



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

Case reference : **LON/00AK/OCE/2019/0216**

**HMCTS code
(paper, video,
audio)** : **CVP Video**

Property : **Cambrai Court, 130 Aldermans Hill,
Palmers Green, London, N13 4QH**

Applicant : **Cambrai Court Management Company
Limited**

Representative : **Mr Michael Jefferis of Counsel
instructed by OGR Stock Denton LLP**

Respondent : **Vectis Property Company Limited**

Representative : **Mr Sam Madge-Wyld of Counsel
instructed by TWM Solicitors LLP**

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

Tribunal members : **Judge Naomi Hawkes
Mr Charles Norman FRICS
Mr Duncan Jagger MRICS**

Date of hearing : **A remote hearing took place on 16, 17,
18 & 19 February 2021, written
submissions were served on 3, 12 & 19
March 2021, and the Tribunal
reconvened to reach its decision on 9
April 2021**

Date of decision : **3 June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVP VIDEO HEARING REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 1707 pages, including index, and 39 colour photographs, the contents of which we have noted. The order made is described below.

The Tribunal's decision

The Tribunal determines that the price payable on the collective enfranchisement of Cambrai Court, 130 Aldermans Hill, Palmers Green, London, N13 4QH is £49,500.

Background

1. This application concerns a collective enfranchisement claim made under the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”).
2. The claim is made in respect of a property known as Cambrai Court, 130 Aldermans Hill, Palmers Green, London, N13 4QH (“Cambrai Court”).
3. Cambrai Court is a three-storey residential block containing nine flats. The estate, of which Cambrai Court forms part, consists of a garden, demised garages, a parking area and walkways. The Tribunal was informed that the flat leases, so far as is material, are in identical form.
4. The Applicant, a wholly lessee owned company, is the nominee purchaser and also the current management company under the flat leases. The registered proprietor of the freehold interest in Cambrai Court is, and was on the date on which the claim was made, the Respondent. The agreed valuation date is 24 June 2019.
5. The terms of the transfer of Cambrai Court are agreed save for the price payable. The price payable for the freehold interest in Cambrai Court is governed by Schedule 6 to the 1993 Act, applied by section 32.
6. The parties’ respective valuers have agreed that, apart from any development hope value attributable to the roof space, the purchase price payable by the Applicant for the freehold should be £24,500. The sole matter remaining in dispute is the development hope value of the roof space of Cambrai Court. The Applicant contends that the development hope value is nil and the Respondent contends that it is £203,300.

The hearing

7. The hearing of this application took place on 16, 17, 18 and 19 February 2021. The Applicant was represented at the hearing by Mr Jefferis of Counsel, instructed by OGR Stock Denton LLP, and the Respondent was represented by Mr Madge-Wyld of Counsel, instructed by TWM Solicitors LLP.
8. In accordance with directions which were agreed at the conclusion of the hearing, the Respondent served written submissions on the valuation issues on 3 March 2021, the Applicant served written submissions on the valuation issues on 12 March 2021, and the Respondent served brief written submissions in reply on 19 March 2021. The Tribunal reconvened, in the absence of the parties, to make its determinations on 9 April 2021.
9. The Tribunal heard oral evidence of fact on behalf of the Applicant from:
 - (i) Mr A M Tunkel, who is a joint lessee of Flat 6 Cambrai Court and a Director of the Applicant company.
 - (ii) Mrs R Savani, who is the lessee of Flat 7 Cambrai Court.
10. The Tribunal also read the witness statement of fact of Mr C S Tyler, a building surveyor and construction planning engineer. Mr Tyler was not relied upon as an expert witness and, insofar as his witness statement contains evidence of fact, it was not challenged.
11. The Tribunal heard oral evidence of fact on behalf of the Respondent from Mr C Rayner who is a Director of the Respondent company.
12. The Tribunal heard oral expert evidence on behalf of the Applicant from:
 - (i) Mr T Martin MRICS;
 - (ii) Mr Bruce Maunder Taylor FRICS MAE; and
 - (iii) Mr D Oates CEng BEng (Hons) MIStructE.
13. The Tribunal heard oral expert evidence on behalf of the Respondent from:
 - (i) Mr C Willis MRICS;
 - (ii) Ms D Setterfield BSc CEng MIMM FGS;

(iii) Mr C Noel, Chartered Town Planner; and

(iv) Mr W Bradley MRICS.

14. It was not possible for the Tribunal to carry out an inspection of Cambrai Court in light of the coronavirus pandemic but we were referred to helpful colour photograph supplied by both parties.
15. At the commencement of the hearing, a procedural issue arose concerning the admissibility of a plan which the Respondent proposed to rely upon in order to demonstrate how a planning condition concerning the provision of bicycle spaces could potentially be met. The plan was served out of time and shortly before the hearing as part of an addendum dated 11 February 2021 to Mr Bradley's expert report.
16. The Tribunal expressed the view that the late service of the plan was unsatisfactory. However, we accepted a submission made by Mr Madge-Wyld that the issue before the Tribunal was not the precise location of any proposed bicycle spaces but rather whether a hypothetical purchaser would be likely to consider that the necessary number of bicycle spaces could be accommodated on site without substantially interfering with the lessee's easements. Accordingly, in our view, the potential significance of the plan was likely to be limited.
17. We determined that we would extend time for service under Rule 6(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in order to enable the plan to be admitted in evidence but that it would be given very little weight if, having heard evidence and argument, we considered that the Applicant was prejudiced by its late production. We have not in fact placed any reliance upon this plan.

The issues

18. The issues to be determined are as follows:
 - (i) whether the Respondent has the legal right to construct new flats on the roof of Cambrai Court; and
 - (ii) the development hope value of the roof space.

Whether the Respondent has the legal right to construct new flats on the roof of Cambrai Court.

19. Mr Jefferis submits that the Respondent has no legal right to construct new flats on the roof of Cambrai Court because the Applicant and the lessees have obligations to repair and maintain the roof and easements enabling them to do so. He states that the Respondent has no right to

permanently prevent the Applicant and the lessees from fulfilling these obligations and from exercising their easements.

20. Mr Madge-Wyld states that the issue for the Tribunal is whether there is any right or obligation under the leases or otherwise that would entitle the Applicant and/or the lessees to obtain an injunction preventing the proposed development from taking place.
21. Mr Madge-Wyld accepts that the Respondent is not entitled to “substantially interfere” with any easements or to prevent obligations under the leases from being fulfilled. However, he submits that the construction of new flats on the roof of Cambrai Court will not substantially interfere with the rights and obligations of the Applicant and/or the lessees and therefore will not entitle them to injunctive relief. He stresses that, in the absence of such substantial interference, any land not demised can be used as the landlord wishes.
22. The lease provisions relied upon by the Applicant include the following:

Clause 1 of the flat leases grants the lessees the easements rights and privileges set out in Part II of the Schedule, namely:

By Paragraph 3: *“The right to subjacent and lateral support and shelter and protection from the elements for the said Flat from the other parts of the Building and from the foundations and roof thereof”*

By Paragraph 4: *“The free and uninterrupted passage and running of water and soil gas and electricity from and to the said Flat and garage through and along the sewers drains and watercourses gutters cisterns cables pipes and wires which now are or may at any time hereafter be in under or passing through the Building or any part thereof and the remainder of the Estate”*

Paragraph 5: *“The right for the Lessee ... to enter into and upon other parts of the Building for the purpose of repairing cleansing maintaining or renewing any such sewers drains and watercourses cisterns gutters cables pipes and wires”*

By Paragraph 6: *“The right for the Lessee ... to enter into and upon other parts of the Building for the purpose of repairing maintaining renewing altering or rebuilding the said Flat or any part of the Building giving subjacent or lateral support shelter or protection to the said Flat...”*

Clause 7 of the leases contains a covenant by the Applicant with the lessees to perform the obligations in Part VI of the Schedule. Clause 8 of the leases contains a similar covenant by the Applicant with the Lessor.

Part VI of the Schedule Paragraph 1 provides that, subject to the lessee performing his obligation to contribute to the costs, the Applicant will:

“maintain repair redecorate and renew: (a) The external walls and structure and in particular the foundations roof storage tanks gutters and rainwater pipes of the Building (b) The gas and water pipes drains and electric cables and wires in under and upon the Building and the remainder of the estate and enjoyed or used by the Lessee in common with the Lessees of the other flats in the Building (c) The main entrances common passages landings and staircases each separate flat entrance door lift (if any) and all other parts of the Building enjoyed or used by the Lessee in common as aforesaid (d) the internal television aerial in the loft of the Building and the wires attached thereto”.

Clause 4 of the leases contains the Lessor’s covenants and clause 4(c) provides: *“That the Lessors will allow the Company and persons authorised by the Company to have such access to the Building and other parts of the said Estate as may be necessary and proper for enabling the Company to carry out its obligations hereunder”.*

23. Mr Jefferis submits that the Respondent will be in breach of covenant if it permanently blocks the Applicant’s access to the roof of the Building. He states that the proposed new flats would be constructed just inches above the roof and would cover it preventing future access to the roof to repair, maintain and renew it.

24. Mr Jefferis submits that the covenant is to repair the existing roof and not a further roof structure placed in, and over, *part of* the existing roof and on a different level. He says, referring to the evidence of Ms Setterfield, that the proposed new structure would be cut into existing walls and roof to enable it to be *“stooled down”* and submits that the join in roof protection between the existing and new structure will be a source of potential practical problems. He states there would also be a legal issue as to responsibility for repairing the joining points.

25. Mr Jefferis referred the Tribunal to Hill & Redman’s Law of Landlord and Tenant at [941]:

“In general, the lease is construed with reference to the circumstances existing at the time of execution”.

26. He also referred the Tribunal to *Drake v Fripp* [2011] EWCA Civ 1279 in which Lewison LJ stated at paragraph [5]:

“5 In addition to the written instrument considered as a whole, the court must also take into account the physical features on the ground at the date of the transfer. As Mummery L.J. recently explained in Pennock v Hodgson [2010] EWCA Civ 873 (at [12]):

“Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction.”

27. Mr Jefferis also relies upon *Barrie House Freehold Ltd v Merie Binmahfouz Company (UK) Ltd* [2012] EWHC 353 (Ch) in which Roth J stated at [29]:

“29. As to the scope of the easement, it is common ground that the words of the grant are to be construed in the context of the lease as a whole and against the surrounding circumstances when it was entered into. Prominent in those surrounding circumstances when the easement is one of use are the physical characteristics of the property itself. There is no suggestion that its character had changed over the period since the leases were granted.”

28. Mr Jefferis says that what follows from the above is that the roof and other parts of Cambrai Court over which the lessees exercise their easements and which the Applicant has covenanted to repair and which the Respondent has covenanted to give the Applicant access to, is the roof in situ at the date of grant in 1969 and not a different new roof one storey higher.

29. Mr Jefferis notes that Part IIIa of the Schedule grants the Respondent:

“(ii) The right at any time hereafter to erect any building upon any land adjoining or near to the said Flat and/or garage or to alter rebuild and make additions to any of the adjoining or neighbouring buildings erected or to be erected on the said land in such manner as the Lessors shall think fit notwithstanding that the access of light or air to the said Flat may be obstructed or diminished.”

30. He submits that *“The right at any time hereafter to erect any building upon any land adjoining or near to the said Flat and/or garage”* does not assist the Respondent because, firstly, it is limited to the erection of a new building but does not authorise the alteration of an existing building and, secondly, *“land adjoining or near”* is not apt to describe the roof and airspace above it, but rather refers to land beside or near to the flat and/or a garage.

31. Further, he states that *“or to alter rebuild and make additions to any of the adjoining or neighbouring buildings erected or to be erected on the*

said land” does not assist the Respondent because, firstly, it is limited to the “*adjoining or neighbouring buildings*” not the building containing the flats, defined in the Lease (recital (2)) as “*the Building*”. Secondly, “*on the said land*” refers to the “*land adjoining or near*” which is not apt to describe the roof and airspace above it, but rather refers to land beside or near to the flat and/or garage.

32. In response, Mr Madge-Wyld states that the rights and obligations are not in relation to a particular roof that existed at the start of the lease but rather they relate to whatever roof exists from time to time. He says that, in the context of a building with leases of a hundred plus years it is inconceivable that “the roof” means the roof which existed at the date of the grant. He submits that the roof can be rebuilt and he also submits that it can be rebuilt in a different location.

33. Mr Madge-Wyld relies upon Part III of the Schedule to the leases which reserves to the Lessor:

“1. Easements rights and privileges over and along and through the said Flat and garage similar in all respects mutatis mutandis to those set forth in paragraphs 3, 4, 5 and 6 of Part II of the Schedule hereto

2. Power for the Lessors and the Company and their respective Surveyors and Agents with or without workmen and others at all reasonable times on notice (except in the case of emergency) to enter the said Flat and/or garage if any garage be hereby demised for the purpose of performing and observing their respective covenants and obligations hereunder the Lessors or Company (as the case may be) making good any damage hereby caused.”

34. He also relies upon Paragraph 3(i) of the leases by which the lessee covenants to (emphasis supplied):

*“Permit the Lessors and the Company and their respective surveyors and agents with or without workmen and others at all reasonable times on notice **to enter into and upon the said Flat** and/or garage or any part thereof **for the purpose of repairing altering or amending any part of the Building** and/or any part of the adjoining garages and for the purpose of making repairing maintaining rebuilding cleaning lighting and keeping in order and good condition all sewers drains pipes cables watercourses gutters wires party structures or other conveniences and services common to the Flats and/or garages or belonging to or serving or used for the Building and also for the purpose of laying down maintaining repairing and testing drainage gas and water pipes and electric wires and cables and for similar purposes and also for the purpose of cutting off the supply of water gas or electricity to the said Flat and/or garage or any other flat or garage on the estate in the case of emergency or in respect of the supply of water only where the Lessee or the occupier of*

such other flat and/or garage as the case may be shall have made default in paying his share of the water rate”

35. Mr Madge-Wyld submits that these provisions cover rebuilding and moving the roof. He referred the Tribunal to *Risegold Ltd v Escala Ltd* [2009] 2 P&CR 1, at [19]-[22], in which it was held that a right of access to re-build has a broad and wide meaning and can include the demolition of an existing structure and its replacement with something different. He does not seek to rely upon Part IIIa to the Schedule.

36. In reply, Mr Jefferis states that the expression, “the Building” is defined in the Lease in recital (2):

“(2) There is erected or in course of being erected on part of the said estate a block of flats known or intended to be known as Cambrai Court Aldermans Hill Palmers Green aforesaid and for the purpose of identification only the Block in respect of which the flat hereby demised is contained is coloured grey on the plan attached hereto (being hereafter referred to as ‘the Building’) and the other part of the said estate is being laid out as garages and gardens with pathways and driveways for the use of the lessees of the said Block.”

37. Thus, he states “the Building” is defined as the block of flats erected or in the course of being erected at the date of the 1969 Lease. Accordingly, the lessee’s easement to enter upon parts of the Building to repair cisterns and to repair any part of the Building giving shelter or protection; the Applicant’s covenant to repair the roof of the Building; and the Lessor’s covenant to allow the Applicant access to the Building to carry out its obligations; are rights and obligations that must be read as referring to the building as erected or in the course of being erected in 1969.

38. Mr Jefferis accepts that, if a roof is repaired, or even renewed in a recognisable manner, then it is the roof, from time to time, that is within the ambit of the provisions. However, he submits that a roof in a different form and on a different level would not have been within the contemplation of the parties when the lease was entered into.

39. Mr Jefferis contends that [15] of Mummery LJ’s judgment in *Risegold Ltd v Escala Ltd* is unhelpful to the Respondent because it explains that “rebuilding and renewal” has a restricted meaning in a leasehold covenant.

40. As stated above, Paragraph 1 of Part III of the Schedule reserves to the Lessor easements:

“over and along and through the said Flat and garage similar in all respects mutatis mutandis to those set forth in paragraphs 3, 4, 5 and 6 of Part II of the Schedule hereto”

- 41. Mr Jefferis submits that means one must substitute the words *“the said Flat and garage”* for the words *“other parts of the Building”* in the third lines of paragraph 5 and paragraph 6 of Part II of the Schedule. He submits that these paragraphs are not granting the Lessor the right which is contended for by the Respondent but rather they are granting the Lessor a right to enter the Flat if it needs access for *“repairing maintaining renewing altering or rebuilding the said Flat or any part of the Building giving etc”*. Accordingly, whilst alterations to the Building are contemplated, they are only the sort of alterations for which the Lessor might require access to the Lessee’s Flat.

- 42. During the course of the hearing, the Tribunal heard argument concerning the meaning of “common parts” in the leases. The covenants referred to above make express reference to the “roof” and to the “Building” and we therefore do not find it necessary to consider the definition of common parts in the context of the discussion below.

- 43. We accept the following propositions:
 - (i) The issue for the Tribunal is whether the construction of new flats on the roof of Cambrai Court will substantially interfere with the rights and obligations of the Applicant and/or the lessees so as to entitle them to an injunction preventing the proposed development from taking place. The Tribunal was referred to *Barrie House Freehold Ltd v Merie Binmahfouz Company (UK) Ltd* [2012] EWHC 353 (Ch), to *B&Q plc v Liverpool & Lancashire Properties Limited* [2001] 1 EGLR 92 and to *Merie Bin Mahfouz Co (UK) Ltd v Barrie House (Freehold) Ltd* [2014] UKUT 0390 (LC) in this context.

 - (ii) As long as the Respondent does not substantially interfere with the rights and obligations of the Applicant and/or the lessees, any land which is not demised can be used as the Respondent wishes.

 - (iii) In general, the lease is construed with reference to the circumstances existing at the time of execution (*Hill & Redman*).

 - (iv) The lease is to be considered as a whole and the Tribunal must also take into account the physical

features on the ground at the date of the transfer
(*Drake v Fripp*).

- (v) As regards the scope of an easement, the words of the grant are to be construed in the context of the lease as a whole and against the surrounding circumstances when it was entered into. Prominent in those surrounding circumstances when the easement is one of use are the physical characteristics of the property itself (*Barrie House Freehold Ltd v Merie Binmahfouz Company* (UK) Ltd [2012] EWHC 353 (Ch)).

44. *Risegold* concerned a right of access to an adjoining freehold property and at [15] of the judgment, Mummery LJ stated (emphasis supplied):

*“15. First, this is a right of entry into Escala’s Adjoining Property: the limited purposes—‘rebuilding and renewal to the Property’—for which the easement may be exercised must be read in that context of the nature of the right. It is important to remember that this is not, for instance, a restrictive covenant giving the owner of the Adjoining Property a right to object to Risegold’s use of its own property in replacing one storey warehouse/industrial units with a mixed development five/six-storey building. I would also say that other instances of the use of the terms ‘rebuilding or renewal’ in planning law or in positive leasehold covenants are unhelpful and, indeed, positively misleading. **It does not follow that because ‘rebuilding’ has a restricted meaning in planning legislation, in a planning permission or in a leasehold covenant that it should bear a similarly restricted meaning in a right of entry provision.** This really is a case in which, in a well-worn phrase, ‘context is everything’.”*

45. We do not find the discussion in *Risegold* concerning the meaning of “rebuilding” in the context of a right of entry to adjoining land of assistance because the present case concerns leasehold covenants in respect of which Mummery LJ stated “*rebuilding has a restricted meaning*”.
46. We accept Mr Jefferis’ submission that, if a roof is repaired, or even entirely renewed in a recognisable manner, then it is the roof, from time to time, that is within the ambit of the provisions but that a roof in a different form and on a different level would not have been within the contemplation of the parties when the flat leases were entered into.
47. In the context of the definition of common parts, we were referred to *LM Homes Ltd v Queen Court Freehold Co Ltd* [2020] EWCA Civ 371, [2020] QB 890, in which Lewison LJ stated of the Upper Tribunal’s decision (emphasis supplied):

“66. The last area that the UT considered was the airspace. The Deputy President found that the airspace provided access to the roof of the building, which was required whenever work of repair or maintenance was to be undertaken. The ‘proper management’ of the airspace entailed its retention as a means of access to the structure of the building to enable inspection and repair when necessary. Proper management of the airspace might also involve its use as a location for facilities serving the building (such as aerials, dishes or air conditioning plant).

67. He continued at [85]:

*‘As with the boiler room and sub-soil, the appellant intends, if planning permission can be obtained, to undertake work which will cause the airspace no longer to be accessible. **Convenient access to the structure would become impossible because of the presence of an additional flat or flats on top of it, and any change in the structure would be unnoticed and difficult to monitor.** In my judgment the risk of these consequences makes it reasonably necessary for the proper management of the airspace that the airspace lease be acquired. If the lease is not acquired the airspace will be incapable of being managed as it currently is. It does not matter that the respondent will presumably still have access to a new roof over the building, or that it will have access to the existing structure in the exercise of the rights reserved in the airspace lease, **since the former will relate to a different structure and the latter will involve a very much more complex and inconvenient operation than is currently possible.**’*

68. Again, I agree.”

48. In our view, on the facts of the present case, a roof above the proposed new flats would relate to a different structure from the Building which was within the contemplation of the parties when the lease was executed. Any requirement to repair a roof placed over part of the existing roof and on a different level would be significantly different in nature from the Applicant’s current repairing obligations. Further, we accept the analysis of Mr Jefferis (which is set out above) that, whilst alterations to the Building are contemplated in the leases, they are the sort of alterations for which the lessor might require access to the lessee’s flat.
49. We find that the “roof” which was in the contemplation of the parties at the time of the grant was the roof of the block of flats erected or in the course of being erected at the date of the 1969 Lease, as subsequently maintained, repaired, redecorated and/or renewed. It was not a roof in a different form on a different level over additional flats. The presence of the proposed new flats would substantially interfere with the rights and obligations of the lessees and the Applicant in respect of the “roof”.

The roof would be largely covered by the new flats on a permanent basis which would substantially interfere with the ability to access it. The lessees and the Applicant would therefore be entitled to an injunction preventing the proposed development from taking place.

50. For these reasons, we find that the Respondent does not have the legal right to construct new flats on the roof of Cambrai Court. Having made this determination, it is not necessary for us to consider the further legal impediments to the proposed development which the Applicant contends exist.

The development hope value of the roof space.

51. The price payable for the freehold is governed by Schedule 6 to the 1993 Act. Paragraph 3(1) of Schedule 6 to the 1993 Act provides that:

3.—

(1) Subject to the provisions of this paragraph, the value of the freeholder's interest in the specified premises is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls within subparagraph (1A) buying or seeking to buy) on the following assumptions—

(a) on the assumption that the vendor is selling for an estate in fee simple—

(i) subject to any leases subject to which the freeholder's interest in the premises is to be acquired by the nominee purchaser, but

(ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the nominee purchaser;

(b) on the assumption that this Chapter and Chapter II confer no right to acquire any interest in the specified premises or to acquire any new lease (except that this shall not preclude the taking into account of a notice given under section 42 with respect to a flat contained in the specified premises where it is given by a person other than a participating tenant);

(c) on the assumption that any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and

(d) on the assumption that (subject to paragraphs (a) and (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the conveyance to the nominee purchaser of the freeholder's interest is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to Schedule 7.

52. As stated above, the parties' respective valuers have agreed that, apart from any value attributable to any right to construct new flats on the roof of Cambrai Court, the purchase price payable by the Applicant for the freehold is £24,500.

53. In *Kutchukian v Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon* [2013] EWCA Civ 90, [2013] 1 WLR 2842, Lloyd LJ stated in respect of an issue which turned on the construction of the 1993 Act and, so far as relevant, the terms of the leases:

"37. ... the valuation must proceed by taking a view as to what the legal position is, not by treating it as uncertain and allowing for that uncertainty by some appropriate discount. This sort of point is quite unlike an uncertainty as regards what the facts may be at the relevant future time, as to which it is clearly right to identify the relevant uncertainties and apply a suitable discount to allow for them."

54. The Tribunal has found that the Respondent does not have the legal right to construct new flats on the roof of Cambrai Court. Accordingly, we have taken a view as to what the position is and we apply no discount for uncertainty as to the legal position.

55. At paragraph 3.4 and 3.5 of his expert report on valuation dated 2 December 2020, Mr Maunder Taylor states (emphasis supplied):

"3.4 It is my opinion that, if the Tribunal determines that the landlord has one or more legal impediments which prevent development then there is no value for developing the roof space.

*3.5 It is my opinion that, if the Tribunal decides either than there is no legal impediment, **or that the Respondent can overcome those legal impediments with some form of negotiated settlement with the Applicant and individual lessees**, then the risks associated with those issues must be considered from the point of view of the hypothetical purchaser as a willing buyer acting knowledgably and prudently according to the RICS definition of market value."*

56. At paragraph 3.7.6 of his report, after drawing the Tribunal's attention to the auction sale of a property known as 1-36 Taylor Close, Mr Maunder Taylor goes on to state:

“It is my opinion that, based on the Taylor Close evidence, if the freehold interest in the Property were to be offered for sale in the market, with no Section 5 (Landlord and Tenant Act 1987) rights being reserved, then the legal impediments, if seen as risks rather than matters preventing development in the face of firm objections by the lessees, would suggest a price payable for two flats of £12,500 each: therefore, a total of £25,000.”

57. Mr Jefferis contends that the legal impediment in the present case is insurmountable and that the development hope value of the roof space is nil. However, having considered all the circumstances including the fact that the block contains only nine flats, we accept Mr Madge-Wyld’s submission that it is likely that the hypothetical purchaser would consider there to be a possibility of negotiating an agreement with the Applicant and with the lessees which would enable the proposed development to go ahead.
58. We find that it is likely that the hypothetical purchaser would pay a “bargaining chip” sum of £25,000 on account of this possibility. To the sum of £25,000 must be added the agreed purchase price of £24,500 which is payable by the Applicant for the freehold apart from any development hope value attributable to the roof space. We therefore find that the total price payable for the freehold of Cambrai Court is £49,500.
59. Having heard evidence and argument on the issue, we will set out the findings we would have made concerning the development hope value of the roof space had we not determined that that the Respondent does not have the legal right to construct new flats on the roof of Cambrai Court.
60. The Respondent contends that, when valuing the roof space, the starting point is an offer which was made by Southern Territory Limited (“STL”) to purchase Cambrai Court for the sum of £200,000 with a view to developing the roof space (“the Offer”).
61. By a letter dated 4 April 2019, marked “subject to contract”, STL states:

“Further to our recent email correspondence, we write to confirm our offer of £200,000 for the purchase of the freehold title at Cambrai Court”.
62. By email dated 10 February 2021, sent in response to an email from Mr Bradley, STL states:

“Our interest in purchasing the roof space at the agreed price, remains in place. Let’s hope you are successful at the Tribunal”.
63. Accordingly, STL has had a long-standing interest in purchasing Cambrai Court.

64. Mr Rayner, a director of the Respondent company, gave evidence that, in November 2014, an agent acting on behalf of STL approached him in relation to the potential sale of the freehold interest in Cambrai Court for the purpose of developing the roof space. He confirmed that neither he nor the Respondent has had any previous dealings with STL. In an addendum to his report dated 4 December 2020, Mr Bradley states that STL incurred costs in connection with Cambrai Court in the sum of £23,948 in respect of planning applications, reports and surveys. There have been three planning applications.
65. The following matters of valuation principle are not in dispute:
- (i) The hypothetical purchaser operates in the real market: *Mundy v Sloane Stanley Estate Trustees* [2018] EWCA Civ 35. The parties each referred the Tribunal to different passages of the judgment and we have considered the judgment in its entirety.
 - (ii) “*The hypothetical purchaser is not ultra-cautious. A hypothetical purchaser who takes ultra-cautious advice is likely to be outbid by another purchaser willing to pay what the market pays*”: *Earl Cadogan v 2 Herbert Crescent Freehold Limited Lands Tribunal* LRA/91/2007.
 - (iii) A residual valuation is a methodology of last resort and reliable market evidence is to be preferred where it is available.
66. It has been suggested that Mr Bradley may not be independent because he has a working relationship with the Respondent. Mr Madge-Wyld submits that that of itself does not mean that he lacks sufficient independence. The RICS guidance note “*Surveyors acting as expert witnesses*” expressly allows for surveyors to act for their employer, at 2.5. Mr Bradley is not employed by the Respondent and, beyond his working relationship, no evidence was put to him to suggest that he had not discharged his obligation to the Tribunal to act independently. For example, it was not put to him that a court or Tribunal had ever found that he had not exercised independent judgment and he was able to substantiate his opinions with evidence from the market. We accept these submissions.
67. There is a dispute between the parties as to whether the Offer comprises reliable market evidence. Mr Bradley relies upon the Offer as the starting point for his valuation. In a supplemental report dated 27 January 2021, Mr Maunder Taylor expresses the opinion that the Offer is not reliable “*for the purposes of a reasonably competent valuation*”. He places reliance upon a residual valuation because, in his view, reliable and truly comparable market evidence is unavailable.

68. Mr Madge-Wyld submits that the Offer can only be ignored if the Tribunal finds that it was not made by a reasonably informed purchaser. He contends that such a submission is untenable given that:
- (i) STL is an established roof-top developer which has many years' experience and has completed many roof-top developments and other developments.
 - (ii) STL had already spent approximately £24,000 on surveys and three planning applications over a five-year period. Its interest is long-standing and the Offer is genuine.
 - (iii) The only reason that the sale did not occur is that the lessees served a section 13 notice one week after the section 5A notices had expired.
 - (iv) Any earlier delays were down to planning first being rejected and then a letter before claim being served one week after planning was granted in May 2018, one purpose of which was to clearly frustrate the sale from proceeding. A revised offer was eventually made after a planning officer made STL aware that planning was likely to be granted.
 - (v) STL is an arm's length purchaser. It has had no other dealings with the Applicant. Mr Bradley described both as a keen seller and a keen purchaser. That is the definition of a market transaction. Both parties wanted to do business with each other in the future but that does not mean that the proposed purchase was not at arms-length. In any event, no other business has transpired.
69. No survey has been undertaken of the foundations of Cambrai Court but Mr Madge-Wyld submits that this does not mean that STL is uninformed. He states that STL made clear that from its recent experience it does not require such a survey and is confident that the building is of a type that would be able to take the weight of the proposed new flats.
70. Mr Bradley stated that there is no basis for alleging STL had not seen the building; it had commissioned surveys and prepared plans for a planning application. STL's practice was to undertake a survey before purchasing a site only if the site appeared to suffer from subsidence. Mr Madge-Wyld submits that it is apparent, from Mr Bradley's other comparables, that the offer was low and it is therefore the case that any structural risk had already been factored into the price.

71. Mr Madge-Wyld submits that the fact that no heads of terms were agreed is also of little relevance. He states that a confidentiality agreement had been signed, planning consent had been obtained and paid for, and that a contract had previously been drawn up.
72. On 1 March 2017, planning consent was refused in respect of an application to construct three flats (2 x two bedroom and 1 x one bedroom) on the roof of Cambrai Court. On 11 May 2018, an application for planning consent to build 2 x two bedroom flats was approved with requirements concerning the provision of 6 bicycle spaces and 3 additional car parking spaces. On 2 July 2019, planning consent was granted for a revised scheme to provide 2 x one bedroom flats, so as to remove the need to provide any additional car parking spaces, but with a requirement to provide 20 bicycle spaces.
73. There is an issue between the parties concerning whether or not the tank room at Cambrai Court needs to be removed. Mr Madge-Wyld submits the tank room can remain. Alternatively, if necessary, the amount of the Offer can be adjusted to reflect the position concerning the tank room and this would be a straightforward valuation exercise.
74. Mr Jefferis submits that no reliance should be placed on the Offer for the following reasons.
75. There is scant documentary evidence concerning the Offer. The Tribunal was simply referred to the offer letter dated 4 April 2019 and to the email of 10 February 2021 confirming that STL's interest in purchasing the roof space at the agreed price remains in place. The author of the offer letter was not called to give evidence and therefore could not be cross-examined. No concluded agreement was ever reached.
76. There is little documentary evidence notwithstanding that negotiations commenced in November 2014 and took place over a period of several years. Mr Rayner accepted in cross-examination that there were in existence documents relevant to the negotiations which have not been disclosed.
77. Mr Jefferis submits that the Respondent could, and should, have disclosed all contemporaneous documents evidencing any draft or prospective deal. The Tribunal was informed that the Respondent's solicitors had said in correspondence that there would be a very significant number of documents in the negotiating process.
78. In written submissions dated 19 March 2021 in reply to the Applicant's submissions on valuation, the Respondent's solicitors say that the Applicant stated by letter dated 18 January 2021 that it required disclosure from the Respondent of:

"only all the legally binding agreements and transactions that have been entered into between itself and STL in relation to Cambrai Court. This is what the Applicant requires and it should not involve the disclosure of more than a handful of documents".

79. It is Mr Rayner's evidence that there has never been any concluded deal, agreement or option agreement between STL and the Respondent. The Respondent's solicitors state that the Applicant did not request disclosure of all contemporaneous documents and cannot criticise the Respondent for not disclosing documents which were not asked for.
80. Mr Jefferis points to the fact that at paragraph 8 of Mr Rayner's first witness statement and in Mr Madge-Wyld's written closing submissions on valuation there is reference to a confidentiality agreement which has not been disclosed. He submits that, if the Respondent wanted the Tribunal to find that Southern Territory's offer of £200,000 was reliable evidence of the value of the freehold, then it should have disclosed the "confidentiality agreement" and all the surrounding correspondence and documents.
81. Mr Jefferis notes that it is common for developers to enter into option agreements or conditional agreements with landowners and questions why that did not happen in the present case. He submits that this is especially surprising since STL had apparently spent some £24,000 on three planning applications. An option agreement or a conditional contract would have ensured that the Respondent could not sell Cambrai Court to a third party after STL had spent this sum. Mr Jefferis states that, if STL remains committed to a purchase, then the absence of any such agreement remains unexplained.
82. Mr Jefferis argues that it is improbable that a genuine offer would remain the same despite the value of the finished flats falling by some £100,000. The offer of 4 April 2019 was for flats with a floor space of 129.5 sqm. The proposed floor space has since reduced to 111 sqm but the proposed purchase price has not reduced.
83. The Applicant challenges the reasons put forward by the Respondent for the failure to exchange contracts. Mr Jefferis contends that the planning consent which has been granted is not implementable and that the true position is that STL will not commit until, at least, there is an implementable planning permission.
84. Mr Rayner stated in evidence that, if the offer had been too low, the Respondent might not have accepted it. Mr Jefferis submits that, if the offer might not have been accepted, then it is not very helpful in assessing value.

85. Mr Jefferis says that it is common ground between the parties' structural engineers that there are cracks in the building which needed to be investigated in order to verify whether the foundations could carry another storey. He submits that the fact that neither STL nor the Respondent has spent an estimated £2,500 (less on Mr Willis' evidence) in carrying out these investigations suggests that neither has reached a point where it is prepared to commit to the purchase or sale.
86. The Tribunal notes that what is relied upon is simply an offer and that there is no concluded agreement. We would have found it useful to have seen the surrounding correspondence. We have taken account of the limited nature of the documentary evidence which was presented to us and the fact that the author of the letter dated 4 April 2019 was not available to be cross-examined or questioned by the Tribunal.
87. We agree with Mr Jefferis that it is common for developers to enter into option agreements or conditional agreements with land owners. However, we do not consider it unusual for a developer to simply make an offer, particularly if they believe that they have a good working relationship with the landowner.
88. As regards STL's failure to reduce the sum offered when the flat size decreased, we accept Mr Bradley's evidence that the offer was low when it was first made. Further, since the offer was made, planning consent has been granted for a rooftop development without a requirement which previously existed to provide car parking spaces. In all the circumstances, we do not consider that the absence of a reduction in the purchase price renders the offer unreliable. We also accept Mr Bradley's evidence that it was STL's practice to undertake a structural survey before purchasing a site only if the site appeared to suffer from subsidence.
89. We find it particularly significant that STL is a third party, entirely unconnected with the Respondent, which has spent in the region of £24,000 on planning applications, reports and surveys relating to Cambrai Court. There is no evidence of any connection between STL and the Respondent, save as a prospective purchaser.
90. Whilst there is a dispute concerning precisely how much development experience STL has, we are satisfied that STL does have development experience and that it is a developer which focuses on the conversion of buildings, including listed buildings, to form flats, offices and for educational uses. STL's work includes the carrying out of roof extensions and the development of new build residential accommodation. We accept the Respondent's case concerning the probable reasons why the offer has not yet resulted in any concluded agreement.
91. In all the circumstances and having carefully considered the points raised by Mr Jefferis in his written closing submissions, which are

summarised but not set out in full above, we are satisfied that in the absence of a legal impediment the Offer would have been sufficiently reliable to inform our valuation process. However, we consider that an adjustment would fall to be made as set out below.

92. Mr Bradley's approach was to (1) take the Offer as a starting point, (2) reduce it to £190,000 to take account of the fact that the size of the new flats with the tank room retained would be smaller, (3) to increase that sum by 16.6% to reflect the costs already incurred by the purchaser (e.g. in obtaining planning permission), and (4) to deduct the sum of £24,500 (being the agreed value of the existing flat reversions and ground rents). Applying this approach, Mr Bradley concluded that the development value of the roof space is £203,300.
93. The Applicant does not accept that any uplift should be applied and contends that, in addition to £24,500, the estimated reversionary value of the proposed two new flats in the sum of £18,800 falls to be deducted. Accordingly, the Applicant contends that STL's Offer of £200,000 in respect of the freehold equates to an offer of £156,700 for a lease of the rooftop airspace.
94. We do not accept the Applicant's case that the estimated reversionary value of the proposed two new flats falls to be deducted because the value of these flats is part of the gain to be made by developing the roof space. We consider that the respective ground rents would be nil.
95. Having weighed the reduction in flat size against the sums expended on obtaining planning permission and the nature of the planning consent which has now been obtained, we are not satisfied that any adjustment is required on account of the matters referred to above save for the deduction of the agreed value of the existing flat reversions and ground rents. Accordingly, in our view, the Offer when broken down includes the sum of £175,500 in respect of the development hope value of the roof space.
96. Mr Bradley used sales evidence concerning eight rooftop development sites in north and outer London within the M25, as a cross-check. On his analysis, purchasers paid between 23% and 44% of the gross development value to acquire these sites.
97. For each of the eight rooftop airspace leases, Mr Bradley calculated the percentage ratio of the airspace lease value (i.e. the auction price) to the sale price of the finished flats (i.e. their gross development value). Having calculated the eight percentages, which range between 23% and 44%, he concluded that the percentage ratio of the airspace lease value to gross development value applicable to Cambrai Court should be 33%.

98. The gross development value of the new flats at Cambrai Court is unknown and so Mr Bradley assessed this with reference to floor size using the agreed values of the existing flats at Cambrai Court as comparables. After making various adjustments, he concluded that the gross development value of the proposed new flats is £798,000 and 33% of this (the airspace lease value) is £260,000.
99. Mr Jefferis submits that a true comparable would be another freehold block of flats with grounds. In our view, having made a deduction in respect of the agreed value of the existing flat reversions and ground rents to arrive at the development hope value of the roof space, the relevant comparables are roof airspace leases rather than freehold blocks with grounds. We note that there is a clearly established market for roof space leases.
100. Mr Jefferis contends that there are other major defects in Mr Bradley's approach. Firstly, he states that instead of calculating ratios based on actual sale prices of rooftop leases and actual sale prices of the finished flats, Mr Bradley has used his own estimates of the sale price of the finished flats. In the three cases where actual sales have taken place, Mr Bradley's estimates were significantly wrong.
101. We agree with this criticism. However, if the actual sale price of £450,000 is applied in the case of the Stanhope Court comparable, the percentage derived is 43.77%; if the actual sale price of £510,000 is applied in the case of the Thanet House comparable, the percentage derived is 35.50%; and if the actual sale price of £549,393 is applied in the case of the Belvard Point comparable, the percentage derived is 32.7%.
102. If the Tribunal were to take an average using simply the three comparables for which actual sales evidence is available, the percentage ratio of the airspace lease value to gross development value would be 37.32%, and this would be to the Applicant's detriment. 37.32% is not contended for by the Respondent and we consider it fairer to apply Mr Bradley's proposed percentage, namely 33%.
103. Mr Jefferis notes the wide range of the percentages and questions why Mr Bradley has assumed that Cambrai Court should be average. He also states that "In general, other sales of leasehold interests in rooftops and airspace are not good bases for a valuation exercise unless you can drill down and get all the detail" and he cites differences in location, type of building and many other variables.
104. In our view, where the use of comparable sales evidence is not the principal method of valuation but is simply a cross-check, a limited degree of investigation and a certain amount of approximation is acceptable. It is also acceptable to make assumptions concerning the terms of a virtual airspace lease of Cambrai Court.

105. Mr Jefferis also took issue with Mr Bradley's assessment of the gross development value of the new flats of Cambrai Court. We accept some of these criticisms. In our view the correct approach is as follows.
106. Our starting point is the agreed value of the existing flats. Mr Bradley noted the difference in agreed value between the smaller and larger flats at Cambrai Court and concluded that, for every 1% reduction in the size of a flat, the value increases by £18.4 per square metre. Mr Maunder Taylor disagreed, stating, *"This can never be a continuous straight line mathematical adjustment. It is agreed that smaller flats tend to be worth more psf than larger flats (all other things being equal) but the adjustment is variable and subjective."*
107. We agree with Mr Maunder Taylor that the increase in price per square foot as flat size reduces is not a straight line. However, in our view, there is insufficient information available in the present case to more accurately establish the relationship between size and price per square foot. Accordingly, we are satisfied that to assume a straight line is a reasonable approach.
108. The combined floor area of the proposed new one bedroom flats is 111 square metres. The agreed rate per square foot for the existing one bedroom flats is £5,389. We accept Mr Bradley's evidence that an enhanced rate per square foot of £5,738 should be applied to reflect the smaller size of the proposed new flats. This results in a gross development value of £636,918 for the proposed rooftop development.
109. In our view, certain adjustments are then required. Firstly, an upwards adjustment of 10% on account of a limited new build premium. We accept Mr Jefferis' submission that the fact that the new flats will be on a 1960s block will make them less attractive than most other new build flats. In reaching the figure of 10% we have primarily relied upon our general knowledge and experience as an expert Tribunal because the other blocks which we were referred to are too different from Cambrai Court to be of any significant assistance in this respect.
110. Secondly, we agree with Mr Jefferis that downward adjustments are required to reflect the position of the proposed new flats on a third floor with no lift, the absence of any garages or on-site parking, and the possibility that Mr Bradley has relied upon Mr Willis' specification which is lower than Mr Martin's. We apply a 5% downward adjustment to reflect these factors.
111. After having made these adjustments, we arrive at a gross development value (rounded down) of £665,000 for the proposed rooftop development. Applying Mr Bradley's 33% to this gross development value produces a value of £220,000 for the assumed airspace lease of Cambrai Court. This indicates that the Tribunal's figure of £175,000, derived from the Offer, is within the range of prices that developers

would pay for such a site. However, we accept that this cross-check with reference to comparable sales evidence is not precise and we place limited weight upon it. We primarily rely upon the Offer.

112. As regards whether a deduction should then be made on account of planning risk, Mr Maunder Taylor put the risk discount at 15%, whereas Mr Noel put it at nil. We prefer the evidence of Mr Noel on this issue.
113. The principle of rooftop development has now been established. Mr Noel gave evidence that, at the valuation date, a hypothetical purchaser would have been advised that a planning application for the removal of car parking spaces and the retention of no more than six bicycle spaces was bound to be granted.
114. He could find no evidence, from previous planning grants or appeals, of Enfield ever requiring additional cycle spaces for an existing lawful development. He stated that it was not correct that the relevant policies required 17 or 20 cycle spaces for the development, nor was there any evident need for such spaces. A further application to retain the tank room would be granted, as it did not increase the overall envelope of the flats or their height.
115. We accept Mr Noel's evidence and we are satisfied that a hypothetical purchaser would consider it likely that the grounds of Cambrai Court could accommodate six cycle spaces (which would not need to be in a single location) without substantially interfering with the lessees' easements. Accordingly, we make no adjustment on account of planning risk.
116. On the issue of structural risk, both Mr Oates and Ms Setterfield agreed that the development would increase the load on the existing building by 10% and that this was generally an acceptable load. Ms Setterfield's evidence was that the building is in visibly good condition and that there is only minor vertical cracking, most likely caused by thermal shrinkage. In her view, this cracking is unlikely to be of great concern and she had no concerns regarding the foundations.
117. Mr Oates accepted that there is no clear evidence of subsidence but he stressed that if it transpired that underpinning was required, the cost of strengthening the walls could render the proposed development unviable. In his opinion, the hypothetical purchaser would be concerned. Both experts were of the view that further investigations would need to be carried out.
118. We accept the evidence of Ms Settlefield that the minor vertical cracking is most likely to have been caused by thermal shrinkage and is unlikely to be of significant concern to a hypothetical purchaser. However,

further investigations are required and we consider that it is necessary to make an adjustment on account of structural risk.

119. We do not accept Mr Madge-Wyld's submission that there is no basis for making any adjustment for structural risk because STL was already aware of the risk. The surrounding correspondence has not been disclosed and there is no evidence before us that this risk has already been factored into the price.
120. In our view, it is likely that a hypothetical purchaser would apply a further downward adjustment of 5% on account of structural risk and would arrive at a figure of £166,725. We are not satisfied on the evidence that it is necessary to remove the tank room so we make no further adjustment on account of this possibility.
121. As we are satisfied that reliable market evidence is available in the present case, we have not undertaken any residual valuation. Had we determined that the Respondent has the legal right to construct new flats on the roof of Cambrai Court, we would have valued the development on the roof space at £166,725 and would have concluded that the total price payable by the Applicant on the collective enfranchisement of Cambrai Court was £191,225.

Name: Judge N Hawkes

Date: 3 June 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such

reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, Cambrai Court and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).