9184

FIRST - TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/OOAW/OAO/2011/0001
Property	:	Colebrook Court, Sloane Avenue, London SW3 3DJ
First Applicant	:	Colebrook Court Headlease Company Limited and the 11 participating tenants
Representative	:	Mr A Radevsky, a barrister instructed by John May Law, solicitors
Second Applicant	:	Vantage Volante Limited
Representative	:	Mr J Sutherland, a barrister instructed by Pemberton Greenish LLP, solicitors
First Respondent	:	Arrowgame Limited
Representative	:	Mr G Fadipe, a barrister instructed by David Goodman & Co., solicitors
Second Respondent	:	Landgate (New Homes) Limited
Representative	:	Mr P Harrison, a barrister instructed by Ashley Wilson Solicitors LLP
Third Respondent	:	David Michael Goodman
Representative	:	Mr Goodman, a solicitor appeared in person
Type of Application	:	Section 31 of the Landlord and Tenant Act 1987
Tribunal Members	:	Angus Andrew Mr D Banfield FRICS Ms A Hamilton-Farey FRICS, FCIArb

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Date and venue of hearing	:	17, 18, 19, 20 June 2013 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	6 August 2013

DECISION

DECISION

1. The price to be paid for the Headlease is £253,456.

2. The transfer is to be that at pages 10-154 to 10-157 in volume 3 of the hearing bundle.

APPLICATION AND PARTIES

3. The long leaseholders of 11 flats in Colebrook Court together with their nominated purchaser applied for a determination of the terms on which the headlease of Colebrook Court is to be acquired by the nominated purchaser. The application was made under section 31 of the Landlord and Tenant Act 1987 ("the 1987 act") and pursuant to an acquisition order made by His Honour Judge Cowell in the Central London County Court on 28 October 2011. In this decision the 11 long leaseholders and their nominated purchaser are collectively referred to as "the tenants".

4. The original respondent to the application was the owner of the headlease, Arrowgame Limited ("Arrowgame").

5. Vantage Volante Limited ("Vantage Volante") owns the freehold reversionary interest and was joined as an applicant.

6. Landgate (New Homes) Limited ("Landgate") and David Michael Goodman ("Mr Goodman") are both chargees of the headlease. They were joined as respondents.

BACKGROUND

7. Colebrook Court was developed in the 1960s on a site bounded by Chelsea Police Station, Makins Street, Sloane Avenue and Petyward. Approximately half of the ground floor fronting Sloane Avenue was constructed as a petrol station but is now occupied and used by Sainsburys as a supermarket. The rear ground floor adjacent to Chelsea Police Station was constructed as a residents' car park. Above the ground floor there is a three storey block of flats. There are 12 flats in all with four flats on each floor. Although the flats

extend across the full width of the site from Makins Street to Petyward the front and rear elevations are set well back from Sloane Avenue and the Chelsea Police Station.

8. On 21 September 1966 Shell-Mex and BP Limited granted a lease of the three storey block of flats and the residents' car park to Colebrook Court Limited ("the Headlease"). The Headlease is for a term of 99 years from 21 September 1966 and reserves a rent of £500 per annum. Thus the Headlease expires on 20 September 2065 and has some 52 years left to run.

9. In due course the owner of the Headlease sold the flats and parking spaces in the residents' car park. It granted leases of the flats and parking spaces for terms of 99 years (less three days) from 21 September 1966 so that the owner of the Headlease retained a three day reversionary interest in each of the flats and parking spaces.

10. The agreed valuation date is 28 October 2011. Prior to that date eight of the twelve long leaseholders had extended their leases under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") so that they now hold leases of their flats for terms expiring on 18 September 2115. At the valuation date the owners of flats 2, 5, 7 and 11 still held those flats under original leases expiring in 2065. After the valuation date the owners of flat 2 extended their lease and now also hold that flat under a new lease expiring on 17 September 2155.

11. Mr Goodman is a solicitor and practices as David Goodman & Co. His sister first occupied flat 11 as a tenant in the late 1960s and subsequently purchased it in 1985. She sold the flat to Mr Goodman in 1987 and from his witness statement it seems he has lived there ever since. Mr Goodman is also the company secretary of Arrowgame and through his firm he also acts as Arrowgame's solicitor.

12. Arrowgame purchased the Headlease on 18 February 1993 for £5,500. Mr A S Browne is the sole director of Arrowgame and all the shares in that company are either owned by him or they are under his control. Until his retirement Mr Browne was a practicing surveyor.

13. Vantage Volante purchased the reversionary freehold interest in 2001.

14. The Headlease is a full repairing and insuring lease. That is Arrowgame is responsible for maintaining, repairing and insuring the block of flats and residents' car park and recovers the cost through the service charge provisions of the flat and parking space leases. Having purchased the Headlease in 1993 Arrowgame initially appointed Gross Fine to manage the flats and parking spaces. However they resigned in June 2003 after which date Mr Goodman acted as the managing agent. A majority of the long leaseholders considered that Mr Goodman was not up to the job and they wanted rid of him. In 2005, 10 of them made a number of applications to the Leasehold Valuation Tribunal ("the LVT") including an application under section 24 of the 1987 Act for the appointment of a manager. The tribunal issued its decision on 14 February 2006 and appointed Bruce Maunder

Taylor FRICS to manage the block of flats and residents' car park with effect from that date and as far as we are aware he has managed them ever since.

15. The long leaseholders were unable to acquire the freehold reversionary interest in Colebrook Court under the enfranchisement provisions of the 1993 Act because more than 25% of the internal floor area of Colebrook Court is not occupied for residential purposes. Part III of the 1987 Act enables a majority of tenants to apply to the County Court for an acquisition order where an LVT appointed manager has been in place for a period of two years. If granted the effect of an acquisition order is to transfer the landlord's interest to the tenants.

16. On 14 September 2009 the tenants entered into an agreement with Vantage Volante that was not disclosed to Arrowgame until a much later date. The agreement recites the tenants' intention to acquire the Headlease under the 1987 Act and Vantage Volante's agreement to assist them in that process. Put shortly Vantage Volante agreed to underwrite the acquisition costs including the tenants' legal costs. In addition Vantage Volante agreed to contribute up to £32,000 plus VAT towards the cost of improving the roof terrace and installing sky television and broadband. In return the tenants agreed to transfer the Headlease to Vantage Volante so that in due course responsibility for the management of Colebrook Court would pass to Vantage Volante as the freeholder.

17. On 20 January 2010 the tenants gave notice of their intention to acquire the Headlease under section 27 of the 1987 Act. The notice set in motion a train of disproportionately expensive litigation that shows no sign of abating. The tenants issued their claim for an acquisition order in the Central London County Court on 22 February 2010.

18. There was a flurry of activity just before the claim was heard. On 10 October 2011 Arrowgame charged the Headlease to Mr Goodman and the charge was registered on 17 October 2011. The extent and purpose of the charge was not explained to us.

19. On 15 October 2011 Arrowgame charged the Headlease to Landgate and the charge was registered on 15 May 2012. We were told that the charge protected Landgate's professional fees to be incurred in both the proposed development of Colebrook House and in these proceedings that had been underwritten by Arrowgame.

20. On 17 October 2011 Arrowgame gave notice under section 5A of the 1987 Act to each of the tenants. Part 1 of the 1987 Act gives tenants generally a right of first refusal where their landlord intends to dispose of its interest in the tenanted property. The notices were signed by Mr Browne and Mr Goodman and informed each of the tenants of Arrowgame's intention to dispose of the Headlease to Landgate at the price of £4,000,000. A majority of the tenants had the option of purchasing the Headlease at that price but the option was not exercised.

21. On the same date, that is 17 October 2011, Mr Browne and Landgate entered into a share sale agreement. Under that agreement Mr Browne agreed to sell his shares in Arrowgame to Landgate for £4,000,000. However the agreement gave Landgate an unconditional right of rescission. As Mr Harrison on behalf of Landgate conceded the agreement in reality did no more than give Landgate the option to purchase Mr Browne's shares for £4,000,000.

22. On the same date (that is on 17 October 2011) the claim for an acquisition order came before His Honour Judge Cowell in a five day hearing. Judge Cowell granted the acquisition order on 28 October 2011. We have read a transcript of his judgement in which he comments on Mr Browne's *"propensity for hugely optimistic and negligent valuations"* and criticises Mr Goodman for being a *"a professional procrastinator"*. Arrowgame was ordered to pay the tenants' costs, some of them on an indemnity basis.

23. On 23 November 2011 the tenants applied to the LVT under section 31 of the 1987 Act to determine the terms of acquisition ordered by Judge Cowell. At the request of both parties the application before the LVT was held in abeyance pending an appeal by Arrowgame against the acquisition order made by Judge Cowell.

24. On 6 July 2012 Landgate applied to the Royal Borough of Kensington & Chelsea for planning permission to erect a three storey extension to the existing block of flats at Colebrook Court. The proposed extension consists of 2 two bed-room flats at fourth floor level and a three bedroom dwelling at fifth and sixth floor levels. The application was withdrawn by Landgate on 16 January 2013.

25. Arrowgame's appeal was heard by the Geraldine Andrews QC sitting as a Judge of the High Court on 25 and 26 July 2012. She permitted Landgate to intervene in the appeal so that they could be heard. She dismissed the appeal and in her judgment of 22 November 2012 she criticises Mr Goodman for his attempts to introduce late evidence including witness statements and voluminous documents.

26. Geraldine Andrews QC having dismissed the appeal the application before the LVT was restored and directions were issued following pre-trial reviews on 8 January and 13 February 2013. Each party was given permission to call single valuation, engineering and planning experts.

27. On 6 March 2013 Mr Goodman and Arrowgame entered into an option agreement. Mr Goodman is Arrowgame's solicitor but we were told that on this occasion Arrowgame were separately advised. Under the terms of the agreement Arrowgame has the option of purchasing Mr Goodman's flat for £2,800,000. The purpose of the option agreement is not entirely clear to us. At the hearing the flat was valued at about £1,000,000 and in any event we were told that the Headlease apart Arrowgame has no other assets and could not therefore have funded the proposed purchase price.

28. Although no relevant documents were included in the hearing bundles we were told that during the week prior to the hearing before us Landgate had lodged a further planning application for a two storey extension to the existing block of flats. The design which incorporates flat 11 (owned by Mr Goodman) is for one large dwelling or maisonette of some 4,750 square feet.

THE HEARING

29. A number of expert reports and witness statements were included in the six volume hearing bundle. For the tenants two experts gave oral evidence. Mr R J Orr-Ewing from Knight Frank gave valuation evidence whilst Mr J Drew MRTPI of Drew Planning and Development Ltd gave planning evidence. In addition there was included in the hearing bundle a witness statement from Mr J W May who is the tenants' solicitor. The statement dealt with the terms of the proposed transfer. It was unnecessary to hear oral evidence from Mr May because all the parties agreed that we could determine the terms of the transfer on the basis of the various witness statements included in the hearing bundles and without hearing oral evidence.

30. For Arrowgame two experts gave oral evidence. Mr J Hewetson MRICS of Matthews & Goodman LLP gave valuation evidence whilst Mr M Cleator C. Eng, F.I. Struct E. M Assoc Cons E gave structural engineering evidence. We also heard oral evidence from Mr Goodman who, the terms of the proposed transfer apart, gave factual evidence. As will be recalled Mr Goodman has various interest in this litigation: as a lessee of flat 11, as a chargee of the Headlease and as the company secretary of and solicitor for Arrowgame. Although called as a witness for Arrowgame it was at times difficult to identify on whose behalf Mr Goodman gave his evidence.

31. Included in the hearing bundle were witness statements from Mr A Browne and Mr K Lumley. It will be recalled that Mr Browne owns the shares in Arrowgame. Mr Lumley is a chartered surveyor and his written statement dealt with a dispute between Arrowgame and Sainsburys and purported to value a *"likely negotiated licence fee"* that Sainsburys might pay to settle that dispute. For reasons that will become apparent neither of these witnesses attended for cross-examination although we read their witness statements and took them into account in reaching our decisions.

32. For Landgate we heard oral evidence from three experts. Mr N de Lotbiniere of Savills gave planning evidence, Mr S Deckker DipVal, MRICS of Savills gave valuation evidence and Mr T Finbow of Walsh Associates Ltd gave structural engineering evidence.

33. Finally we heard oral evidence from Mr G Underhill who is a surveyor and property developer and a director of Landgate.

34. Neither Vantage Volante nor Mr Goodman tendered any witness evidence although Mr Goodman's evidence appeared to be given as much on his own behalf as it was on behalf of Arrowgame for whom he was called as a witness.

35. At the start of the hearing on 17 June Mr Fadipe on behalf of Arrowgame requested that we adjourn for an unspecified period because both Mr Lumley and Mr Browne were ill and unable to attend for cross-examination. Mr Lumley had recently had a heart attack and would be unable to resume work for at least 28 days. Mr Browne suffers from a debilitating illness that has rendered him permanently incapacitated. The application was opposed by Mr Radevsky on behalf of the tenants.

36. No medical evidence was tendered to substantiate the medical condition of either witness and no advance warning of the application had been given. Neither Mr Browne nor Mr Lumley were called as expert witnesses. Although Mr Lumley purported to give evidence as to the value of Arrowgame's claim against Sainsburys that valuation was also dealt with by Mr Hewetson. We read their witness statements and although their evidence might be given greater weight if they had attended for cross examination their statements would not be disregarded. Essentially we had to value the Headlease and the evidence of Mr Browne and Mr Lumley would at best have only a marginal impact on that valuation. Finally we had regard to the prejudicial effect of an adjournment on the tenants. The litigation as a whole goes back to the first LVT application for the appointment of a manager in 2006 whilst it is now some three and half years since the tenants first made their claim to acquire the Headlease. They are entitled to have that claim brought to a conclusion without further delay. Consequently and for each of these reasons we refused the adjournment request.

37. Mr Goodman arrived at the hearing with a large quantity of further material and requested that it be admitted in evidence. Although he had had the hearing bundle for at least six days he said that it was only during the previous evening that he appreciated that the documents had not been included. He told us that he had previously emailed the documents to Mr May with a request that they be included in the hearing bundle. The documents in the main related to an offer of £3,000,000 said to have been made for the Headlease and also to the recent planning application for the two storey extension.

38. In answer to our questions Mr May said that none of these documents had previously been disclosed to him whilst Mr Goodman was unable to identify the covering email that he had sent to Mr May. Again the application to admit the additional evidence was opposed by Mr Radevsky on behalf of the tenants.

39. We had regard to the criticisms of Mr Goodman made by Judge Cowell and Geraldine Andrews QC in the Court proceedings and in particular his propensity for leaving matters to the last moment and attempting to introduce late evidence. Admitting the additional evidence might well result in a postponement whilst it was considered by the various experts and for the reasons stated above that would prejudice the tenants. Finally and having regard to the task before us we did not consider that the additional evidence would assist the valuation of the Headlease: a view that was subsequently confirmed when all the parties ultimately agreed that the Headlease should be valued as at the date of the acquisition order. Consequently and for each

of these reasons we refused Mr Goodman's request to admit the additional evidence.

MR ORR-EWING'S POSITION

40. It was common ground that the Headlease should be valued in accordance with section 31(2) of the 1987 Act that reads as follows:

"(2) Where an application is made under this section for [the tribunal] to determine the consideration payable for the acquisition of a landlord's interest in any premises, [the tribunal] shall do so by determining an amount equal to the amount which, in their opinion, that interest might be expected to realise if sold on the open market by a willing seller on the appropriate terms and on the assumption that none of the tenants of the landlord of any premises comprised in those premises was buying or seeking to buy that interest."

41. Furthermore although there was initially a difference of opinion as to the correct valuation date by the end of the hearing it was agreed that the Headlease should be valued on 28 October 2011 being the date of the acquisition order.

42. Mr Orr-Ewing's valuation was in two parts. He capitalised the receivable rents under the four unextended leases and four separately leased parking spaces at 6% with a 2.25% sinking fund. He then added hope value to reflect the possibility that the four unextended leases might in due course be extended under the 1993 Act. He took 10% of the total marriage value that would be released and apportioned that between the freeholder and the headlesee in proportion to the value of their respective interests. From the resulting figure he deducted the rent payable under the Headlease that he capitalised at a single rate of 6%. The calculation produced a valuation of £3,456.

43. The second part of Mr Orr-Ewing's valuation related to the development potential that a hypothetical buyer of the Headlease would take into account when making his bid. He considered that the freeholder was the most likely developer and that he was not excluded from the market. Adopting the reasoning of both the LVT and the Upper Tribunal in the Trustees of the Sloane Stanley Estate v Carey-Morgan [2011] UKUT 415 (LC) Mr Orr-Ewing concluded that the possibility of developing Colebrook Court either as a whole or within the envelope of the Headlease demise was so speculative that a hypothetical willing buyer would pay no more than a gambling chip for a seat at the table of any future negotiations. Having regard to the outcome of Sloane Stanley Estate he valued that gambling chip at £20,000. Thus he valued the Headlease at £23,456.

44. Mr Orr-Ewing considered that the development potential was so speculative that a hypothetical willing buyer would not base his bid on a residual valuation and in advance of the hearing he did not prepare one. Having heard Mr Hewetson's evidence and in an effort to assist the tribunal Mr Orr-Ewing prepared a residual valuation during the course of the hearing, which

produced a site valuation of £636,680 for the Headlease although he did not alter his primary position that a willing buyer would pay only a gambling chip for the Headlease.

MR HEWETSON'S POSITION

45. Mr Hewetson considered that the hypothetical willing buyer's bid would be determined by the development potential of Colebrook Court. He considered a number of potential development schemes and he prepared a residual valuation for each of them.

46. The first scheme was the proposed three storey extension for which a planning application was lodged in July 2012 and withdrawn in January 2013. Although his residual valuation indicated that a buyer might bid up to £4,500,000 to acquire the Headlease to facilitate this development he concluded that the market value of the Headlease was represented by the offer of £4,000,000 that was said to have been made by Landgate to Arrowgame for its purchase. However in answer to Mr Radevsky's questions Mr Hewetson conceded that he should have discounted his residual valuation by between 35% and 50% to reflect the planning risk. Consequently he revised his valuation to between £2,000,000 and £2,600,000.

47. The second scheme was the two storey extension for which a planning application had been lodged during the week prior to the hearing. That valuation indicated that a willing buyer would have £2,192,080 available to purchase both one of the top storey flats (that was an integral part of the proposed development) and the Headlease.

48. The third scheme was a whole site development or at least the demolition of the existing flats and their replacement with a new block of 18 flats including two penthouses. Such a development could only be undertaken by the freeholder but it was common ground that only the tenants' bid was to be excluded under section 31(2) of the 1987 Act and that consequently the freeholder was *"in the market"* as a willing buyer. On the basis of his residual valuation in which the Headlease was taken at £4,000,000 and the marriage value divided equally Mr Hewetson concluded that the market value of the Headlease with Vantage Volante in the market as a willing bidder was £8,500,000.

49. Mr Hewetson also valued a number of other attributes of the Headlease that he said would be taken into account by a willing buyer. The first was *"Arrowgame's share of the remaining lease extension premiums"* that he put at £12,500. The second was the value of *"claims for breach of covenant in the residential leases"* that he put at £25,000. The third was the value of *"the removal of the restrictions on subletting"* that he put at £50,000 *"per applicable flat"*. The fourth was the value of Arrowgame's potential claim against Sainsburys for *"the use of the refuse bay"* that he put at £500,000.

50. However none of these additional valuations were either included in or added to the three development valuations to which he spoke. In answer to Mr Radevsky's question Mr Hewetson said that he assumed that these

additional values *"would be lost in the round"* but that they would have greater significance if the development value was found to be substantially less than that for which he contended.

MR DECKKER'S POSITION

51. Mr Deckker simply provided desktop valuations of the flats envisaged by the two and three storey schemes to which we have referred. For each scheme he provided two valuations for each valuation date originally contended for. The first on the basis of 52 year leases assumed that the flats would be sold by the headlessee. The second on the basis of long leases (for 99 or 125 years) assumed that the flats would be sold by the freeholder: although he did not specifically say so the second valuations assumed that the Headlease was bought by the freeholder.

52. At the agreed valuation date he valued the large dwelling envisaged by the two storey scheme at £5,961,962 if sold on a long lease and £4,870,923 if sold on a 52 year lease.

53. At the agreed valuation date he valued the three flats envisaged by the three storey scheme at £10,410,502 if sold on long leases and £8,505,380 if sold on 52 year leases.

REASONS FOR OUR DECISION ON VALUE

Development hope value

54. In determining the price to be paid for the Headlease we have to consider a sale *"on the open market by a willing seller"*. That phrase requires us to consider both a hypothetical willing seller and a hypothetical willing buyer. It was agreed that the freeholder is in the market but again we must have regard to a hypothetical freeholder rather than Vantage Volante. Equally the tenants are excluded from the pool of potential bidders with the result that marriage value will not arise.

55. Against that background and before considering the development potential of the Headlease it is helpful to consider the position of the hypothetical willing buyer in October 2011. We must assume that it has had a reasonable time within which to investigate the market and to make the usual searches and enquiries that any prudent buyer would make before committing itself to the purchase of the Headlease. Having made those enquiries what would it have discovered?

56. It would have discovered that Arrowgame purchased the Headlease in 1993 for £5,500 indicating that at that time the seller at least did not consider that there was any material development potential in Colebrook Court. It would also have discovered that for many years Arrowgame had been attempting to realise the perceived development value in Colebrook Court by selling the Headlease. Mr Goodman drew our attention to correspondence in the hearing bundle dating back to December 1995 when First Penthouse Limited

proposed *"a two year option, subject to planning, on a development lease over the roof space"*. However the hypothetical buyer would have discovered that no planning application had ever been made for Colebrook Court and that none of the offers that had undoubtedly been made for the Headlease had ever come to fruition.

57. Our hypothetical buyer would undoubtedly have considered the development potential inherent in the Headlease. It is appropriate to consider the hypothetical buyer's position through the lens of subsequent events. As Mr Radevsky put it, we are entitled to draw inferences from what actually happened after the agreed valuation date. On that basis the hypothetical willing buyer would have considered the three development options suggested by Mr Hewetson and discussed at the hearing.

58. It was common ground that the whole site development could only be completed by the freeholder who it was agreed is in the market. However the whole site could only be developed with the agreement and cooperation of Sainsburys and all twelve flat owners. As Mr Hewetson conceded each of them could hold the developer to ransom and frustrate the development. A whole site development could only be completed with any degree of certainty in 2065 when the existing original flat leases expire and development break clauses in the new extended leases could be triggered. Even then compensation would be payable to the owners of the extended leases. A willing buyer would consider that the possibility of buying in all the existing leasehold interests was so remote that he would not make an offer on the basis of such a development. Indeed Landgate had not prepared a proposal for a whole site development nor had they submitted a planning application for such a development. At best the realistic possibility of developing the site in 52 years time might increase the willing buyer's confidence to make a bid on the basis of other development potential but it would do no more and certainly it would not persuade it to put additional money on the table in its negotiations with the willing seller.

59. There was initially a suggestion that the tenants had entered into an undisclosed agreement with the freeholder for a whole site development. The implication being that we should infer that the hypothetical willing buyer had entered into such an agreement. When this point was taken Mr Radevsky handed in copies of witness statements sworn by the tenants in the court proceedings denying any agreement other than that of 14 September 2009 to which we have referred. The other advocates accepted those statements and did not wish to cross-examine one of the tenants who attended the hearing. Consequently the point was not pursued.

60. It was also suggested that the freeholder's bid should effectively be discounted because it would bid only £1 more than a third party bidder. We reject that argument for each of two reasons. Firstly because it presupposes a completely transparent market that could only be achieved by a public auction sale and there is nothing in the legislation to suggest an auction sale rather than the more usual sale by private treaty. Secondly because as Parliament did not exclude the freeholder from the pool of potential bidders it cannot have intended the freeholder's bid to be worthless.

61. Turning to the more realistic option of the proposed two and three storey extensions the hypothetical buyer would take planning advice as Mr Underhill had done on behalf of Landgate. If it had consulted Mr de Lotbiniere it would have been advised to apply for a three storey extension on the basis that it would probably get permission for a two storey extension: as Mr de Lotbiniere put it *"try for three but aim of two"*. On the other hand if it had instructed Mr Drew it would have been told that it had virtually no chance of obtaining permission for a three storey development and only a limited chance of obtaining permission for a two storey extension.

62. Mr Radevsky suggested that we should discount Mr de Lotbiniere's evidence because he had acted for Landgate and could not therefore be regarded as an independent expert. We do not accept that reasoning. Mr de Lotbiniere answered our questions with a degree of candour that is unusual. For example in answer to our questions about the two storey planning application that had been made in the week before the hearing he said that it had been made against his advice and he imagined that its sole purpose was to influence the outcome of the hearing. His preference would have been to work up a more sophisticated scheme and take that through the pre-application procedure before lodging a formal application.

63. Mr de Lotbiniere is a highly experienced planner who specialises in this area of London whereas Mr Drew has a wider geographic practice. Furthermore Mr de Lotbiniere had the advantage of having taken the actual three storey application through the planning process before it was withdrawn in July 2012. We do not discount Mr Drew's evidence and neither do we question his integrity. Having regard to the totality of the evidence given by both planning experts we are satisfied and find that our hypothetical buyer would have discounted the possibility of a three storey extension but would have concluded that there was a reasonable chance of obtaining planning permission for a two storey extension incorporating one of the existing four flats on the top storey of Colebrook Court.

64. A third party willing buyer would appreciate that under the terms of the Headlease the freeholder's consent would be required to any roof top development although such consent could not be unreasonably refused. He would no doubt make inquiries of the freeholder and he would learn, as Mr Underhill had learnt, that the freeholder was not prepared to give its consent primarily because it considered that the airspace was not within the Headlease demise. We heard considerable argument on his point but we cannot see that it is relevant because the freeholder is in the market and the freeholder would not be constrained in his bid by the exclusion of the airspace from the Headlease demise.

65. Nevertheless as the issue was discussed at length we will deal with it briefly. In suggesting that the air space was not included in the headlease demise Mr Radevsky relied principally upon the judgment of Mr Nicholas Strauss QC, sitting as a deputy High Court Judge in Roseberry Ltd v Rocklee Ltd and Another [2010] EWHC B1(Ch). In that case the Judge decided that a supplemental underlease of an extension to a sixth floor flat did not include

the airspace above the extension so as to prevent the owner of two seventh floor flats erecting a roof terrace above it. By paragraph 43 of the judgment the decision is limited to a lease of part and in that paragraph the Judge distinguished the facts of the case from Davis v Yadegar [1990] 1 EGLR 71 that, as he said, *"was a case in which the demise included the entire top floor and the entire roof"*. Davis v Yadegar was a Court of Appeal decision and in answer to our questions Mr Radevsky did not suggest that it was a bad law. As pointed out at paragraph 41 of the judgment in Rosebery, Davis v Yadegar is authority for the proposition that where the demise of the upper part of a building includes the roof space and roof it also includes the airspace above it. The Headlease includes the whole of the top floor and the roof of the block of flats and on the basis of Davis v Yadegar we conclude that it includes the airspace above it.

66. The hypothetical buyer would also consider whether it was structurally possible to complete a roof top development. The tenants did not put forward a structural engineer. Nevertheless we heard evidence from two structural engineers and their evidence was not dissimilar. Further detailed test would have to be undertaken but they were both reasonably confident that the tests would be positive and that consequently it should be possible to complete the proposed development. Mr Cleator who gave evidence on behalf of Arrowgame put the possibility of a successful outcome to the outstanding tests at 90%. To put it another way the hypothetical buyer would have to factor in a 10% risk of not being able to complete the development at all.

67. The hypothetical buyer would also consider whether the flat owners could effectively prevent a rooftop development. He would be reassured to find that the all the leases contain a reservation permitting development by the lessor. We fully accept Mr Radevsky's point that there is a tension between such reservations and the lessor's covenants for quite enjoyment. No authority was offered to resolve that tension but we are satisfied that where a residential lease includes a development reservation the lessee cannot as of right prevent a roof top development although the development would have to be completed with due regard to the lessee's comfort and security. If that were not the position rooftop developments that are by no means uncommon would never be built.

68. There was discussion about the costs incurred by the parties. Landgate has incurred some £200,000 in costs including those incurred in pursuing the planning applications to which we have referred. Vantage Volante had underwritten the tenants' costs in the court proceedings and before us, which must be considerable even taking into account the £150,000 that Mr May considers will be recovered under the court cost orders and which will be deducted from the price to be paid for the Headlease. In effect we were asked to infer that the Headlease must be worth a substantial amount if these parties were prepared to put up costs of that order. We reject that inference. Litigation has a life of its own and it is doubtful that at the outset either of them contemplated their ultimate cost liability: having embarked on the litigation it was difficult for them to draw back. In any event we have to consider a hypothetical willing buyer. Such a buyer would certainly not have

contemplated the costs that have been incurred and if it had it would have reduced rather than increased its bid.

69. Having quantified all these risks as best as it could the hypothetical buyer would then want to calculate the potential profit in the development should the risks be overcome. We accept Mr Orr-Ewing's point that the hypothetical buyer would probably not complete a detailed residual valuation of the type that was put before us and which are commonly put before tribunals in enfranchisement cases. Such valuations are of necessity undertaken with the benefit of hindsight and are to an extent artificial.

70. However we are satisfied that the hypothetical buyer would in contemplating its bid assess the likely sale value of the proposed two storey extension and the various development costs that it would incur. From these calculations it would be able to assess the amount available both to buy in the lease of one of the top floor flats and the Headlease and that assessment would inform its bid.

71. The residual valuations undertaken by Mr Hewetson and Mr Orr-Ewing were surprisingly similar. Both put the realisable sale price at £5,818,760 on the basis of a 52 year lease. However the hypothetical freeholder is in the market and its bid would be informed by the possibility of granting a long 99 or 125 year lease. Only Mr Deckker valued a sale on a long lease and consequently his valuation of £5,961,962 is more realistic and we adopt it.

72. Although the constituent elements of their valuations differed both Mr Orr-Ewing and Mr Hewetson broadly agreed the development costs including the developer's anticipated profit. Mr Orr-Ewing put them at £3,682,070 whilst Mr Hewetson put them at £3,626,670. In such circumstances we adopt an average of £3,654,370. Thus after taking a reasonable profit on the development the hypothetical willing buyer would be left with some £2,307,592 [£5,961,962 –£3,654,370] to buy in the lease of one of the top floor flats and the Headlease.

73. The cost of buying out one of the four top floor flats would have been problematical because collectively the four lessees could hold the hypothetical willing buyer to ransom. It seems that Mr Goodman, on the basis of the option agreement that he entered into with Arrowgame, would have demanded £2,800,000. If all four lessees had adopted a similar valuation than the hypothetical willing buyer would no doubt have concluded that the development was not financially viable and would not have made a bid.

74. There is however a degree of artificiality in Mr Goodman's arrangement with Arrowgame and we do not think that it is possible to conclude from it that the owners of all four flats would have demanded such a premium when each of their flats had by common consent a value of about £1,000,000. Mr Orr-Ewing suggested that the hypothetical willing buyer would have to go as high as £1,500,000 to secure one of the top floor flats. Although Mr Hewetson did not initially put a figure on that acquisition cost, in answer to Mr Radevsky's

questions he agreed with Mr Orr-Ewing's assessment that we therefore accept.

75. Consequently the hypothetical willing buyer would have concluded that he could in theory at least bid up to £807,592 (£2,307,592-£1,500,000) and still make a reasonable profit on the development. As the hypothetical buyer would have been unlikely to work to such detailed margins we round the figure down to £800,000. However such a bid would only be made on the basis that the development was *"shovel ready"*: it was far from that. Even taking into account a bid from the freeholder planning would still be a major obstacle and even if consent was achieved would probably delay the development by at least 18 months. There was a residual risk that the development could not be completed at all for structural reasons. A third party purchaser would factor in the risk of litigation with the freeholder in obtaining consent to the development although that would not reduce the freeholder's bid.

76. In such circumstances what would the hypothetical willing buyer do? We have no doubt that in the real world it would do what First Penthouse Limited and Landgate Limited did. It would endeavour to secure an option to purchase the Headlease so that it could pursue its planning application and carryout its structural investigations without having to put any money on the table.

77. Notwithstanding the difficulties with the right of first refusal contained in the 1987 Act Landgate could have entered into a conditional contract that would have committed it to purchase the Headlease for £4,000,000 in the event of the tenants failing to exercise their right of first refusal. It did not do so. Instead it entered into what Mr Harrison candidly accepted was no more than an option to purchase the shares in Arrowgame and through that company the Headlease. Indeed Landgate went beyond that and managed to obtain an indemnity from Arrowgame to cover all its costs although we have little doubt had it not been for the court proceedings the indemnity would not have been forthcoming.

78. It is unlikely that Landgate would ever have paid £4,000,000 for the Headlease because in evidence Mr Underhill said that with the benefit of hindsight he would only have paid half that sum. However he did not explain how he arrived at that sum and we treat his evidence with caution. Given the acquisition order Landgate could not acquire the Headlease. As Mr Harrison conceded Landgate's objective was to secure a valuation that would enable it to recover its costs under its agreement with Arrowgame.

79. However we are not in the real world. We are in a hypothetical world in which the possibility of an option is not available to the willing buyer. We have to assume that the hypothetical willing buyer will make a bid that will be acceptable to a hypothetical willing seller. Indeed Mr Underhill accepted that if pushed he would have paid a fixed sum for the Headlease with the balance being covered by an overage agreement that would have mitigated Landgate's risk. Surprisingly none of the advocates asked Mr Underhill what that fixed sum would have been.

80. We have considered Mr Orr-Ewing's argument that a hypothetical willing buyer would have paid little more then a nominal bargaining chip of the sort awarded in the Sloane Stanley Estate case. There is however a considerable danger in applying a decision in one case to the different facts of another case. Sloane Stanley Estate was an enfranchisement case with different valuation criteria. Mr Radevsky drew our attention to the fact that in Sloane Stanley Estate the two experts put the chances of obtaining planning consent for the proposed roof top development at 60% and 70% and thus he argued that the case was comparable to Colebrook Court. We have however read the decision. Both experts were called on behalf of the landlord. It is apparent that both the LVT and the Upper Tribunal discounted the expert evidence as being wholly unrealistic not least because the property was in a conservation area where there was a specific planning policy against roof top developments.

81. Colebrook Court is not in a conservation area and there is no specific planning policy against roof top developments. Furthermore in Sloane Stanley Estate the Upper Tribunal was clearly influenced by the failure of either expert to give examples of other roof top developments that had actually been completed. In contrast Mr de Lotbiniere was able to confirm that numerous such developments had been completed in Kensington and Chelsea and he gave one specific example, his evidence in this respect not being challenged.

82. We have found that the hypothetical willing buyer would have concluded that there was a reasonable chance of obtaining a planning consent for the two storey development. Given that reasonable possibility and factoring in the other risks and the history of Colebrook Court since 1993 to which we have referred we are satisfied and find that the hypothetical willing buyer would have been prepared to pay more than a nominal gambling chip for the development value in the Headlease. On the reasonable assumption that the hypothetical willing buyer would have paid as much as £800,000 for the Headlease if the proposed development was shovel ready we conclude and find that it would have been prepared to bid up to £250,000 after factoring in the risks to which we have referred and in particular the planning risk: that is a little less than one-third of the sum available to buy the Headlease. To put it another way we find that the hypothetical willing buyer would have been prepared to put £250,000 on the table to secure the Headlease when signing an unconditional contract for its purchase. That in our view is a realistic bid that would in the market be accepted by a hypothetical willing seller and we therefore assess the development value at £250,000.

Capitalised rents and hope value

83. In answer to Mr Radevsky's questions Mr Hewetson accepted that his valuation was flawed. He had failed to capitalise the whole of the rent payable to the freeholder under the Headlease and under cross examination he accepted that he found the treatment of the Headlease rent *"very confusing"*. He also accepted that he should not have included the whole of

the marriage value that would be released on the extension of the four unextended leases.

84. Although the hope value at 10% of the marriage value is a little conservative it is nevertheless not unreasonable and as Mr Hewetson accepted that his approach was wrong we see no reason to depart from it in the absence of any other proposal.

85. Consequently we prefer and adopt the valuation of Mr Orr-Ewing which in terms of methodology is consistent with establishes practice and was not challenged. As Mr Fadipe said in his closing submissions: *"It makes no difference to Arrowgame.......whether the approach results in a basic valuation ... of £3K odd as suggested by Mr Orr-Ewing or £13K odd as suggested by Mr Hewetson".*

Other hope value

86. It will be recalled that Mr Hewetson valued three other attributes of the Headlease that he said would be taken into account by a willing buyer. They were all a species of hope value.

87. Firstly he valued potential claims for breach of covenant against the flat lessees at £25,000. Mr Hewetson was unable to particularise any specific claims but by way of example he said that in any block of flats there will be unauthorised alterations. Under cross examination from Mr Radevsky, Mr Hewetson accepted that the suggested claims were purely speculative and he withdrew his valuation of £25,000.

88. We were told that an unspecified number of the flat leases prohibited the lessees from subletting for a period of more than two years in any three years. Mr Hewetson originally contended apparently upon instructions from Mr Goodman that the lessee of each such flat would pay £50,000 to the headlessee to secure the removal of the restriction.

89. However since 1993 when Arrowgame purchased the Headlease only one lessee has sought the removal of this restriction. The lessee of flat 12 apparently agreed to pay £1,000 a year for the removal of the restriction but on the basis of Mr Goodman's evidence he has never paid that or any other sum despite letting his flat permanently since 2006.When this was pointed out to Mr Hewetson he accepted that he could no longer speak to his valuation of £50,000.

90. Finally Mr Goodman valued a potential claim against Sainsburys at £500,000. The background to this was explained at some length in the statements of Mr Lumley and Mr Goodman. In essence Sainsburys had in carrying out alterations to its store inserted an air vent into a dividing wall separating its store from the refuse collection bay and it was suggested that both the use of the wall and the *"dumping"* of waste air into the refuse collection bay amounted to a trespass. Both Mr Lumley and Mr Hewetson valued the resulting potential claim against Sainsburys at £500,000.

91. Mr Goodman on behalf of Arrowgame had first raised this issue with Sainsbury in 2005 and at that time a number of letters were sent to Sainsburys threatening legal action. In April 2006 Mr Lumley on behalf of Arrowgame attended a meeting with representatives of Sainsburys to discuss the issue but it came to nothing. Arrowgame had simply not pursued the claim against Sainsbury until March 2013 when Mr Goodman wrote to them inviting them to enter into negotiations. No response was received to those letters.

92. When this was pointed out to Mr Hewetson he agreed that the claim against Sainsbury was speculative. In answer to Mr Radevsky questions he agreed that on reflection a hypothetical willing buyer would *"not pay very much"* for the potential claim.

93. If there has indeed been a trespass then it has continued for at least 8 years. During that time Arrowgame has taken no positive action to bring the trespass to an end. Having regard to that delay legal proceedings against a well resourced opponent such as Sainsburys would be fraught with difficulty.

94. In their closing submissions both Mr Fadipe and Mr Harrison distanced themselves from these valuations. Mr Fadipe said on behalf of Arrowgame that he did not wish to pursue these *"peripheral elements of value"*. Mr Harrison on behalf of Landgate adopted a similar approach saying that the evidence did not support the *"non development value aspects"* of Mr Hewetson's valuation.

95. Only Mr Goodman persisted with them. We agree with the other advocates. The valuations were simply not grounded in reality and there was no evidence to support them. They were so speculative in nature that no hypothetical willing buyer would take them into account when making a bid for the Headlease and neither do we.

Conclusions on value

96. We therefore value the Headlease at the valuation date at £253,456 calculated as follows:-

Capitalised ground rents for flats 2, 5, 7 & 11:	£ 9,538
Less capitalised head rent:	£ 7,973
Value of flat ground rents:	£ 1,565
Value of parking space rents:	£ 115
Hope value @ 10% of marriage value:	£ 1,776
Development hope value:	£250,000
Total:	£253,456

REASONS FOR OUR DECISIONS ON THE TRANSFER

97. Mr May, the tenants' solicitor had prepared a standard Land Registry Transfer in form TR1. By analogy with the 1993 Act he had included details of

the relevant provisions of 1987 Act and the acquisition order. In response Mr Goodman in his capacity as Arrowgame's solicitor had deleted those additional provisions and had added 17 additional clauses including a number of indemnities and various provisions relating to the payment of the purchase price. He also included a provision that the registered charges would remain in full force and effect if the purchase price determined by ourselves was not sufficient to discharge them. Lastly he included a declaration that the transfer was subject to *"all overriding interests"*.

98. With the exception of an indemnity in respect of past breaches of covenants (including those contained in the registered leases) Mr May rejected all of Mr Goodman's amendments.

99. In his closing submissions Mr Fadipe said that Arrowgame did not *"contend for the various additions proposed by Mr Goodman"*. As the transfer is a matter between Arrowgame and the tenants that should be an end of the matter.

100. However as Mr Goodman persisted with his amendments (although in what capacity is not clear) we will deal with them briefly. The additional provisions inserted by Mr Goodman (other than the indemnity that Mr May accepted) were wholly misconceived. As Mr Goodman accepted in answer to our question they were in the main provisions that one would expect to find in a contract rather than a transfer or conveyance. Section 32(1) of the 1987 Act provides specifically for the automatic discharge of any existing charges on completion of the transfer and it is not open to Mr Goodman to contradict that provision. Equally we agree with Mr May that an express provision contained in a transfer relating generally to overriding interests is wholly superfluous. Consequently and for each and all of these reasons we approve the revised form of transfer prepared by Mr May at pages 10-154 to 10-157 in volume 3 of the hearing bundle

Name: Angus Andrew **Date:** 6 August 2013

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