats may be linked, there was uncertainty in that all might not agree and there might not be enough money offered to do so. Not everyone, he said, was motivated by money and he did not think that the additional £200,000 would be sufficient to induce a leaseholder to give up their home. He then returned to his submissions on the question as to whether or not this was marriage value in disguise and we do not need to go into those in any more detail as that is in writing and is before the parties.

36. Miss Gibbons' submissions referred to the cases in the bundle. She told us that schedule 6 of the Act is designed to compensate the landlords not that the tenants should get development for nil consideration. The cases contained in

the bundle before us were of assistance but in particular the Cravecrest case. In her view, if the leases were more than 80 years to run then the DHV would be hope value, which is considered under paragraph 3 of schedule 6, rather than marriage value under paragraph 4. She accepted that you could only get compensation under paragraph 3 or 4 but not both. In her view DHV and DVR have been calculated under paragraph 3 and it was therefore hope value not marriage value and in this regard she relied on authorities within the bundle. Development value was not, she said, marriage value and she found support in this in the Cravecrest case which says you can have hope value under paragraph 3. Mention had been made as to the impact of the Human Rights Act but she conceded that it would not be appropriate for us to make a finding that there had been a breach, but nonetheless it is something that we should bear in mind. We should, she said, interpret the Act so that it did not give a windfall to the tenants but also to meet the provisions of the Human Rights Act. It was, she said, agreed that a successful bidder would bid on the DHV valuation. It is merely a disagreement between the valuers as to how that should be calculated. The freeholder's case is that the current market value includes both the OVB of £286,000, and the development potential. The willing seller, she said, is not a seller at any price. There would be negotiations in the open market which would include the development element. The freeholder has value and hope. Under paragraph 3 of the schedule the freeholder, she said, wants value that he is certain to get at term but there is hope in this case that an earlier deal could be struck for which there is DHV. She then reviewed the evidence of both valuers, suggesting that Mr Mellor had been too depressive in the discounts that he had made for both DVR and DHV. There was, she said, no evidence to support the reductions but speculations. He had, she said, over-egged the puddings.

THE LAW

37. We have applied he provisions of schedule 6 to the Act. We do not think it necessary to set out the provisions of Section 61 as we believe it is accepted that it would apply at the reversion in 2049 and that the risks associated with same, although understood, have been clarified by the recent Court of Appeal decision in Kutchukian.

FINDINGS

38. The first matter that we proposed to deal with is the submission made by Mr Buckpitt that the DVR and DHV are in effect marriage value in disguise. We have noted all that Mr Buckpitt said both in his written submissions and in the submissions he made at the hearing. We have considered also Miss Gibbons' closing submissions both written and oral. We cannot agree with Mr Buckpitt's submission. We find support in our position by reference to the Court of Appeal case of Cravecrest. Although this case involved the valuing of intermediate leases the decision went on to say at paragraph 8.3 *"In a case where there are no intermediate leases, a valuation of the freehold under schedule 6 of the 1993 Act required any development hope value to be taken into account and the position where there were immediate leases was not different. It was no obvious part of the social policy underlying the 1993 Act to confer on tenants of flats in a building not only the right to acquire the*

freehold and intermediate leases, but to do so at a price which ignored completely the value attributable to development value if those interests or some of them were vested in the same person; there was nothing in the wording of the Act which required such a conclusion." The decision went on to state at paragraph 47 *"It is common ground that the development hope or marriage value in the present case does not fall within paragraph 4 of schedule 6."* Further comment is made under the discussion heading at paragraph 61 which says as follows *"There is nothing in the 1993 Act that would have required that development hope value to be ignored when valuing the freehold to ascertain the price to be paid for it by the Appellant, as nominee purchaser."* Further comment is made at paragraph 66 *"... It can be broadly said that there is no obvious part of the social policy underlying this legislation to confer on tenants of flats in a building not only the right to acquire the freehold and intermediate leases, but to do so at a price which ignored completely the value attributable to development value if those interests or some of them were vested in the same person. It is common ground that, as I have said, if there had been no intermediate leases in the present case, the price payable by the Appellant to the first respondent freeholder would certainly have reflected the value of the development potential of the property by restoring it to a single house."* Further going on to paragraph 67 the Chancellor says as follows *"Neither side on this appeal has suggested at any time, or when the amendments were made to paragraph 3(i) by the Housing Act 1996, did Parliament specifically have in mind an intention to give the occupying tenant or tenants the right to acquire from the freeholder inherent development hope value without any payment for it."* Finally at paragraph 75 the following is said *"I agree with Mr Jefferies that schedule 6 must be interpreted coherently as a whole so far as possible. It does not follow, however, having regard to the complexity and history of the legislation, that Parliament could not have intended the price payable by the nominee purchaser to reflect the type of development hope value in issues in the present case because it made no provision for the price to reflect hope value or marriage value save in the context of paragraph 4 of schedule 6. On the contrary, as I have said, if there had been no intermediate leases in the present case, the development potential of the property with vacant possession would have been fully reflected in the price payable for the freehold."*

39. Taking these matters into account and considering the relevant paragraphs of schedule 6 it seems to us that the assessment of the development value in this case is not marriage value. Schedule 4 clearly sets out the marriage value to be obtained under paragraph 4(2). It does not seem to us that this applies in this case. We are of the view that the development hope value, whether it be DVR of DHV, falls to be considered as part of the process of assessing the value of the freeholder's interest under paragraph 3. DVR and DHR are in our findings matters that we need to consider.

40. We then turn on to dealing with those two elements. Before we deal with the valuers discounts we should first comment on the valuing evidence that was given to us and how that has impacted on the decision that we make. The question of DHV is a relatively new concept and it seemed to us that the

valuers for both parties were to an extent "shooting in the dark" when it came to assessing the value that was attributable to these two elements.

41. One thing, however, it seems to us is clear from the authorities and was agreed by counsel in the Leasehold Valuation Tribunal case (as it was) relating to 20 Hamilton Terrace, that it is not appropriate for both DVR and DHV to be factored into the calculation. Miss Gibbons said to us that she did not think she was bound by that agreement between Counsel but then sought to argue that Mr Lawrence-Smith's calculations were not in any event any form of double counting. It seems to us that the concessions made by Counsel on the 20 Hamilton Terrace case were correct. The freeholder cannot have both. It is an either or basis and in this case it is agreed that the DHV value gives the higher price and that is the sum which should be payable by the leaseholders.

42. In general we prefer the evidence of Mr Mellor to that of Mr Lawrence-Smith. We do think that Mr Lawrence-Smith has in fact double counted. In his calculation for DHV he has retained the sum which he considered would be recoverable for DVR. That gives the figure of £700,865. It was interesting to note when taking his calculations on appendix A of his report and substituting the £499,116 for the OVB of £286,000 but utilising his other calculations, gave rise to an enfranchisement price of only some £6,000 or so more than his DVR figure. His suggestion that the freeholder would in effect park the DVR figure as a given and then expect to receive an uplift on that to reflect the DHV value seems to us to be wrong. The starting point in our findings must be the OVB figure of £286,000 to which the uplift either for DVR or DHV should be added. For that reason we found Mr Mellor's evidence more compelling. We have also thought that Mr Lawrence-Smith's assessment of risk was too cheerful. Equally, however, Mr Mellor's assessment was too depressive. Somewhere in the middle we find lies the difference.

43. We will deal firstly with the DVR figure. Both valuers are agreed that the original price for the enfranchisement is £286,000 and that the agreed freehold vacant possession value of the property ripe for conversion to a house is £8,539,215. The risks to be considered relate to a change in the planning strategy of Westminster, market changes and any potential difficulties in imposing the provisions of Section 61 of the Act. Taking Section 61 first, as we have indicated above the Kutchukian case has clarified the potential risks. Undoubtedly in our finding there would be an element that any HP would factor into the equation as a form of inducement to ease the lessees away from the property. The deferment for one year seems to us to be a realistic period of time to allow the legal work to be undertaken to deal with the acquisition of the leases. A prudent HP might well consider an additional figure of say £10,000 as a fund being an inducement for the avoidance of court proceedings. We do not put a specific percentage figure on that amount but instead incorporate it within the total deduction that we would make in respect of DVR.

44. The next matter that we need to consider is the planning strategy. It does seem to be common ground that this would continue until 2030 or 2031. We note that in the documentation before us the London boroughs immediately adjacent to City of Westminster have a different policy and whilst it does seem that there is at the moment at least a supportive view of conversions of flats

into houses in this locality, we are not convinced that that would necessarily be the case in 2049. Mr Mellor sought to discount this by some 50% and Mr Lawrence-Smith by 5%. Mr Lawrence-Smith's 5% figure was taken from the Upper Tribunal decision on 87 Hamilton Terrace. As we understand it, in that case the valuer has sought to discount the benefit by 100% when asked to try and allocate percentages against certain elements he originally started at 10% and reduced it to 5%. There is no compelling evidence before us as to what element of risk should be incorporated in respect of this matter. There is no doubt that the current planning strategy would allow for conversion to a house. That has been evidenced by the conversions in Hamilton Terrace. Doing the best we can we think that Mr Mellor's assessment of a 50% too high and conclude that 30% would be appropriate.

45. As to market changes, at present there appears no doubt that the conversion to a house is the way forward and there appears to be little doubt on the evidence before us that the value of conversion to a house remains substantially higher than the use of the property as flats. If the other local authorities are going to be supporting conversions of houses to flats it seems to us this will in itself create a demand for houses. The 35% taken by Mr Lawrence-Smith again came from the Hamilton Terrace case. Mr Mellor has concluded that the risk of the change in the relativity between house and flat values to be as high as 70%. It seems to us that in this location that is too high a risk. In this instance we are closer to the risk assessment of Mr Lawrence-Smith but we believe that his assessment slightly low at 35% and find a figure of 40%, just a tad up, is one that we are comfortable with. This gives an overall deduction in respect of DVR of 70% which we would include the inducement in respect of Section 61 referred to above.

46. Applying these figures to the DVR valuation prepared by Mr Mellor at tab 9 of his bundle leads us to the conclusion that the price payable, incorporating DVR would be £395,961. We have reached this by taking the agreed conversion value of the property and deducting from that the costs of buying out the extended leases at £4,504,680, deducting £50,000 being £10,000 for each of the leases, giving a figure of £3,984,535. Thereafter applying the calculation adopted by Mr Mellor and the deductions in respect of the values at reversion and hope value and applying a 70% risk gives the figure that we have recited above. This is shown on the attached valuation for DVR

47. However, in this case it seems to us that the figure that will be payable is the higher of DVR and DHV and in our view that higher figure is DHV. Again, using Mr Mellor's valuation at tab 10, we agree his figure of £2,616,045 being the product of the conversion value less the costs of buying out the five leases at their market value and the ordinary freehold enfranchisement price of £286,000. However, we are of the view that the overall risk for this scheme at 75% is on the high side. Our findings are that if this scheme were to take place within the next five years, which is anticipated by both valuers, the planning and market convergent risks are minimal. It seems to us the biggest risk is associated with actually being able to obtain vacant possession. There is some evidence within the description of the leaseholders that there is a "commercial element." That is to say the leaseholders may well be aware of the potential for conversion and that this has value. Accordingly an HP would, we believe in the

real world, seek to enter into options or conditional contracts with the leaseholders so that he has some certainty that upon acquiring the freehold he would be able to obtain vacant possession. There is no evidence that this has been done in the present case and whilst it is fair to say that not everybody has a price, the potential value for this property once the conversion has been concluded of we were told £15m (which was not contested) might well encourage an HP to be prepared to pay additional sums to induce the leaseholders to part with possession. We do not know what those are but it seems to us reasonable to factor in an element of risk in negotiating those and to determine the risk factor, doing the best we can on the information that is available to us. Mr Lawrence-Smith in his report had suggested a risk of 25%, Mr Mellor a risk of 75%. At the risk of appearing to exercise the judgement of Solomon, it seems to us that it is not unreasonable to take the mid line between the two and assess this element at 50%. These calculations are set out on the attached valuation. Taking those into account, we conclude that the price payable taking into account DHV is £432,405. As that exceeds the DRV value it is this price that we find is the amount payable for the enfranchisement of the freehold of 137 Hamilton Terrace.

Judge: *Andrew Dutton*

A A Dutton

Date: 20th February 2014

137 Hamilton Terrace London NW8 9QS

Development Hope Value (DHV)

		£	£	£
Value of building ready for conversion to a house		8,539,215		
less value of the existing interests	flat 1	1,039,610		
	flat 2	1,356,300		
	flat 3	1,191,960		
	flat 4	1,039,500		
	flat 5	1,009,800		
	ordinary freehold	286,000		
		2,616,045		
less discounts for risks				
1 defer receipt for 5 years @ 5% to acquire all interests		0.7835		
			2049671	
2 discount for risk of uncertainty over scheme	at 50%	0.5		
DHV			**1024836**	
DHV shared equally amongst 7 parties				
Freeholder share of DHV				146405
add ordinary freehold				286,000
Enfranchisment price with DHV				**£ 432405**

137 Hamilton Terrace London NW8 9QS

Development Value at Reversion (DVR)

	£	£	£
Value of building ready for conversion to a house	8,539,215		
less agreed value of extended leases	4,504,680		
less costs of VP of whole	50,000		
	3,984,535		
1 defer receipt 37.20 years @ 5%	0.1628		
		648682	
less value of reversion of extended lease flats	9,485		
less value of reverion of unextended lease flat	244,673		
less hope value from flat 1	27,986		
		282144	
		366538	
less deduction for risk from change in planning & market at 70%		0.7	
freeholder DVR			109961
add ordinary freehold			286,000
Enfranchisment price with DVR		**£**	**395961**