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

**Case Reference** : KH/LON/00AY/OLR/2015/1380  
KH/LON/00AY/OLR/2015/1643

**Property** : Flat 2 Ely Lodge, 35 St Faiths Road,  
London SE21 8JD

**Applicants** : Mr Khuam Adedolapo Fatuga (1)  
Dr Emma-Louise Radway Bright  
(2)

**Representative** : Mr Nicholas Trompeter (Counsel)

**Respondents** : Ms Helena Kowalska (1)  
Carlton Professional Services  
Limited (2)

**Representative** : Ms Diane Doliveux (Counsel)

**Type of Application** : Application under section 48 of the  
Leasehold Reform, Housing and  
Urban Development Act 1993

**Tribunal Members** : Mr Jeremy Donegan – Tribunal  
Judge  
Mr Luis Jarero BSc FRICS – Valuer  
Member

**Date and venue of  
Hearing** : 15 December 2015  
10 Alfred Place, London WC1E 7LR

**Date of Decision** : 08 March 2016

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**DECISION**

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## **Decisions of the tribunal**

- (1) Carlton Professional Services Limited ('CPSL') is added as the Second Respondent to these applications, pursuant to Rule 10(1) of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the 2013 Rules').**
- (2) The tribunal determines that the premium payable under Schedule 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'), on the grant of a new lease of Flat 2 Ely Lodge, 35 St Faiths Road, London SE21 8JD ('the Flat') is £17,087 (seventeen thousand and eighty-seven pounds).**
- (3) A schedule setting out the tribunal's calculation of the premium is attached.**
- (4) The tribunal makes determinations on the disputed terms of the new lease, as set out at paragraph 128 of this decision.**
- (5) The applications for costs under Rule 13(1)(a) and/or (b) of the 2013 Rules are refused.**

## **The background**

1. The Applicants are the leaseholders of the Flat, which is on the first and second floors of Ely Lodge, 35 St Faiths Road, London SE21 8JD ('Ely Lodge'). The First Respondent was the freeholder of the Ely Lodge until 01 October 2015, when it was transferred to CPSL.
2. Ely Lodge is a substantial, three-storey Victorian villa that has been converted into three flats. All three flats are held on long leases. The First Respondent is the leaseholder of Flats 1 and 3.
3. On 22 December 2014 the the Applicants served a notice of claim on the First Respondent pursuant to section 42 of the 1993 Act, seeking a new lease of the Flat. The notice proposed a premium of £10,000 for the new lease and made the following proposal for other terms and conditions at paragraph 4:  
  
*"All other terms as per the existing lease save for such modifications permitted under section 56 of the LRHUDA 1993."*
4. On 23 February 2015 the First Respondent served a counter-notice in which she admitted the Applicants' entitlement to a new lease, in

accordance with section 45 of the 1993 Act. The counter-notice proposed a premium of £30,000. Paragraph 2 reads:

*"I accept the following proposals contained in your notice, a term equal to the unexpired residue of the lease dated 31<sup>st</sup> August 1994 plus ninety years at a peppercorn rent, and all other terms as per the existing lease."*

### **The application**

5. On 19 August 2015 the tribunal received two applications under section 48 of the 1993 Act; one from the Applicants and one from the First Respondent. Both applications sought determinations of the premium and terms of the new lease.
6. Directions were sent to the parties on 09 September 2015. On 29 September 2015 the tribunal wrote to the parties, stating that it had treated the leaseholders' application as the live application and that the two applications would be consolidated and heard together. The tribunal refers to the leaseholders, Mr Khuam Adedolapo Fatuga and Dr Emma-Louise Radway Bright, as the Applicants in this decision. Ms Kowalska and CPSL are referred to as the Respondents.
7. The tribunal's letter of 29 September 2015 stated that the parties should continue to deal with the directions. Paragraphs 1-4 of the directions are set out below:

#### ***"Recoverable costs***

1. *Any application to determine the landlord's recoverable costs is stayed. Any application to lift the stay must include confirmation that the recoverable costs are in dispute.*

#### ***Lease terms***

2. *The landlord must by **Wednesday, 23 September 2015** submit a draft lease to the tenant for approval.*
3. *The tenant must by **Wednesday, 07 October 2015** return the draft lease to the landlord with any amendments shown in red.*
4. *The landlord must by **Wednesday, 14 October 2015** provide the tenant with a list of the terms of the draft lease that remain in dispute."*

8. On 01 October 2015 the First Respondent transferred the freehold of Ely Lodge to CPSL for no consideration. The First Respondent is the sole shareholder in CPSL and is one of two directors.
9. On 28 October 2015 the Applicants' solicitors wrote to the tribunal, notifying them of the transfer of the freehold and enclosing a copy of the transfer deed. They also asked that CPSL be substituted as the Respondent.
10. The following day, the Respondents' solicitors wrote to the tribunal in the following terms:

*"We enclose the Landlord's Listing Questionnaire in these matters.*

*A Transfer of the freehold interest of the subject flat from Helena Kowalska to Carlton Professional services (sic) has rendered the initial notice in these cases void (the leaseholder did not register the effect of the initial notice against the freehold title), our client in the circumstances must contend that the transfer has voided the effect of both applications.*

*If the leaseholder is not prepared to accept this position we would request the tribunal list the matter for a preliminary hearing to deal with this issue."*

11. On 04 November 2015 the tribunal wrote to the Applicants' solicitors, inviting representations on the effect of the freehold transfer. The latter responded on 05 November 2015 (with copy to the Respondent's solicitors), as follows:

*"We write further to your letter dated 4 November 2015.*

*It is our clients' position that Carlton Professional Services Limited ("Carlton") did not give valuable consideration to acquire the freehold title of Ely Lodge. Pursuant to section 29 of the Land Registration Act 2002 ("LRA 2002") disposals for valuable consideration will postpone any interest not registered as a priority. However, the event that no valuable consideration was given the basic rule of priority interest will apply pursuant to section 28 of the LRA 2002. This means Carlton will take subject to our clients' entitlement to a new lease pursuant to their section 42 notice dated 22 December 2014.*

*In the circumstances, we request that this matter is listed for a preliminary hearing to determine whether our clients' section 42 notice dated 22 December 2014 is void or not."*

12. On 16 November 2015 the tribunal wrote to the parties in the following terms:

*“Having reviewed the tribunal files a judge has directed that the issue of the tribunal’s jurisdiction will be considered at the start of the hearing on 15 December 2015. If the tribunal accepts jurisdiction it may then go on to hear the substantive application.*

*In respect of the jurisdiction issue skeleton arguments and copy authorities should be exchanged and copied to the tribunal by 4pm on 11 December 2015.”*

13. The Respondents’ solicitor raised the issue of jurisdiction in an email to the Applicants’ solicitor dated 08 December 2015, in which he wrote:

*“The jurisdiction of the Tribunal is limited to dealing with the terms of the new lease and the valuation aspects of this case under Section 91 of the 1993 Act. I would ask you to provide legal authority which confirms the tribunal can actual deal with the preliminary issue on Tuesday.”*

14. On 10 December 2015 the Applicants’ solicitors filed their skeleton argument on the preliminary issue. The Respondents’ solicitors wrote to the tribunal the same day, withdrawing their clients’ challenge to the section 42 notice. The relevant paragraph reads:

*“We did advise the Tribunal in October how the transfer of the freehold interest did render the initial notice void. In response, the tribunal confirmed that it would consider this preliminary issue at the beginning of the listed hearing of the case. Whilst we would contend that the initial notice was rendered void by the Transfer (as a matter of law) and that the Tribunal does not have jurisdiction to consider this legal question, in order to bring an end to this long drawn out case and to not waste the Tribunal and parties’ experts’ time our client will permit the 22 December 2014 Initial Notice to stand so that the Tribunal can focus on determining the premium and form of new lease.”*

15. The relevant legal provisions are set out in the Appendix to this decision. The relevant provisions of the existing lease are referred to below.

### **The existing lease**

16. The lease was granted by Alan Borlase Batten and Gillian Ruth Tarlas (“the Lessor”) to Joanne Elsey (“the Lessee”) on 31 August 1994 for a term of 99 years from 31 August 1994. The ground rents are £80 per

annum for the first 33 years, £160 per annum for the next 33 years and £240 per annum for the remainder of the term.

17. Recital (ii) provides:

*"If the lessors grant a lease or leases of other flats in the building then they will be in similar terms to those herein contained and until lease or leases are granted the lessors will observe and perform the covenants in respect of flats on which leases are not so granted and contained in Clause 2 hereof"*

18. The Flat is described in clause 1 as *"...ALL THAT flat (hereinafter called "the Flat") on part of the first and second floor of the building (hereinafter called "the Building") known as Flat 2, 35 St Faiths Road SE21 in the London Borough of Lambeth shown coloured red (for the purposes of identification only) on the plan No 2 annexed hereto..."*. The areas coloured red on plan 2 exclude the 'tank room' on the second floor, which is coloured yellow.

19. The Lessee's covenants are to be found at clause 2 and include an obligation to pay a service charge. The service charge proportion is 3/7ths and the service charge expenses include:

*"2(2)(a)(iv) the cost of employing and maintaining the service of a Maintenance Staff"*

20. The alienation provisions are set out at clause 2(15) and include the following obligations on the part of the Lessee

*"(iii) Not to assign underlet or part with possession of the Flat without first obtaining from the assignee transferee underlessee or undertenant a covenant directly with the Lessor to pay the service charge covenanted to be made under sub-clause (2) hereof and in the case of an assignment or transfer a further covenant by the assignee or transferee with the Lessor to pay the rent hereinbefore reserved and to observe and perform all the covenants on the part of the Lessee and conditions herein contained"*

....

*(v) Upon every assignment transfer underlease mortgage charge or other document affecting the lease to give to the Lessor within one month thereafter notice in writing thereof and also if required by the Lessor to produce each such document to the Lessors solicitors and pay a fee of TWENTY FIVE POUNDS for the registration of each such notice or document plus value added tax"*

21. The Lessor's obligations are contained in clause 5 and include repairing and insuring covenants.
22. The exceptions and reservations are set out in the second schedule and include:  
  

*"1(ii) Power for the Lessor and its surveyors or agents with or without workmen and others at all reasonable times on notice (except in case of emergency) to enter the Flat for the purpose of carrying out its obligations under Clause 5 of this Lease and to the extent necessary to repair adjoining flats or buildings*

...

  3. *The Lessors having a key to the flat for the sole purpose only of gaining access to the tank room coloured yellow on Plan No 2 by the Lessor's (sic) or their authorised agents in case of emergency"*

### **The hearing**

23. The hearing took place on 15 December 2015. The Applicants were represented by Mr Trompeter and the Respondents were represented by Ms Doliveux. The Applicants and the First Respondent attended the hearing and the latter confirmed that Ms Doliveux was instructed by both Respondents. The tribunal heard oral evidence from the parties' valuation experts, Mr Gregory Rowland MRICS for the Applicants and Mr Christopher Avery FRICS for the Respondent. The Tribunal also heard oral evidence from the Second Applicant and the First Respondent.
24. The tribunal members were supplied with a paginated hearing bundle that included copies of the applications, directions, notice of claim, counter-notice, Land Registry entries, existing lease and draft leases, valuation reports, a joint statement from the experts and a witness statement from the First Respondent dated 09 December 2015.
25. Immediately before the hearing the tribunal were also supplied with a witness statement from the Applicants' solicitor (Mr Walter Kramer) dated 14 December 2015, skeleton arguments from both Counsel with bundles of authorities and the Applicants' statement of costs. During the course of the hearing, Mr Trompeter handed up a copy of the RICS professional information guide "*Comparable evidence in property valuation*".
26. The hearing was listed for 15 and 16 December 2015 but Mr Trompeter was unavailable on the second day. The tribunal heard evidence and submissions on the valuation issues on the first day and directed the

parties to provide written submissions on the disputed terms of the new lease and costs, by 06 January 2016.

27. The parties filed their written submissions on 04 and 06 January 2016, respectively. The tribunal also received emails from both counsel and an updated statement of costs from the Applicants' solicitors. The Respondents' submissions referred to various authorities and a witness statement from their solicitor that were not received by the tribunal until 18 January 2016.
28. At the start of the hearing, the tribunal queried the status of CPSL. Mr Trompeter suggested that this company be added as a second Respondent. Ms Doliveux proposed that it be substituted as the Respondent, in place of Ms Kowalska. She accepted that CPSL is bound the notice of claim and confirmed that the preliminary issue, as to the enforceability of the notice, was not being pursued. The tribunal informed the parties that it would deal with CPSL's status in its decision. The tribunal's decision is that CPSL be added as a second Respondent pursuant to rule 10(1) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the 2013 Rules'). This is appropriate, rather than substitution, given that the transfer of the freehold took place two months after the tribunal applications were issued and given the costs issues raised by the parties concern both Respondents.

### **The inspection**

29. The tribunal inspected the Flat on the morning of 16 December in the presence of the First Applicant. The tribunal also undertook walk-by inspections of comparable properties put forward by the two experts at 1A/B, 9, 11 and 18 St Faiths Road, 118 Norwood Road and 5 Birkbeck Hill.
30. St Faiths Road is a quiet residential street and has good transport links, being a short walk from Tulse Hill railway station and the A215 (Norwood Road). Ely Lodge is situated approximately half way along the road and is an imposing detached period villa, constructed of London Yellow Stock brick under a natural slate roof. The exterior would benefit from some updating.
31. The Flat comprises of four bedrooms, a bathroom/WC and small storage cupboard on the second floor and a shower room/WC with storage cupboard behind, dining room, small kitchen and large sitting room on the first floor.
32. The second floor accommodation has pitched ceilings and two of the bedrooms are small. The bathroom is in the former tank room and has its own hot water supply. There are no water tanks in this room. The



tribunal did not inspect the loft space, which is accessed from a ceiling hatch on the second floor landing. The First Applicant stated that it has limited headroom and houses the current water tank/s. The first floor has a slightly awkward layout and the kitchen is very small for the size of the Flat.

### Issues

33. By the time of the hearing the only valuation issues in dispute were the long lease and freehold vacant possession ('VP') values of the Flat. The following matters had been agreed, as set out in the experts' joint statement:

Unexpired lease term	78.69 years
Floor area (GIA)	144 square metres
Relativity rate	95.92%
Capitalisation rate	7.5%
Deferment rate	5%
Discount for improvements	£0

34. Although it was not referred to in the joint statement, the agreed valuation date is 22 December 2014 being the date of the section 42 notice.
35. The agreed GIA figure excludes the tank room, as this is not demised by the lease. The parties are currently in dispute over the ownership of this room, which was converted into a bathroom by the Applicants' predecessors. Neither expert took account of the tank room, when valuing the Flat. The tribunal was not asked to make any determination of the ownership of this room, nor does it have jurisdiction to do so.
36. The parties are also in dispute over alterations to the layout of the Flat that were undertaken by the Applicant's predecessors.
37. The issues to be decided by the tribunal are:
- (i) The long lease and freehold VP values of the Flat;
  - (ii) The disputed terms of the new lease; and

(iii) The parties' applications for costs under Rule 13 of the 2013 Rules.

38. The valuation experts were unable to agree the extended lease value of the Flat and whether there should be a 1% uplift for the freehold VP value. In his opening submissions, Mr Trompeter made various criticisms of the comparable sales put forward by Mr Avery, including the use of post valuation date sales. He contended that these should be disregarded and referred the tribunal to the High Court's decision in ***Gaze and another v Holden and others [1982] 266 EG 998***, which concerned an option to purchase a farm that provided for "valuation in the usual way". HHJ Finlay QC concluded that this meant "...taking account of the events which have happened as at the date when the property falls to be valued...and taking into account not only the actualities at that date but the possibilities in relation to all the circumstances and that the valuer has, as best he can, to form his own judgment as to how these possibilities and the various prospects that are inherent in the then existing situation affect the value of the property as at that date; but that he is not entitled to take into account events which happened subsequently and which resolve how these various possibilities and prospects in fact turn out".
39. Ms Doliveux argued that post valuation date sales could be take into account and pointed out that ***Gaze*** was decided by the High Court, did not concern the 1993 Act and could be distinguished on its facts. The tribunal is an expert panel with specialist valuation knowledge, putting it in a different position to the High Court. Ms Doliveux also pointed out that some of the comparable sales relied upon by Mr Rowland had completed after the valuation date.

### **Capital values of the Flat**

#### **Evidence**

40. Both experts are valuation surveyors. Mr Rowland is a director of Macland Surveyors Limited, which is a general practice surveying firm based in Beaconsfield, Buckinghamshire. He has approximately 11 years' experience in the property industry, was admitted as professional member of the RICS in May 2011 and is an RICS Registered Valuer.
41. Mr Avery is the principal professional in the firm of Avery Associates Chartered Surveyors, which is based in London SW16 3AG. He has almost 40 years' experience in the property industry and qualified in 1971. He became a fellow of the RICS in 1986 and established his current practice in 1994. This operates mainly in the South London boroughs and specialises in residential property matter and landlord and tenant work.

42. The tribunal were supplied with one report from each expert. In his report, dated 30 November 2015, Mr Rowland valued the new lease premium at £14,055. Mr Avery valued the premium at £26,500 and his report is dated 07 December 2015. It is unnecessary for the tribunal to recite the contents of these reports in detail, as they are there for the parties to see and many of the valuation issues were agreed. Furthermore, Mr Avery's report ran to 196 pages (including the various appendices). This is wholly excessive, given the relatively modest sum in dispute. Mr Rowland's report was a more manageable 25 pages.
43. Mr Rowland relied on four comparables, as detailed below:

Property	Completion	Price	Details
11A St Faiths Road SE21 8JD	27/06/14	£425,000	Two bedroom GFF with private demised garden and share of freehold. 730 ft <sup>2</sup> Lease – 999 years from 19/12/92.
118C Norwood Road SE2 9AY	23/12/14	£480,000	Three bedroom on second and third floors. Fully refurbished. 1,410 ft <sup>2</sup> . Lease – 99 years from 01/01/14.
118A Norwood Road SE24 9AY	16/01/15 (under offer on valuation date)	£517,000	Three bedroom flat on ground and lower ground floors. Small garden/patio and fully refurbished. 1,207 ft <sup>2</sup> . Lease -99 years from 01/01/14.
5 Birkbeck Hill SE21 8JS	13/02/15 (under offer on valuation date)	£635,000	Three bedroom semi-detached house. Private rear garden. 1,100 ft <sup>2</sup> . Freehold.

44. Mr Rowland considers these to be the best comparables, given the paucity of sales of large flats in the local area. He has analysed the sales and taken account of differences in accommodation, facilities and location, when valuing the Flat. He has taken the floor areas from sales particulars, copies of which were appended to his report.
45. 11A St Faiths Road is much smaller than the Flat and the location of 118C and D Norwood Road is inferior, as this is a busy road. Even so, Mr Rowland considers that 118C is a particularly good comparable, given the size and the short gap between sale date and the valuation date. He also considers 5 Birkbeck Hill to be a good comparable, as it is in a similar location to the Flat and sold close to the valuation date. However it would command a substantial premium, as it is freehold house with a private garden. The Flat has no outside space and Mr Rowland feels this would hinder the value, as its size would otherwise lend itself to family occupation.
46. Mr Rowland does not consider it appropriate to value the Flat on a price per square foot/metre basis, given its location and the lack of correlation between the floor areas and sale prices of his comparables. In his opinion, valuing on floor area is rare outside prime central London ('PCL') and other city centres, save in the case of new-build properties. Local buyers look at accommodation, rather than floor area. Mr Rowland described the Flat as being unique, given its large size and lack of outside space. However this uniqueness does not enhance its value. There are other options available to local buyers looking for a family property.
47. In Mr Rowland's opinion, the unimproved, unaltered and unmodernised freehold VP value of the Flat is £550,000. This is based on a long lease value of £544,500 with an uplift of 1%. His rationale is that the various relativity graphs express relativity as a percentage of short lease to freehold (rather than long lease) values.
48. In cross-examination, Mr Rowland stated that he had qualified all four of his comparables by checking the details with the selling agents, although this was not referred to in his report. When valuing the Flat he had not made specific adjustments for the differing attributes of the comparables. Rather he had made broad-brush adjustments. Again, these were not referred to in his report. Mr Rowland did not make any adjustment for time, when analysing the sale of 11A St Faiths Road. He accepted that the best comparables were those closest in time to the valuation date.
49. Mr Rowland acknowledged that he had not considered the impact of the right of access to the tank room, when valuing the Flat. His view is this might affect saleability but would have no impact on value.

50. On questioning from the tribunal, Mr Rowland stated that he had looked at a number of local sales before selecting the best four comparables and there had been no 'cherry picking'. He is familiar with the local area and valued other properties in Streatham and Brockley, but not Tulse Hill.
51. Mr Avery also used a comparable approach to valuing the Flat. He had looked at sales of numerous flats in the local area. Appended to his report were details of 22 comparables in St Faiths Road, Birkbeck Place, Deerbrook Road, Deronda Road, Elmcourt Road, Norwood Road, Romola Road and Thurlow Park Road. Of these, the following six are all in St Faiths Road:

Property	Completion	Price	Details
Flat 1A, 1A St Faiths Road SE21 8JD	17/04/15	£340,000	Ground floor new-build flat with front paved area and off street parking. 48.77m <sup>2</sup> . Lease – 999 years from 01/06/14.
Flat 2, 1B St Faiths Road SE21 8JD	01/05/15	£455,000	First floor new-build flat. No outside space or off street parking. 67.30m <sup>2</sup> . Lease – 999 years from 01/06/14.
Flat 4, 1B St Faiths Road SE21 8JD	13/04/15	£337,500	Second floor new-build flat. No outside space or off street parking. 49.60m <sup>2</sup> . Lease - 999 years from 01/06/14.
Flat 5, 1B St Faiths Road SE23 8JD	23/07/15	£337,500	Second floor new-build flat with no outside space or off road parking. 65.03m <sup>2</sup> . Lease – 999 years from 01/06/14.

Flat 1, 9 St Faiths Road SE21 8JD.	27/02/15	£440,000	Two bedroom ground floor flat with garden. 67.95m <sup>2</sup> . Lease – 158 years from 27/06/14.
Flat 2, 18 St Faiths Road SE21 8JD	30/05/14	£575,000	No description. Garden “remote” from flat. 122.29m <sup>2</sup> . Lease – 114 years from 08 December 2011.

52. The first four of these comparables are all in the same newly constructed, purpose built block on the corner of St Faiths Road and Thurlow Park Road. (1A/B St Faiths Road). Mr Avery described St Faiths Road is being in an “*island of relative tranquillity*”. In his opinion the location of Ely Lodge is superior to all of his comparables and its features are superior to almost all of the nearby properties.
53. Mr Avery analysed all of his comparables and not just those in St Faith’s Road, to put his valuation in context. Copies of his calculations and the Land Registry entries and filed plans were appended to his report. He worked out a price per square metre for each property, as at the valuation date. This involved calculating the GIA by taking measurements from Land Registry filed plans, using a calibrated 1:1250 rule to match the scale on the plans. For each road he also undertook site measurements, using a calibrated laser measuring device, to establish the width of the carriageway at stated locations. Mr Avery then checked each site measurement against the scaled dimension for the carriageway, to identify the ‘plan discrepancy’ in percentage terms, for the linear measurement. He then adjusted the linear measurement for each comparable by this percentage. For example in the case of 1A/B St Faiths Road the adjustment was 6.438%.
54. Having worked out the GIA for each comparable, Mr Avery then adjusted the sale prices for time (where appropriate) using the Land Registry House Price Index (‘LRHPI’) for Lambeth. His final step was to divide the adjusted price by the adjusted GIA, to work out the price per square metre on the valuation date.
55. Mr Avery valued the Flat having regard to the six comparables in St Faiths Road, which had a mean average value of £6,820 per square metre. He then discounted the figures for the four flats at 1A/B St Faiths Road by 15%, to reflect the premium that might be paid for new-builds, which reduces the average value to approximately £6,000 per

square metre. Mr Avery did not make any other adjustments, for the differing characteristics of his comparables.

56. Mr Avery also had regard to the marketing of the Flat in the summer and autumn of 2014. It was marketed by Pedder Estate Agents, initially at a price of £625,000. Copies of the sales particulars were also appended to Mr Avery's report. The floor plan includes the tank room and the GIA is stated to be 157 square metres. Within a few weeks of marketing, the asking price was dropped to £599,950. The Applicants subsequently withdrew their instructions to Pedder and decided to retain the Flat, rather than sell it.
57. Mr Avery adjusted the asking price of £599,950 to take account of the short lease, using a relativity of 95.54%. This gave a value of £4,450 per square metre, including the tank room. Mr Avery calculated the value excluding the tank room at £4,620 per square metre. Having regard to these figures and the average for the comparable in St Faiths Road, his opinion is that both marketing prices were too low. Mr Avery suggested that this might be due to defects in the lease.
58. Ultimately, Mr Avery based his valuation on the averages for the St Faiths Road comparables (£6,050 per square metre) less a discount of 10% for the larger size of the Flat. He then applied the GIA, excluding the tank room and deducted a sum of £5,000 to reflect the adverse impact of the reservation over the tank room. This resulted in an long lease value of £779,080, which Mr Avery rounded down to £779,000. He did not give a freehold VP value, arguing that the relativity percentage should be applied to the long lease value. The tribunal referred him to the RICS research report "Leasehold Reform: Graphs of Relativity (2009)". Paragraph 2.1 reads:

*"In the context of statutory valuations under leasehold reform legislation, "leasehold relativity" is the value of a dwelling held on an existing lease at any given unexpired term divided by the value of the same dwelling in possession to the freeholder, expressed as a percentage."*

59. Mr Avery was cross-examined, regarding his relationship to Ms Kowalska, his experience of valuing properties in the West Dulwich area and his approach to valuing the Flat. He accepted that the value of the Flat was the price that a hypothetical buyer and seller would have struck on the valuation date but was adamant that subsequent sales of comparable properties could be taken into account. He has given evidence in previous tribunal cases where post valuation date comparables have been accepted. Further such evidence shows market trends, which are taken into account by hypothetical buyers and sellers. The LRFPI for Lambeth increased by 8% during the period June to December 2014.

60. In cross-examination, Mr Avery explained that his valuation involved a two-stage process. Firstly he looked at the comparables to derive a value for the Flat, by analogy. He then stood back and looked at whether the valuation was realistic. This is where the comparables in the other roads came in. They acted as a "sense check" and justified a value of at least £6,050 per square metre. Many of the comparables had higher floor area values. A hypothetical buyer would look at other local properties being marketed by estate agents, to see what alternatives were available.
61. The four comparables at 1A/B St Faiths Road all completed after the valuation date but Mr Avery's understanding is that they were purchased off-plan and that contracts had been exchanged much earlier. This was based on the term of each lease, which commenced on 01 June 2014. He believed that contracts were exchanged "about June 2014" but there was no evidence of the exchange dates. It may be that one or both of the other flats at the development were sold earlier, which would explain the commencement date. It would be normal for all six leases to be coterminous.
62. Mr Avery was cross-examined at some length regarding his methodology. He had not undertaken internal inspections of any of his comparables and could not be sure of their internal state of repair. However he felt able to make a very good estimate, based on his external inspections, his knowledge of other local properties and information gleaned from internet searches.
63. In relation to Flat 2, 18 St Faiths Road, Mr Avery accepted that the longer lease would enhance its value. His opinion is that the garden would have no material impact on value, as it is 30-40 meters away from this flat, is an unusual shape and overgrown and is adjacent to a very fast moving train-line. This information was based on a Google Earth photograph of the property.
64. When measuring the comparables, Mr Avery had included with the width of the walls. The RICS Code of Measuring Practice states that walls should be disregarded. Furthermore the HMLR filed plans show general boundaries only and include an express disclaimer in the following terms:
- "This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match the measurements between the same points on the ground."*
65. Mr Trompeter referred Mr Avery to discrepancies in measurements for 118A Norwood Road. This was one of Mr Rowland's comparables and the Rightmove property details gave GIA figures of 1,207 square feet and 112.13 square metres. This property had also been analysed by Mr



Avery, who had calculated the GIA to be 81.94 square metres. This is a discrepancy of 39.18 square metres. Mr Avery suggested that GIA figures in agents' particulars are often inaccurate and referred to Rightmove's standard form disclaimer.

66. Mr Avery accepted that his measurement approach did not follow that suggested in the RICS Code but pointed out that the Code is not prescriptive. Rather it sets out best practice. Mr Avery also accepted that if his measurements were wrong then the values per square metre would need to be adjusted.
67. Mr Avery had little knowledge of the data used to prepare the LRHPI but rejected Mr Trompeter's suggestion that this index had limitations and was of little probative value. Mr Trompeter referred the tribunal to section 4.2 of the RICS information paper "*Comparable evidence in property valuation*", which suggests that property market indices should be treated with caution.
68. Mr Avery was also cross-examined on the marketing of the Flat in the summer and autumn of 2014. The original asking price of £625,000 was reduced to £599,950 after a short period, yet his short lease value of the Flat was much higher. Mr Avery suggested that the asking prices were low and this might reflect 'defects' in the lease that were to be disregarded when valuing the Flat under schedule 13 to the 1993 Act. Also, there has been a considerable increase in property values during the second half of 2014.
69. On questioning from the tribunal, Mr Avery stated that the defects in the lease were:
  - the unauthorised annexation of the tank room;
  - unauthorised alterations to the internal layout of the Flat; and
  - other breaches of the lease.

Mr Avery considers that these issues would all deter prospective purchasers. However he accepted that they are not defects in the lease. Rather they are alleged breaches of the lease.

70. In re-examination, Mr Avery stated that any occupation of the Flat by sub-tenants might have affected the marketing price in the summer/autumn of 2014 and that he would need to see the tenancy agreement to determine the impact.
71. After the oral evidence from the two experts, Mr Trompeter sought permission to call one of the Applicants to briefly give evidence

regarding the marketing of the Flat. Ms Doliveux objected on the basis that no statement had been disclosed. However the tribunal acceded to the request, given the potential importance of this evidence. The marketing of the Flat had been covered in Mr Avery's report, which included copies of the sales particulars, so this was not a new issue. Further Ms Doliveux was given an opportunity to test the evidence in cross-examination. The tribunal explained that it would carefully consider what weight to attach to the evidence, when making its decision.

72. The Second Applicant then gave oral evidence. She and her husband selected Pedder to market the Flat and it was Pedder who suggested the original asking price of £625,000. The Flat went on the market on 14 August 2014. At that time the Applicants were still living at the Flat. After approximately 2 weeks, during which time had been no viewings, Pedder suggested a reduction to £599,500 as they had received feedback that the Flat was overpriced. This would have been in late August 2014.
73. The Applicants moved out of the Flat on 07 October 2015. Pedder continued the marketing until November. In total there were 3 viewings and no offers. The Applicants decided to take the Flat off the market as the adjacent property was being redeveloped and was a "building site". Also the quiet Christmas period was approaching. The Applicants then sublet the Flat.
74. In cross-examination, the Second Applicant stated that Pedder had first been instructed in July 2014 but the Flat did not go on the market until 14 August 2014. During the marketing period the internal condition was reasonably good. The Flat was marketed on Pedder's website and at all of their offices. There was also an open morning one Saturday, when the Applicants had to stay away from the Flat. The general feedback from Pedder was that the asking price was too high and they could not get people through the door. The First Applicant did not consider the lease-length to be the problem, as they could have negotiated on the price had this been raised.
75. One other factor that might have affected the marketing of the Flat was a letter sent by the First Respondent's then solicitors, Van Eaton, to Pedder on 23 July 2014. This read:

*"We refer you to the conversation of even date (wallis/redburn) where it was confirmed to you that the above is the subject of an ongoing dispute in respect of the alleged encroachment of the tank room no used as a second bathroom by your client.*

*Have Mr & Mrs Fatuga made you aware, and through you and potential purchasers of this?"*

## Submissions

76. Both counsel made oral submissions on valuation at the end of the hearing. Ms Doliveux invited the tribunal to take account of the post valuation date comparables. She pointed out that **Gaze** was a decision of the High Court made back in 1982 and that Mr Trompeter had not referred to more recent decisions. If post valuation date sales are disregarded then this would exclude all but one of Mr Avery's comparables in St Faiths Road.
77. Ms Doliveux suggested that the tribunal should attach little weight to Mr Rowland's evidence, as:
- he had only relied on a very limited sample of 4 comparables;
  - he had not provided details of the other properties considered; and
  - he had taken a broad-brush approach to adjustments and it was not clear how he had reached his valuation of the Flat, which was seemingly plucked from thin air.
78. Ms Doliveux submitted that Mr Avery's evidence should be preferred, as he had used a clear methodology that had been closely scrutinised in cross-examination. He accepted that there were some limitations to his approach but had taken his role as an expert witness very seriously and made considerable efforts to discharge his duty to the tribunal. Furthermore Mr Avery had far greater local experience than Mr Rowland.
79. Ms Doliveux asked the tribunal to attach little weight to the Second Applicant's evidence on the marketing of the Flat, in the absence of any statement. Mr Rowland's valuation was substantially below the two asking prices and there was no independent evidence from Pedder.
80. Ms Doliveux invited the tribunal to accept Mr Avery's method of applying relativity to the long lease value.
81. Mr Trompeter maintained that the post valuation date sales should be disregarded, as such events could not be in the mind of a willing seller. Only one of Mr Avery's comparables completed before the valuation date and he had not said how the other five might be of probative value. This left just one useful comparable, Flat 2, 18 St Faiths Road. Mr Avery had little information about this property but it has the benefit of a garden, albeit remote and a much longer lease.

82. Mr Trompeter described the omission of specific adjustments to Mr Rowland's four comparables as "*probably a demerit*". However he contended that this did not detract Mr Rowland's broad-brush approach, which was based on feel rather than science.
83. Mr Trompeter was critical of Mr Avery's methodology and referred to the latter's lack of knowledge of his comparables and failure to make adjustments for their differing characteristics. He also highlighted the unusual approach to measuring the comparables, which was contrary to the RICS code. He suggested that Mr Avery's measurements were unreliable, as evidenced by the large disparity with the agent's figures for 118A Norwood Road. Furthermore, Mr Avery's valuation was unsustainable having regard to the marketing of the Flat in 2014. It was inconceivable that the short lease value could be £744,257 when it had not sold at £599,950, a few months earlier.
84. Mr Trompeter suggested that the LRHPI should not be relied upon when adjusting for time, as Mr Avery did not really understand the data used to compile the index.
85. On relativity, Mr Trompeter submitted that a 1% uplift was appropriate as the agreed relativity applies to the freehold value.

### **The tribunal's decision**

86. The tribunal determines that:
  - (a) the long lease value of the Flat on the valuation date was £620,000 (six hundred and twenty thousand pounds); and
  - (b) the freehold VP value was £626,200 (six hundred and twenty six thousand, two hundred pounds).

### **Reasons for the tribunal's decision**

87. Neither expert was entirely convincing. Mr Rowland failed to make any adjustment for time for 11A St Faith's Road, which is much smaller than the Flat and of little assistance. The comparables at 118 Norwood Road were on a much busier road and in a less attractive building, so were far from ideal. Furthermore, Mr Rowland did not quantify his adjustments to the comparables. Rather he had taken a broad-brush approach and reached his valuation by 'feel'. This made it very difficult to assess the accuracy of his valuation. Surprisingly, Mr Rowland did not address the marketing of the Flat in the summer/autumn of 2014, which was highly relevant. It may be that he was unaware of this. If so, then this was significant omission in his instructions.

88. Mr Avery relied on six comparables in St Faith's Road but four of these were in the new-build block at number 1A/B and were so markedly different to the Flat to be of little value. The comparable at 9 St Faiths Road is significantly smaller than the Flat and is also of little assistance. Flat 2, 18 St Faiths Road was of some benefit but Mr Avery had not made any adjustments for the garden or longer lease.
89. The tribunal agree with Mr Rowland that it was not appropriate to value the Flat on a floor area basis, given the location and the unusual combination of large size with no outside space. Furthermore, Mr Avery's method of measuring his comparables was unreliable, as the Land Registry make it very clear that that measurements scaled from their filed plans might differ from those on the ground. This is borne out by the disparity in the measurements for 118A Norwood Road.
90. At this point it is appropriate to comment on Mr Trompeter's submission on post valuation date sales. These should not be disregarded altogether. Rather each comparable should be assessed on its merits. An ideal comparable is one that is very similar to the subject property with completion very close to the valuation date. However these are rarely found and an expert must then try and find the best comparables available, whether before or after the valuation date.
91. The tribunal is not constrained by the decision in *Gaze*, which is fact sensitive and did not concern a statutory valuation under the 1993 Act. However the tribunal was not required to assess the merits of any post valuation date sales, given that Mr Avery's only helpful comparable (Flat 2, 18 St Faith's Road) completed in May 2014.
92. The marketing of the Flat in the summer/autumn of 2014 was highly relevant, being shortly before the valuation date. It did not sell at the asking price of £599,950 between late August and November 2014. This suggests that the price was too high but the tribunal had very little information to go on and cannot be sure why the Flat did not sell. Presumably Pedder felt that the Flat was worth close to £599,950, having recommended this figure to the Applicants.
93. The best comparable evidence was the sale of Flat 2, 18 St Faith's Road in May 2014 at £575,000. This is very close to the Flat but the building is less attractive than Ely Lodge. However it does have the benefit of a garden. The tribunal rejects Mr Avery's assertion the garden has no impact on value. This is a large flat that would lend itself to family occupation. Clearly the garden enhances the value. The tribunal concluded that the benefit of the garden counteracts the less attractive building, which means this comparable is very similar in value to the Flat. Adjusting the sale price for time, using the LRHPI for Lambeth, gives a long lease value on the valuation date of £621,862. The tribunal used the Land Registry index, notwithstanding the reservations

expressed by Mr Trompeter. Clearly there has to be an adjustment for time and no alternative index was put forward.

94. The tribunal also had regard to the sale of 5 Birkbeck Hill for £635,000, in February 2015. This was only two months after the valuation date. The tribunal agrees with Mr Rowland that this property would be more valuable than the Flat, as it is a freehold house with a garden. Given a choice between a leasehold flat and a freehold house, of similar size and in similar locations, most prospective buyers would prefer the house.
95. Doing the best it can on the limited evidence available, the tribunal concluded that the long lease value of the Flat on the valuation date was £620,000.
96. Having regard to the RICS research report on relativity and the members' professional knowledge and experience, the tribunal concluded that the agreed relativity should be applied to the freehold value of the Flat. There is a difference (albeit slight) in the long leasehold and freehold values of the Flat, which justifies an uplift of 1%. The amount of the uplift, as opposed to the principle, was not challenged by Mr Avery. Increasing the long leasehold value of £620,000 by 1% gives a freehold value of £626,200.
97. The tribunal also undertook its own "*sense check*". Applying the agreed relativity of 95.92% to the freehold value gave a short lease value of £600,651. This is marginally higher than the marketing price of £599,950, which reflects the slightly later valuation date and the increase in local property prices during the latter part of 2014.

### **Summary**

98. **Having determined the freehold value of the Flat at £626,200 and applying the agreed relativity, capitalisation and deferment rates, the tribunal determines that the lease extension premium is £17,087 (seventeen thousand and eight-seven pounds). The tribunal's calculations are set out in the attached schedule.**

### **Disputed lease terms**

99. The disputed lease terms were addressed in the First Respondent's evidence and both parties' written submissions.

### **Evidence**

100. The First Respondent's statement, dated 09 December 2015, primarily dealt with the tank room and the layout of the Flat. She owns Flats 1

and 3 at Ely Lodge. She lives in Flat 1 and sublets Flat 3 to an “*elderly gentleman*”, who has lived there for several years.

101. The First Respondent has been familiar with Ely Lodge since 1971, as a friend (Victoria Sewell) used to live in Flat 3. The First Respondent moved into Flat 3 in 1980, which she rented from the then freeholder (Gillian Taras). They subsequently became close friends.
102. The tank room on the second floor, can only be accessed from the Flat. It used to house water tanks that served the three flats at Ely Lodge. The First Respondent used to check on the tank room and to light night lights under the tanks, to prevent the water freezing, when the tenants of the Flat were away.
103. The First Respondent went to university in the early 1990s. Gillian asked if she wanted to buy the Flat, which she declined. The Flat was then sold to Joanne Elsey, who was granted the existing lease dated 31 August 1994.
104. Gillian went into a nursing home in the early 2000s. Around this time the First Respondent heard lots of banging and crashing from the Flat, which is above Flat 3. She attributed this to building works and also observed building materials in the garden, including pipes and plumbing equipment. She thinks it likely that the tank room was converted into a bathroom during this period. The building works were undertaken by Joanne Elsey’s partner, John.
105. Gillian’s son, Chris Taras, obtained a valuation of the freehold of Ely Lodge in July 2002. This was prepared Mr D Williamson FRICS of Hindwoods Hunter Payne, who produced a report dated 30 July 2002 following an inspection on 22 July. He valued the freehold at a figure in the region of £225,000. This was based on vacant possession of Flat 1, the lease of the Flat and a protected tenancy of Flat 3. In his report, Mr Williamson referred to the first floor of the Flat being divided “...into a self-contained unit comprising lobby, bedroom, living room with kitchen area off and shower room with WC, whilst the top floor comprised four rooms (one fitted as kitchen) and bathroom with WC”. This establishes that the tank room had been converted into a bathroom by the time of his report.
106. The First Respondent informed the Applicants of the alterations to the Flat, which she believed to be unauthorised, prior to their purchase in (September) 2003. Three or four months later, she acquired the freehold of Ely Lodge. She subsequently obtained a report from Property Services Plus Limited Surveyors and Estate Managers, dated October 2004, prepared following an inspection on 18 August 2004. This addressed the layout of the Flat and recorded that the first floor was broadly the same as the lease plan, save that the kitchen had been altered so that it opened onto the dining room rather than the hallway.

This necessitated various changes to the pipework, both internal and external. The report confirmed that the tank room on the second floor had been converted into a bathroom/WC, again with consequential changes to the pipework.

107. It is clear from Mr Williamson's report that the alterations to the Flat were undertaken prior to the First Respondent's acquisition of the freehold. At paragraph 16 of her statement she says "*I can only assume that the alterations were carried out by Joanne Elsey's partner, during the period 2002-2004*". Earlier on, at paragraph 3, she says "*Gillian was extremely pedantic and meticulous in her record keeping. She would insist that all dealings with the property were confirmed in writing. I am absolutely certain that she was not asked for permission to carry out alterations to the tank room nor was she notified on completion of the works*".
108. In cross-examination, the First Respondent accepted that the lease of Flat 3 is in materially the same form as the existing lease of the Flat. The subtenant of Flat 3 has not entered into a direct covenant to pay the service charge, as required by clause 2(15)(iii). The First Respondent does not consider this appropriate, as the subtenant has no money. She has never asked the subtenant to pay a service charge.
109. The First Respondent suggested that the requirement for a direct covenant was really aimed at long term subtenants, rather than those with short tenancies, to ensure they comply with the lease terms.
110. The First Respondent was also cross-examined about the tank room. She believes the water tanks were moved into the eaves, when it was converted into a bathroom and can only be accessed via the tank room. The First Respondent has not obtained access to the tank room during the last 15 years. She does not have a key to the Flat but has sought access by ringing on the doorbell, without success. This was to investigate leaks. There have been 7 incidents of flooding in the last 15 years. When pressed by Mr Trompeter, the First Respondent stated that she had tried to get into the tank room "*about twice*".

### **Proposed amendments to the existing lease**

111. The Applicants seek two amendments, namely:
  - (a) the modification of clause 2(15)(iii) by the addition of the words in bold type, so it reads:

*"Not to assign underlet or part with possession of the Flat without first obtaining from the assignee transferee underlessee or undertenant **(but excluding assured or assured shorthold***



*tenants) a covenant directly with the Lessor to pay the service charge covenanted to be made under sub-clause (2) hereof...”; and*

(b) the deletion of the rights over the old tank room, reserved at paragraph 3 of the second schedule.

112. The Respondents seek the following amendments:

(a) the modification of clause 2(15)(iv) so that the existing registration fee of £25 is increased to “...£100 plus VAT or such greater registration fee as the Landlord reasonably requires”; and

(b) the introduction of new obligations at clause 2 reading:

*“(21) To pay on demand all costs and expenses of the Landlord by way of legal costs and/or surveyors fees or otherwise in relation to the Tenant making any application to the Landlord or made on the Tenant’s behalf arising out of terms of the existing lease whether or not the Landlord approves such applications*

...

*(26) To pay any legal costs properly incurred by the Lessor in enforcing compliance with the covenants herein contained entered into by the Lessee*

*(27) To pay the reasonable and proper fees and costs (including legal fees) of the Landlords agents (which may be a company connected or associated with the Landlord) for the collection of recovery of rents and service charges for the units in the building and for the general management of the building but not including fees charges expenses or commissions on or in connection with the letting or sale of any other flats in the building*

113. There is a gap in the numbering, as the Respondents originally proposed a number of new sub-clauses. By the time of the hearing, some of these had been abandoned. Confusingly, sub-clauses (21) and (27) refer to “Landlord” and “Tenant”, whereas sub-clause (26) refers to “Lessor” and “Lessee”. The latter is consistent with the terms of the existing lease.

## **Submissions**

114. Both counsel provided lengthy written submissions. Mr Trompeter set out the relevant provisions of section 57 of the 1993 Act and referred to

the Lands Tribunal's decision in **Gordon v Church Commissioners for England [2007] LRA/110/2006**. The latter was cited in **Rossman v The Crown Estate Commissioners [2015] L&TR 31**. Mr Trompeter outlined the various principles that emerge from these authorities. He drew particular attention to paragraph [41] of **Gordon**, in which HHJ Huskinson remarked "*In my judgment there is no power under section 57(6) for a party to require that there is added to the new lease a new provision which is not found in the old lease*".

115. Ms Doliveux also referred to the relevant provisions in section 57 and **Rossman**. The latter establishes a three-part test whereby the party seeking an amendment under section 57(6)(a) must show:

- there is a proper basis for claiming there is a defect;
- the defect is sufficiently serious to warrant change; and
- the change would cure, not just ameliorate the defect.

Ms Doliveux submitted that the burden of proof falls on the party seeking the amendment, whether under subsection (1) or (6).

116. Ms Doliveux also referred to the Upper Tribunal's decision in **Burchell v Raj Properties Limited [2014] L&TR 3**, where the removal of a restriction on the occupation of the flat was refused. The UT found that section 57(6) did not apply, as there was no evidence of a change of circumstance and the restriction could not be said to be a defect.

117. The Applicants seek the amendment to clause 2(15)(iii), under section 57(6)(b). Mr Trompeter outlined the changes that have occurred since the lease was granted, including the First Respondent's acquisition of the freehold of Ely Lodge and the leases of Flats 1 and 3. He also referred to the subletting of Flat 3 on an assured shorthold tenancy, without a direct covenant from the subtenant. The Flat is also sublet on an assured shorthold tenancy and there is no evidence that any of the flats were let on such a tenancy, when the existing lease was granted.

118. Ms Doliveux submitted there was no evidence of a change in circumstances or any legislative change or change in convention, justifying the proposed amendment. Assured and assured shorthold tenancies were introduced by the Housing Act 1988, which came into force almost 6 years before the existing lease was granted. Ms Doliveux also argued that the existing clause is not defective, as it is for the mutual benefit of both parties, relying on the decision in **Burchell**.

119. Mr Trompeter submitted that paragraph 3 of the second schedule should be deleted to take account of alterations to the Flat since the grant of the existing lease, pursuant to section 57(1)(b). At some point

prior to the Applicants' purchase of the Flat, the tank room was converted into a second bathroom and the water tanks were moved into the roof space. This effectively incorporated this room into the demise. Mr Trompeter contended that the alterations rendered the right of access redundant. The water tanks are no longer located in the tank room and there is no conceivable situation where emergency access to this room would be required.

120. The Respondents want to maintain the rights over the tank room. The water tanks have been moved but still exist and may need to be accessed. Ms Doliveux and the First Respondent both referred to the tanks now being in the eaves, whereas it appears the tanks are actually in the loft space above the tank room. They are certainly not in the room itself, as borne out by the inspection.
121. Ms Doliveux submitted that the rights over the tank room were still required. Further there was no evidence from the Applicants or their expert, as to the current location of the tanks. In the absence of such evidence, the Applicants cannot establish a change of circumstances (section 57(6)(b)) or a defect (section 57(6)(a)), justifying the removal of these rights.
122. Ms Doliveux submitted that there had been a change in circumstances justifying an increase in the registration fee at clause 2(15)(v). She described this change as "*..an increase in this registration fee*". In an email to the tribunal dated 08 January 2016, Ms Doliveux referred to the increase in Land Registry fees since the existing lease was granted in 1994.
123. Ms Doliveux relied on a decision of the First-tier Tribunal ('FTT'), concerning 7, 9, 12, 19, 25 and 33 Belmont Hall [2014] LON/00AZ/OLR/2013/1382 & 1474. In that case the FTT allowed a change to the registration fee, as it was considered to be reasonable within the meaning of section 57(6) and there was no prejudice to the lessee, who would be protected by schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act').
124. Mr Trompeter's position was that the proposed change does not fall within section 57(6)(b), as there has been no explanation, or evidence, of the alleged change in circumstances. He also made the point that the tribunal is not bound by the ***Belmont Hall*** decision. It appears that the FTT were not referred to the ***Gordon*** decision in that case and adopted the wrong legal test. Mr Trompeter also distinguished the facts of the two cases. In the present case, a registration fee is payable on the happening of various events, including sub-letting. If a fee of £100 plus VAT is payable every time the flat is sub-let on an assured shorthold tenancy then this would prejudice the Applicants.

125. The three new sub-clauses proposed by the Respondents would enable the Second Respondent to recover certain costs from the Applicants and can be dealt with together. Ms Doliveux submitted that the absence of these costs obligations comprises separate defects. They are required to “..*compensate the landlord for their usual expenses of owning the freehold*” and to prevent him from being left out of pocket, when enforcing the terms of the lease. Ms Doliveux suggested that the defects are sufficiently serious to warrant change. The proposed amendments would cure rather than ameliorate the defects and satisfy the three-part test in ***Rossman***. Further the Applicants would have the protection of schedule 11 to the 2002 Act, in so far as the costs are only payable if they are reasonable.
126. Mr Trompeter’s submissions on the proposed sub-clauses were very succinct. They do not fall within the scope of section 57(1) and the tribunal has no jurisdiction to add new provisions under section 57(6), as stated in ***Gordon***. Further there has been no explanation or evidence from the Respondents, to demonstrate how section 57(6) might be engaged.
127. Mr Trompeter also made submissions on a possible amendment to clause 2(2)(a)(iv). This had been included in the draft lease produced by the Respondents’ solicitors but was not addressed in Ms Doliveux’s submissions. The tribunal assumes that the Respondents no longer seek this amendment.

### **The tribunal’s decision**

128. The tribunal makes the following determinations in relation to the disputed lease terms:
- (a) The proposed amendment to clause 2(15)(iii) of the existing lease is refused.
  - (b) Paragraph 3 of the second schedule is deleted in its entirety.
  - (c) The proposed amendment to clause 2(15)(v) is refused.
  - (d) The proposed introduction of new sub-clauses 2(21), (26) and (27) is refused.

### **Reasons for the tribunal’s decision**

129. In the tribunal’s experience it is unusual for a residential lease to oblige a sub-tenant to pay service charges. However the existing lease was freely entered into by the original parties and is the starting point when determining the terms of the new lease. The Applicants have not

established changes since the commencement date which affect the suitability of clause 2(15)(iii). Accordingly the requirements of section 57(6)(b) have not been satisfied.

130. The transfer of the freehold to the First Respondent does not alter the purpose of the direct covenant, which benefits the freeholder by establishing a direct contractual relationship with the sub-tenant. Furthermore the First Respondent no longer owns the freehold, having transferred it to the Second Respondent in October of last year.
131. The First Respondent's acquisition of Flats 1 and 3 does not alter the purpose of the direct covenant, either. The grant of other leases at Ely Lodge was clearly contemplated by the original parties to the existing lease, as borne out by recital (ii). This expressly provided that other leases would be in similar terms. The fact that the First Respondent is now the lessee of these flats is immaterial.
132. The original parties also contemplated the sub-letting of the Flat, as borne out by alienation provisions at clause 2(15). Clearly this would include assured/assured shorthold tenancies, as the Housing Act 1988 had already been in force for approximately 6 years. The Applicants did not refer to any legislative changes or changes in conveyancing practice that could affect the suitability of the direct covenant.
133. The tribunal were not supplied with a copy of the lease for Flat 3. If this contains the same alienation provisions, then the First Respondent is in breach of her lease by sub-letting it without a direct covenant from the sub-tenant. However this is not a change that justifies a modification to the Applicants' lease. The same is true of the sub-letting of the Flat.
134. With all due respect to her, the First Respondent's interpretation of clause 2(15)(iii) is incorrect. The requirement for a direct covenant applies to all sub-tenancies, of whatever duration. Whether or not this is reasonable is a different matter. The onus was on the Applicants to establish changes that affect the suitability of clause 2(15)(iii), which they failed to do. In the absence of such changes, there was no need for the tribunal to then consider the question of reasonableness. Equally, it was unnecessary to consider whether the clause amounted to a defect, as the Applicants did not rely on section 56(6)(a).
135. There has been a substantial alteration to the Flat since the grant of the original lease, namely the conversion of the tank room into a bathroom and the incorporation of this room into the demise. The water tanks have been moved out of this room and there is no longer any need for emergency access to this room. The likelihood is that the tanks are now located in the loft space. This is accessed from the ceiling hatch on the second floor landing, rather than the tank room. Accordingly the purpose of paragraph 3 of the second schedule to the lease has ceased to exist and this paragraph is deleted pursuant to section 57(1)(b). The

First Respondent still has the right to enter the Flat under paragraph 1(ii) of the second schedule.

136. Clause 2(15)(v) of the existing lease provides for a fixed registration fee of £25. The intention of the original parties was this fee would apply until the expiry of the term in August 2093. The Respondents have not established any change since the commencement of the lease that affects the suitability of this fee. The fact that Land Registry fees have increased in the intervening 22 years is immaterial. The registration fee is payable to the Lessor's solicitors.
137. Of course there has been inflation over the last 22 years and the value of the fee has reduced, in real terms, during this period. However the original parties would have been aware of this when the lease was granted. They chose a fixed rather than variable fee and the Respondents have not established grounds to increase this fee. The proposed grant of the new lease is not a relevant change, as this has not yet occurred. The tribunal is not bound by the FTT's decision in **Belmont Hall**. Further that decision can be distinguished on its facts.
138. The Respondents seek the introduction of new costs obligations by the addition of sub-clauses 2(21), (26) and (27), pursuant to section 57(6)(a). These are disallowed for the reasons advanced by Mr Trompeter. Paragraph 41 of **Gordon** is clear. There is no power for the tribunal to introduce new provisions under section 57(6). Furthermore, as mentioned by the tribunal at the hearing, they were not sought in the counter-notice.

### **Costs**

139. The Applicants and the Respondents seek costs orders under Rule 13(1)(a) and/or (b) of the 2013 Rules. The grounds of their applications were set out in the solicitors' witness statements (Mr Kramer for the Applicants and Mr Mitchell for the Respondents) and the written submissions from both counsel. Neither Mr Kramer nor Mr Mitchell gave oral evidence but the factual matters covered in their statements are not in dispute. Rather there is a difference of opinion, as to each other's conduct.
140. The Applicants' claim is based on the Respondents' conduct of the preliminary issue, which arose from the transfer of the freehold in October 2014. The total sum being claimed is £4,453.20 (including VAT). Mr Mitchell's statement and Ms Doliveux's submissions also refer to the determination of the costs payable under section 60 of the 1993 Act. However this was not raised in Mr Trompeter's submissions and Mr Kramer's statement spelt out that Applicants' statement of costs was limited to the withdrawal of the preliminary issue. The issue of section 60 costs was not before the tribunal, as that part of the applications had been stayed by paragraph 1 of the directions.

141. The Respondents seek a costs order based on the Applicants' late compliance with paragraph 3 of the directions and failure to disclose the assured shorthold tenancy agreement for the Flat. The sum being claimed is £1,100 plus VAT (total £1,320).
142. The written submissions helpfully set out the relevant law. The tribunal has the power to make a wasted costs order against a legal or other representative, arising from "...any improper, unreasonable or negligent act or omission..." (Rule 13(1)(a) and sections 29(4) and (5) of the Tribunals, Courts and Enforcement Act 2007). The leading case on wasted costs is ***Ridehalgh v Horsefield [1994] Ch 205***, which analysed each of these adjectives. The word unreasonable "...aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case..." and "The acid test is whether the conduct permits a reasonable explanation".
143. The tribunal also has the power to make an order for costs "if a person has acted unreasonably in bringing, defending or conducting proceedings..." (Rule 13(1)(b)(ii)). There is a high threshold and costs orders are relatively rare. Ms Doliveux referred to three cases involving costs applications before other tribunals; ***Total Fulfilment Logistics v May (Valuation Officer) [2014] UKUT 354***, ***Wallis v HMRC [2013] UKFTT 081 (TC)*** and ***Osannaya v Queen Mary University of London [2011] UKEAT 0225/11/SM***. In all three cases, the tribunals declined to make a costs order.
144. Ms Doliveux also referred to Rule 3(4) and the parties' obligation to help the tribunal further the overriding objective and to cooperate with the tribunal generally.
145. Mr Trompeter submitted that the Respondents have acted unreasonably. Alternatively the Respondents' solicitors have acted improperly, unreasonably or negligently by raising and/or pursuing and/or abandoning the preliminary issue. Mr Trompeter referred to the following matters:
- (a) the transfer of the freehold in October 2014, as a means of trying to defeat the new lease claim;
  - (b) the late withdrawal of the preliminary issue, one month after the further directions and only one day before the due date for skeleton arguments;
  - (c) the Applicants had incurred costs in preparing for the preliminary issue argument by the time of the withdrawal; and
  - (d) after withdrawing the preliminary issue, the Respondents' solicitors continued to maintain that the notice of claim was invalid. However

at the hearing, Ms Doliveux expressly confirmed the opposite. The work on the preliminary issue could have been avoided, had the Respondents' solicitors accepted this at the outset. It was first in the letter from the Applicants' solicitors to the tribunal of 05 November 2015.

146. Unfortunately there was a factual dispute over the extent of the concession made by Ms Doliveux at the start of the hearing. Her position is that she simply agreed the tribunal had jurisdiction to hear the case. The tribunal's note is that having confirmed that the preliminary issue was withdrawn, Ms Doliveux accepted that the Second Respondent was bound by the notice of claim. However nothing turns on this factual dispute.
147. The Respondents oppose the Applicants' costs application. Ms Doliveux suggested that the discretion to award costs under Rule 13(1)(a) or (b) should be wielded with extreme caution. The subject of the preliminary issue was an undecided point of law that might be outside the tribunal's jurisdiction. The point was pursued in good faith and in the Respondents' interests. The decision to withdraw the preliminary issue was a commercial one, as the Applicants' solicitors would not agree a separate preliminary hearing. This meant it was necessary to brief counsel for the full hearing and not just the preliminary issue. The withdrawal of jurisdiction argument, prior to the hearing, saved costs rather than wasting them and the Respondents should not be penalised for this.
148. The Respondents' grounds for seeking a costs order are:
  - (a) the Applicants' solicitors failed to return the Respondents' draft deed of surrender and re-grant with any amendments shown in red by 07 October 2015, in breach of paragraph 3 of the directions; and
  - (b) the Applicants' solicitors failed to comply with two requests for a copy of the tenancy agreement for the Flat and Mr Kramer refused the second request in an email dated 07 December 2015. The agreement was sought so Mr Avery could complete his report. In oral evidence he stated the agreement would have had little impact on his valuation but was relevant in so far as vacant possession might be preferred by a potential buyer.
149. Ms Doliveux also submitted that the Applicants had acted unreasonably in pursuing, and then failing to withdraw, their costs application. She suggested that the parties' conflicting complaints of unreasonable behaviour might cancel each other out and that the fairest might be for each side to bear their own costs.



150. The Applicants' failure to comply with the directions was addressed at paragraphs 13 to 16 of Mr Kramer's statement. His starting point was that both parties had missed deadlines, due to the complications caused by the transfer of the freehold and the ongoing without prejudice negotiations. The Applicants did not comment on the draft deed, as none of the lease variations proposed by the Respondents were permitted under section 57 and there were errors in the deed. Rather the Applicants' solicitors produced their own draft lease on 04 December 2014. This was 11 days before the hearing and the Respondents have suffered no real prejudice from the delay. Furthermore the Respondents failed to comply with directions and only served Mr Avery's report on 11 December 2015.
151. Mr Trompeter referred to the Respondents' solicitors' failure to explain why the tenancy agreement was of any relevance to these proceedings and why its non-disclosure had resulted in unnecessary legal costs. It is also difficult to discern why the purported non-compliance with directions had resulted in unnecessary costs. Mr Trompeter characterised the Respondents' costs application as "*...an unattractive and opportunistic reaction to the Tenants' own application for costs*".

### **The tribunal's decision**

152. The tribunal refuses both applications for costs.

### **Reasons for the tribunal's decision**

153. At the hearing the tribunal expressed its view that this case should have settled, given the modest sum in dispute relative to the costs of the proceedings. This view was reinforced when considering the parties' lengthy written submissions.
154. The difference between the experts' valuations was only £12,500 and the disputed lease terms should have been capable of agreement. It is surprising that the parties chose to incur substantial costs in contesting the case through to a full hearing, rather than reaching a sensible compromise. The tribunal does not know the reasons for this but there has clearly been a breakdown in the parties' relationship. It appears this has coloured their approach to what should have been a straightforward lease extension claim. They seemed intent on disputing every point, no matter how small, resulting in the case taking up a disproportionate amount of the tribunal's time and resources.
155. Both parties conducted these proceedings in a heavy-handed manner. However the tribunal does not know who was responsible for this. It might be down to the legal representatives or their clients, or a combination of both. There was insufficient evidence to establish that the legal representatives have acted improperly, unreasonably or

negligently. Accordingly there is no basis for making a wasted costs order. The threshold for making a wasted costs order is very high and was not made out in this case. The tribunal would require clear evidence of improper, unreasonable or negligent acts or omissions by a representative, as opposed to his/her client, before making such an order.

156. The tribunal then went onto consider the conduct of the parties. The transfer of the freehold in October 2014 did not amount to unreasonable behaviour in defending or conducting these proceedings. Rather this was a conveyancing transaction by the Respondents and was not part of the proceedings themselves. Further the opportunity to transfer the freehold arose from the Applicants' failure to protect the section 42 notice by registering a unilateral notice against the freehold title. The transfer permits a reasonable explanation, namely a legitimate attempt to take advantage of this omission to try and defeat the lease extension claim.
157. The tribunal is satisfied that the preliminary issue was pursued in good faith and that the Respondents believed they had an arguable case, based on advice from their legal team. The tribunal then considered the withdrawal of this issue. In their letter to the tribunal dated 05 November 2015, the Applicants' solicitors referred to sections 28 and 29 of the Land Registration Act 2002. They argued that the Second Respondent was bound by the section 42 notice, as the transfer of the freehold had not been for valuable consideration. The Respondents were aware of this legal argument from 05 November onwards and the tribunal gave further directions on 16 November. However the preliminary issue was not withdrawn until 10 December 2015, the day before the parties were due to exchange skeleton arguments.
158. The tribunal accepts the preliminary issue was withdrawn on a commercial basis, in order to save costs. This decision itself was reasonable but why was the withdrawal so late in the day? Does it permit a reasonable explanation? The further directions provided that the preliminary issue would be dealt with at the start of the full hearing. The Respondents' solicitors would have received the directions on 17 or 18 November 2015. No satisfactory explanation has been given for the subsequent delay in withdrawing the preliminary issue. This should have been addressed at least 14 days before the hearing, by 01 December. The delay between this date and 10 December amounted to unreasonable conduct and put the Applicants' to unnecessary expense.
159. The Applicants' pursuit of their costs application did not amount to unreasonable conduct. It was a legitimate application to make, given the late withdrawal of the preliminary issue.
160. The Applicants' failure to disclose the tenancy agreement certainly permits a reasonable explanation. It was requested very late in the day

and the Respondents' solicitors failed to explain why it was relevant to these proceedings. There was nothing in the directions obliging the Applicants to disclose the agreement. If the Respondents or Mr Avery felt it was crucial to their case, then it should have been requested much earlier with proper reasons.

161. The Applicants' breach of paragraph 3 of the directions is a different matter. Directions must be complied with to ensure that cases can be dealt with in accordance with the overriding objective. The tribunal accepts that the transfer of the freehold on 01 October 2014 might have caused some delay but this was no excuse for the Applicants' total failure to comply with paragraph 3. If their solicitors were unhappy with the Respondents' draft deed then they should have amended it, rather than disregard it altogether. This is not just a case of late compliance. Rather the Applicants made a conscious decision not to comply with this direction, which was unreasonable. The subsequent late service of Mr Avery' report does not excuse their conduct.
  
162. The tribunal has found unreasonable conduct on the part of the Applicants and the Respondent. However it declines to make any costs orders. Costs orders under Rule 13(1) are discretionary. The tribunal agrees with Ms Doliveux that the complaints effectively cancel each other out (at least in part). Furthermore the Respondents' unreasonable conduct flows from the Applicants' failure to protect the section 42 notice, by registration. Had it been correctly registered, immediately after service, then preliminary issue would not have arisen. Taking account of these factors and the parties' heavy handed approach to this litigation, the tribunal concluded each side should bear their own costs of these proceedings.

**Name:** Tribunal Judge Donegan    **Date:** 08 March 2016

**Appendix of relevant legislation**

**Leasehold Reform, Housing and Urban Development Act 1993 (as amended)**

**Section 56**

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

.....

- (5) No provision of any lease prohibiting, restricting or otherwise relating to a sub-demise by the tenant under the lease shall have effect with reference to the granting of any lease under this section

.....

**Section 57**

- (1) Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1)), the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate to take account –
- (a) of the omission from the new lease of property included in the existing lease but not comprised in the flat;
  - (b) of alterations made to the property demised since the grant of the existing lease; or
  - (c) in a case where the existing lease derives (in accordance with section 7(6) as it applies in accordance with section 39(3) from more than one separate leases, of their combined effect and of the differences (if any) in their terms.

.....

- (6) Subsections (1) to (5) shall have effect subject to any agreement between the landlord and the tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the

purposes of the new lease any term of the existing lease shall be excluded or modified in so far as –

- (a) it is necessary to do so in order to remedy a defect in the existing lease; or
- (b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

.....

## **The Tribunals, Courts and Enforcement Act 2007**

### **Section 29**

- (1) The costs of and incidental to—
  - (a) all proceedings in the First-tier Tribunal, and
  - (b) all proceedings in the Upper Tribunal,shall be in the discretion of the Tribunal in which the proceedings take place.
- (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
- (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
- (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—
  - (a) disallow, or
  - (b) (as the case may be) order the legal or other representative concerned to meet,the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
- (5) In subsection (4) “wasted costs” means any costs incurred by a party—
  - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
- (6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.
- (7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

**The Tribunal Procedure (First-tier Tribunal) (Property Chamber)**  
**Rules 2013**

**Rule 3**

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes –
  - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
  - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
  - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
  - (d) using any special expertise of the Tribunal effectively; and
  - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it –
  - (a) exercises any power under these Rules; or
  - (b) interprets any rule or practice direction.
- (4) Parties must
  - (a) help the Tribunal to further the overriding objective; and
  - (b) co-operate with the Tribunal generally.

**Rule 10**

- (1) The Tribunal may give a direction adding, substituting or removing a person as an applicant or respondent.
- (2) If the Tribunal gives a direction under paragraph (1) it may give such consequential direction as it considers appropriate.
- (3) A person who is not a party may apply to the Tribunal to be added or substituted as a party.

**Rule 13 (1)**

The Tribunal may make an order in respect of costs only –

- (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
- (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
  - (i) an agricultural and land drainage case,
  - (ii) a residential property case, or
  - (iii) a leasehold case; or
- (c) in a land registration case.

## First Tier Tribunal

Ref: RC/LON/00AY/ODL/2015/1380

**Valuation of Flat 2 Ely Lodge, 35 St Faith's Road London SE21 8JD**

Valuation date	22 December 2014
99 year lease from 31 August 1994	
Length of lease remaining	78.69 years
Ground rent for 1st 33 years	£80
Ground rent for 2nd 33 years	£160
Ground rent for remainder	£240
Freehold value of flat	£626,200
Long Lease value	£620,000
Existing lease value	£600,650
Matters agreed by the parties	
Capitalisation rate	7.5%
Deferment rate	5%
Value of landlords current term.	£1,521

**Value of freeholder's present interest**

Value of term as agreed		£1,521
Reversion to freehold value	£626,200	
Deferred 78.69 years at 5%	0.021510	£13,470
Freeholder's present interest		£14,991

**Value of freeholder's future interest**

Ground rent	0	
Reversion to freehold value	£626,200	
Deferred 168.69 years at 5%	0.0002664	£167
Diminution to landlords interest		£14,824

**Marriage Value****Value of property after grant of long lease**

Freeholder's interest	£167
Tenant's interest	£620,000

**Value of existing interests**

Freeholder's interest from above	£14,991	
Tenant's interest	£600,650	
Marriage value	£4,526	
Marriage value to be divided equally between freeholder and tenant	£2,263	£2,263

**Premium payable to freeholder** **£17,087**