UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – COLLECTIVE ENFRANCHISEMENT – roof top development potential – refusal of planning permission before valuation date – planning permission granted after FTT decision – FTT wrong to take into account refusals after valuation date – appeal allowed and value of roof top development re-determined at £100,000

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

FRANCIA PROPERTIES LIMITED **Appellant**

and

ST JAMES HOUSE FREEHOLD LIMITED **Respondent**

Re: St James House,
28 Drayton Park
London
N5 1PD

Martin Rodger QC, Deputy Chamber President and A J Trott FRICS

Royal Courts of Justice

9 January 2018

Michael Walsh for the appellant
Mathew McDermott instructed by Streathers, solicitors for the respondent

The following cases are referred to in this decision:

Arrowdell v Coniston Court (North) Hove Limited [2007] RVR 39

Earl Cadogan v 2 Herbert Crescent Freehold Limited Lands Tribunal LRA/91/2007, ([2009] EWLands LRA_91_2007

West Berkshire District Council and another v Department for Communities and Local Government [2015] EWHC 2222 (Admin).

Secretary of State for Communities and Local Government v West Berkshire District Council and another [2016] EWCA Civ 441

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber) ("FTT") made on 25 March 2017 (and corrected on 30 March 2017) by which it determined that, for the purpose of the respondent's acquisition of the freehold interest in St James House, 28 Drayton Park, London N5 1PD, the value attributable to the opportunity to develop an additional floor on the roof of the building was £295,000. With the assistance of that and other determinations the parties were then in a position to agree the price payable for the freehold under Schedule 6 to the Leasehold Reform, Housing and Urban Development Act 1993.

2. The valuation date by reference to which the price was to be determined was 20 October 2015, the date on which the respondent had served its notice claiming entitlement to acquire the freehold of St James House. Before reaching its decision the FTT received evidence of a history of unsuccessful applications for planning permission to develop additional accommodation on the roof of the building. Only one such application had been determined by the valuation date, with subsequent refusals coming after that date. In reaching its decision on the value of the development opportunity the FTT made a deduction of 65% from the development value to reflect what it considered to be "the more than minimal risk involved" in achieving the development "having regard to the previous planning refusals."

3. Permission to appeal was granted by this Tribunal on the grounds that it was arguable that the FTT had not made a proper assessment of the material which would have been available to a prospective purchaser of the building in the open market at the valuation date. That material would have been limited to pre-application advice provided by the local planning authority and the single refusal of permission which had been received in May 2015. It was arguable that the FTT gave inappropriate weight to failed applications after the valuation date, or that it did not sufficiently distinguish between information which would have been known to prospective purchasers on the one hand, and evidence of post-valuation date events on the other.

4. At the commencement of the appeal Mr Mathew McDermott of counsel, who represented the respondent, sought to persuade the Tribunal that even if, as he conceded may very well have been the case, the FTT had given weight to irrelevant matters (failed applications for planning permission after the valuation date) its assessment that a discount of 65% from the full development value was appropriate to take account of risks was nevertheless one which a tribunal properly directing itself only on relevant considerations could have arrived at. We indicated after hearing Mr McDermott that we were not persuaded by that submission and would allow the appeal. As we had indicated in granting permission to appeal, we then proceeded to rehear the application for the determination of the contribution which the opportunity to develop the roof would make to the purchase price payable by the respondent.

The facts

5. St James House is a purpose-built block of flats which was completed in about 2001 and contains 14 flats on ground and three upper floors. Each of the flats is held on a lease for a term of 125 years which, at the valuation date, had 110 years unexpired. On the ground floor there are

two three-bedroom flats, one of which has its own private garden area. The remaining flats on the upper floors each have two bedrooms, with four flats on each floor. At the rear of the building there is a private car park with spaces for seven cars and, we were informed, room for one additional vehicle to be parked adjacent to a bin store. The seven parking spaces are allocated to leaseholders of flats in the building, with the result that the leaseholders of seven flats and any additional accommodation which can be created have no private parking space.

6. The building is towards the southern end of Drayton Park, a wide road leading north east from the A1 Holloway Road. The surrounding buildings are in a diversity of styles ranging from three-storey 19th Century houses to modern apartment blocks. The building itself is of yellow stock brick and rendered elevations, incorporating small balconies at first floor level. It has a flat roof with a concrete parapet surround. The building frontage is in line with the neighbouring residential block to the west but, due to the curve in the road, projects beyond the front elevation of the residential building to the east. The neighbouring buildings to the east and west are predominately of three or four storeys, with a five-storey building located further to the east and a part five, part six-storey building opposite the site on the corner of Benwell Road.

7. On 22 March 2013 the appellant, Francia Properties Limited, purchased the freehold of St James House for £70,000.

8. The appellant drew up plans for the construction of a three-storey addition on the roof of the building intended to create nine new two-bedroom flats. It discussed its proposal with the local planning authority, the London Borough of Islington, at a meeting between Mr Baker, the planning officer, and the appellant's representative on 18 February 2014. The day after the meeting Mr Baker wrote a letter containing pre-application advice.

9. The advice was qualified in the usual manner to the effect that it might become redundant if the proposed scheme were to be altered or if adopted planning policies changed. Mr Baker referred to planning policies in the London Plan encouraging boroughs to optimise housing, with two bedroom units being particularly required. On that basis the principle of the development was said to be acceptable, subject to the assessment of the details of the proposal in the light of other relevant considerations. Those considerations, and in particular the design and scale of the proposal, caused Mr Baker to advise that the development would be incongruous. He nevertheless suggested that:

> "… the provision of a single additional penthouse floor could be considered acceptable at the site, where this was set a significant distance back from the roof edges to ensure that it was not immediately apparent within the locality. With regard to the design and materials of such an additional floor this should have a low profile and contemporary materials or lightweight materials would be acceptable."

10. In concluding his advice Mr Baker reiterated that while the proposed addition of three floors would not be acceptable due to the resulting scale and massing of the building, "you may

wish to explore the option of a single additional floor at the site where this was of a suitable scale and design and was set back from the roof edge."

11. Despite Mr Baker's advice the appellant proceeded with an application for planning permission for the construction of the proposed three-storey addition on the roof of the building (which in the event was for four two-bedroom flats and two three-bedroom flats), which it submitted on 17 April 2015. The plans did not show the new floors set back at the rear but they were set back from the parapet at the front of the building and, to a lesser extent, at the sides. This application was refused on 18 May 2015.

12. On 5 October 2015 the appellant submitted a second application for planning permission, this time for a more modest development comprising a single-storey and part two-storey roof extension containing two two-bedroom and one three-bedroom self-contained units. This application was refused on 18 November 2015. The reason given for the refusal was that the proposed extension would form a discordant and dominant feature when seen from surrounding public and private land by reason of its inappropriate design, scale, massing, bulk, height and detailed finish. An appeal against this decision was dismissed on 17 May 2016.

13. Before the refusal of the second application for planning permission the respondent, St James House Freehold Limited, a company in which the leaseholders of each of the 14 flats in the building participate, submitted an initial notice under section 13 of the 1993 Act claiming to be entitled to acquire the freehold of the building for which it proposed a purchase price of £134,000.

14. On 23 December 2015 the appellant admitted the respondent's entitlement to acquire the freehold in the building but proposed a purchase price of £1,666,437.

15. A third application for planning permission was submitted by the appellant on 18 February 2016, this time for three two-bedroom flats on a single additional storey. It was refused on 1 April 2016. This was followed by a fourth application for a similar scheme which, for the first time, was supported by the planning officer, now Mr Daniel Jefferies. On 5 August 2016 the appellant executed a deed containing unilateral planning obligations in anticipation of obtaining consent for the fourth proposal. Notwithstanding the obligation and Mr Jefferies' support the fourth planning application was refused by the authority on 29 November 2016.

16. On 22 December 2016 the appellant appealed against the refusal of the fourth application. That appeal was allowed by the Planning Inspectorate on 30 March 2017. The FTT was, of course, unaware of the outcome of the planning appeal on 17 January 2017 when the hearing of the application to fix the purchase price took place and on 25 March and 30 March 2017 when its decision and correction were issued.

The FTT's decision

17. In its decision the FTT first recorded the case presented for the respondent by Mr McDermott, who had submitted that the refusal of four previous planning applications was evidence of the unlikelihood of planning permission ever being granted for a roof development at St James House. The evidence of Mr Jatinder Dhanoa MRICS, the respondent's expert witness, also dealt with the four previous unsuccessful planning applications. Mr Dhanoa considered the risk associated with the development and applied a deduction of 90% "to reflect the risk evidenced by the previous failed planning application." Notwithstanding that evidence Mr McDermott was then recorded in his closing submissions as asserting once again "that in view of the numerous failed planning applications there is only a 10% chance of it being granted in the future."

18. The expert witness appearing for the appellant, Mr Wilson Dunsin FRICS, took a much more optimistic view of the prospect of planning permission eventually being obtained for a single additional storey. He considered that a deduction of only 10% was necessary to take account of planning risk having regard to the evidence of other developments in the surrounding area.

19. The FTT's reasons for its decision are contained in paragraphs 20 to 23. It first referred to the numerous developments which it had observed on its inspection. We assume that this was a reference to the developments referred to by Mr Dunsin. It continued:

> "The tribunal considered that in light of the history of failed planning applications there remains a significant risk of planning permission not being granted. However if planning permission is granted, the tribunal considered it is likely only for a development that will be well set back from the building's edge thereby reducing the area available for any roof development. Therefore, the tribunal determines in its expert view, that a maximum of two flats can reasonably be constructed on the roof space having regard to the distance they are likely to be required to be set back in order to achieve planning permission."

20. The FTT then attributed a value of £750,000 to each of the two flats it thought capable of being created and adjusted the resulting gross development value of £1.5m to allow for Community Infrastructure Levy costs of £45,000, £7,000 for party wall issues and £40,000 for disposal fees, legal costs and new leases. The parties were in dispute over a number of other variables in their residual valuations but the FTT did not comment on them in terms. It set out in its own residual valuation the value it gave to the disputed variables. It adopted those figures which the parties had agreed, i.e. the cost of finance at 7% and a deferment rate of 6%. The FTT assessed that the residual value of the development was £843,254. It discounted this figure by 65% for associated risks to produce a development value of £295,000. The FTT explained that discount in paragraph 22 of its decision as follows:

> "The tribunal considered the risk associated with the roof development and allowed a deduction of 65% to the development value to reflect the more than minimal risk involved in the actual carrying out of the scheme having regard both to the previous planning refusals but the significant development to other nearby properties."

The appeal

21. In his statement of case on the appeal Mr Walsh, who appeared for the appellant as he had done before the FTT, submitted that the only material available to the hypothetical purchaser on 20 October 2015 would have been the pre-application advice, which looked favourably on a modest one-storey addition to the building, and the refusal on 18 May 2015 of the application for the much larger three-storey addition. The prospective purchaser might also have been aware that a second application for planning permission had been made on 5 October 2015 for a more modest scheme but this remained undetermined at the valuation date. Mr Walsh submitted that the assessment of the development value under paragraph 5 of Schedule 6 to the 1993 Act had to be by reference to information available to a hypothetical purchaser on the valuation date and by an assessment of the approach which such a purchaser (and the vendor to it), both acting prudently, would adopt to the value of the building. The FTT had failed to give proper weight to the pre-application advice (which it did not specifically mention) and gave inappropriate weight to failed applications after the valuation date.

22. In response, Mr McDermott suggested that it was difficult to understand what the FTT had meant when it referred in paragraph 20 and again in paragraph 22 of its decision to "the history of failed planning applications" and "the previous planning refusals" which caused it to assess that there was a significant risk of planning permission not being granted so as to require a discount on the value of the development opportunity of 65%. He suggested that the pre-application advice, which had indicated that a three-storey development would be resisted, and the refusal of the first planning application before the valuation date might together explain the reference to a "history of failed planning applications." Apart from that he could suggest no other reason for the FTT referring to "refusals" in the plural when, as he accepted, refusals which had occurred after the valuation date could not have been in the mind of a prospective purchaser and were therefore irrelevant factors when determining the price that would have been agreed on 20 October 2015.

23. In our judgment the only available interpretation of paragraphs 20 and 22 of the FTT's decision is that it had regard to the whole of the previous history of planning refusals which it had referred to in summarising the party's statements of case and submissions. It is striking that the decision makes no reference to the need to distinguish between events which occurred before the valuation date and those which occurred after it. The only suggestion that anyone appreciated the importance of that distinction comes in the FTT's account of the respondent's case in which Mr Dhanoa appears to have based his proposed discount of 90% solely on "the previous failed planning application". The respondent's counsel, however, focussed on "the numerous failed planning applications" and it is impossible for the Tribunal to be satisfied that the FTT did not take the full history into account when making its own assessment of an appropriate discount. The only fair reading of paragraphs 20 and 22 of the decision is that the FTT did indeed take account of irrelevant matters when reaching its conclusion.

24. Mr McDermott's fall back argument was to suggest that even if the FTT had impermissibly had regard to events which occurred after the valuation date in making its assessment of the discount which a prospective purchaser would apply to the development value of the roof top, so long as its assessment was one which would have been open to it if it had disregarded post

valuation date evidence, the Tribunal ought not to disturb the FTT's assessment. We have no hesitation in rejecting that approach. The resolution of a valuation issue is a matter of expert assessment on which views may differ. The existence of a range of competent valuations does not mean that any valuation within that range, no matter how it is arrived at, must be an acceptable one. The task of the FTT was to form its own view of the price payable for the freehold of St James House having regard only to relevant considerations. If, as appears to have happened, it took irrelevant considerations into account, it has not performed the task allotted to it. It is impossible from the decision to estimate the influence which post valuation date refusals of planning permission had on the FTT's thinking. We therefore allow the appeal and set aside the FTT's decision on the development value of the roof space. We now proceed to re-determine that issue.

The re-hearing

25. The remaining dispute concerns the market value of the roof development and can be broken down conveniently into three issues:

(i) What discount should be applied to the market value of the roof development to allow for planning and other project risks?

(ii) What type of roof development would a prospective purchaser have considered likely?

(iii) What was the market value of the roof development at the valuation date?

Discount for risks

26. For the appellant Mr Dunsin considered that a hypothetical purchaser would know by the valuation date that the local planning authority had indicated its willingness to consider a single-storey roof extension and the purchaser would therefore be confident of obtaining planning permission. Given the favourable planning indications he thought the "hypothetical purchaser will therefore be able to safely conclude that there were no planning obstacles in the way of the roof development". He made a small discount of 10% from the development value to allow for this low planning risk.

27. Mr Dunsin acknowledged that the outcome of planning applications made after the valuation date were not relevant but said that the fact that permission had eventually been granted vindicated his assessment of the planning risk at that time.

28. In *Arrowdell v Coniston Court (North) Hove Limited* [2007] RVR 39 planning permission to construct three penthouse flats had been refused despite having been granted on appeal for a similar penthouse development on a neighbouring block. In valuing the property under the 1993 Act the Lands Tribunal made a 50% deduction from the development value to reflect the lack of planning permission. Mr Dunsin said that in the present case the planning officer had already indicated that a single penthouse floor could be acceptable and he thought the risks associated with St James House were considerably less than those associated with Coniston Court in

Arrowdell where planning permission had been refused. Mr Dunsin also referred to another FTT decision where he had appeared for the respondent freeholder and in which the FTT had made a 15% deduction from the value of a roof space development to reflect the lack of planning permission at the valuation date (although permission had been granted four times previously but had lapsed).

29. For the respondent, Mr Dhanoa noted that no planning permission had been granted for a roof development at the valuation date. The application for six flats over three additional floors had been refused in May 2015, and the second application for three flats over part one and part two storeys had been submitted shortly before the valuation date but not determined. The pre-application advice obtained in February 2014 was that "a single additional penthouse floor could be considered acceptable … where this was set a significant distance back from the roof edge to ensure it was not immediately apparent within the locality." The requirement for a set-back of the floor gave scope for "a discreetly located roof terrace where this would not result in any overlooking to neighbouring occupiers." Mr Dhanoa said the planning officer had given no indication of the size of the development or its type of construction.

30. Mr Dhanoa broadened the consideration of risk to include the possibility of additional strengthening works being required as a result of the proposed roof extension and the requirements of the Building Regulations 2010 (Approved Document A). Without details of the building's construction or whether intrusive investigations might be required there was a risk of incurring significant additional project costs and causing major disruption to other occupiers.

31. Mr Dunsin had not undertaken a building survey or commissioned a structural engineer's survey but said he knew from his experience of inspecting, surveying and valuing similar blocks of flats and conversions that it would be possible to erect additional accommodation on top of the roof. Mr Dunsin made this statement despite saying a few paragraphs earlier in his report that he "can give no assurance, opinion or guarantee that the ground has sufficient load bearing strength to support the existing structures or any other structures which may be erected upon it."

32. Mr Dunsin did not refer to the report from Mr Armanto Chatziai MEng, MIStructE of Atelier 10 Limited dated 20 October 2016 which had been commissioned by the appellant and provided to the FTT. That report concluded that the additional load would not exceed the existing structure's capacity and deflection limits and would be safely transferred to the ground.

33. For his part Mr Dhanoa relied upon a report from Holdgate Consulting Limited dated 20 September 2017 that had not been available to the FTT. The report considered it would be necessary to verify the capacity of the existing foundations to take additional load by exposing them and by conducting soil tests, a process that would be extremely disruptive to the occupiers of the ground floor flats. Furthermore, Mr Holdgate considered that compliance with Approved Document A of the Building Regulations would "involve more or less the construction of an internal steel frame." That would have a significant impact upon all the flats and it was very unlikely that the work could be undertaken without vacating the building. Mr Holdgate estimated the cost of these works at £1.717m excluding VAT. In his valuation Mr Dhanoa

allowed £90,000 for external and internal engineering investigations (including making good) but otherwise allowed nothing for structural works.

34. Mr Dhanoa said that in *Arrowdell* the Tribunal knew the subject property could support an additional storey since three penthouse flats had already been built on Phase 1 of a two phase development and the structural engineer for the construction of those flats had provided written evidence that it was sensible to assume that penthouses could also be constructed on the roof of Phase 2 (the appeal property) notwithstanding the possible presence of HAC in the internal floors. It was highly likely that planning permission would be granted on appeal for an identified form of development (as indeed it was) the cost of which was known, as well as the likely length of development and the extent of occupier disruption (based upon the Phase 1 development). Mr Dhanoa considered that in the current appeal, where there was no such certainty, a higher risk factor should be allowed and he took 70% to include both planning and engineering risks. During cross-examination Mr Dhanoa said that of this allowance 30% was for planning risk and the remainder for the risk of structural upgrading of the building being required.

Discussion

35. A hypothetical purchaser of St James House at the valuation date would make reasonable inquiries and would know from the pre-application advice given to the appellant, or similar advice given to the purchaser, that a single-storey roof development was acceptable in principle to the planning officer. Anything more than this was likely to be resisted, as had already occurred with the refusal of the first planning application in May 2015. It would be appreciated by the purchaser that the scale and detailed design of such a single-storey extension and the need to set it back from the roof edge would be key factors in obtaining planning permission.

36. Mr Dunsin considered that the fourth planning application, granted on appeal on 30 March 2017, was "the perfect application that would have been in the mind of the well-informed hypothetical purchaser on the valuation date." That opinion is based entirely on hindsight and we consider that a hypothetical purchaser, although reasonably optimistic about the prospects of obtaining planning permission for a limited single-storey extension, would not consider planning permission to be a certainty, particularly in the light of a recent planning refusal. In our opinion the hypothetical purchaser would discount his bid by 30% to reflect planning risk. We consider that to be a moderate allowance reflecting the relatively positive attitude of the planning officer, the uncertainty over the size or number of additional units and the substantial downside if, for reasons not yet anticipated, planning permission were to be refused altogether. In reaching our conclusion we place little weight on the Lands Tribunal's decision in *Arrowdell* or the FTT decision referred to by Mr Dunsin, neither of which provides a precedent for the assessment of planning risk. The assessment of risk is specific to the circumstances of each individual case, and no prospective purchaser would have regard to tribunal decisions in forming its own commercial judgment. For this purpose previous decisions concerning different factual circumstances are of little relevance.

37. The second element of risk concerns the possible requirement for strengthening works to the structure of the building to allow the construction of an additional storey. The respondent

attached little weight to the Atelier 10 report produced by the appellant, dismissing it as "simple conjecture" containing no structural calculations or supporting evidence. As part of its own investigation the respondent requested details of the structure of the building from the local authority, the NHBC and elsewhere, but these were unavailable. The respondent's criticism of the Atelier10 report applies equally to the report it commissioned from Holdgate Consulting which, in the absence of details of the building's structure, also lacked structural calculations or supporting evidence although it did refer to the relevant parts of the Building Regulations.

38. In *Earl Cadogan v 2 Herbert Crescent Freehold Limited* Lands Tribunal LRA/91/2007 (unreported) the Tribunal considered how a hypothetical purchaser would act where at the valuation date there was professional advice available (as it can be assumed there would have been to well informed purchasers in the market) that ranged from the ultra-cautious to the over-optimistic. The Tribunal said at paragraph 72:

> "Clearly the hypothetical purchaser who received ultra-cautious advice and acted upon it would be unlikely to be the person who made the highest bid for the freeholder's interest and therefore would not be the successful purchaser. We conclude therefore that we should not assess the value of the freeholder's interest under Schedule 6 paragraph 3 on the basis that the successful hypothetical purchaser would receive ultra-cautious advice. However we conclude that we must assume that this successful hypothetical purchaser would receive sound and responsible advice rather than over optimistic advice."

In our judgment the respondent has taken an unnecessarily cautious approach. Holdgate Consulting's report suggested that it was reasonable to assume the developer of St James House constructed it to the minimum specification necessary and that it was unlikely the foundations would be able to bear additional loading (even of a lightweight structure). We do not accept that assumption. This is a modern (2001) residential block. The sample lease (Flat 1) in the evidence anticipates the possibility of further development being undertaken by the landlord with rights being reserved in paragraph 7 of the Third Schedule to carry out works to the structure of the block to create one or more additional flats or any development of whatever nature provided the amenity of the flat is not diminished. Although it is possible that the reservation is simply based on a standard precedent, it also suggests to us that the developer may have constructed the building with a vertical extension in mind and that Holdgate's assumption that the foundations were only designed to accommodate the load of the block as then built may well not be justified.

39. In our judgment the hypothetical purchaser would reflect the engineering risk in two ways. First, he would allow a sum for the cost of a more detailed engineering analysis and a structural survey. Holdgate allowed £90,000 for the cost of investigative works and making good. We do not think a hypothetical purchaser would allow for an intrusive investigation of the foundations. This is a modern block where the possibility of extension may have been taken into account, and we therefore allow £25,000 for further engineering analysis. Secondly, the hypothetical purchaser would significantly increase his allowance for risk to reflect the absence of construction details and the possibility that such further analysis may reveal problems in constructing an additional floor or that the amenity of existing flat owners may be diminished in the process so that the viability of the whole proposal was jeopardised.

40. Mr Dhanoa made a total discount for risk of 70%, of which 40% was for engineering risk, which is of the order we consider appropriate. Mr Dunsin made no allowance for engineering risk, which we consider to be unrealistic. The impact of a series of different risks on the appetite of the prospective purchaser is not necessarily a simple matter of addition. A reasonably prudent purchaser, weighing up the proposal in the round would, in our judgment, discount the price it would be prepared to pay by about two thirds, or say 65%, to reflect planning and engineering risks. A discount of 65% is equivalent to the discount determined by the FTT, which it described as reflecting all of the risks associated with the roof top development.

The form of development

41. The experts agreed that the new roof top flats which a purchaser would assume could be developed would each have two bedrooms. Mr Dunsin assumed there would be three flats on the additional floor while Mr Dhanoa considered the case for both two and three flats.

42. Mr Dunsin based his valuation on the assumption that the prospective purchaser would have in mind the "perfect application", namely the scheme which eventually obtained planning permission in March 2017. The total GIA of the three permitted flats is 184.2m^2, two at 61.0 m^2 and one at 62.2m^2. The London Plan specifies a minimum size of 61.0 m^{2}for such flats.

43. Mr Dhanoa measured the total roof area on site as 321.26m^2, including the lift shaft and stairwell. Allowing for the pre-application advice that any development should be set back a significant distance from the roof edges, Mr Dhanoa adjusted the total possible developable area to 207.6m^2. He then deducted the area of the lift shaft and stairwell (13.84m^2) to give a maximum GEA of the flats as 193.82m^2 which, he said, equated to a GIA of 175m^2. That meant it would not be possible to build three flats which complied with the local planning authority's minimum GIA standard of 61m^2. Mr Dhanoa therefore assumed that the development would comprise two flats, each of 90m^2 (with some small space saving having been achieved). Having dismissed the possibility of three flats Mr Dhanoa nevertheless provided alternative valuations on that basis and during cross-examination he accepted that the allowance he had made for the set back of the flats on the edge of the building could be reduced, thereby increasing the GIA.

44. Neither expert considered the possibility of the development comprising two three-bedroom flats. Mr Dhanoa assumed instead that there would be an en-suite bathroom to the main bedroom and generally larger rooms.

45. We are satisfied that it would have been physically possible to construct three two-bedroom flats on the fourth floor whilst satisfying the requirements of the local planning authority. But the flats would be small and barely compliant with the minimum size standards. Furthermore the design constraints imposed by the shape, size and setback of the roof development mean that, at least in the development for which planning permission was granted in March 2017, two of the bathrooms (Flats 15 and 17) are accessed from the reception room while the third bathroom (Flat 16) has no natural light.

46. Mr Dhanoa produced a schedule of the existing units showing the areas of all but two of the flats (Nos. 2 and 17). We do not take these areas to be accurate because the lease plan shows floors 1-3 as having identical layouts and Mr Dhanoa's areas for the first and third floors are 271.4m^2 and 285.6m^2 respectively. But, at the very least, the measurements suggest that the existing flats, with the possible exception of Flat 6 (61.0m^2), are all larger than the proposed flats. Mr Dunsin accepted in cross-examination that each of the existing flats had an en-suite bathroom.

47. In our judgment the hypothetical purchaser would prepare its bid by considering alternative valuations for a roof space development: either (i) three two-bedroom flats of approximately 61m^2 each with no en-suite bathrooms; or (ii) two two-bedroom flats of approximately 91m^2 each with en-suite bathrooms.

Valuation

48. Both experts estimated the market value of the roof top development by using a residual valuation.

49. For the appellant, Mr Dunsin reproduced the expert report he submitted to the FTT and confirmed that his reasons and conclusions were unchanged, namely that the value of the roof top development was £1,371,785. This figure was based upon the development of three flats with a combined market value of £2.25m (£0.75m each) and development costs of approximately £0.635m. This gave a residual value of £1.615m which Mr Dunsin deferred for the period of construction (agreed to be one year) to give a development value of approximately £1.525m. He discounted this for planning risk by 10% to give a final value of £1,371,785.

50. For the respondent Mr Dhanoa gave alternative valuations for two and three flats. He concluded that neither valuation showed a positive value. Mr Dhanoa said the gross development value would be between £1.282m (two flats each worth £641,000) and £1.237m (three flats each worth £412,000). The respective development costs were £1.344m and £1.441m. Mr Dhanoa considered both the two and three flat schemes to be "totally unviable".

51. The experts disagreed about most of the input variables in the residual valuation and we consider their differences below together with our response.

Gross development value

52. Mr Dunsin provided a schedule of 18 comparable flat sales. He said he had carried out an analysis of these to arrive at his valuation of £0.75m per flat, but no such analysis was shown in his report. Mr Dunsin explained that he had searched for comparables within a mile of the subject site and for sales up to a year before and two months after the valuation date. 17 of the comparables, like the proposed flats, did not have car parking. The majority of the comparables (14 out of 18) were larger than the proposed flats. Only three of the comparables were in modern

purpose-built blocks, the remainder were in period buildings. Only six of the flats were located above first floor level, none of which were said to be served by a lift. Seven flats were at first floor with the remaining five being garden flats on the ground or lower ground floor.

53. Mr Dunsin's valuation of the new flats represented £12,215 per m^2, a figure that was higher than all but two of his comparables. No explanation was given for this high value other than the fact that the flats would be "brand new".

54. Mr Dhanoa valued the roof top development in three ways. First, he analysed the sale of comparable two-bedroom flats within a radius of a quarter of a mile from the subject property and a time frame of two months before and one month after the valuation date. Five of his six comparables were sales of flats in a single large development of modern apartment blocks on the opposite side of the road from St James House and a little further north at 71 and 73 Drayton Park. The remaining comparable was a three-bedroom ground and first floor maisonette in a converted end of terrace period property with its own garden. We do not think this comparable is helpful.

55. Mr Dunsin also relied upon a sale of a flat in the same development at Drayton Park: Flat 21 at 71c (not referred to by Mr Dhanoa). This was a third floor flat measuring 76.92m^2 with a balcony, en suite bathroom and an allocated car parking space that sold for £587,500 (£7,638 per m^2) in September 2015.

56. Mr Dhanoa deducted £15,000 from the sale price of those comparables with a secure car parking space to reflect the lack of parking for the new roof top flats at St James House.

57. Mr Dhanoa's analysis gave a range of values for the two-bedroom flats of £6,416 to £8,000 per m^2, with an average of £7,208 per m^2. He said the comparables were in a more modern block than St James House with better amenity space and balconies. They were in very close proximity to the Emirates Stadium (Arsenal FC) which he said gave them a premium value of 5%. He applied the average rate of £7,208 per m^2 to the area of the two larger flats (90 m^2 each) to give a value of £648,720. He then discounted this by 5% to give an adjusted value of £616,220 per flat.

58. He made a further discount of 5% when valuing the three smaller (61m^2) flats to reflect the lack of en suite bathrooms. That reduced the rate to £6,487 per m^2 and gave a value of £395,720 per flat.

59. Mr Dhanoa's second method of valuation was to index the price of the four most recent sales of flats in St James House (Flats 1, 2, 10 and 14) using the Land Registry UK House Price Index for Islington. He excluded the sale of Flat 2 from further analysis because it was the only flat with a private garden. Discounting the price of Flat 1 by £15,000 for its car parking space, Mr Dhanoa said the average time-adjusted value was £7,499 per m^2 and he used this figure to calculate the value of a large flat at £674,880. For the smaller flats he again discounted the rate

by 5% for the lack of en suite bathrooms. This gave an adjusted rate of £7,124 per m^2 and a value of £434,564 per flat.

60. Mr Dhanoa's third valuation method was to time adjust four valuations of Flats 1, 6, 9 and 11 at St James House undertaken by local estate agents in September 2016. As these values represented asking prices Mr Dhanoa discounted them by 7.5% to obtain the likely sale prices. Adjusting further for car parking spaces and en suite bathrooms gave a value for the larger flats (90 m^2) of £631,305 (£7,014 per m^2) and for the smaller flats (61 m^2) of £406,504 (£6,664 per m^2).

61. Mr Dhanoa took the average of his three valuations to give values of £604,801 for the larger flats and £412,262 for the smaller flats.

62. It was unsatisfactory that the experts had made so little effort to consider each other's comparables or to draw up a joint list of those which they each considered to be genuinely helpful. The Tribunal had issued directions for the experts to communicate with each other with a view to narrowing issues, which ought to have included some sifting of the numerous comparables which they each relied on. It was striking that none of those comparables were referred to in both reports.

63. We obtain very little assistance from Mr Dunsin's comparables, none of which he had analysed or differentiated. Almost all of them were flats (or maisonettes) in period properties and many (13) were located more than three quarters of a mile from the subject property, often in streets with a very different character to Drayton Park. Some are located outside Islington; some have gardens, balconies, separate kitchens, restricted heights, irregular shaped rooms, a concierge, lifts etc. Without a proper and careful analysis of these and other factors Mr Dunsin had provided little more than a bare list of potential comparables from which no useful conclusions could be drawn.

64. Mr Dunsin's adopted rate of £12,215 per m^2 was only exceeded by two of his 18 comparables and he provided no explanation of why flats in the proposed roof top development should be worth so much other than because they would be brand new. Unlike Mr Dhanoa, Mr Dunsin did not consider in terms the effect on value of an en suite bathroom, a parking space or a garden.

65. Mr Dunsin provided the details of his collective enfranchisement valuation in which he had estimated the freehold value of the existing flats. The two large three-bedroom flats on the ground floor (circa 96m^2 each) were valued by him at £750,000 and £800,000. These flats are over half as big again as the proposed roof top flats and have an additional bedroom, an en suite bathroom and a parking space. It is simply unrealistic to suggest that the proposed new flats, lacking these advantages, would somehow be worth as much just because they would be new. Mr Dunsin also valued the existing top floor flats (each of which has an en suite bathroom) at an average of £9,350 per m^2, with the result that the proposed new flats would be worth over 30% more on his valuations. Despite being new, each of the proposed flats would be smaller than the

existing top floor flats and none would have an en suite bathroom, and we do not think that such a differential in value is justified.

66. Mr Dhanoa placed equal weight on each of his three valuations approaches by taking the average of their results. We find his third method, adjusting the valuations of local estate agents, to be of no assistance. These are said to be asking prices, not sale prices, and were of comparables marketed nearly a year after the valuation date.

67. Mr Dhanoa's primary valuation was based on the analysis of comparables in the modern blocks on the opposite side of Drayton Park, but his analysis of these was not satisfactory for two reasons. First, he should have taken the average of all the comparables and not just the two at either end of the value range; and, secondly, he failed to analyse and include the sale of Flat 3, 71c Drayton Park which was one of his five comparables.

68. Mr Dhanoa obtained his data from the Zoopla website, which gives the area of Flat 3 at 71c as 67.9m^2. It is a ground floor flat with a terrace/patio but no car parking space. It sold for a price equivalent to £8,174 per m^2.

69. The average value of Mr Dhanoa's five comparables is £7,487 per m^2. The average including Mr Dunsin's additional comparable at Flat 21 at 71c is £7,479 per m^2 [1].

70. We are not persuaded that a discount of 5% is justified to reflect what Mr Dhanoa says is a premium attached to flats which are close to the Emirates Stadium. He bases this upon three press reports that homes in the same postcode as Premier League football grounds have increased in value by more than average. That is not a robust information source and does not explain what is meant by the same postcode. Bearing in mind that St James House is less than a third of a mile from 71 Drayton Park (and in the same road) and shares an N5 postcode (unlike the Emirates Stadium which is in N7) we do not think it likely that there is any price differential attributable simply to the proximity of the stadium.

71. Mr Dhanoa's second valuation method was based on indexing prices achieved in recent transactions involving flats in St James House itself. Excluding Flat 2 (because it has a garden) the indexed values averaged, he said, £7,499 per m^2. Mr Dhanoa's analysis of the Flat 10 sale appears to us to be overstated. Using his figures we calculate the indexed value to be £508,898 and not £530,271, giving a value of £7,375 per m^2 and a revised average of £7,395 per m^2.

72. Using the corrected average of prices within the building gives a value of £665,550 each for the two larger flats and £431,350 (having made a discount of 5% for the lack of an en suite bathroom) for each of the three smaller flats.

[1] This reflects the analysis of the comparable at Flat 21 71c by deducting £15,000 from the sale price in respect of an allocated car parking space. This gives £7,443 per m^2.

73. The average of Mr Dhanoa's two methods using adjusted sale prices (as corrected) is £7,437 per m^2 which gives a (rounded) value of £669,000 for the larger flats and £434,000 for the smaller flats. These figures appear low compared to the indexed values of the latest sales of the existing flats. But discounting the average of the indexed sale prices of Flats 10 and 14 (approximately £520,000) by 5% because they have en suite bathrooms and allowing for the fact that the existing flats are slightly larger ($69m^2$) than the proposed smaller flats ($61m^2$) gives an adjusted comparable figure for the smaller flats of £437,000.

74. We are satisfied that Mr Dunsin has significantly overvalued the proposed flats. Looking at the evidence as a whole and adopting Mr Dhanoa's adjustments for car parking and the lack of an en suite bathroom (both of which we think are reasonable) we consider that the larger flats would be worth £7,725 per m^2 and the smaller flats £7,375 per m^2. This gives rounded values of £1,390,000 (£695,000 each) for the two larger flats and £1,350,000 (£450,000 each) for the three smaller flats.

Construction costs

75. The experts are a long way apart in their estimate of construction costs. Mr Dunsin adopts a figure of £1,400 per m^2 including the cost of providing a lift to the new floor and a contingency allowance but excluding professional fees. Mr Dhanoa adopts £2,200 per m^2 including professional fees but excluding the cost of the new lift and a contingency allowance. The inclusion of professional fees is stated in terms in the statement of agreed facts but in his residual valuation Mr Dhanoa adds 12.5% (the agreed allowance) to his rate of £2,200 per m^2, thereby double counting for professional fees.

76. The experts agree that professional fees should be taken at 12.5%, so Mr Dunsin's figure becomes £1,575 per m^2 inclusive of fees. Mr Dunsin said that the costs are lower than normal building or rebuilding costs as the development would not need ground works, foundation works, underground drainage works or site clearance. He said that he had based his cost estimate upon the figure adopted by the FTT in another case he had been involved in which had also concerned a prospective roof space development. Mr Dunsin's reliance on this information was surprising since the building concerned did not have a lift, so the figure for building costs was not directly applicable to the subject property. It was also a historic cost given that the valuation date was in 2010. In cross-examination Mr Dunsin also suggested that for insurance purposes reinstatement costs would be taken to be £1,600-£1,800 per m^2 including a lift which he then discounted by £200 per m^2 because of the limited nature of the works required. Mr Dunsin gave no indication about the level of the contingency allowance that he included in his cost estimate. He also applied his cost rate to the GIA rather than the GEA of the proposed development.

77. Mr Dhanoa obtained his cost estimate from a cost consultant familiar with the location and this type of development and also from an experienced builder. They estimated the cost at £1,200 - £2,500 per m^2. This excluded the cost of a new lift at £100,000 which a lift consultant (Able Lifts) had told Mr Dhanoa would be required because it would not be possible to modify the existing hydraulic lift to serve an additional floor.

78. Neither expert provided robust support for their cost estimate. Mr Dunsin adopted the cost (£1,400 per m^2) of a roof top development determined in a previous FTT decision involving a different type of building that had no lift. Mr Dhanoa relied upon emails from a construction company based in Wembley (Sienna Limited) and a firm of construction and property consultants based in Hemel Hempstead (Synergy). Neither company appears to have been provided with a detailed specification of the proposed works. Sienna Limited said that because it had not seen any drawings or design specifications it would be difficult to give an accurate quotation. Their estimate ranged from £1,200 per m^2 for a basic project, to £2,000 per m^2 for a mid-range to high-end project and £2,500 for an ECO build project. Synergy quoted for a development of 100m^2 which was considerably less than the proposed development. The advice from Able Lifts was even more perfunctory and comprised a simple statement that it would not be practical to extend the current hydraulic lift. They did not give an estimate of the cost of a new installation; the figure "in the region of £100,000" given by Mr Dhanoa as the likely cost is unsupported by evidence.

79. We consider that Mr Dunsin's cost estimate is too low even though it excluded professional fees. It appears to be based on costs provided by BCIS of £1,600 - £1,800 per m^2, less £200 per m^2 for works that Mr Dunsin says will not be required in this instance. Mr Dhanoa says BCIS told him its figures were not applicable to the present circumstances. Mr Dunsin emphasised the value advantage of a "brand new" development but does not reflect a good quality specification in his cost estimate. We are also concerned that Mr Dunsin's figure of £1,400 per m^2 includes an unquantified contingency allowance.

80. We think a figure of £2,000 per m^2 including professional fees is more realistic and is in line with the limited advice received by Mr Dhanoa. These costs apply to the GEA (208m^2) and not the GIA (184.2m^2). We accept it could be difficult to extend the existing hydraulic lift and that a new mechanism (piston) would be required. Mr Dhanoa said that the cost of the lift was not included in his cost rate and his separate allowance of £100,000 was not challenged in terms during cross-examination. We think such a sum is realistic and we adopt it.

Other costs

(i) Community Infrastructure Levy

81. Both experts accept that Community Infrastructure Levy would be charged at £300 per m^2 on the GIA of 184.2m^2, giving a total of £55,260. Mr Dunsin, unlike Mr Dhanoa, does not add finance charges to this amount. We think finance should be added to this cost which is chargeable on the commencement of the development not its completion.

(ii) Party wall costs

82. Mr Dunsin allowed £7,000 for party wall costs and Mr Dhanoa £27,167. Mr Dunsin did not explain the basis of his figure (which we assume to be £500 per occupier) but denied it was too low for a modern building of this type of construction. Mr Dhanoa allowed £1,350 for each of the fourteen existing flats which he said came to £18,666.62. In fact that amount is based on

£1.333.33 per flat, the figure in another FTT decision referred to by the parties. In addition Mr Dhanoa allowed a further £8,500 for the cost of the freeholder. Mr Dhanoa acknowledged he had made the unlikely assumption that each occupier would instruct a different party wall surveyor and that if only one surveyor were appointed the cost would be halved. In our opinion the hypothetical purchaser would allow £15,000 for this cost.

(iii) Legal costs

83. Mr Dhanoa allowed £18,900 for the cost of varying the existing leases, a figure he said was provided by solicitors and which "could be wrong". Mr Dunsin made no such allowance. We allow £14,000 for these legal costs.

(iv) Small sites contribution

84. Mr Dhanoa allowed a further cost of £51,000 per flat which he said was payable under the Islington Affordable Housing Small Sites Contributions SPD as a contribution towards the provision of affordable housing elsewhere in the borough. Mr Dunsin denied that a contribution was payable and referred to a written ministerial statement ("WMS") dated 28 November 2014 identifying specific circumstances where contributions for affordable housing should not be sought from small scale development, including developments of 10 units or less with a combined GIA of no more than 1,000m^2. The National Planning Policy Guidance was amended to this effect on the same day and revised on 27 February and 26 March 2015.

85. This policy was challenged in *West Berkshire District Council and Another v Department for Communities and Local Government* [2015] EWHC 2222 (Admin). Holgate J held, on 31 July 2015, that the planning policy promulgated by the Secretary of State in his WMS was unlawful. Subsequently, on 13 May 2016, the Court of Appeal allowed an appeal against this decision ([2016] EWCA Civ 441). In so doing the Court of Appeal made it clear that the small sites exemption did not automatically override development plan policy, which remained the starting point for the determination of applications.

86. At the valuation date in October 2015 a well-informed hypothetical purchaser would be aware that the small sites exemption had recently been held to be unlawful in the High Court and would be likely to allow a contribution towards affordable housing and we allow £50,000 per flat. We do not think that such a purchaser would speculate that the decision of the High Court might later be reversed by the Court of Appeal.

(v) Compensation

87. Mr Dhanoa allowed £1,000 per flat for compensation for disruption to the car park during the works. Mr Dunsin said that the lease allowed the freeholder to do the works and there was no reason why any compensation should be paid. The lease entitles the freeholder to do the work subject to the proviso that the amenity of the flats is not diminished. We think a prudent hypothetical purchaser would make an allowance for compensating occupiers for disturbance and disruption and we accept Mr Dhanoa's figure as being reasonable.

(vi) Profit and contingency

88. Mr Dunsin takes developer's profit at 10% of the gross development value and allows an unspecified contingency in his construction cost. Mr Dhanoa takes developer's profit at 15% of the gross development value and allows a contingency of 20% on construction costs.

89. The proposed development is a small and difficult project undertaken on a physically constrained site with 14 occupiers remaining in situ. In our opinion the hypothetical purchaser would want a higher return than 10% and we think Mr Dhanoa's estimate of 15% is more realistic.

90. We are satisfied that a contingency allowance is appropriate but we consider 20% to be too high given we have made a separate discount to reflect the engineering risks as well as a generous profit allowance and specific adjustments for other items such as the lift extension. The appropriate contingency allowance is 10%.

Determination

91. Adopting the values for the variables we have determined above we estimate the value of the two two-bedroom development at £114,000 (Appendix 1) and the three two-bedroom development at £86,000 (Appendix 2). In our judgment the market value of the roof top development is fairly assessed at £100,000 and we so determine.

92. We understand this to have been the only element of the enfranchisement price which the parties have been unable to agree, and the date of this decision may therefore be taken to be the date of determination of the terms of acquisition.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)

9 April 2018

APPENDIX 1

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION

TWO x TWO-BEDROOM FLATS

Gross Development Value:			£1,390,000
LESS			
(i)	Construction cost: 208m^2 @ £2,000 per m^2: (including professional fees)	£416,000	
(ii)	Structural survey:	£ 25,000	
(iii)	Lift:	£100,000	
(iv)	Community infrastructure levy:	£ 55,260	
(v)	Small sites contribution:	£100,000	
(vi)	Party wall costs:	£ 15,000	
(vii)	Legal costs:	£ 14,000	
(viii)	Compensation:	£ 14,000	
(ix)	Agent's fees @ 2%:	£ 27,800	
(x)	Finance on ½ costs for 12 months @ 7%:	£ 26,847	
(xi)	Profit @ 15% GDV:	£208,500	
(xii)	Contingency @ 10% of (i):	£ 41,600	
			£1,044,007
			£ 345,993
Deferred for one year @ 6%:			0.9434
Development value:			£326,410
Discount @ 65% for risk:			0.35
			£114,243
		say	£114,000

APPENDIX 2

UPPER TRIBUNAL (LANDS CHAMBER) VALUATION

THREE x TWO-BEDROOM FLATS

Gross Development Value:			£1,350,000
LESS			
(i)	Construction costs (including professional fees) 208m^2 @ £2,000 per m^2:	£416,000	
(ii)	Structural Survey:	£ 25,000	
(iii)	Lift:	£100,000	
(iv)	Community infrastructure levy:	£ 55,260	
(v)	Small sites contribution:	£150,000	
(vi)	Party wall costs:	£ 15,000	
(vii)	Legal costs:	£ 14,000	
(viii)	Compensation:	£ 14,000	
(ix)	Agent's fees @ 2%:	£ 27,000	
(x)	Finance on ½ costs for 12 months @ 7%:	£ 28,569	
(xi)	Profit @ 15% GDV:	£202,500	
(xii)	Contingency @ 10% of (i):	£ 41,600	
			£1,088,929
			£ 261,071
Deferred for one year @ 6%:			0.9434
Development value:			£ 246,294
Discount @ 65% for risk:			0.35
			£ 86,203

say £ 86,000