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

**Case reference** : **LON/00BK/OCE/2016/0135**

**Property** : **127-129 & 131-133 Cleveland Street and  
17-19 Carburton Street, London W1**

**Applicant** : **3C Freehold Limited**

**Representative** : **Mr M Loveday of Counsel instructed by  
Bishop & Sewell LLP**

**Respondent** : **(1) Eliezer Schwarcz  
(2) Hinda Schwarcz  
(3) Stephen John Oram**

**Representative** : **Edwin Johnson QC instructed by Bude  
Nathan Iwanier LLP**

**Type of hearing** : **A collective enfranchisement claim  
made under the Leasehold Reform,  
Housing and Urban Development Act  
1993  
Judge N Hawkes**

**Tribunal members** : **Mr N Martindale FRICS  
Mr D Jagger MRICS**

**Date and venue** : **The hearing took place on 19-21 and 26  
February 2018 at 10 Alfred Place,  
London WC1E 7LR. The Tribunal  
reconvened to reach its decision on 6  
April 2018**

**Date of decision** : **15 May 2018**

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**DECISION**

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## **Decisions of the Tribunal**

- (1) The first respondent and second respondents' application to adjourn the final hearing is refused.
- (2) The applicant is entitled to acquire the first respondent's freehold interest in the Additional Areas.
- (3) The applicant is entitled to acquire the second respondent's leasehold interest in the Additional Areas.
- (4) The applicant is entitled to acquire the second respondent's leasehold interest in the Basement Rooms.
- (5) The applicant is not entitled to acquire the second respondent's leasehold interest in the Upper Orange Room.
- (6) The applicant is entitled to acquire the second respondent's leasehold interest in the two Lower Orange Rooms.
- (7) The applicant is entitled to acquire the second respondent's leasehold interest in the airspace above the two flat roof areas at first floor level.
- (8) The applicant is entitled to acquire the second respondent's leasehold interest in the area above the lift (including the roof space).
- (9) The premium payable in respect of the first respondent's freehold interest in the Property is £1,283,280.
- (10) The premium payable in respect of the second respondent's interest in the Additional Lease is £80,000.
- (11) The premium payable in respect of the second respondent's interest in the Roofspace lease is £500.
- (12) The respondents, shall by 28 days after the date of this decision, serve on the applicant draft transfers in the form contended for by the respondents.
- (13) The applicant, shall within 14 days thereafter, serve the draft transfers on the respondents marked up with those revisions contended for by the applicant.
- (14) In default of agreement within 14 days thereafter, the issue of the form of transfers shall be listed for determination by the Tribunal on the first open date with a time estimate of 1 day, upon the parties notifying the Tribunal that a further hearing is required.
- (15) The parties shall have liberty to apply.

## **The background**

1. This is an application concerns a collective enfranchisement claim (“the Claim”) made under the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”) by an initial notice dated 13 August 2015.
2. The applicant is the nominee purchaser and the respondents are the landlord in respect of the Claim. Counter-notices were served by the first and second respondents dated 22 October 2015.
3. The Claim was made in respect of a property known as Carlton House, Clifton House and Carburton House which is situated at 127-129 & 131-133 Cleveland Street and 17-19 Carburton Street, London W1 (“the Property”).
4. The registered proprietor of the freehold interest in the Property is and was at on the date on which the Claim was made (“the Valuation Date”) the first respondent.
5. The validity of both the initial notice and the counter-notice were challenged in proceedings in the County Court at Central London, which were ultimately settled by way of a consent order. This application was made to the Tribunal on 19 April 2016.
6. The Property includes a block of flats which comprises three sections known as Carlton House, Clifton House and Carburton House, each with their own entrances (“the Building”).
7. Each section of the Building is arranged over six floors, namely, the basement/lower ground floor, the ground floor, and four upper floors. Carlton House and Clifton House each have an entrance on to Cleveland Street and Carburton House has an entrance on to Carburton Street.
8. There were originally six flats on each floor of the Building. However, two of the flats, namely Flats 3 and 7 Carburton House, have been divided creating two additional units (Flats 3a and 7a Carburton House). The Building therefore currently contains a total of thirty-eight Flats (“the Flats”). On the Valuation Date, Flats 3, 3a and 7 and 7a were occupied by a mixture of assured shorthold and Rent Act 1977 tenants.
9. The Building has a mansard roof which the Tribunal was informed was constructed in about the 1990s. There is an area of roof space above the mansard roof of the fourth floor of the Building which has not been developed (“the Roofspace”).
10. Both within and above the Building, there are various sundry areas (“the Internal Areas”), which will be considered further below. In addition to the Building and the airspace above the Building, the Property includes a rear yard,

pram sheds/outhouses and lightwells, vaults and open areas where the Property fronts on to Cleveland Street and Carburton Street. These parts of the Property which are external to the Building will be referred to below as "the Additional Areas".

11. There is a lease of the Roofspace dated 15 April 2011 which was granted by the first respondent to the second respondent for a term of years from and including 1 March 2011 to and including 28 February 3010 ("the Roofspace Lease"). The second respondent remains the registered proprietor of the Roofspace Lease.
12. There is a lease of the Internal Areas and the Additional Areas dated 15 April 2011 granted by the first respondent to the second respondent for a term of years from and including 1 March 2011 to and including 28 February 3010 ("the Additional Lease"). The second respondent remains the registered proprietor of the Additional Lease.
13. There is a superior lease of Flat 8, Carburton House, dated 5 September 2011 which was granted by the first respondent to the second respondent for a term of 999 years from 1 July 2011 ("the Flat 8 Lease"). The second respondent remains the registered proprietor of the Flat 8 Lease.
14. There is a superior lease of Flat 12, Clifton House dated 7 January 1983 which was granted by Uniexport Trading Co. Limited to David Norrie for a term of 125 years from 1 April 1982 ("the Flat 12 Lease"). The registered proprietor of the Flat 12 Lease is and was on the Valuation Date the third respondent.
15. Thirty-four of the Flats are held on long leases by qualifying tenants, within the meaning of the 1993 Act. Four of the Flats are and were at the Valuation Date held in hand by the first respondent, as part of the freehold in the Building.
16. By the initial notice dated 13 August 2015, the participating tenants in respect of the Claim claimed to be entitled to acquire the following interests in the Property:
  - (i) The freehold interest in the Building ("the Building Freehold").
  - (ii) The freehold interest in the Additional Areas ("the Additional Areas Freehold"), with the exception of the vaults adjacent to Cleveland Street and Carburton Street ("the Vaults").
  - (iii) The Roofspace Lease.
  - (iv) The Additional Lease, with the exception of the Vaults.
  - (v) The Flat 8 Lease.

(vi) The Flat 12 Lease.

### **The hearing**

17. The applicant was represented at the hearing by Mr Loveday of Counsel, instructed by Bishop & Sewell LLP, and the first and second respondents (“the respondents”) were represented by Mr Johnson QC of Counsel, instructed by Bude Nathan Iwanier LLP. The third respondent played no active part in the proceedings.
18. The hearing of this application took place on 19, 20, 21 and 26 February 2018. The Tribunal inspected the Property on the afternoon of 19 February 2018, in the presence of the parties’ representatives, and it reconvened in order to reach its decision on 6 April 2018.
19. The Tribunal is very grateful to Counsel for their assistance which extended to providing detailed written closing submissions in addition to oral closing submissions (when there was no direction or requirement that they should do so).

### **The application for an adjournment**

20. On 14 February 2018, the respondents applied for an adjournment of the final hearing of this application pursuant to Rule 6(3)(i) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the 2013 Rules”) on the grounds that the case was not ready for trial. In particular, an amended direction pursuant to which expert evidence was to be filed and served by 15 December 2017 had not been complied with.
21. On the respondents’ side, the reason given for this was that Mr Pariente, the solicitor with conduct of this matter on behalf of the respondents, was taken ill on 15 December 2017. The Tribunal was provided, on a confidential basis, with medical evidence concerning Mr Pariente’s condition.
22. The Tribunal was informed that Mr Pariente was the only solicitor within Bude Nathan Iwanier LLP with expertise in enfranchisement matters and that a change of solicitors would not have been feasible. Further, the respondents contended that all parties had failed to comply with the Tribunal’s directions.
23. It was submitted that a failure to accede to the application for an adjournment could result in potentially very serious injustice to the respondents, primarily because the Tribunal would not have before it expert evidence in support of the respondents’ contention that the development value of the roof space was around £4 million. The applicants’ valuer was of the opinion that the development value of the roof space was £500.

24. By a decision dated 14 February 2018, Judge Vance refused the application for an adjournment; directed that any party wishing to rely upon expert evidence, as previously provided for in the Tribunal's directions, must serve such evidence by 4 pm on 16 February 2018; and stated that the respondents could renew their application for an adjournment at the start of the hearing on 19 February 2018.
25. By 4 pm on 16 February 2018, the respondents had filed and served:
  - (i) the witness statement of the first respondent;
  - (ii) the witness statement of Guittel Weil;
  - (iii) the expert report of Maurice Berger FRICS (valuation);
  - (iv) the expert report of Nicholas Mark Fennel BSc MRICS (planning);
  - (v) the expert report of Shiraz Dudhia BSc (Hons) CEng FICE (structural engineer); and
  - (vi) the expert report of James Richardson of Emmaus Consulting (quantity surveyor).
26. By 4 pm on 16 February 2018, the applicant had filed and served three witness statements of fact and one valuation report prepared by Timothy Henson MRICS. However, the applicant indicated that it wished to file and serve further expert evidence in response to the expert evidence which had been filed and served by the respondents on 16 February 2018.
27. In accordance with the decision of Judge Vance dated 14 February 2018, the respondents renewed their application for an adjournment at the commencement of the hearing.
28. As stated above, Mr Pariente became ill on 15 December 2017; the date on which the experts' reports were to be filed and served. Mr Johnson QC accepted that Mr Pariente should have instructed the respondents' proposed experts well in advance of 15 December 2017 in order to ensure that their reports were available on that date. There was no explanation of which Mr Johnson QC was aware why this had not been done. Accordingly, no explanation could be put forward for the respondents' failure to comply with the Tribunal's directions (as amended).
29. Mr Johnson QC submitted that, in the absence of an adjournment, a fair hearing would not be possible. He stated that the expert reports which had been filed did not contain the correct statements regarding the experts' duties and that further time was needed in order to fully prepare the case for trial. He

submitted that it would not be appropriate for the applicant's proposed expert evidence in reply to arrive during the course of the hearing.

30. Mr Johnson QC accepted that parties to litigation cannot fail to prepare a case without good reason and then require the Tribunal to grant an adjournment on the basis that it has no option but to do so in order to ensure a fair trial. However, he argued that given the nature, complexity, and the potential financial value of the proceedings, the Tribunal should exercise its discretion to grant an adjournment in the exceptional circumstances of the present case.
31. It was the respondents' case that both parties were at fault and Mr Johnson QC therefore contended that the parties should each bear their own costs of and occasioned by any adjournment.
32. The applicant strongly opposed the respondents' application to adjourn the final hearing. Mr Loveday informed the Tribunal that the applicant had spent the entirety of the weekend, at considerable expense, ensuring that it would be in a position to proceed notwithstanding the late service of the respondents' expert evidence. He noted that it is usually the party who has received substantial quantities of late evidence rather than the party who has served such evidence who seeks an adjournment.
33. In response to criticisms made of the applicant, Mr Loveday submitted that it would not have been possible for the applicant to have served detailed evidence concerning the development value of the roof space at an earlier stage. He stated that, prior to the receipt of the respondents' evidence (which was served shortly before 4 pm on the Friday before the Monday on which the hearing was due to start) the applicant had been unaware of the case which it had to meet in this regard.
34. Mr Loveday took the Tribunal through a detailed chronology and argued that the responsibility for the late service of evidence lay entirely with the respondents. He submitted that any resulting difficulties could be met by giving the parties until the morning of 20 February 2016 in which to conclude their preparation.
35. Having carefully considered the parties' submissions, the overriding objective, and all of the circumstances of this case, the Tribunal declined to exercise its discretion to adjourn the final hearing. However, the Tribunal determined that it would adopt a flexible approach to the proceedings and, in particular, that it would allow the parties some additional time in which to prepare before commencing the substantive hearing.
36. In reaching this decision, the matters which the Tribunal took into account included:

- (i) The absence of any good explanation for the fact that the preparation for the final hearing had not taken place at an earlier stage.
- (ii) The fact that the witness statements and the expert evidence upon which the respondents wished to rely had now been served (subject to including confirmation that the experts understood the relevant duties).
- (iii) The late stage at which the application for an adjournment was first made.
- (iv) The applicant had ensured that it was ready to proceed and the application to adjourn was strongly opposed by the applicant.
- (v) This application was listed with a 5 day time estimate. For a considerable period of time, two experts had been booked to hear the application over a 5 day period, rendering them unavailable to hear other cases on the dates on which this application had been listed. The probable result of granting a late adjournment would be to deprive other litigants of the special expertise of these experts over a 10 day period, in total. Pursuant to the Tribunal's overriding objective, dealing with a case fairly and justly includes using any special expertise of the Tribunal effectively (see Rule 3 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules")).
- (vi) The Tribunal's resources are limited and the proposed adjournment would have been at considerable expense and inconvenience to the Tribunal, in addition to the expense and inconvenience to the parties. Pursuant to the Tribunal's overriding objective, dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the resources of the Tribunal (see Rule 3 of the 2013 Rules).
- (vii) The Tribunal also took into account its ability to seek to increase the fairness of the hearing (whilst accepting that the hearing would nonetheless not be ideal) by adopting a flexible approach to the proceedings and, in particular, by allowing the parties some additional time in which to prepare before commencing the substantive hearing.

37. The Tribunal informed the parties of this decision at 12.45 pm on 19 February 2018. The Tribunal determined that it would inspect the Property on the



afternoon of 19 February 2018 and it emphasised that the parties' legal representatives were under no obligation to attend the inspection.

38. Further, the Tribunal determined, in consultation with Counsel, that the substantive hearing would not commence until 11 am on 20 February 2018 in order to give the parties' representatives and the Tribunal additional time in which to prepare.

### **The issues remaining in dispute**

39. The following issues remain in dispute.

### ***The Acquisition Issues***

40. First, there is a dispute as to whether the applicant is entitled to acquire the Additional Areas Freehold or any part of it; that is to say the first respondent's freehold interest in the Additional Areas.
41. Second, there is a dispute as to whether the applicant is entitled to acquire the Additional Lease which demises both the Additional Areas and the Internal Areas.
42. In the case of the Additional Lease, the applicant has accepted that the second respondent is entitled to retain her leasehold interest in part of the Internal Areas; namely the twelve WC/storage areas distributed over the floors of the Building. It is further accepted by the applicant that the Vaults are not included in the Claim.
43. There are certain parts of the Internal Areas which are shown as included in the premises demised by the Additional Lease, but which appear to have been included in the premises demised by the Additional Lease in error.
44. The relevant parts of the Internal Areas, which the Tribunal has been invited to disregard (and which, in the absence of any representations to the contrary, the Tribunal has disregarded), are as follows.
  - (i) The areas in front of two of the Orange Rooms (for the definition of "Orange Rooms" see paragraph 45(ii)(b) below), shown hatched in black on Plan 2 in "ES2".
  - (ii) The rectangular area, at basement level, adjacent to the entrance to Carburton House, shown hatched in black on Plan 2 in "ES2".
45. This leaves in issue the question of whether the applicant can acquire the second respondent's leasehold interest in the following areas.

- (i) The Additional Areas.
- (ii) The following Internal Areas:
  - (a) The three rooms in the basement of the building, adjacent to the Lightwells, containing meters. The expression “the Basement Rooms” will be used to refer to these rooms.
  - (b) The three rooms which were referred to during the course of the hearing as “the Orange Rooms”, shown coloured orange on the plans contained in the expert report of Mr Henson, at pages 11 and 12 of the report.
  - (c) The two flat roof areas at first floor level.
  - (d) The area above the lift.

46. In the remainder of this decision:

- (i) references to the Internal Areas mean only those Internal Areas, identified above, where the right of acquisition remains in issue (the areas which the Tribunal has been invited to disregard will be referred to as “the Disregarded Internal Areas”);
- (ii) references to Additional Areas mean the Additional Areas identified above, therefore excluding the Vaults; and
- (iii) references to the Additional Areas Freehold also exclude the freehold interest in the Vaults.

### ***The Valuation Issues***

47. In terms of the freehold valuations, the position is as follows:

- (i) The valuation of the reversionary interest in the Leases (the long leases of the Flats) and the ground rents is agreed at £280,000.
- (ii) The area of dispute is the valuation of the freehold interest in the four flats; namely Flats 3, 3a, 7 and 7a, Carburton House (“the Four Flats”).
- (iii) In terms of the Additional Areas Freehold, Mr Berger did not assign any separate value to the Additional Areas Freehold.

Mr Henson assigned nominal figures of £500 to the Yard, £600 to the Lightwells, and £500 to the Sheds which the Tribunal has been invited to accept.

48. In terms of the leasehold valuations, the position is as follows:

- (i) So far as the superior leasehold interest in Flat 8, Carburton House, held by the second respondent, is concerned, this valuation has been agreed at £5,400.
- (ii) So far as the superior leasehold interest in Flat 12, Clifton House, held by the third respondent, is concerned, this valuation has been agreed at nil.
- (iii) So far as the Roofspace Lease is concerned, the claim to development value in the Roofspace Lease is no longer pursued by the respondents. However, the respondents submit that the Tribunal should adopt Mr Henson's nominal valuation of £500.
- (iv) So far as the Additional Lease is concerned, neither valuer assigns a value to the Basement Rooms, the two flat roof areas, or to the area above the lift, if the leasehold interest in these areas can be acquired.
- (v) So far as the Additional Lease is concerned, it is again the case that the Vaults are not included in the Claim.
- (vi) So far as the Additional Lease is concerned, there is a dispute as to the value of the Orange Rooms, the Yard and the Sheds, if the leasehold interest in these areas can be acquired. Mr Berger does not assign a value to the Lightwells. Mr Henson includes the Lightwells in the nominal valuation which he assigns to the Yard and the Sheds, in the combined sum of £1,000.

49. In summary, the leasehold valuations in dispute concern the Additional Lease and are confined to the valuations of the Orange Rooms, the Yard and the Sheds if, contrary to the respondents' case, the leasehold interest in these areas can be acquired.

### ***The Conveyancing Issues***

50. At the request of the parties, the Tribunal has agreed that any dispute concerning the Conveyancing Issues will be determined at a separate hearing, following the handing down of the Tribunal's decision on the outstanding Acquisition Issues and Valuation Issues. The Tribunal has approved directions

which have been agreed by the parties for this purpose and which are set out above.

51. Further, the Tribunal has been invited to note that the statutory costs payable in respect of the Claim have yet to be agreed or, in the absence of agreement, determined by the Tribunal.

### **The Tribunal's Determinations**

#### **The Acquisition Issues**

##### **The Additional Areas Freehold**

52. The Additional Areas comprise the Lightwells, the Yard and the Sheds. The applicant's basic right is to acquire the freehold of the premises in which the qualifying lessees' flats are contained (see sections 1 and 3 of the 1993 Act).
53. In the present case, the premises comprise the footprint of the three component parts of the Building, shown edged red on the notice pursuant to section 13 of the 1993 Act (including the freehold of the Flats which are "in hand").
54. In addition, the lessees are entitled to acquire the freehold of other property. Firstly, they may acquire appurtenant property under section 1(3)(a) of the 1993 Act.
55. Secondly, the lessees are entitled to the freehold of certain common areas under section 1(3)(b) of the 1993 Act. This applies to property which at the Valuation Date is:  
  
*"property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not)."*
56. It is section 1(3)(b) of the 1993 Act which is relied upon by the applicant ("the section 1(3) test"). The burden is upon the applicant to establish that the Additional Areas Freehold is an interest which can be acquired. It is noted that the first respondent does not seek to rely upon section 1(4) of the 1993 Act.
57. The applicant submits that the key consideration is that (unlike the equivalent provision relating to the acquisition of leasehold interests) the exercise focusses on the *rights* set out in the Flat Leases, rather than on the *use* of the relevant freehold areas. The applicant states that the freehold Acquisition Issues are therefore primarily, if not entirely, a matter of law.
58. The applicant submits that there is no limitation on what the section 1(3)(b) common property might comprise, and it may include such things as a

communal garden, gymnasium, tennis court, swimming pool or sauna: *Hague* at 20-05.

59. However, “use” in this context means the lessees must be entitled physically to go onto the relevant land, not merely have some “visual amenity” over it. For example, if the tenants are expressly banned from entering an area of land, they are not “entitled” to “use” it under s.1(3)(b): *Cutter v Pry* [2014] UKUT 0215 (LC); [2014] L.&T.R. 27 at para 44(2).
60. It is common ground that leases of the Flats are in materially similar form (“the Flat Leases”). The applicant has referred the Tribunal to the lease of Flat 12 Carlton House (“the Lease”). The material rights granted to the tenants include the following in Schedule 1 of the Flat Leases (“the blue rights”):

*“1. A Full right of way and passage for the Lessee and all persons authorised by him with or without workmen and their tools and materials over the paths roads ways and entrance hall staircases and landings of the Reserved Property as edged in blue on the plan attached hereto leading to the Flat for all purposes connected with the use and enjoyment of the Flat and the maintenance and repair thereof.”*

61. These “blue rights” are shown on the Lease plans and, in particular, on the plan of the basement. There are then other rights granted. These rights include (the applicant’s emphasis added):

*“2. All easements and quasi-easements and rights of light and air appurtenant to the Flat and in particular:-*

*(a)...*

*(b)...*

*(c)...*

***(d) The right for the Lessee with or without servants workmen and others at all reasonable times on notice (except in emergency) to enter into and upon any part of the remaining flats in the Flat Blocks and the Reserved Property for the purpose of repairing maintaining renewing altering or rebuilding the Flat or any part of the adjoining or adjacent premises giving subjacent or lateral support or protection to the Flat and for the purpose of testing repairing maintaining renewing altering rebuilding or cleaning all sewers drains pipes cables wires and aerials which now are or may at any time be in or under or passing through the said building buildings or any part thereof and belonging to or serving the Flat and also for the purpose of laying down or erecting any new sewers drains pipes cables wires and aerials causing as little damage as possible and making good any damage thereby caused to or work carried out on the structure of the Reserved***

*Property without the consent of the Lessor which shall impose such conditions as it may deem requisite for granting such consent."*

62. The "Reserved Property" is defined by Recital (B)(ii) to the Lease and includes the "grounds forming part of the Flat Blocks", which are in turn defined by reference to the Title number 243145 (see Recital (A) to the Lease). Title no. 243145 includes the whole site, including the buildings, yard and lightwells.
63. As far as the rights in the Flat Leases are concerned, "the blue rights" in Schedule 1 paragraph 1 of the Flat Leases do not cover any part of the rear Yard. The applicant's case is that the lessees of the Flats enjoy express rights to use the Yard under Schedule 1 paragraph 2(d) of the Flat Leases (the "2(d) rights").
64. The applicant states that this provision grants an unconditional right to the lessee and the lessee's "servants workmen and others". It entitles them "to enter ... the Reserved Property" for various purposes. The "Reserved Property" expressly includes the whole of the Yard marked green and *prima facie*, the 2(d) rights expressly apply to the Yard.
65. The applicant submits that the existence of such rights over the Yard is strongly supported by the blue rights. The blue rights are an express right of way over "paths roads ways entrance hall staircases and landings ... edged blue on the plan attached hereto". Those blue rights are extensive in scope, and expressly include a right to use the halls and landings "with ... workmen and their tools" and "for all purposes connected with the use and enjoyment of the relevant Flat and the maintenance and repair thereof".
66. The applicant states that the blue rights are carefully drawn on the Lease plans and extend throughout the internal hallways and staircases of the building as far as the basement to the three doorways leading to the rear Yard. Indeed, the lessees of the flats enjoy blue rights over the three doorways themselves, as far as the outer faces of the doorways and apparently including the doors themselves.
67. The applicant rhetorically questions what the "purpose" of such an express right of way with "workmen" and "tools" down several flights of stairs, balconies and corridors, and into rooms with doors to a Yard and through those doors to the outside of the Building would be. The applicant contends that the obvious answer is contained in the very next provision of the Flat Lease, namely for the lessee to exercise rights to repair and maintain etc. in that Yard.
68. That applicant states that its contention that the express 2(d) rights are enjoyed over the Yard is further supported by the reference in the provision itself to having access to "the structure of the Reserved Property". The "structure of the Reserved Property" includes the rear elevation. That rear elevation can only be accessed through the Yard.

69. The applicant argues that the express and unconditional 2(d) rights are substantial and not transient. They expressly permit the lessees and their servants to repair, maintain, alter, and even to rebuild their Flats. The 2(d) rights further entitle the lessees to lay down “new sewers drains pipes and cables wires and aerials” on the Reserved Property. The 2(d) rights allow them to carry out work to “the structure of the Reserved Property” (with consent).
70. The applicant states that rebuilding the Flat or laying down new sewers etc. could take many weeks to complete and might involve a lengthy physical presence on the Yard with scaffolding etc.
71. On the applicant’s analysis, the 2(d) rights extend to the whole of the Yard, including the Sheds. The applicant submits that it matters not whether anyone has exercised the 2(d) rights in the past, or indeed whether such rights were necessary or desirable. However, the applicant points to the fact that, in any event, Mr Wallis (the lessee of Flat 1, Clifton House) gave evidence that the lessees have in the past exercised their rights of access to the Yard to repair and maintain their Flats.
72. The applicant submits that the express 2(d) rights plainly entitle the lessee to “use” the rear Yard within the meaning of section 1(3)(b) of the 1993 Act. It is not simply a right of visual amenity as in Cutter.
73. In relation to the lightwells, the applicant notes that Mr Berger is clear that the long leasehold interest in the lightwells has only a nominal value and that the reversionary interest in the lightwells is likely to have even less value. The applicant observes that why the respondents wish to retain the lightwells is unclear.
74. The applicant submits that, as regards the lightwells, similar arguments apply to those in relation to the rear Yard. The 2(d) rights are enjoyed over the lightwells. The applicant accepts that the blue rights do not directly lead to the lightwells and that they only terminate at the doors to the three Basement Rooms.
75. However, the applicant points to the fact that the Basement Rooms themselves provide access to the lightwells and the blue rights go as far as the doors to those three rooms. Moreover, the three access doors which exist to the front lightwells are not shown on any of the lease plans. The applicant submits that this may well explain why the draftsman omitted any blue rights over the Basement Rooms to the front lightwell doors.
76. The respondents point to the fact that the demise of each Flat is by way of internal demise only and includes no part of the structure and exterior of the Building. The respondents state that this is reflected in the repairing obligations of the parties to the Lease. The tenant is required to keep the Flat and its services in repair (the Tribunal was referred, in particular, to clauses 2(vi) and (vii) of the Lease).

77. Further, the landlord's repairing obligations include the obligation to keep the Reserved Property, as defined in the Lease, in repair (clause 3(4) of the Lease). Those repairing obligations also include the obligation to keep in repair "the sewers drains channels watercourses gas and water pipes electric cables and wires and supply lines in under and upon the Reserved Property except in so far as they may be repairable by a Statutory Authority". Accordingly, the landlord is responsible for repairing the services external to the Flats.
78. The respondents contend that the applicants face two difficulties in seeking to rely upon the 2(d) rights.
79. The respondents state that the first problem is that the 2(d) rights are narrowly confined. The right to carry out work to the services is confined to services within the Building "belonging to or serving the Flat". It is not a general right to carry out works to the services of the Building, which are in any event the responsibility of the landlord.
80. So far as work to the Flat itself is concerned, the premises demised by the Lease are internal only. They do not include any part of the structure or exterior of the Building. Paragraph 2(d) also provides in terms that no work can be carried out to the structure of the Reserved Property without the consent of the landlord, which consent the landlord has an absolute right to withhold.
81. The respondents state that it follows that, when the rights in paragraph 2(d) are carefully examined, they do not in fact amount to the right to use the Additional Areas for the purposes specified in paragraph 2(d).
82. In the alternative, the respondents submit that there is a second problem which confronts the applicant. What the applicant must prove, in order to satisfy the section 1(3) test, is that each and every part of the Additional Areas is subject to rights of the tenants of the Flats to use each and every such part of the Additional Areas for such purposes. The respondents submit that the existence of such common rights has not been established in this case and, given the limited nature of the rights granted by the Lease, could not be established.
83. The respondents contend that this is illustrated by the evidence of Mr Wallis. Mr Wallis gave evidence regarding a couple of occasions on which he has carried out works to the rear external pipework of the Building. The respondents state that this work was in fact the responsibility of the RTM company which has been responsible for the management of the Building since 2008.
84. Further, the respondents state that even if one assumes, wrongly, that Mr Wallis had the right to go into the Yard (which is not within the blue edging) for this purpose, this is nowhere near the exercise of a right of common use of the kind required to satisfy the section 1(3) test. Even if this were the exercise of a right of common use, it was confined to that part of the Yard to which access was required for the relevant purpose.



85. The respondents state that, by way of example, Mr Wallis' occasional visits to the area of the Yard behind his Flat could not possibly be described as the exercise of a common right of use of the Sheds, or indeed any part of the Yard beyond that part immediately adjacent to the rear external wall of Clifton House.
86. The respondents state that, what the Applicant must demonstrate, so far as paragraph (b) of section 1(3) of the 1993 Act is concerned, is that on the Valuation Date each and every part of the Additional Areas constituted property which the tenants of the Flats were entitled under their Leases to use in common with each other and that the Lease contains no such entitlement.
87. Having carefully considered the parties' written and oral submissions, the Tribunal determines that the section 1(3) test is satisfied and that the applicant is entitled to acquire the Additional Areas Freehold.
88. The Tribunal accepts the applicant's contention that the section 1(3) test focusses on the *rights* set out in the Flat Leases, rather than on the *use* of the relevant freehold areas and that the freehold Acquisition Issues are therefore primarily, if not entirely, a matter of law.
89. The paragraph 2(d) rights are physical rights over the Reserved Property; they are not simply rights of visual amenity. Each and every part of the Additional Areas is (and was at the Valuation Date) subject to the paragraph 2(d) rights of the tenants of the Flats to use each and every such part of the Additional Areas for the purposes specified in paragraph 2(d).
90. For example, there is no part of the Additional Areas over which any lessee may not lay down any new sewers, drains, pipes, cables, wires and/or aerials. The applicant is not required under the section 1(3) test to demonstrate a history of actual use and the fact that the common use of some parts of the Additional Areas may, in practical terms (having regard to the purposes for which such access is restricted), be less likely than the common use of other parts of the Additional Areas is not fatal to the applicant's claim because the test focusses upon legal entitlement.
91. There is no part of the Additional Areas which lessees are not entitled to use for the purposes specified in paragraph 2(d). Further, there is no part of the Additional Areas the potential use of which is restricted to one lessee or to certain lessees only.

### **The Additional Lease**

92. Despite the respondents' acceptance in the counter-notices that the applicant may acquire the Additional Lease, it initially appeared to be contended by the respondents that the applicant is not entitled to acquire the Additional Lease at all.

93. The applicant submitted that it is not open to the respondents to resile from the agreement in the counter-notices which they have served admitting the applicant's right to acquire an interest.
94. In response, the respondents stated that they accept that the Disregarded Internal Areas are shown outlined in red on the Plans to the Additional Lease and that the Disregarded Internal Areas therefore fall within the demise but that the respondents do not wish to retain them. Accordingly, the respondents are content for these areas to be acquired.
95. On this basis, it was agreed that the respondents may assert that no other areas demised by the Additional Lease fall to be acquired without resiling from the agreement contained in the counter-notices.
96. So far as the Additional Lease is concerned, the Applicant is only entitled to acquire the Additional Lease if and in so far as it can establish the right to do so pursuant to Section 2 of the 1993 Act.
97. The starting point is subsection 2(1) of the 1993 Act which provides:

*"(1) Where the right to collective enfranchisement is exercised in relation to any premises to which this Chapter applies ("the relevant premises"), then, subject to and in accordance with this Chapter—*

- (a) there shall be acquired on behalf of the qualifying tenants by whom the right is exercised every interest to which this paragraph applies by virtue of subsection (2); and*
- (b) those tenants shall be entitled to have acquired on their behalf any interest to which this paragraph applies by virtue of subsection (3);*

*and any interest so acquired on behalf of those tenants shall be acquired in the manner mentioned in paragraphs (a) and (b) of section 1(1)."*

98. The applicant relies upon subsection 2(3) of the 1993 Act, by which it is entitled to acquire:

*"... the interest of the tenant under any lease ... under which the demised premises consist of or include-*

*(a) any common parts of the relevant premises, or*

*(b) any property falling within section 1(2)(a) which is to be acquired by virtue of that provision,*

*where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, or (as the case may be)*

*that property, on behalf of the tenants by whom the right to collective enfranchisement is exercised.”*

99. This involves a two-stage test (“the section 2 test”) and the burden is on the applicant to satisfy the Tribunal that both stages of this test are met in respect of the relevant premises demised by the Additional Lease.
100. At the first stage, the question is whether the relevant demised premises (the premises demised by the lease of which acquisition is sought) consist of or include either (i) any common parts of the relevant premises (i.e. the building in respect of which the collective enfranchisement claim is made), or (ii) any property falling within section 1(2)(a) of which the freehold is to be acquired pursuant to section 1(2)(a).

101. “Common parts” are defined in section 101(1) of the 1993 Act which provides that:

*“common parts”, in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it;”*

102. The applicant referred the Tribunal to the judgment of Mann J in Westbrook Dolphin Square v Friends Life [2014] EWHC 2433; [2015] 1 W.L.R. 1713 at paragraphs 196-200 where it is stated that:

(1) It must be intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all: Panagopoulos v Cadogan [2010] EWHC 422 (Ch); [2011] Ch. 177.

(2) It is not necessary that the part be devoted to purposes as a matter of obligation in the leases.

(3) It is not necessary for residents to have access to a part of the building for it to be a “common part”.

103. The respondents referred the Tribunal to the judgment of Roth J. in Panagopoulos v Earl Cadogan [2010] EWHC 422 (Ch) [2011] Ch 177, and also to the judgment Carnwath LJ in the Court of Appeal in the same case (also reported at [2011] Ch 177). At paragraph 43 of his judgment (190G-191A), Roth J. identified common parts in the following terms:

*“43 The statutory definition is inclusive not exhaustive. It clearly encompasses more than the ordinary meaning of common parts, which would not cover the exterior of the building. Without attempting a comprehensive definition, I consider that it is intended to include those parts of the building that either may be used by or serve the benefit of*

*the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all. Thus, I consider it will cover the boiler room or a room housing the lift machinery, although those rooms may be kept locked and no resident ever goes into them. It will encompass a covered atrium that all the residents can use, and also a sunken garden in the centre of the building to which the residents do not have access but which is a common amenity that is to be regarded as part of the building; or a banked rockery at the front of the building over which the residents do not pass but which is maintained for their common benefit and should be considered as part of the “exterior” although not part of the structure. Furthermore, there is no requirement that the part must actually be used by all the residents: for example, the fact that the residents on the ground floor may never use the lift does not prevent it from being a common part.”*

104. The Court of Appeal upheld the decision of Roth J. in this case that a caretaker’s flat, contained within the relevant premises subject to the collective enfranchisement claim, was a common part. The only qualification to the Court of Appeal’s decision, which is not directly relevant for present purposes, was that the Court of Appeal left open the question of whether a facility within a building could be a common part where the flat tenants did not have the legal right to use the facility.
105. The respondents referred the Tribunal to Carnwath LJ’s analysis of what constitutes a common part, at paragraphs 13-19 (203E-204F) and they too referred to the analysis of what qualify as common parts given by Mann J. in Westbrook Dolphin Square Limited v Friends Life Ltd (No. 2) [2014] EWHC 2433 (Ch) [2015] 1 WLR 1713, at paragraphs 196-200 (1758F-1759C).
106. The applicant states that the second stage of the section 2 test is largely, if not entirely, a question of fact. Acquisition must be “reasonably necessary” for:
  - (1) “The proper management or maintenance of” the common parts, or;
  - (2) “The proper management or maintenance of” the areas to be acquired under s.1(2)(a).
107. The respondents state that the issue is not whether acquisition of the relevant leasehold interest is required for the proper management or maintenance of the building which is the subject of the collective enfranchisement claim, or for the proper management or maintenance of some part or parts of that building. The test is whether acquisition of the relevant leasehold interest is reasonably necessary for the proper management or maintenance of *that part or those parts* of the premises demised by the relevant leasehold interest which satisfy the first stage of the section 2 test.

108. The respondents state that in the present case therefore it is not sufficient for the applicant to demonstrate that acquisition of a particular area demised by the Additional Lease is required for the proper management or maintenance of premises outside that particular area. The question is whether acquisition of that particular area is required for the proper management or maintenance of that particular area.
109. By way of example, the respondents contend that the Sheds would only satisfy the second stage of the section 2 test if it could be demonstrated (assuming satisfaction of the first stage of the section 2 test) that the acquisition of the leasehold interest in the Sheds constituted by the Additional Lease was reasonably necessary for the proper management or maintenance of the Sheds, taken on their own.
110. Further, they state that the Yard would only satisfy the second stage of the section 2 test if it could be demonstrated (assuming satisfaction of the first stage of the section 2 test) that the acquisition of the leasehold interest in the Yard was reasonably necessary for the proper management or maintenance of the Yard, taken on its own. The respondents emphasise that, on their case, the same test applies to each part of the Internal Areas.
111. The respondents state that it is also important to note that the question is not whether acquisition of the relevant part is reasonably necessary in order to access some other part of the premises. By way of example, reasonable necessity is not demonstrated in respect of the Basement Rooms by the argument that they are required for access purposes.
112. The respondents submit that, given the narrow terms of the second stage of the section 2 test, it is not normally easy for a nominee purchaser to demonstrate that acquisition of a leasehold interest in a part of the relevant building, or in a part of premises external to the relevant building, is reasonably necessary for the proper management or maintenance of that particular part. If the relevant part comprises a room, or a lightwell, or an open area, it will not normally be the case that acquisition of a leasehold interest in such a part is reasonably necessary for management or maintenance purposes.
113. The respondents state that, if such reasonable necessity is to be demonstrated at all, the nominee purchaser should normally call expert management evidence to establish that the reasonable necessity exists in relation to the relevant part of the premises.
114. Accordingly, it was suggested to Mr Henson in cross-examination that such management issues might require a degree of expert evidence. The applicant disputes this but submits that if correct, as an expert Tribunal, the Tribunal can apply its own expertise in management.
115. Further, the respondents state that the Additional Lease is not a demise of any structural parts of the Building, or the services of the Building (the Tribunal was

referred to the definition of the Reserved Property in the Additional Lease, which identifies what is not included in the demise). As with the Leases of the Flats, the Additional Lease, in so far as it demises the Internal Areas, is a demise of internal areas only. It does not include the structure and services of the Building.

116. The respondents state that it is therefore difficult to see how the reasonable necessity test could be satisfied in relation to these internal areas of demise. So far as the Additional Areas are concerned, they are open areas, with the exception of the Sheds. So far as the Sheds are concerned, they are not part of the Building, and there is no evidence that they house any services of the Building.
117. In addition, the respondents state that it is fundamental that the Second Schedule to the Additional Lease reserves an extensive set of rights, including rights of emergency access, to the landlord, as follows:

*“THE SECOND SCHEDULE*

*There is excepted and reserved to the Lessor and the owners and lessees of the remaining flats in the Flat Blocks:-*

1. *Full right and liberty for the Lessor and all persons authorised by it with or without workmen and others at all reasonable times and upon reasonable notice being given (except in the case of emergency) to enter into and upon any part of the Property for the purpose of repairing maintaining renewing altering or rebuilding any part of the reserved Property or the other flats in the Flat Blocks and for testing repairing maintaining renewing altering rebuilding or cleansing all sewers drains gutters watercourses cables pipes conduits wires and aerials which are now or may at any time during the Specified Period be in or under passing through the Property and for laying down or erecting any new sewers drains gutters watercourses cables pipes conduits wires and aerials causing as little damage as possible and making good any damage occasioned thereby*

2. *The free and uninterrupted passage and running of water and soil gas and electricity from and to the remaining flats through the sewers gutters watercourses cables pipes wires and conduits which now are or may at any time hereafter during the Specified Period be in under or passing through over or along the Property or any part thereof*

3. *All easements or quasi-easements and rights of support protection way access exit light and air equivalent to such rights as the remaining flats would have acquired by prescription had the Property and the remaining flats been at all times in separate ownership*

4. *The right at any time hereafter to rebuild alter add to extend build on or use any of the parts of the Lessor's premises comprised in the Flat Blocks*

*(including any parts thereof not at the date hereof built thereupon) according to such plans (whether as to height extent or otherwise) and in such manner as shall be approved by the Lessor notwithstanding that the access of light or air to or any other easements for the time being appertaining to or enjoyed with the Property or any part thereof may be obstructed or interfered with or that the Lessee might otherwise be entitled to object to such alteration addition extension rebuilding or user*

*5. The Lessor shall have the right to regulate the colour of the exterior decoration of the window frames and shall have exclusive right to redecorate the same”*

118. The respondents state that if therefore, which is not the case, the evidence heard by the Tribunal had established any reasonable necessity to enter upon any parts of the Internal Areas or the Additional Areas, as demised by the Additional Lease, for the purpose of management or maintenance of any such part, the required rights to do so exist under the Second Schedule to the Additional Lease.
119. The respondents state that Roth J. reached much the same conclusion, in relation to a set of reserved rights considerably narrower than those reserved in the Second Schedule to the Additional Lease, in Panagopoulos at paragraphs 69-71 (195G-196G). They state that it follows that if, which is substantially disputed, any parts of the premises demised by the Additional Lease do satisfy the first stage of the section 2 test, they fail decisively the second stage of the section 2 test.
120. In response, the applicant submits that the “reserved Property” in this context does not include the Yard and that rights to manage the common parts are not reserved but rather the landlord has the right to go onto the reserved Property for limited purposes only (for example, there is no reference to managing and maintaining a meter room). Further, the rights to repair, maintain etc. are reserved to the “Lessor” whereas the words “on behalf of the tenants” in section 2(3) of the 1993 Act should not be construed as references to a third party.
121. The Tribunal accepts the applicant’s submission that the terms of the Additional Lease are not adequate to protect the need to manage and maintain the common parts on behalf of the tenants. The remaining issues will be considered below below.

### ***The Additional Areas***

122. As regards stage 1 of the section 2 test, the applicant submits that the Yard and lightwells serve the benefit of the residents in common, using that expression in a non-technical sense. The applicant states that they provide common access to rear areas for the purposes of maintenance and repair.

123. The applicant referred the Tribunal to the evidence of Mr Wallis that the lessees do in fact use the rear Yard. Further, the applicant relies upon the first respondent's acceptance that he was not at the premises frequently enough to contradict this. In addition, the applicant states that, if it acquires the freehold of the Yard and lightwells under section 1(2)(a) of the 1993 Act, the stage 1 test provided for in section 2(3)(b) is met, in any event.
124. The respondents submit that the Additional Areas cannot be common parts, because they are external to the Building. The respondents state that common parts can include an exterior part of a Building, such as the external brickwork or roof space. Common parts can also include a lightwell which is contained within the relevant building. They cannot, however, include an external area such as the Lightwells, the Yard or the Sheds.
125. In support of this contention, the respondents referred the Tribunal to the judgment of Roth J. in Panagopoulos, at paragraphs 64-66 (194F-195B):

*“64 Under the scheme of the 1993 Act, a “common part” has to be a part of the building (or a part of the relevant part of a building) since it is the building itself (or relevant part of the building) that constitutes the premises which may be subject to an enfranchisement claim: see section 3. A building for this purpose of course includes its exterior. But a communal garden, back yard or forecourt is not part of the building and therefore cannot qualify as “common parts”. Under the complex statutory provisions, the participating tenants' rights in respect of areas of that kind are separately addressed by section 1(2) to (4).*

*65 A light-well in the centre of a building, entirely surrounded by its walls, can sensibly be regarded as part of the building: see Dartmouth Court Blackheath Ltd v Berisworth Ltd [2008] 2 P & CR 36 , para 65, where Warren J reached that conclusion in applying the similarly worded definition of “premises” in the Landlord and Tenant Act 1987 in the context of the tenants' statutory right of first refusal upon a disposal by the landlord (although Warren J observed later in his judgment that he would be reluctant to apply by analogy a construction of the 1993 Act to the Landlord and Tenant Act 1987 , that was as regards the statutory context of “common parts”; I do not see any distinction as between the two Acts when considering the everyday concept of a “building”). Does it make a difference that in the present case the light-well is framed by the walls of the building only on three sides? In fact, the light-well functions as such because of the similar, adjacent space framed by three walls of 53 Cadogan Square. Together, the premises known as 51 and 53 Cadogan Square thus enclose on all four sides a space allowing light to come through for the benefit of the two premises.*

*66 I consider that the matter can best be approached by considering the implications if the light-well were not part of the building. In that case, as it would not be part of the premises covered by section 3, the participating tenants would not have the right to acquire the freehold of the light-well under section 1(1). Nor would they have the qualified right to acquire its freehold*



*under section 1(2)–(4) since it is not property which the tenants are entitled to use in common. It would therefore fall outside the scope of the right to collective enfranchisement.”*

126. Having found that the applicant is entitled to acquire the freehold interest in the Additional Areas, the Tribunal accepts that the stage 1 test provided for in section 2(3)(b) is met.
127. As regards stage 2 of the section 2 test, the applicant submits that it is also “reasonably necessary” for it to acquire the leasehold interest in the Lightwells and Yard. Without the leasehold interest in these areas, the applicant states that it cannot repair or maintain them or gain access to the elevations which form part of the common parts and the Building.
128. The respondents state that the relevant question is whether the acquisition of the Additional Areas is reasonably necessary for the proper management or maintenance of the Additional Areas themselves; that the applicant has adduced no expert evidence to this effect; and that the applicant has failed to make out its case.
129. Having carried out a detailed inspection of the Property, the Tribunal finds that it is reasonably necessary for the applicant to acquire the leasehold interests in the Additional Areas in order to properly manage and/or maintain the Additional Areas themselves. For example, the surfaces require cleansing and repair and will need to be kept clear of leaves and rubbish. The Tribunal notes that these areas are not currently in good order.

### ***The Basement Rooms***

130. The applicant notes that Mr Berger does not suggest that the long leasehold interest in the basement rooms has any value at all. As regards stage 1, the applicant submits that the basement rooms are plainly and obviously “common parts”.
131. Firstly, the applicant states that these rooms have electrical equipment on the walls, including meters, fuse-boxes, switches, distribution boards, cabling etc. The applicant submits that they are plainly and obviously serving the Flats, the common parts and other areas of the Building, and that they “serve the benefit of the residents in common (using that expression in a non-technical sense)”.
132. The applicant states that there is no need for the basement rooms to be accessible to the residents (referring the Tribunal to Dolphin Square). Further, the applicant states that some support for this is given by the findings in the County Court case of Indiana Investments v Taylor [2004] 3 E.G.L.R. 63, CC at p.66M-67A.

133. Secondly, the applicant states that these rooms are the only means of access to the lightwells and that, again, they therefore “serve the benefit of the residents in common (using that expression in a non-technical sense)”.
134. The applicant states that, although it is not a necessary requirement of the test for the residents to have access to the basement rooms, Mr Wallis gave evidence that they have in fact been used for access purposes. The applicant noted that the first respondent denied in cross-examination that he had asked anyone to change the locks to the basement rooms in order to stop access by the lessees of the Flats.
135. As regards stage 2 and whether it is “reasonably necessary” for the applicant to acquire the second respondent’s interest in the Basement Rooms for their “proper management or maintenance”, the applicant contends that the need is obvious.
136. The applicant states that electrical equipment needs to be checked. The fuses may need to be changed, switches switched, meters read, cables and equipment repaired and replaced. The rooms themselves need maintenance, such as repairs to ceilings, doors, security, lighting etc.
137. The applicant submits that it is also “reasonably necessary” for it to have the leasehold interest in the basement rooms in order to manage and maintain the lightwells which are other elements of the “common parts” comprised in the Additional Lease which, on the applicant’s case, it will acquire under s.2(3). The applicant states that it is artificial to divide up the various elements of the Additional Lease for the purposes of the section 2 test and that the test applies to the second respondent’s interest in the Additional Lease as a whole, not to a component part of the Additional Lease.
138. The respondents state that there are no communal rights in respect of the Basement Rooms. They submit that the Basement Rooms provide no common facilities and that they are not part of the common parts of the Building.
139. The respondents note that the meters located in the Basement Rooms may or may not be functioning and serving the Building. Whilst there is evidence to this effect in the witness statement of Mr Wallis, the respondents point out that his evidence only relates to the meters in the Basement Room in Clifton House.
140. The respondents contend that this, however, is irrelevant because the meters are not contained in the premises demised by the Additional Lease (in this respect, the Tribunal was referred to the second element of the definition of the Reserved Property in the Additional Lease).
141. As regards stage 2, the respondents state that the relevant question is whether the acquisition of the Basement Rooms is reasonably necessary for the proper management or maintenance of the Basement Rooms themselves; that the

applicant has adduced no expert evidence to this effect; and that the applicant has failed to make out its case.

142. Having inspected the Basement Rooms, the Tribunal considers it likely on the balance of probabilities that meters and also the wires in those rooms are (and were at the Valuation Date) serving the Building and the Flats.
143. In the Panagopoulos case, Roth J. at [45] gave as an example a gym which would be a “common facility”. The Tribunal notes that it is common for gym equipment to be leased, for plant to be retained by statutory undertakers, and for furniture within a communal reception area to be leased. The Tribunal is not satisfied that the relevant question is whether or not the meters within the Basement Rooms are contained in the premises demised by the Additional Lease.
144. Further, in the Court of Appeal, Carnwath LJ stated at [17] (emphasis added):  
  
*“...the “facility” represented by a boiler is **not just the physical structure, but also includes the service** of hot water provided from it. If the lessees have the right to obtain hot water from a common boiler, then, whether or not they have access to the boiler room, it can in my view properly be regarded as a “common facility”, and therefore within the common parts...”*
145. The Tribunal is of the view that the meters are performing a service, akin to a boiler, and that the Basement Rooms serve the benefit of the residents in common, using that expression in a non-technical sense. Accordingly, the Tribunal finds that stage 1 of the section 2 test is satisfied.
146. As regards stage 2, the Tribunal accepts that applicant’s case that within the Basement Rooms it is likely that fuses will need to be changed, switches switched, meters read, cables and equipment repaired and replaced. Further, the internal areas of the Basement Rooms themselves will need maintenance, such as repairs to the ceilings, doors and lighting. The Tribunal notes that the Basement Rooms are not currently in good order.
147. Accordingly, the Tribunal finds that stage 2 of the section 2 test is satisfied and that the applicant is entitled to acquire the second respondent’s interest in the Basement Rooms.

### ***The Orange Rooms***

148. The Orange Rooms comprise two rooms at basement level (“the lower Orange rooms”) and one room at half landing level in Clifton House (the “upper Orange room”). The Tribunal has inspected the interiors of all three rooms either directly or through a window. The upper Orange room has a butler sink, an old WC and window. The lower Orange Rooms, each have cupboards, shelves and goods, two doors and a window.

### *The Upper Orange Room*

149. As regards stage 1 of the section 2 test, the applicant accepts that this room has plainly not been used for any purpose for very many years. However, the applicant asserts that it does seem that the Upper Orange Room was once used to provide some kind of communal function, for washing and WCs. Further, the applicant submits that this room would provide useful accommodation for cleaners etc.
150. As regards stage 2 of the section 2 test, the applicant submits that acquisition of the Upper Orange Room is also “reasonably” necessary for its “management” and maintenance. The applicant states that this room could not easily be maintained and/or managed other than by acquiring it. It requires decoration, lighting, cleaning etc. and the applicant submits that it is hard to see how the Upper Orange Room can be managed separately from the rest of the building.
151. The respondents note that this is an enclosed room, over which the lessees do not have “blue rights”. The respondents state that there was and is no communal right to use the Upper Orange room, nor was the room in use as any kind of communal facility on the Valuation Date. The respondents contend that the Upper Orange Room is, therefore, not part of the common parts of the Building.
152. Having inspected the Upper Orange Room, the Tribunal accepts the respondents’ contention. The room did not appear to have been put to any type of use for a very considerable period of time and the Tribunal is not satisfied on the balance of probabilities that it is likely that this room has been used for any communal function. Accordingly, the Tribunal finds that stage 1 of the section 2 test is not satisfied and that the applicant is not entitled to acquire the Upper Orange Room.

### *The Lower Orange Rooms*

153. As far as the lower Orange Rooms are concerned, these rooms are subject to “blue rights” and the respondents accept that they qualify as common parts.
154. As regards stage 2 of the section 2 test, the applicant submits that it is artificial to divide up the component parts of the Additional Lease and states that, without these rooms, the applicant is denied two of three means of access to the rear Yard, and it is forced to use a highly inconvenient doorway from Carburton House.
155. The applicant invites the Tribunal to test this by imagining what a cleaner would have to do if they were on the stairwell at the foot of Carlton House. They would have to climb to the fourth floor and go along the balcony before descending the stairs to Carburton House. The applicant states that the same applies to maintenance of the rear elevation with workmen, scaffolding and plant and that

it is “reasonably” necessary for the applicant to acquire the lower Orange Rooms to avoid this.

156. The respondents state that the relevant question is whether the acquisition of the Lower Orange Rooms is reasonably necessary for the proper management or maintenance of the Lower Orange Rooms themselves; that the applicant has adduced no expert evidence to this effect; and that the applicant has failed to make out its case.
157. Having inspected the Lower Orange Rooms, the Tribunal finds that the internal areas of the Lower Orange Rooms themselves will need management and maintenance, such as repairs to the ceilings, doors and lighting. The Tribunal notes that the rooms are not in good order.
158. In all the circumstances, the Tribunal is satisfied that stage 2 of the section 2 test is satisfied and that the applicant is entitled to acquire the second respondent’s interest in the Lower Orange Rooms.

***The airspace above the two flat roof areas at first floor level***

159. The applicant submits that the airspace above a roof is almost always required to clean and repair the roof itself and that courts and tribunals frequently find they are “common parts” which are “reasonably necessary” for proper management.
160. In support of this proposition, the applicant referred the Tribunal to *Hague* at 20-09:

*“A lease of the surface of, and the airspace above, the flat roof of a block is a lease of common parts, and is liable to acquisition under s.2(1)(b). It has been held in one case that the roof space was required for the proper management of the roof, and proper management would not be possible were the lessee to build flats or place mobile phone masts upon it.”*

161. The respondents submit that there are no communal rights in respect of the airspaces above the two flat roof areas and that these airspaces provide no common facilities. The respondents say that it is doubtful that the airspaces are correctly classified as Internal Areas at all, as opposed to areas external to the Building but that, in any event, they are not part of the common parts of the Building.
162. The Tribunal prefers the applicant’s submissions, which are supported by *Hague*, and finds that the applicant is entitled to acquire the second respondent’s interest in the airspace above the two flat roof areas at first floor level.

***The area above the lift***

163. The respondents do not concede that the Tribunal should infer that the area above the lift (or part of this area) houses lift machinery. However, the respondents accept that, if the Tribunal were to draw this inference, this area would also qualify as a common part.
164. Having inspected the relevant area, the Tribunal is satisfied that it is highly likely that the locked storage area directly above the lift houses the lift machinery.
165. In the event that the lift machinery does not fill the entirety of the storage cupboard, the Tribunal considers that the primary purpose of the cupboard is likely to be the storage of lift machinery and that the entirety of the cupboard is a common part. By analogy, it was not suggested in argument that a boiler room would not be a common part by virtue of the fact that the boiler and ancillary items are unlikely to fill the entirety of the space within the boiler room.
166. The Tribunal finds that it is “reasonably necessary” for the applicant to acquire the second respondent’s interest in the storage area above the lift in order to manage and maintain the lift machinery and the storage area itself.
167. As regards airspace above the storage area, the parties rely upon the arguments which were advanced in respect of the airspace above the two flat roof areas at first floor level.
168. The Tribunal prefers the applicant’s submissions, which are supported by *Hague*, and finds that the applicant is entitled to acquire the second respondent’s interest in the area above the lift (including the roof space).

### **The Valuation Issues**

169. Having heard full evidence and argument, the Tribunal will make determinations in respect of all of the valuation issues, notwithstanding its finding that the Upper Orange Room does not fall to be acquired.

### **The freehold valuations**

#### ***The freehold interest in the Four Flats***

170. Mr Berger is of the opinion that the starting figure for the valuation of the freehold interest in the Four Flats, before any deductions are made, is £1,300,000 (£325,000 per Flat) based upon sales evidence relating to Flats 2 and 10 Clifton House. However, it is unclear precisely what adjustments Mr Berger has made in order to derive the valuation of £325,000 per flat from this sales evidence. Mr Berger then went on to make adjustments to two flats only, making deductions of 15% for existing tenants and £25,000 for improvement works which provides an adjusted figure of £1,152,500.

171. Mr Henson speaks to a starting figure of £1,061,500, derived from the square footages that were used in his valuation of the reversionary interest in the Flats. These were, in turn, derived from four comparables, including the sales of Flats 2 and 10 Clifton House.
172. Mr Henson used the range of agreed price per square foot values, namely £1400 for two of the flats and £1350 for the two remaining flats. He then made a split adjustment of 70% and 50%, which accounted for condition and his discount for tenure. Based upon the Schedule provided in Mr Henson's report, this produced a total figure of £424,600 for the four flats.
173. As regards the starting point for the valuation, the Tribunal prefers Mr Henson's methodology. It considers that adopting a price per square foot is the most appropriate method of valuing the freehold interest in the Four Flats in light of the fact that no comparable sales evidence in respect of studio flats is relied upon.
174. The applicant submits that, whilst ordinarily the price per square foot increases as units become smaller, no increase is warranted in the present case. The applicant invites the Tribunal to find that a hypothetical purchaser would be likely to wish to convert Flats 3 and 3A and Flats 7 and 7A into two flats. Mr Henson gave evidence to this effect and, under cross-examination, Mr Berger appeared to accept that there was force in this suggestion.
175. However, the applicant accepts that, in order to carry out such a conversion, the hypothetical purchaser would need to deal with more than one tenant and could not proceed with its scheme until it had obtained vacant possession of at least two adjacent Flats. In the meantime, the hypothetical purchaser would have to pay interest on its borrowings and the rent return on the Flats occupied by statutory tenants would be significantly below market value.
176. There is a possibility that the statutory tenants might remain in occupation for a considerable period of time or that they might demand significant reverse premiums in exchange for the surrender of their tenancies. Further, the assured shorthold tenancy for Flat 7 did not expire until November 2015 and, if the assured shorthold tenants did not leave voluntarily at the appropriate time, they could not be evicted without first obtaining a Court order.
177. In light of these factors, the Tribunal does not accept that it is likely on the balance of probabilities that the hypothetical purchaser would seek to convert Flats 3 and 3A and Flats 7 and 7A into two flats. Accordingly, the Tribunal has adopted a price per square foot of £1,600 to take account of the fact that the Four Flats are small units in respect of which space is at a premium.
178. The experts have agreed discounts in order to reflect the condition of the Four Flats but they have not agreed discounts in order to reflect the security of tenure of the occupants. The position can be summarised as follows:

- (i) The Tribunal was informed that the gross internal floor area of Flat 3 Carburton House is 193 square foot. On inspection, this Flat was vacant. The living accommodation comprised two rooms with limited cooking facilities. The Flat was in poor condition with no space heating and the use of a shared WC on the other side of the corridor. The Tribunal was informed that this property was occupied by a statutory tenant on the Valuation Date. According to the first respondent, the tenant was “aged about 83 years old” at this time. The Tribunal was informed that the capped registered rent was £70 per week, of which £6.93 per week was attributable to services, with the next rent increase not registrable until July 2017. The valuers have agreed a discount for condition of £30,000 in respect of this Flat.
- (ii) The Tribunal was informed that the gross internal floor area of Flat 3A Carburton House is 193 square foot. On inspection, this Flat was found to be tenanted. The living accommodation comprised two rooms with limited cooking facilities and a very small shower room/WC. The Flat was in a poor condition with no space heating. The Tribunal was informed that, on the Valuation Date, this Flat was occupied by an assured shorthold tenant at a rent of £1,050 per month. The valuers have agreed a discount for condition of £25,000 in respect of this Flat.
- (iii) The Tribunal was informed that the gross internal floor area of Flat 7 Carburton House is 193 square foot. On inspection, this Flat was found to be tenanted. The living accommodation comprised two rooms with limited cooking facilities. The Flat was in poor condition with no space heating and the use of a shared WC on the other side of corridor. The Tribunal was informed that, on the Valuation Date, this Flat was occupied by an assured shorthold tenant at a rent of £883.33 per month. The valuers have agreed a discount for condition of £30,000 in respect of this Flat.
- (iv) The Tribunal was informed that the gross internal floor area of Flat 7A Carburton House is 193 square foot. On inspection, this Flat was found to be tenanted. The living accommodation comprised two rooms with limited cooking facilities. The Flat was in poor condition with no space heating and the use of a shared WC on other side of corridor. It was subject to a statutory tenancy on the Valuation Date. According to the first respondent, the tenant was “aged about 80” at the time, and in poor health. The Tribunal was informed that the capped registered rent was £70 per week, of which £6.93 per week was attributable to services, with the next rent increase not registrable until July 2017. The



valuers have agreed a discount for condition of £25,000 in respect of this Flat.

179. As regards the statutory tenants, there is a consensus that there should be a discount but no agreement as to its quantum. Mr Berger gave evidence that a 15% discount was appropriate. He explained that investors often have a number of properties and balance the possibility of a Rent Act tenant remaining in occupation for a long period in one property against the windfall which will accrue if a Rent Act tenant leaves a property sooner than expected.
180. Mr Henson gave evidence that a much more substantial discount should be applied. In paragraph 12.9 of his report, Mr Henson said that the discount should be 70%, incorporating an adjustment for condition and "on the assumption that the properties are subject to rights of indefinite occupation with no rent payable" (the information regarding the tenancies was not initially available). Mr Henson currently contends for a discount of 30% in respect of tenure.
181. Neither expert has provided the Tribunal with any specific comparable evidence. Doing its best on the limited evidence available, the Tribunal finds that the appropriate discount in respect of the statutory tenancies is 20%. The Tribunal prefers Mr Berger's general approach to this issue but, on the basis that the Tribunal considers that greater weight should be given to the potential risks, the Tribunal has added 5% and has applied a 20% discount for tenure in respect of the statutory tenancies.
182. As regards the assured shorthold tenancies, Mr Henson has applied a discount of 15% and Mr Berger has applied no discount.
183. The applicant submits that a flat with any kind of sitting tenant is less valuable than one without a tenant and that there are special circumstances in the present case because the hypothetical purchaser would be likely to wish to convert the pairs of studio flats into two larger units.
184. For the reasons set out above, the Tribunal does not accept that it is likely on the balance of probabilities that the hypothetical purchaser would seek to convert Flats 3 and 3A and Flats 7 and 7A into two larger flats.
185. Mr Berger pointed out in cross-examination that the hypothetical purchaser would have the benefit of the rental income pending the determination of the assured shorthold tenancies. Further, he is of the view that the risk of a possession order being required in order to secure vacant possession at the end of the term is a risk inherent in any tenanted property.
186. The Tribunal accepts Mr Berger's evidence in this regard. The risk of a possession order being required in order to secure vacant possession is not a risk peculiar to an assured shorthold tenancy. The Tribunal is not satisfied that it is a risk which is likely to justify a separate discount and, in any event, there

was no evidence before the Tribunal which would justify applying a separate discount. Accordingly, the Tribunal has not applied any discount for tenure in respect of the Flats which were occupied by assured shorthold tenants on the Valuation Date.

187. Applying the findings set out above, the Tribunal has valued the first respondent's freehold interest in the Four Flats in the sum of £1,001,680. A copy of the Tribunal's valuation is attached to this decision marked "Appendix A".

### ***The Additional Areas freehold***

188. As stated above, Mr Berger did not assign any separate value to the Additional Areas Freehold.
189. Mr Henson assigned nominal values of £500 to the Yard, £600 to the Lightwells, and £500 to the Sheds and the Tribunal accepts Mr Henson's evidence on this issue.

### **The leasehold valuations**

#### ***Clause 2(xvi) of the Additional Lease***

190. The applicant states that, when assessing the price of the second respondent's leasehold interest, it is important to bear in mind what it is that is being valued. Strictly speaking, it is not the value of the Yard or pram sheds, or indeed even the value of the leasehold interest in those separate areas.

191. Schedule 6 Pt. IV paragraph 10(2) of the 1993 Act provides:

*(2) Where the nominee purchaser is to acquire any leasehold interest by virtue of section 2(1) other than an intermediate leasehold interest, or he is to acquire any leasehold interest in pursuance of section 21(4), then (subject to subparagraph (3) below) the price payable for that interest shall be the aggregate of—*

*(a) the value of the interest as determined in accordance with paragraph 11, and*

*(b) any amount of compensation payable to the owner of the interest in accordance with paragraph 13.*

192. The applicant states that the hypothesis here is that the hypothetical purchaser in August 2015 would be bidding for the whole of the Additional Lease (less the value of the areas which are to be retained by the second respondent), not individual component parts of it.

193. The applicant accepts that, in fact, the experts agree that such a successful purchaser in the open market would have looked at the various component parts of the Additional Lease and assessed its bid by taking a view about what it might do to exploit the various component parts such as the Yard, the Orange Rooms etc. However, the applicant stresses that one must not ignore the legal point that the hypothetical purchaser is still buying the whole Additional Lease comprising several, often unconnected and, on the applicant's case, "slightly odd" areas of the Property.
194. The applicant also stresses that the terms of the Additional Lease (such as user and alienation) still apply to all of the areas under consideration. The applicant states that this is not, of course, inconsistent with the exercise involved with the decision about the areas of the Additional Lease which will be severed and kept by the second respondent (the Tribunal was referred to *Hague* at 20-09).
195. The applicant referred the Tribunal to clause 2(xvi) of the Additional Lease which provides that the lessee may not "*assign transfer let or part with possession any part of the flat (as opposed to the whole)*". The applicant submits that, construing the Additional Lease as a whole, in this provision, "flat" is an obvious typographical error for "Property".
196. In response, the respondents submit that (if, which is denied, the word "flat" is a typographical error for Property) the hypothetical purchaser would have in mind the possibility of either granting licences of the various component parts of the Property or of subletting the whole to a third party who would then separately sublet the component parts. The applicant did not put forward a positive case that the hypothetical purchaser would be unable to take these steps.
197. The Tribunal accepts that the hypothetical purchaser is likely to be concerned that, construing the Additional Lease as a whole, "flat" in clause 2(xvi) is likely to be considered to be a typographical error for "Property". Further, the Tribunal accepts the respondents' submission that the hypothetical purchaser would be likely to conclude that it would be able to find a mechanism for facilitating the transfer of rights in component parts of the Additional Lease.
198. However, the Tribunal accepts that clause 2(xvi) of the Additional Lease creates a potential hurdle which the hypothetical purchaser would have to expend a certain amount of time and expense in dealing with, and which would be likely to have a limited negative impact upon the hypothetical purchaser's potential profit. The Tribunal has taken these matters into account in reaching its valuations below. No evidence was adduced as to the extent of any negative impact and the Tribunal has therefore done its best on the limited information available.

### ***The Roofspace lease***

199. The Tribunal adopts Mr Henson's nominal valuation of £500.

### *The Orange Rooms*

200. Mr Henson is of the view that the Orange Rooms are worth £13,500 (i.e. £4,500 each) on the basis that these rooms could be used as ancillary storage space. He considers each of these rooms to be 45 square foot in size and values them at the rate of £100 per square foot.
201. Mr Berger is of the view that the Orange Rooms are worth £225,000 (i.e. £75,000 each). He considers each of these rooms to be 50 square foot in size and is of the opinion that the demand would exist from the lessees "to have them as additional space".
202. In cross-examination, Mr Berger considered that there was potential for the Orange Rooms to be used as additional "living space". In his report, Mr Berger stated that enquiries which he had made online suggested that a room with shared facilities was being "let" at a rent of £158 per week. In cross-examination, he explained that he had seen a room "marketed" online for that rent. The precise nature and location of the room was unclear.
203. Mr Berger applied a discount of 25% to the rental figure in order to reflect the nature of the Orange Rooms and then capitalised the rent (applying a capitalisation rate @ 6%) and arrived at a figure of £84,000. Allowing £9,000 for decoration, this produced a valuation of £75,000 per room.
204. Unlike the upper Orange Room, the lower Orange Rooms have two doors and are subject to rights of way for leaseholders. Accordingly, the Tribunal has valued the upper Orange Room and the lower Orange Rooms separately.

### *The Upper Orange Room*

205. The Tribunal heard some creative submissions regarding the uses to which this room could potentially be put. The Tribunal is of the view that the room is most likely to be used as storage space but it accepts that there is also a possibility that an occupant of a flat on the same floor might consider using it as, for example, a study. The Tribunal notes that this room has the benefit of natural light. However, the Tribunal also takes account of the fact that the potential market for the use of this room as ancillary living accommodation such as a study is very limited.
206. On the basis that the Tribunal considers that the Upper Orange Room is most likely to be used for storage, it adopted Mr Henson's approach as its starting point. The Tribunal has then applied a substantial uplift (a) to reflect the possibility that the occupant of a flat on the same floor may wish to use the room as a study or similar ancillary living accommodation, and (b) on account of the fact that, in the Tribunal's general knowledge and experience, the price of £100 per square foot is low for storage space in this area.

207. Neither expert provided the Tribunal with any comparable evidence (a) in respect of the price per square foot payable as at the Valuation Date for storage space in the locality of the Property or (b) in respect of the price per square foot payable for residential use such as study, ancillary to other self-contained living accommodation (which itself contains the sleeping accommodation, kitchen, bathroom and living accommodation). Similarly, in relying upon its knowledge and experience, the Tribunal has not identified any specific comparable evidence of its own but rather has adopted the “broad brush” approach put forward in the expert evidence.
208. Taking all of these factors into account, in addition to the rights of lessees under clause 2d of the Leases, the condition of the room, the risks, the costs and the other matters to which it was referred in the parties’ written submissions, the Tribunal determines that the value of the upper Orange Room is £25,000 (i.e. that this room adds £25,000 to the value of the Additional Lease).

#### *The Lower Orange Rooms*

209. It is common ground that the Lower Orange Rooms are subject to “blue rights” i.e. to rights of way for 34 leaseholders. These rights, which are set out in Schedule 1 paragraph 1 of the Leases, are unqualified and give rights to the other lessees to go into the rooms at any time of the day or night, without notice, with workmen and tools. In light of the nature and extent of these rights as well as the location, small size and inconvenient shape of the rooms, the Tribunal is not satisfied that the Lower Orange Rooms have any value.

#### *The Yard and the Sheds*

210. The former pram sheds/outhouses (“the Sheds”) are situated in the Yard. Accordingly, either the Yard or the Sheds could potentially be developed but not both.
211. Mr Henson gives the Yard and Sheds a nominal value of £500. He is of the view that a hypothetical purchaser would not consider these areas of be of any significant value.
212. Mr Berger is of the view that the Yard is worth £200,000, based on the possibility of the existing/future lessees of the basement flats being “prepared to pay for the benefit of having outside spaces”. Mr Berger assigns each proposed patio/garden a value of £50,000 on the basis that this is approximately 10% of the value of each of the Flats.
213. In the alternative, Mr Berger’s has valued the 24 sheds at £5,000 each and £120,000 in total (based on a suggested rental value of £6 per week). He suggests that the Sheds could be used as extra storage space, in particular, for storing bicycles.

214. The Tribunal is not satisfied on the evidence that the respondents have made out their case in respect of the proposal in relation to the Sheds. No comparable evidence has been produced to support the proposition that each Shed has a potential rental value of £6 per week (rather than, for example, a rental value of £4 per week or £2 per week) and the Tribunal does not itself have knowledge and experience of the rental value of such Sheds.
215. The Tribunal accepts the applicant's case that there is a small potential market for each Shed. There are 38 Flats in the Building and, for the proposed scheme to work, 24 of the occupants of the Flats would have to be prepared to pay £300 per year for storage. There is no evidence of such demand within the Building and, notwithstanding that there are 24 Sheds, there is no suggestion that any of them have been let since the leases of the Flats were granted in the 1980s.
216. As regards the suggestion that the Sheds would be likely to be used for storing bicycles, the Tribunal accepts the applicant's submission that they are inconvenient in both shape and location for this purpose.
217. The Tribunal is not persuaded, on the evidence before it, that a hypothetical purchaser would attribute any value to the Sheds as potential storage space.
218. The Tribunal does, however, accept the respondents' contention that the Yard has some value as potential outside space for the lessees of the four basement Flats. Whilst one of the Flats would not have its own private doorway, the Tribunal is of the view that a walkway could be created in order to facilitate access to this Flat's patio/garden.
219. The Tribunal has adopted Mr Berger's approach of valuing the gardens at the rate 10% of the value of each Flat as its starting point. However, the Tribunal considers it necessary to make substantial discounts in order to reflect the following matters:
- (i) The Yard is subject to rights of access for 34 leaseholders under Schedule 1, paragraph 2(d) of the Leases. The Tribunal considers that these rights are likely to be exercised intermittently and that they would not render the proposed scheme unviable. However, it accepts that the existence of these rights is a factor to be taken in to account in assessing value.
  - (ii) The Tribunal accepts the applicant's submission that the Yard is damp and unattractive. The Sheds would need to be demolished, a considerable amount of work would be required to improve the condition of the gardens and, even if a significant amount of work were carried out, there is likely to be a limit to what can be achieved by way of improvement.

- (iii) There is a very limited market of four (or, at most, six ground floor lessees) and little evidence of any demand. The first respondent gave evidence that he was at one time in negotiations with a lessee to purchase some outside space for the sum £50,000 but that the proposal fell through. The Tribunal notes that the proposed purchase price could have been a factor in the proposal falling through.
- (iv) The Tribunal has taken into account all costs etc. to which it has been referred by the applicant and the need of the hypothetical purchaser to realise a profit.

220. In all the circumstances, the Tribunal values the four potential patio gardens at £20,000 each (i.e. the Tribunal determines that the Yard adds £80,000 to the value of the Additional Lease).

### ***The Lightwells***

221. Mr Berger does not assign a value to the Lightwells. Mr Henson includes the Lightwells in the nominal valuation which he assigns to the Yard and the Sheds, in the combined sum of £1,000. Adopting the approach taken by Mr Berger, the Tribunal does not assign any additional value to the Lightwells.

### **Conclusions**

- 222. The applicant is entitled to acquire the first respondent's freehold interest in the Additional Areas.
- 223. The applicant is entitled to acquire the second respondent's leasehold interest in the Additional Areas.
- 224. The applicant is entitled to acquire the second respondent's leasehold interest in the Basement Rooms.
- 225. The applicant is not entitled to acquire the second respondent's leasehold interest in the Upper Orange Room.
- 226. The applicant is entitled to acquire the second respondent's leasehold interest in the two Lower Orange Rooms.
- 227. The applicant is entitled to acquire the second respondent's leasehold interest in the airspace above the two flat roof areas at first floor level.
- 228. The applicant is entitled to acquire the second respondent's leasehold interest in the area above the lift (including the roof space).

229. The premium payable in respect of the first respondent's freehold interest in the Property is £1,283,280.
230. The premium payable in respect of the second respondent's interest in the Additional Lease is £80,000.
231. The premium payable in respect of the second respondent's interest in the Roofspace lease is £500.

Judge Hawkes

15 May 2018



## Appendix A

### **The valuation of 3,3a, 7 and 7a Carburton House. (Freehold)**

Flat 3 £308,800 less 20% = £61,760 : £247,040 - £30,000 = £217,040

Flat 3a £308,800 less £25,000 = £283,800

Flat 7 £308,800 less £30,000 = £278,800

Flat 7a £308,800 less 20% = £61,760: £247,040 - £25,000 = £222,040