**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **KA/LON/00AW/OCE/2019/0114**<br>**KA/LON/00AW/OC9/2019/0134** |
| **Property** | **:** | **Cameret Court, Lorne Gardens, London W11 4XX** |
| **Applicant** | **:** | **Cameret Court Freehold W11 Limited (Nominee Purchaser)** |
| **Representative** | **:** | **Mr Aaron Walder, Counsel instructed by Comptons Solicitors LLP**<br>**Mr Rudy Fattal MRICS MSc BA (Hons) DipSurv DIPIMP, Chartered Surveyor**<br>**Mr Robert Ross, Director of Applicant Company** |
| **Respondent** | **:** | **Addison & Holland Estates Limited** |
| **Representative** | **:** | **Mr Piers Harrison, Counsel instructed by BDB Pitmans LLP with Mr James Rangeley MRICS, Chartered Surveyor** |
| **Intermediate Landlords** | **:** | **Cameret Court Limited and Cameret Court Residents Association Limited** |
| **Type of Application** | **:** | **Application under section 24(1) of the Leasehold Reform Housing & Urban Development Act 1993 (Collective Enfranchisement)** |
| **Tribunal Members** | **:** | **Tribunal Judge Dutton**<br>**Mr L Jarero BSc FRICS** |
| **Date and venue of Hearing** | **:** | **10 Alfred Place, London WC1E 7LR on 22nd & 23rd October 2019** |
| **Date of Decision** | **:** | **2nd December 2019** |

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**DECISION**

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## DECISION

**The Tribunal determines that the premium payable in respect of the development hope value in respect of the collective enfranchisement of the property Cameret Court, Lorne Gardens, London W11 4XX is £675,085. This should be divided as we have provided for below. The other elements of the valuation are as set out on the Statement of Agreed Facts dated 1st October 2019.**

## BACKGROUND

1. On 7th January 2019 the qualifying participating tenants gave notice to the Respondent, Addison & Holland Estates Limited of their intention to exercise a collective enfranchisement in respect of the property Cameret Court, Lorne Gardens, London W11 4XX (the Property) on the terms set out in that initial notice. The nominee purchaser was identified as Cameret Court Freehold W11 Limited, the Applicants in the case.

2. On 14th March 2019 a counter notice admitting the claim was served on behalf of the Respondent.

3. It has not been possible for the terms of acquisition to be fully agreed and accordingly the matter came before us for hearing on 22nd and 23rd October 2019.

4. We are grateful to the valuers Mr Fattal and Mr Rangeley for agreeing so many elements of the valuation in this case. Those matters were set out on a statement of agreed facts signed by both valuers on 1st October 2019. The matters that are agreed are as followed:

    - The relevant valuation date is 7th January 2019
    - The total premium payable for the freehold interest (including value of addition freeholds) is £392,000 before the inclusion of any share of the development hope value where applicable
    - The premium payable and due to Cameret Court Residents Association Limited for their interest is £1 before inclusion of any share of the development hope value where applicable
    - Following the service of a notice of separate representation dated 30th August 2019, Cameret Court Limited has agreed direct and in writing with the Applicant a premium of £45,299 for their interest before the inclusion of any share of the development hope value where applicable
    - The gross development value (for development hope value where applicable) is agreed £1,100 per square foot and based on gross internal floor areas of 787 square feet, 984 square feet and 1,229 square feet for the three proposed new flats. This gives an agreed value of £3,300,000.
    - Any positive development value is to be split 50% to the freeholder and 25% to each of the first and second intermediate landlord respectively.

5. The matter that remains in dispute and is the focus of these proceedings is the amount of premium attributable to the development hope value payable in accordance with schedule 6 paragraphs 3 and 7 of the Leasehold Reform, Housing & Urban Development Act 1993 (the Act).

6. At the hearing we were provided with a bundle containing the application, the directions, the notices served under section 13 and section 21, copies of the freehold and leasehold titles, the existing lease for Flat 1, draft transfer and witness statement of Mr Robert McKirkle Ross. In addition we had expert reports from Mr Fattal and Mr Rangeley. Files containing authorities, which were referred to by Counsel during the hearing and in the course of their submissions, were also included.

7. We were not requested by any party to inspect the Property.

**HEARING**

8. We heard firstly from Mr Fattal on behalf of the Applicant. Before we deal with the evidence he gave us at the hearing we set out briefly the matters contained in his expert report dated 9th October 2019. After the preambles introducing himself and dates of inspection he records the statement of agreed facts which we have set out above and details of the various leases which relate to the flats occupied by tenants, of which there are 36.

9. We were told that the Property is situated within a private development located off Holland Park Avenue. There are 2 separate but adjoining blocks being Block A comprising Flat Nos 1 – 19 inclusive (there is no Flat 13) over ground to fifth floor and Block B comprising Flat Nos 20 – 37 being over ground to sixth floor. Each block is served with a passenger lift. Externally there are communal gardens to the rear and side and 23 car parking spaces which are held by leaseholders.

10. He recounts the issue to be considered stating that the Respondents contend there is development value payable by the Applicant for the enfranchisement due to the proposal to construct three new apartments on the roof of the Property. His view is that that is not the case and his opinion is that there is no development value. He proceeds then to set out certain terms of the lease which we have noted. It is right to note that the leases to Cameret Court Limited and to Cameret Court Residents Association Limited both include covenants which provide absolute prohibitions against alterations. It was said that the entire Property is demised to Cameret Court Limited and that the Respondent has not retained any part including roof spaces and plant room. Accordingly the current Respondent has no legal right to the roof space or plant rooms and cannot carry out development work.

11. It was said on behalf of the Applicant that it would not agree to development works being carried out. His report states that the hypothetical position is that a prospective purchaser of the Respondent's freehold interest takes the existing lease. The prospective purchaser would therefore be relying on hope value only (and not marriage value) for being able to purchase the roof space and having the legal right to carry out the work. However, the Applicant has clearly stated they

would not grant any such consent, now or in the future. Accordingly it was said by Mr Fattal there cannot be any hope value for the proposed development works.

12. In support of this he also relied on the provisions of the penthouse flat at No 19, which would be the property most affected by any roof development. In particular he thought that the covenant for quiet enjoyment would in effect prevent any of the works that were the subject of a planning permission.

13. The planning permission granted by the Royal Borough of Kensington and Chelsea is dated 2nd February 2017 and is for the extension of the sixth floor west, plant and lift rooms, to create two two-bedroom flats and the erection of a seventh floor flat to create a three-bedroom flat and a plant room at the south eastern end of the building. The time limit for the commencement of the development is three years from the date of the permission. There are certain conditions, one in particular is that the development shall not commence until particulars have been provided as to the materials to be used on the external face of the buildings and details of bicycle parking. In addition also, no development shall commence until a construction traffic management plan has been submitted and there are a number of other conditions set out on the permission.

14. It is said by Mr Fattal in his report that the proposed development works would result in "excessive and unreasonable disturbance" to the leaseholders and will be contrary to the landlord's covenant for quiet enjoyment. He goes on to say that Flat 19 on the sixth floor would be particularly harmed by the proposed development to such an extent that firstly he considered the structure to be relatively lightweight and unlikely to be able to withstand an additional floor being constructed upon it and secondly that the construction works would render the flat uninhabitable. He calculated that if the development proceeded compensation would have to be paid to the owner of Flat 19 which he calculated would be £104,900 based upon his estimate as to the value of the flat thought to be £1,049,000 with 10% of that value to reflect the compensation element.

15. His report went on to deal with the planning and statutory consents and referred to a section 106 agreement citing that a warranty is included in the following terms *"The owner hereby warrants that it has full power to enter into this deed and that it has obtained all necessary consents from all mortgagee, charge or other person having a title or right in the land."* He goes on to say that there was no legal right to the roof space and that accordingly the warranty given in the section 106 agreement is incorrect and would render it void. His view was that the development would be highly unlikely to be able to commence within the three year period and would result in the planning consent being null and void. As there had been two previous planning applications, which were withdrawn or refused in 2017, he took the view this strongly indicated that current planning consent would not be renewed if it expired.

16. He then went on to deal with the development value issues. He set out the basis upon which the costs which made up his residual valuation had been assessed relying also on his extensive experience of project managing of building works of various sizes and types.

17. He told us that the gross development value had been agreed between the valuers at £3,300,000 on the basis that Flat 1 would have a sale value of £865,700, Flat 2 £1,082,400 and Flat 3 £1,351,900.

18. He then went on to set out his views on the various costs that would need to be factored in in respect of the development as provided for in the planning permission.

19. Mr Harrison had very helpfully prepared a schedule which contrasted Mr Fattal's figures on a residual value basis with those of Mr Rangeley. We have set those out at the end of this decision with an additional column inserted for us to indicate our findings in respect of those elements.

20. His report fully sets out the basis upon which he reached the figures shown on the schedule and in particular how he has assessed a risk factor of 50% in respect of the development.

21. The upshot of his calculations led him to conclude that the net development value was £174,379 after allowing for the risk assessment of 50% and acquisition costs from a gross land value of £454,270, which was the amount left after deducting from the gross development value the various items of expenditure set out on the schedule. When a further reduction of £104,900 is made for his perceived reduction in value of Flat 19 and a further £36,400 in respect of alternative accommodation, it left him with an adjusted net development value of £33,079. This he divided, as had been agreed with Mr Rangeley, between the parties as to £16,540 to freeholder Respondent, £8,269.50 both to Cameret Court Limited and Cameret Court Residents Association Limited.

22. He had also carried out a deferred value of the gross development value assuming planning consent could be obtained in the year 2104 for the three flats which gave him a figure of £4,731 as he set out at paragraph 59 of his report.

23. His statement of truth was noted. There were various documents annexed to his report.

24. He was asked questions by Mr Harrison. The first attacked his statement of truth. Mr Harrison asked Mr Fattal to confirm whether he was familiar with the RICS Guidance and that it was important for him to draw all material facts to the Tribunal's attention and also to state such issues that may be outside his expertise.

25. The first matter that was drawn to his attention as appearing to depart from this obligation was his understanding of the lease for Flat 19. In particular he was asked to consider the 3rd schedule to the lease, a specimen of which was within the bundle, which at paragraph 4 contained the following wording: *"Full right and liberty for the lessor or the superior lessor in its or their absolute discretion to deal as it or they may think fit with any part of the estate or any land or property adjacent or near to the estate and to erect thereon any building whatsoever and to make any alterations and carry out any demolition, rebuilding or other works which it or they may think fit or desired to do whether such building, alterations or work shall or shall not affect or diminish*

*unreasonably the light or air which might now or at any time during the term hereby granted be enjoyed by the tenant and PROVIDED that any such works of construction, demolition or alteration are carried out with due regard to modern standards and methods of building and workmanship and that tenants shall permit such works to continue without interference or objection unless actual use of the demised premises or any part thereof is made impossible."* Mr Fattal confirmed that he was not suggesting that the owner of Flat 19 could stop the works but that they would have a genuine complaint about same that they could not live in the flat whilst the building works were undertaken.

26. As to the covenants in the head lease, he did not suggest that a purchaser could not get a waiver of covenants by being the purchaser of all interests. It was suggested that the "excessive unreasonable disturbance" caused was over-egging the pudding and he accepted that he was not a structural engineer and that accordingly his suggestions that the Flat 19 may not be structurally sound to enable the development to take place were based upon his experience. He was of the view that the planning would require strengthening works to the construction. He confirmed that his construction costs did include strengthening works but there had been no structural assessment carried out.

27. He was asked about his comments concerning the section 106 agreement which did not reflect the lack of consent of the intermediate leaseholders. He confirmed that all he was saying was that the statement at paragraph 15 above was incorrect and in his view that it invalidated the agreement. Asked whether he considered the non-implementation of the planning was a risk but he felt that it was not such a risk as the lease problems and was not able to give an estimate as to any risk that might be associated with the planning aspect. He did, however, think that there were complexities set out in the lease prohibitions, the planning conditions and the works that were required. He did consider that there was a risk factor associated with Flat 19 in that his view was that compensation would be payable and although he accepted that the owner of Flat 19 could not stop the works, they could make it a difficult construction. He confirmed that his risk factor of 50% reflected all the issue that he outlined in his report.

28. Asked about the hypothetical purchaser he indicated that it could be anyone and he could make no assessment as to who it might be. Whilst he did not think it would necessarily be a local developer he did think it would be someone familiar with the market and with the local conditions.

29. He was then asked various questions about the residual figures that he had put forward. He confirmed that there was little difference between the two valuers when it came to construction costs and that he had good first-hand knowledge as to what fees might be payable in respect of the development as a result of his experience.

30. He had retained the services of a quantity surveyor and at the end of his report was a schedule of the costings which that quantity surveyor had suggested although no evidence was called from that person.

31. He was then challenged on the VAT element. It was put to him that in fact the proposed building work could be zero VAT rated and that he had therefore taken

the view that the construction costs would assume to be VAT rated and that VAT would be payable professional and associated fees. He had therefore included a non-recoverable VAT element of some £47,207. With this in mind there is also a fee allowed in his schedule for a VAT consultant.

32. He was questioned on the financing and his view was that the majority of people carrying out this type of development would require financing. He had made an allowance of over £200,000 for financing costs and it was put to him by Mr Harrison that nobody would pay that amount of money. His financing costs included an arrangement fee of 2%, interest at 7% and an exit fee of 1%. In addition also, there appeared to be legal costs, monitoring and draw down fees of some £36,440. He thought those costs were standard practice although he accepted that all three flats would be built at the same time.

33. Asked about the profit any hypothetical purchaser would be seeking to achieve in carrying out the proposed works, he did not agree that the flats would sell so easily and that the profit could therefore be as low as 15% as suggested by Mr Rangeley. Mr Fattal thought a 20% profit was reasonable.

34. Moving on to the circumstances surrounding the hypothetical purchaser's acquisition, he was asked whether if the statutory hypothesis said that all interests were to be sold would that have an impact. He said that the consent of all three would be needed to enable the development to proceed and accepted that if the head lease were for sale it would be prudent to refer to the fact that planning was available. He was satisfied that if the hypothetical purchaser acquired all interests then he would be able to proceed with the development and that a willing seller would be looking for development value. Nonetheless he still felt that a 50% discount was discount was reasonable in all the circumstances. He did accept that if the hypothetical purchaser could buy all three interests the discount for risk might be less. He was reluctant to indicate what that risk might be but did say that if everything fell into place then the risk would still be around 20% as there are problems with the development in any event.

35. He was then asked about acquisition costs and his views on the comparable evidence produced by Mr Rangeley. His view was that you could not rely on other developments to assess the value of the proposed development value as there were risks in this type of development and that the residual valuation basis was the best way forward. He confirmed that he had not carried out any review of Mr Rangeley's comparable evidence. It was put to him that he should have undertaken a review of the comparable developments put forward as comparables by Mr Rangeley and that in not doing so he had not stood back and considered the matter.

36. He was asked why he considered that Flat 19 will be uninhabitable, which he confirmed was on his own experience. He thought the works would result in the terrace being unusable, there would be a loss of privacy, noise and general inconvenience. He was of the view that a developer would factor in an element of compensation to be paid and this would form part of his assessment of the risk that Flat 19 could be an impediment to the works.

37. Asked why he had reduced the value of Flat 19 by 10% to reflect a claim in damages for the impact of the works he told us that the flat was no longer a penthouse, that the quiet enjoyment had been affected, although accepting that that was not permanent, and he did not consider that the extension of the lift service to benefit Flat 19 would be enough to balance out the problems caused by the development.

38. After his evidence we heard from Mr Ross who had provided a witness statement. Mr Ross is a Director of Cameret Court Limited and has been such since March of 1992. He is a lawyer by profession and confirmed the details of the ownership of a residential lease dated 30th November 1979 for a term of 125 years from that date. He confirmed that Cameret Court had chosen to be separately represented and that the figure of £45,299 had been agreed as the premium due in relation to this matter. He confirmed also that in his opinion the likelihood of Cameret Court Limited selling such rights to a developer to increase the number of the flats at the Property would be nil and indeed previous attempts had been made to persuade the company to part with air space or permit development and they had all failed.

39. He was of the view that Cameret Court had given an undertaking, to whom it was not clear, that they would not develop at the roof space and he confirmed that undertaking was repeated at the hearing before us. He told us that the majority of residents in the block were against development. They had recently spent a significant sum of money (£200,000) on replacing the lifts and upgrading the plant room. There was already limited car park space and development would destroy their enjoyment of the Property. Further the company had always objected to planning applications by representations to the local authority.

40. We turn then to the evidence that we received from Mr Rangeley. As with Mr Fattal, this was contained within a report, this dated 10th October 2019. This report set out details of Mr Rangeley's experience and in particular a number of properties that he had been involved in with development sales and acquisitions in London, which were listed.

41. He confirmed that the key issue in dispute between the parties related to amount of development hope value applicable in accordance with paragraphs 3 and 7 of schedule 6 to the Act.

42. Mr Rangeley had considered the residual valuation method and provided figures which led him to the conclusion that the net land value using this method would be £764,000.

43. Under the heading "Title" he explained the leases which existed, being the first intermediate lease to Cameret Court Limited out of which the flat leases have been granted. The second intermediate lease to the residents association is for 118 years less seven days from 30th November 1986. The original flat leases were granted for a term of 125 years less 10 days from 30th November 1979 and therefore have approximately 86 years remaining at the valuation date. One lease (Flat 12) has been extended and now has approximately 176 years remaining. In respect of the Cameret Court Limited lease, we were told it is a company with 19 shareholders, 12 of whom are participating in the claim and five

are non-participators, one of which appears to be a trustee for the previous tenant of Flat 9 and the other a company that the details are not known. The second intermediate lease to the residents association is said to be a fairly typical residents management company lease of which each tenant of a flat is a member. It is accepted that both intermediate leases contain an absolute restriction in respect of alterations save for internal and non-structural. It is also agreed between the parties that at the valuation date no single landlord can carry out any development of or on the Property without first obtaining a tri-partite agreement with the other two.

44. The planning history was included in Mr Rangeley's report. It appears that in 2017 the proposal of the construction of an infill extension on the sixth floor and creation of a further two floors with five residential units was refused. A further planning application was withdrawn, which again included infill on the sixth floor and the extension of the seventh and eighth floors to provide five residential units. The planning permission that was granted in 2017 relates the creation of two two-bedroom and one three-bedroom flats.

45. Mr Rangeley commented on the residual value appraisal approach indicating that in his view this was subject to criticism, in particular because of the ability to layer cost upon cost to either produce an unrealistic low land value or to ignore certain costs and thus produce an unrealistically high value. He told us that in advising clients on development value he produce residual appraisals on a regular basis and has done so for single property developments on a number of occasions. However, where possible these are cross-checked against available sales evidence and his general market experience. He accepts, therefore, that the residual appraisal is a good starting point but should only be relied upon is there is a paucity of comparable evidence.

46. His report then went to deal with his views on the elements of the residual approach which we have noted. In respect of financing, he thought that it would be a relatively inexpensive and short term project and that some developers could finance the project themselves or by introducing an equity partner who would share in the profits. He had taken these matters into account together also with an interest rate at 6% to give a cost for the finance charges of just over £100,000. This contrasted with Mr Fattal's finance cost estimate of over £200,000. On the profit and risk elements he was of the view that the less risk there was and the faster the developer could exit the lower the profit the developer would be prepared to accept. He considered that market risk was low because of the affordable nature of the finished units in this locality. In his experience, working with and for developments of a consented scheme on this scale, they would have a target element of profit of 15%. Taking these matters into account, his residual appraisal derived a net land value of £764,000. At this point he had not made deductions for risk, which he dealt with in relation to the market evidence approach.

47. The other method to deduce land value was market evidence which he considered was preferable. He accepted that the availability of directly comparable evidence was problematic and that no two projects would be the same. He had considered eight projects, details of which were provided. They varied in location, date, quality and pricing but each was a rooftop development in London, although one

at Queens Gate Terrace was not a completed sale. He set out the different factors relating to each of the projects that he put forward as evidencing the open market comparables. Taking into account the comparable evidence that he produced, he derived land values relative to the anticipated gross development value in the range between 28.3% and 42.2% of the GDV. He also briefly dealt with the position under the Leasehold Reform Act 1967 and the standing house approach, where relying on Hague and the determinations of tribunals for those in London there appeared to be site values between 27.5% and 55.% of the entirety value. His own experience of claims under the 1967 Act in central London was that site value was usually in the range of 35% to 45%.

48. His conclusion was that at the date of valuation planning permission existed and this was an opportunity which would attract a considerable amount of interest from developers. He considered that those developers would self-manage the projects and thus keep costs under control. His residual appraisal showed a net land value of 23.15% of the gross development value (GDV) before the allowance for investment risk but in his view this was an inferior method of determining value compared to market evidence. The market evidence of rooftop developments showed a land value between 28.3% and 42.2% of GDV and taking into account his views in respect of the values attributable under the 1967 Act he concluded that the net land value should be 35% of the GDV giving a figure of £1,155,000.

49. He then went on to deal with the development hope value being the net land value with a discount to reflect the risk, both in respect of investment and uncertainty under structural feasibility.

50. He was of the view that because of statutory assumptions the hypothetical purchaser must complete the acquisition of each interest, that is to say the freehold and the intermediate leases sequentially rather than as a joint transaction. The appropriate question, therefore, was what discount would a purchaser, likely to be a developer, apply to the development value to reflect this arrangement. He then went on to indicate that enquiries would be made by a prudent purchaser and also referred us to the Court of Appeal case of *Cravecrest v Duke Westminster (1) and Vowden Investments Limited (2) [2013]EWCACiv731*. He paraphrased some of the elements of the Upper Tribunal case in Cravecrest which were confirmed by the Court of Appeal. He confirmed that he must make an assumption that the vendor of each legal interest is willing and would not deal at a price that did not adequately reflect their share of the development value.

51. He went on to explain that there appeared to be two intermediate interests but effectively one and the same, in that the shareholders of the first intermediate interest were 17 of the shareholders and that the members of the company of the second intermediate landlord comprised all of the flat leaseholders. His view, therefore, was that a hypothetical purchaser was not faced with the prospect of negotiating deals with the freeholder and two entirely distinct intermediate leaseholders. In addition also, he put forward a number of propositions as to why in his view it was realistic to assume high probabilities of success. These were as listed at paragraph 7.2 of his report essentially that the beneficial owner and director of the freehold company is also a leaseholder, that each flat leaseholder

would substantially benefit from the potential windfall, that the planning permission had to be implemented by 2nd February 2020 with no guarantee that the local authority would renew the permission so that the windfall had a limited shelf life and in addition the new flats would set a precedent in terms of pricing and would result in an upgrade of the entrance lobbies. Taking these matters into account he concluded that the risk associated with the development was 10%.

52. He also considered that a further 10% discount should be made as a result of the inability of any developer to carry out a structural survey. Accordingly the total discount to the net land value was 20% reducing it from £1,155,000 to £924,000. He attributed this in accordance with the agreed division resulting in the development hope value of £462,000 being attributable to the Addison & Holland Estates Limited and the sum of £231,000 being attributed to Cameret Court and the residents association.

53. He was asked some additional questions by Mr Harrison. In answer to those he confirmed that he considered the use of market evidence was an appropriate way to deduce the percentage rate payable for the site. He was also of the view that a developer would do as much of the work inhouse as they could. He considered that the comparable approach was best, the more so as in his view the difference between the residual valuation, which he had undertaken and the comparables was too extensive and the comparable valuation was in line with his own experience. He confirmed that with the three interests to be acquired he considered a 10% risk was appropriate and a further 10% risk for the lack of survey.

54. He was then asked questions by Mr Walder for the nominee purchaser. He confirmed that he was aware that the intermediate leaseholders had objected to the planning and indeed that they had written to the Council accordingly. He was asked whether he had taken into account the fact that the existing sellers would seek to block the transaction but he was of the view there was still hope value if we were dealing in the real world. He did however think a 50% reduction as made by Mr Fattal was too large a discount and without specific figures to justify same he considered it to be excessive. His assessment was that he would deal with the valuation on the basis that parties were similarly motivated but that consent would be needed to undertake the transaction.

55. On the question of Flat 19 his view was that a prudent developer would look at the risks and rely on legal advice. As to what sum might be set aside to deal with the potential problems arising from the development around Flat 19, he said that would depend upon the legal risk and that they would make that assessment before they completed the purchase. He accepted that the provision of a lift to this floor would have an effect on value but was not able to say whether Flat 19 would be rendered uninhabitable during the construction work. He told us that he had not been involved in cases where the tenant had to be relocated in these circumstances. His view was that the residual approach was too far removed from the comparable evidence he had adduced. He had nonetheless carried out a residual valuation but he considered it was out of line. He was of the view that this particular development contained a number of items of certainty and accordingly the residual approach was inappropriate.

56. He was referred to the case of Mon Tresor Mon Dessert v Ministry of Housing which was a Privy Council case concerning land in Mauritius. This case said that the assessment of value was best dealt with by way of evidence of comparable figures from sales of other comparable properties but if there was no comparable sales resort could be had to the residual value method. It also went on to record that the adoption of the residual method was wrong and should only be undertaken where the proposed development scheme has such prospects of success that the comparison method cannot give such a realistic and reasonably accessible figure. It went on to say that residual method more suitable for valuing land where variables such as the chance of obtaining planning permission are not large and the effect upon the valuation of any contingencies can be readily assessed. It was put to him therefore that this supported the residual valuation approach. He was, however, of the view that he had complied the convention and not used a fully costed appraisal. However, if the residual valuation had fallen within the brackets of the comparable evidence then he would have included it. He confirmed that he preferred real world evidence and indeed that if it was offered for sale in the real world it would accord closely with his own assessment. He had more faith in comparable evidence than in the residual value.

57. He did accept that the residual valuation was a possible starting point but he preferred the comparable evidence. He was then taken through his residual costs and confirmed that the construction cost put forward by both valuers was very close to each other. He confirmed he considered a 1% charge for professional fees was reasonable but did not consider the project manager was necessary. Architect's fees he also thought were reasonable at around £5,000 and that on the question of profit, if you over-egged that you would be unlikely to be able to undertake the work. His profit expectations were around 15% and if there were significant risk or no planning then that would increase. On finance costs he explained his view that 6% was conventionally applied for projects of this type and that his allowance of 10% for the lack of the survey was in his view reasonable.

58. On questions from the Tribunal he told us that a couple of the comparables that he had put forward were not in fact rooftop developments. It seems the Elms and Queensgate fell into that category. He was also of the opinion that some of the comparables had greater value, for example Lords View. He did accept that the Property was not in a very prime central London position and that the build costs would have some relationship to the value. In re-examination he accepted that Flat 19 would need to reflect the fact that it had a lift to that floor and one would also need to take into account the possibility of action being taken by the owner and he considered a developer might put aside up to £10,000 to deal with that and other expenditure.

59. The evidence concluded the matters on the first day and on the 23rd October we heard submissions from both Mr Harrison and Mr Walder.

60. Mr Harrison told us that there were three matters that he wanted to deal with. Those were the evidence of the valuers, the methodology and the impact of the Court of Appeal case of Cravecrest.

61. In respect of Mr Fattal's evidence, he suggested that he was wedded to his position and not prepared to put forward a different assessment of risk save when questioned by the Tribunal and that this showed some lack of impartiality. He had also taken on responsibility for dealing with matters that were beyond his expertise such as the assessment of the impact of the section 106 agreement, the compensation that might be payable in respect of Flat 19, VAT treatment and the structural assessment of Flat 19.

62. Mr Harrison told us that in his view the section 106 agreement was not a planning requirement and the warranty to enter into the section 106 agreement was not enforceable in respect of planning but under a different Act.

63. In respect of the assessment of damages for Flat 19 he said that Mr Fattal had no legal basis for this assessment as damages would have been assessed on breach for a period of say 12 months not resulting in the level of award that was put forward. We were also reminded us of the provisions of the lease in which there is no right to object to building works.

64. The argument relating to VAT was outside Mr Fattal's knowledge but he did not make that clear. The true position appeared to be that all VAT was recoverable as a developer it being zero rated. In this regard we were referred to an extract from HMRC's manual concerning VAT guide, which Mr Harrison indicated that at page 20/90 zero rating for the sale of or long lease in non-residential buildings converted to residential use confirmed that VAT would not be payable. We will come back to this point as it seems to us that heading 30 rating the construction of new buildings where enlargements and extensions that create additional dwellings are shown as being zero rated with an example of a new eligible flat built on top of an existing building being zero rated. In any event the point being made by Mr Harrison was that Mr Fattal had no experience in VAT issues.

65. In so far as the allegation that the structure of Flat 19 may be insufficient, again it was suggested that this was not within his expertise and a structural engineer's report should have been obtained, as Mr Rangeley suggested, for which he made an allowance of 10%. He was also critical of the declaration in the report and his apparent non-compliance with the RICS requirements.

66. On the question of methodology he told us that in his opinion Mr Rangeley was aware of the fees and other costs as he undertakes agency work and that they are in line with market rates. We should therefore adopt Mr Rangeley's view on certain elements of the costs in particular estate agents and legal fees, finance and his view was that the costs put forward by Mr Fattal were excessive. He submitted that the case of *Francia Properties Limited v St James House Freehold Limited [2018]UKUT79(LC)* gave an indication as to how the assessment of finance should be undertaken, namely on the basis that half the costs over 12 months multiplied by the relevant interest rate is the correct way of dealing with it rather than the method by which Mr Fattal had calculated the cost over an 18 month time frame assuming that a developer would be borrowing 65% of the gross development value. It was Mr Harrison's suggestion that the experts were wildly apart and if the matter were to proceed based on Mr Fattal's calculations they would be an unsuccessful bidder. He was also of the view that some of Mr Fattal's mathematics were incorrect. Mr Harrison did not seek to

challenge every item on the residual value but by so doing asked us to accept that that did not mean he agreed same. He also relied on Mr Rangeley's view that a small developer would manage many of the roles inhouse.

67. He referred to the Mon Tresor case and that Mr Rangeley had put forward sites with development values, which he had analysed. The comparable method followed in the case of 37 Cadogan Square Freehold Limited v The Old Cadogan where preference was given to looking to sales of site ready for development rather than deducting the costs of conversion from the adjusted sale price. He also pointed out that the proper approach was that comparables were the best and that these had been unchallenged. Mr Rangeley had not been cross examined on the comparable evidence and certainly not put to him that they were not genuinely comparable. Mr Fattal for his part had not sought to adduce any comparable evidence nor to analyse Mr Rangeley's assessment.

68. He referred us to the case of Cravecrest which we have referred to above and also the cases put forward by Mr Walder of Spirerose and Trocette. The Trocette case it was suggested that the intermediate landlord indicated that they were against the development. This, however, Mr Harrison said contravened the statutory hypothesis set out in the Spirerose case. Under paragraphs 3 and 7 of schedule 6 each element is for sale and will be sold on the valuation date. Further if one was entitled to take into account the real person who will sell in his view they would clearly want to include the fact that planning permission was available in the assessment of the value. His submission was that the statutory hypothesis does not exclude the possibility of a purchaser of one interest also being the successful bidder for another interest which falls to be acquired. Mr Rangeley's discount for the risk associated with this transaction in respect of the ability to undertake same was 10%.

69. Mr Walder in response was that the current case was the valuing of the freeholder's interest under paragraph 3 of the 6th schedule. There was he said no statutory assumption about the intermediate leasehold and the only way of looking at that was the actual intermediate leasehold. The starting point was the value of property subject to the intermediate lease held by these lessees. He asked what the valuers were actually valuing. His submission was that the freehold was subject to the intermediate lease and whoever holds the intermediate lease can prevent the development. Until the valuation date those interests were hold by people opposed to the development. If someone was acquiring the Property what information would they be getting from the intermediate leaseholder he asked. He suggested they would be told that those people did not want the development and therefore there was a risk although that would not apply at the valuation date.

70. In Cravecrest the freeholders and the intermediate leaseholder wanted to develop. Each valuation he said precludes either the freeholder or the intermediate leaseholder as purchaser but must include successors in title. At Cravecrest the decision of the Upper Tribunal is referred to by the Court of Appeal. This concluded that the Upper Tribunal considered the valuation of what was then called the ORL and GEB lease should be carried out on the basis of a two stage transaction, namely the hypothetical purchaser of the GEB lease and the ORL would acquire one soon after the other. The concise reasoning and

conclusions of the Tribunal on these points was set out. A paragraph 113 of the Upper Tribunal decision it said as follows: *"We accordingly conclude that in valuing the GEB lease and the ORL it is proper to include such extra value as the hypothetical purchase of the relevant interest would be willing to pay to reflect the prospect of being able soon after his purchase of that interest to acquire the other interest and to enjoy in the consequence of the development value."* The LVT was correct in so deciding held the Court of Appeal. It was submitted that this case that we are dealing with differed from Cravecrest. The difference being that in this case any hypothetical purchaser would not have received favourable reactions from the intermediate leaseholder prior to the purchase.

71. His submission was that the only point at which you can consider the intermediate leaseholder as a willing seller was at the valuation date. You could not make any assumptions save that there would be a willingness of the seller to sell on the valuation date. He considered that the reduction of 50% to reflect the risk was the correct approach. He submitted to us that if the hypothetical purchaser was told that the current intermediate leaseholder did not wish the development to proceed, then it must in their mind mean that another intermediate leaseholder would also take that view. We were required he said to undertake a real world assessment, as in Cravecrest, and the risk to be associated is to be much higher than 10% suggested by Mr Rangeley. He had only considered three interests being acquired at the same time. The order of dealing with the matter would be the freehold first followed by the intermediate leaseholders separately. In Cravecrest all wanted to proceed. In this case neither the intermediate leaseholder nor the nominee purchaser wanted to develop.

72. He also suggested that the agreed percentage split between the three could be overridden if we were so minded, utilising our experience.

73. Moving on the methodology he confirmed that in his submission both were subject to criticism. There is, he said, no authority that says one particular method is right. In this case we have a planning permission that would expire a year after the valuation date but that we were not considering the future. He referred to the Mon Tresor case which was a compulsory purchase where a valuation was suggested that should reflect the future was not accepted. According to that case this is a matter where a residual appraisal is the most appropriate. Mr Fattal was of the view there were no comparables and that this matter only required a residual valuation. We have before us two residuals and a comparable and the similarity between experts in respect of such matters as construction costs and the differences on finance and professional fees would, on review, indicate that there was a quite close comparable between Mr Rangeley and Mr Fattal. Instead Mr Rangeley had overlooked residual valuations and instead had adopted the comparable approach. It was he said up to the Tribunal to consider which was the most appropriate. The hypothetical purchaser he said would undertake a residual valuation. The comparable method gives different figures but was not challenged. This is not he said a case where a blended approach should be undertaken, instead we should consider the two residual valuations only.

74. Mr Harrison responded briefly highlighting the elements of the Trocette case where it states that the best evidence is by comparison of figures of other sales of

comparable properties and if there are no comparable sales, resort may be had to the residual method. The case goes on to say that is reserved for exceptional cases. As we have recited above, the question of the residual method should be adopted only where the proposed development scheme has such prospects of success that the comparison method cannot give such a realistic and reasonably assessible figure. Mr Harrison also highlighted paragraph 79 of Cravecrest but this appeared to be an obiter comment.

75. We should also say that we have taken into account the notes by Mr Walder in preparation for the hearing together with the opening submission for the Respondent by Mr Harrison and Mr Harrison's closing notes for the Respondent. These we found to be very helpful in reaching our decision.

**FINDINGS**

76. We have been referred to a number of authorities throughout the course of the hearing although it does seem to be accepted that the main authority is that of Cravecrest v the Trustees of the Will of the Second Duke of Westminster (1) and Vowden Investments Limited (2). That case is slightly different from this one in that the intermediate leaseholder was in favour of the development, which was from flats to a house. The Court of Appeal adopted the Upper Tribunal's two-stage valuation approach and in this case it appears to be accepted that we would have firstly the purchase of the freehold followed by the acquisition of the intermediate leasehold interests at the valuation date.

77. We remind ourselves that schedule 6 paragraphs 3 and 7 both indicate that the sale is in both cases by a 'willing seller' on certain assumptions set out at in the sixth Schedule at paragraph 3 (1A) for the freehold and in respect of the leasehold interests as set out at paragraph 7(1) and (1A).

78. In pursuance of section 2(1) of the Act the qualifying tenants shall acquire every interest to which the paragraph applies, in this case any lease which is superior to the qualifying tenants lease, being the intermediate leases held by Cameret Court Limited and Residents Association in pursuance of section 2(1)(b) and (2). This means, therefore, that the intermediate leasehold interests are part of the transaction, albeit following on from the acquisition of the freehold, but all happening at the valuation date.

79. At paragraph 66 of the Cravecrest judgment, following on from the recounting of the statement of Millett LJ in Cadogan v McGirk that the Chancellor says this *"it can broadly be said that it 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 ignores completely the value attributable to development value if those interests or some of them were vested in the same person"*

80. In this case, we note the evidence of Mr Rangeley, which was not challenged, that the interests of the intermediate leaseholders (Cameret Court Limited and Cameret Court Residents Association) are pretty much one and the same. Much is made of the apparent evidence that the intermediate lessees could frustrate the development by refusing to sell. However, it seems to us that is contrary to the

legislation as the valuing exercise is on the basis that each interest is on the market and will be sold at the valuation date by a willing seller. We accept also Mr Harrison's submission that in order to maximise the price paid any seller would allude to the existence of planning permission and the fact that other interests necessary to implement the planning permission were for sale. We also accept Mr Harrison's proposition that the statutory hypothesis does not exclude the possibility of a purchaser of one interest also being the successful bidder for another interest which falls to be acquired.

81. With these findings in mind we turn to the evidence we received. It is, we think common ground that there has been judicial criticism of the residual approach. The over assessment of any particular item can easily skew the end figure. We find that Mr Fattal has fallen into this 'trap'. For example his assessment of the risk associated with flat 19 we find is excessive. The lease of the flat does not allow the owner to block the development. The best that could be hoped for are some damages for the breach of quiet enjoyment, which in our view would not achieve the levels allowed for by Mr Fattal. Other examples are the over egging of the estate agents fees which we find are more realistic by Mr Rangeley. The construction costs appear to be closely aligned but other expenses not so. We have completed the schedule supplied by Mr Harrison to show our findings on the costs adopting the residual valuation method.

82. Accordingly taking the matter in the round, we come to the conclusion that we prefer the assessment of the residual valuation approach adopted by Mr Rangeley, albeit not without question, than that adopted by Mr Fattal.

83. We turn then to the market evidence submitted by Mr Rangeley. We must confess that we are somewhat surprised that Mr Fattal did not consider it necessary to at least review this evidence adduced by Mr Rangeley. Given the judicial doubt expressed on more than one occasion in respect of the residual value approach we would have expected some response. However, there is none and no pertinent questions could be asked of Mr Rangeley on this point by Mr Walder. We have reviewed the report prepared by Mr Rangeley on the market evidence point and note all he says.

84. Of concern to us is the somewhat wide location of the comparables and the dates. The property at Frognal Court appears to be dated 2016 and 300 Vauxhall Bridge 2015. The Lords View and Corben Mews are more current. The Queens Gate property is only under offer and not of assistance. The other three, Playfair House (2015) and Corney Reach Way (2016) are some time distance from the valuation date of 9th January 2019. The Elms is geographically we think, a different location.

85. Mr Harrison indicated it would be appropriate, if we were so minded, to undertake a blended approach, that is to say to consider both the residual value and the market comparables produced by Mr Rangeley. We have done so. Our reason for this is that we consider that a purchaser would inevitably want to establish the cost of construction before putting in his bid. In addition he would consider what the market shows as a value for this type of development. Mr Rangeley has done both.

86. We have considered the residual valuations and on the attached schedule show the figures that we consider to be appropriate, with our reasoning. On our calculation, before considering the risk element, this would give a total cost of £2,639,576. This leaves a net land value of £660,424.

87. As to risk we found Mr Fattal's initial unwillingness to review this element unhelpful. Taking into account the findings we have made on the ability of the hypothetical purchaser to acquire all three elements on the valuation date and that the seller is a willing party the risk at 50% is too high. We prefer the assessment of Mr Rangeley at 20% for the reasons he stated. As to profits again we consider that the assessment by Mr Rangeley is more realistic. Too higher a desire for profit will make the purchaser an ineffectual bidder. The development has planning, shows the potential for a good and quick return and given the nature of the build and the locality we are satisfied that a purchaser would consider 15% profit a good outcome.

88. We have considered the comparable value suggested by Mr Rangeley of £1,155,000 being 35% of the GDV of £3,300,000, less his assessed risk of 20%, reducing the figure to £924,000. Although this is not a figure actually challenged, we consider it right to review the evidence in the report as best we can. We have found flaws with the assessment. The two closest in time are Lords View and Corben Mews. These had ratios to GDV of 28.33% and 33.93% respectively. An average of 31.13%. Mr Rangeley accepted the range was 28.3% to 42.2%, plumping for 35% of GDV to give the net land value on the market evidence basis of £1,155,000. If we accept the comparable evidence of Lords View and Corben Mews and apply 31.12% to the GDV this gives a figure of £1,027,290 before risk is factored in. With risk this reduces the development hope value to £821,832. We have compared this figure with our view of the residual value of £660,424, less 20% for risk, reducing it to £528,339.

89. There is a substantial difference. The more so when one considers Mr Fattal's evidence, limited as it was to the residual assessment. We must reject Mr Fattal's evidence for the reasons set out above and as shown on the schedule. Doing the best we can on the evidence produced to us both in the reports of the experts and the evidence given to us at the hearing and applying the law including a review of the authorities produced to us we have reached an assessment of the development hope value by taking the mean of these two figures to give our finding, on development hope value, of £675,085. This accepts Mr Harrison's submission that a blended approach was acceptable. This is to be divided, as was agreed between the valuers, as to 50% to the freeholder (£337,543) and 25% to each of the intermediate leasehold interests (£168,771).

Judge: Andrew Dutton

A A Dutton

Date: 2nd December 2019

**ANNEX – RIGHTS OF APPEAL**

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

| | Rudy Fattal | James Rangeley | |
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| Deductions from agreed development value for the purposes of residual calculation | | | The agreed GDV was £3,300,000 which has formed the basis for the assessment of costs set out below |
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| Estate agent fees | £79,200 | 1.5% (£49,500) | Mr Rangeley (R) appeared to have more experience of estate agents charges. Using our own knowledge and experience we conclude that 1.5% is reasonable and agree the figure of £49,500 |
| Legal fees | £21,000 | £4,500 | The legal fees suggested by Mr Fattal (F) seem too high. The cost suggested by R too low. We conclude that a fee of £15,000 would be reasonable. This also reflects that some consideration will need to be given to the existing service charge provisions to reflect the three extra flats. |
| Construction costs | £1,604,376 | £1,608,433 (£1,464,212 + £146,221 contingency) | The valuers are very close. Both have allowed a contingency of 10%. R maths seem wrong. The total is £1,610,433. Exercising the |

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| | | | judgement of Solomon we conclude that the construction costs should be shown as £1,607,000 (net £1,446,300 after deducting 10% contingency) We note that F allows for VAT on fees, appearing to accept that the new build costs would be zero rated |
| Contingency fund for build costs and part wall issues | Party wall fees: £10,000 + VAT | £18,000 | We accept R assessment of this cost, which includes some allowance to cover repairs |
| Town planning/<br>Local Authority/<br>Building Regs | Building Regs and Building Inspector fees: £5,000+ VAT<br>Traffic Management Plan: £2,000 + VAT<br>Discharging planning conditions fee: £1,000 + VAT<br>Building Warranty: £12,500<br>Air Test: £1,500 + VAT<br>Acoustic Test: £1,500 + VAT<br>EPC Certificate: £150 + VAT | £5,000 | The figure of £5000 is agreed.<br>The evidence at the hearing was that a pro forma could be used to resolve the traffic management issues, which we would have thought should not be a major obstacle to the development. We do not know what fee would be paid to discharge the planning and no evidence was produced to confirm such an expense other than it appears in the schedule produced by the surveyor retained by F, who did not give evidence. We agree with F that a Building Warranty would be required and the charge seems reasonable at £12,500<br>It is not clear what air test or acoustic test are required<br>The EPC certificate is agreed at £150 |
| Professional costs | % of construction cost: 1.4% M&E consultant (£22,000 + VAT)<br>1.75% Quantity Surveyor (£28,000 + VAT)<br>1% Structural Engineer<br>Architect: £39,000 + VAT<br>1% Engineers fees (£15,000 + VAT)<br>CDM Health & Safety fees: £3,500 + VAT<br>Project Manager: £45,000 + VAT<br>Non-negligence insurance: £4,000 | % of construction cost: 1% M&E consultant (£14,622)<br>1% Quantity Surveyor (£14,622)<br>1% Structural Engineer (£14,622)<br>Architect: £5,000 | We prefer the assessment of these first three professional costs at 1% of the net construction costs, that is to say ignoring the uplift for the contingency of 10%. We accept the argument of Mr Harrison that these works would, on the face of it, be zero VAT rated.<br>We do not find that the developer would be prepared to spend a further £39,000 on architects fees. We prefer the £5,000 suggested by R as being appropriate.<br>It is not clear what further engineers fees would be required when a fee has already been allowed for a structural engineer<br>We agree this fee for CDM at £3,500<br>We find that for a development of this nature a small to medium sized developer building 3 flats would have in-house knowledge and would manage the project accordingly. Certainly we doubt a developer would consider spending £45,000 on the services of |

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| | | | a project manager<br><br>We would have thought that any developer would carry the necessary insurance as a matter of good business and no additional cover would be required. |
| Finance costs | £207,416 | 6% (£101,738) | Following the Francia case we conclude that the assessment of the finance costs should be on the basis that the purchaser would put some money into the project. The net development costs, after ignoring the contingency is circa 1,446,300. Assuming the purchaser borrowed £968,800, being 50% of the total project cost for 15 months at 6.5% . This should give sufficient time to acquire, build and sell. This gives an interest cost of £78,715. We accept that there would be an upfront cost of 2% (£19,376) and an exit fee of £9,688. This gives total finance costs of around £107,777, say £108,00, close to the assessment of R. The additional fees of legal costs, monitoring and draw down fees are based on figures put forward by the surveyor for F who we could not question. |
| Developer's profit | £533,298 | 15% (£431,242) | We consider that the normal approach would be to take a figure by reference to the GDV, which is £3.3m. Accepting Mr Rangeley's 15% we find that the profit would be £495,000 |
| VAT | £47,207<br>VAT consultant fee: £1,500 + VAT | VAT recoverable | On the basis of the evidence provided we agree with R and do not see the need for a VAT consultant. The accountant for the purchaser would provide guidance, as would the HMRC |
| Risk | £227,135 | 20% of New Land Value (£231,000)[1] | We accept the assessment of risk at 20% but See our decision for the figure we consider in this element |
| Compensation to tenants | £104,900 + £36,400 | £36,000 and £10,000 for improvements to common parts | The assessment of the damages paid to the owner of flat 19 of 10% of the value we find is without foundation. The lease for the flat contains no provision to prevent the development (see para 25 above). At the most we consider that there may be a claim for breach of quite enjoyment but we do not consider it would lay the purchaser open to such extensive claims. The assessment of the costs by R is more realistic although we would round it up to £50,000 to give some leeway. |
| Acquisition costs (dependent on site value) | £52,756 | 1.5% (£44,160) | We have taken the mean of these two figures and assess the costs of acquisition at £48,500 |
| Community Infrastructure | £178,560 | £178,560 | This sum is agreed |

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| Levy | | | |
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| **New Land Value** | **£33,079** | **£1,155,000 (based on comparables)**<br>**(£764,000 on residual)** | See our decision on these elements |
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[1]Applied to New Land Value derived from comparative method – JNR 6.93