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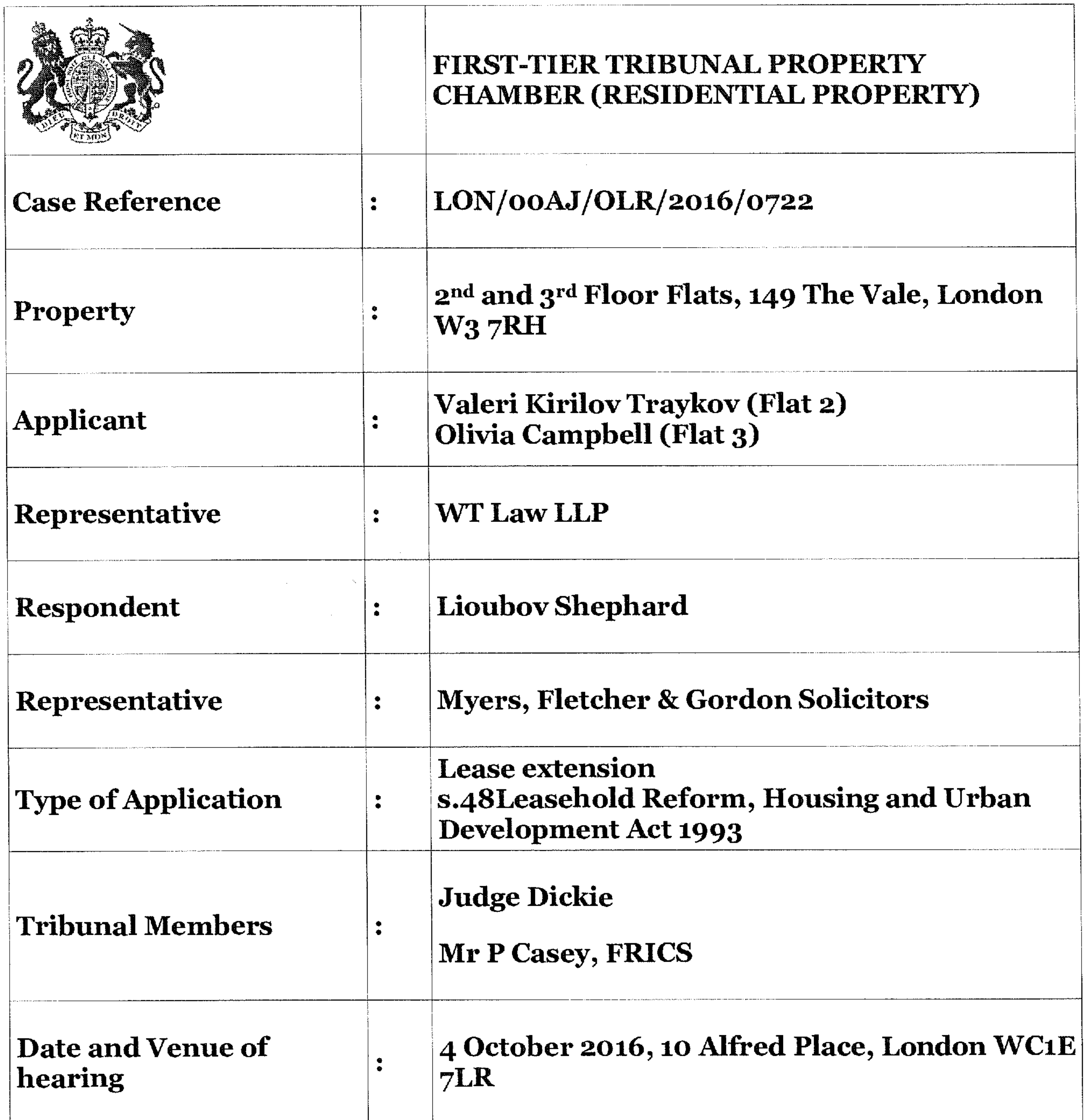

		FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)
Case Reference	:	**LON/00AJ/OLR/2016/0722**
Property	:	**2nd and 3rd Floor Flats, 149 The Vale, London W3 7RH**
Applicant	:	**Valeri Kirilov Traykov (Flat 2) Olivia Campbell (Flat 3)**
Representative	:	**WT Law LLP**
Respondent	:	**Lioubov Shephard**
Representative	:	**Myers, Fletcher & Gordon Solicitors**
Type of Application	:	**Lease extension s.48Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	:	**Judge Dickie Mr P Casey, FRICS**
Date and Venue of hearing	:	**4 October 2016, 10 Alfred Place, London WC1E 7LR**

DECISION

Decision of the tribunal

The tribunal determines that the premiums payable for the lease extensions are both £15,935 according to the attached calculation.

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The application

1. Application has been made under s.48(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid and the terms on which extended leases of both subject premises ("the premises") are to be granted. Those premises are the properties known as Second Floor Flat and Third Floor Flat, 149 the Vale, London W3 7RH (also known as flats 3 and 4 respectively).

2. The Respondent is the freeholder. The Applicants each are the current holders of the leasehold interest of one of the subject premises pursuant to leases granted for a term of 99 years from 25 December 1986 on a ground rent of £50 per annum increasing every 33 years to £100 and £150.

3. A Notice of Claim under section 42 of the Act was served by the Applicants on 18 November 2015 (in respect of flat 3) and on 1 December 2015 (in respect of flat 4) (the valuation dates) proposing a premium of £12,500 in respect of the grant of each new lease pursuant to the provisions of Part II Schedule 13 of the Act. The landlord's counter notices are dated 24 January 2015 (sic) but understood to have been served on or about 24 January 2016 and proposed premiums of £19,000 for each flat.

4. By an application to the First Tier Tribunal the Applicants proposed that the new leases should be on the same terms as the existing leases save that the service charge provisions ought to be updated to take account of the abolishment of the domestic rating system and the creation of new flats by the Respondent since the grant of the existing leases.

The Premises

5. The subject premises are two converted flats on the second and third floor of a four storey building, with a commercial retail unit (shop) situated on the ground floor. The building forms part of a terraced parade of similar properties of traditional construction on a busy main road. The shop unit is currently self contained, with no access to or from the other parts of the building. Access to all five flats is by way of a long narrow hallway leading to an internal stairway. The tribunal conducted an inspection on 31 October 2016 of the subject premises, the common parts and the shop.

6. When first leased both flats comprised one bedroom, living room, kitchen and bathroom. Both have now been converted to provide two bedrooms, an open plan kitchen / living room and bathroom or shower room (there being an additional en suite shower room in flat 4). Neither valuation report mentioned this en suite, but it, in addition to the remodelling of the layout, is a tenant's improvements to be disregarded for the purposes of the statutory valuation. Both flats have replacement double glazing, which was installed some time ago, and gas fired central heating with radiators.

The Hearing

7. The Applicants were represented by Mr Joia, solicitor, and the Respondent by Mr Mamon, the Respondent's son and owner of the first floor flat at 149 The Vale. Mr A C Barton, MRICS, gave expert valuation evidence for the Applicants. The Respondent had not instructed an expert valuer, but Mr Mamon sought to give valuation evidence on her behalf. His valuation report was not served on the Applicants until 3 October, though the tribunal's directions had required the exchange of expert valuation reports at least two weeks before the hearing. He produced a number of documents, including evidence of comparable sales, which were new to Mr Barton.

8. Mr Mamon had no qualification relevant to property valuation. He said he had a Masters of Engineering and had for 15 years run a company organising conferences for Blue Chip companies. He was familiar with the subject building, having run his business from there and having lived opposite for 8 years. Mr Mamon had for many years helped manage, acquire and dispose of properties in and around W3, as well as worked with local estate agents. He said he had also researched LVT/FTT decisions on lease extensions under the 1993 Act, and had attended a number of tribunal hearings to provide help to leaseholders (friends, relatives and neighbours).

9. The tribunal allowed Mr Mamon to present his valuation arguments, and it has considered them. Plainly, however, he is not an expert in property valuation, and the weight of professional expertise lies with Mr Barton, who felt able to deal with Mr Mamon's report notwithstanding that he had had little notice of it. Mr Barton was clear that he could make the tribunal aware if there were matters in it that he was unable to deal with.

10. Mr Mamon based his valuation report on informal email advice provided to the landlord by Mr Barry Passmore, MRICS, who had valued the flats for the counter notice. Mr Passmore could not be cross examined upon overall advice given in a brief email, which was accordingly of negligible evidential value.

Issues for Determination

Value of Flats with Extended lease

11. The following were agreed:

(i) The capitalisation rate is 6%

(ii) The appropriate Deferment rate is 5%.

(iii) Marriage value is 50%.

12. Mr Barton's extended lease valuation was at £250,000 per flat. Mr Mamon was at £280,000, but he was largely dependent on the document from Mr Passmore, and his calculation of the premium contained an error, in that he had used his extended lease value in calculating the value of the reversion and marriage value.

13. Mr Barton was of the view that the properties would be difficult to mortgage, being situated above a shop. He relied on evidence of sales of comparable properties, notably 155 The Vale, Acton, a one bedroom flat in good order occupying the third floor within the same parade, completion having taken place on 13 November 2015 for £235,000. This is the same size as the subject flats and in the view of the tribunal is the most comparable in terms of type of property and date of sale. Clearly Mr Barton took the view that the sale price looked low when looked at against his other comparables hence his valuation of £250,000. Neither he nor Mr Mamon suggested any value difference between the second and third floor flats.

14. Flat 135d The Vale was a comparable produced only by Mr Mamon, with a 73 years unexpired lease. This was a two bedroom flat above shops in a neighbouring parade, sold in February 2014 for £235,000. Mr Mamon produced a copy of the Land Registry entry showing this sale. Mr Barton took the view that this sale was too historic to be relied upon. Mr Mamon had sought to index it by using a general Land Registry index for England. Nobody presented the tribunal with an Ealing flats index, but in a rising market the tribunal can say no more than it suggests that Mr Barton's £250,000 is a little on the low side.

15. Most of the remaining comparables relied on by both parties were not truly comparable, but provided some help. Some are not above shops, others were very small studios, some were in locations of very different character, and some of a different period or style. However taken in the round they provided some indication of local values for flats of about this size, which the tribunal has taken into account.

16. Mr Barton is the only expert giving evidence, and overall his opinion is to be preferred to that of Mr Mamon. However, in light of the evidence of flat 135d The Vale, the tribunal takes a long lease value of £260,000 as being correct. This figure, in the view of the tribunal, does not need any adjustment for tenants' improvements (rejecting Mr Barton's view that the double glazing would add to the value of the flats, given its age and condition).

Relativity

17. Both Mr Barton and Mr Mamon relied on their selection of graphs of relativity, neither having sought to use market evidence. Mr Barton was at 93% based on averaging the figures he said he had derived from the graphs prepared by South East Leasehold, Nesbitt and Co, Austin Gray and Andrew Pridell.

18. Mr Mamon produced the RICS research report on graphs of relativity, which included all of these graphs. He relied on those referred to by Mr Barton, save for the Austin Gray graph, but with the addition of those produced by Knight Frank, John D Wood and Charles Boston, which produced an average of 90.61%. The evidence as presented to the tribunal was not particularly persuasive but doing its best the tribunal determines a relativity of 92% for the following reasons.

19. Knight Frank and John D Wood are both very much Prime Central London related, and Charles Boston is not a graph mentioned these days by practitioners as being relied upon. The tribunal was not therefore persuaded by Mr Mamon's approach. Broadly speaking, Mr Barton's expert opinion is to be preferred, but if he is right about the difficulties of obtaining mortgages on flats over shops, one can only see those difficulties being exacerbated where there is a shorter leasehold term. The actual figures for the four graphs relied upon by Mr Barton are 93.04%, 91.06%, 93.53% and 92.57%. Looking at those in the round the tribunal considers an appropriate figure for a flat over shops would be towards the lower end of his basket of evidence.

20. Accordingly, the tribunal derives the valuation according to the attached schedules.

Lease Terms

21. By Clause 3(b) of the leases the Lessee covenants:

(ii) To pay a proper and reasonable share of the due expenses incurred by the Lessors including the employment of managing agents in respect of the management of the Building and maintaining repairing redecorating and renewing the roof and foundations and any parts of the Building common to all the Lessees and any common ways and common gutters rainwater pipes drains gas pipes electric cables and wires in under or upon the Building used in common and any common internal lobbies in the ground floor of the Building and enjoyed or used by the Lessee in common with the owners and lessees of the other flats in the Building, in such proportion or proportions as shall in the absolute discretion of the Lessors of its agents be deemed to be fair and reasonable based on the rateable value of the demised premises as compared with the rateable value of the Building (excluding the ground floor thereof) AND ALSO to pay the due proportion of insurance premium payable by the lessors in accordance with clause 5(e) of this Lease

(iii) To pay on account (if demanded) a reasonable sum in advance of any likely payment due from the Lessee hereunder where the Lessors are obliged under the terms of this Lease to expend monies.

22. Pursuant to Paragraph 1 of the recitals, "the Building" is the freehold property consisting of the property know as 149 The Vale, London W3, Title Number NGL 394073, and includes all the grounds relating thereto and forming part thereof.

23. The original conversion of the building was into three self contained flats above the ground floor commercial premises which, and at the time of the grant of the

residential leases, had living accommodation at the rear. From inspection of the rear of the building and neighbouring properties in the parade which have not been extended, it seems likely that this accommodation was in a two storey outrigger. Mr Mamon sought to produce evidence of this original arrangement at the hearing, though this evidence had not been disclosed in compliance with the tribunal's directions. The tribunal declined, in light of the Applicants' objections, to admit this evidence, but it has noted the obvious original arrangement of the property as was evident on inspection. Also from inspection it was clear that this rear section has been extended on both ground and first floors. From oral evidence at the hearing it is understood that circa 2011 this rear section was converted into two self contained flats, one on the ground floor to the rear of the shop (flat 1), and one on the first floor on the half landing (flat 5). These flats are retained by the landlord and not let on long leases.

24. The existing terms of the leases of the original three flats, which apportion service charges by fair and reasonable proportion based on rateable value, do not reflect the creation of these two new flats. Since their conversion the landlord had apparently been applying an ad hoc apportionment of any recoverable service charge costs to take into account the existence of the two new flats.

25. A copy of the current lease of the ground floor shop was produced. Though it was not signed by the tenant and no plan showing the extent of the demise was attached, both parties relied on its terms. It was dated 1 August 2016 and was for a term of 5 years. It imposed obligations on the commercial tenant to pay a service charge of 25% of the cost of maintenance of the structure and common parts, heating lighting and cleaning the common parts. The service charge was defined by reference to expenditure on the Building, but the Building was not defined. The insurance provisions were unclear, as Clause 1.4 required the tenant to contribute 25% of the cost of insuring the property (which is the property demised), whereas Clauses 1.2, 3.1, 3.2 required the tenant to pay 25% of the landlord's cost in complying with the covenant in Clause 12 to insure the Building.

26. Taking an assumed 25% service charge contribution from the commercial tenant into account, the Applicants sought varied lease terms to allow for a single fixed rate contribution of 15% per subject flat towards service costs and insurance (representing 1/5th of the 75% remaining after deduction of the contribution by the shop lessee). The Applicant had produced entirely modernised and redrafted service charge provisions, but these were not agreed by the Respondent.

27. The Respondent had not taken a consistent position with regard to the new lease terms. In the counter notice her proposal had been for the service charge provisions to be updated to reflect the current position in respect of payments made in the last three years and for the lease as a whole to be modernised. However, there was no witness statement or other evidence disclosed in relation to what this had been.

28. In the statement of issues in dispute, signed by solicitors for both parties, the Respondent restated the same position (specifying the service charge proportions proposed as 20% for residential common parts services, 25% for structure services and 16.67% for insurance), but that if such service charge split

was not agreed by both parties the existing service charge apportionment provisions on the leases should remain. The parties also agreed in the statement of issues in dispute that: "Both parties seek to more clearly define the services that are provided by the landlord and included in the service costs, but disagree on the detail", and an extract of the parties' respective proposals was attached.

29. The Respondent had entirely redrafted the service charge provisions to seek to achieve a separation in the services and service charge liabilities between the commercial and residential parts of the building. However, the obvious difficulty with the Respondent's proposed redraft was that the definition of the Building (being "149 The Vale, London N3") was not altered. Thus the landlord would be able to recover more than 100% of expenditure on the management of the Building.

30. As at the hearing, there was produced a travelling draft of the lease. Neither party produced a skeleton argument in support of its respective approach, and since the preliminary issues and evidence in respect the determination of the premium took until 3:15pm, the tribunal had a challenge to understand the evidence and the parties' respective positions and drafts in the time available.

31. At the hearing, furthermore, the Respondent's position had altered. Mr Mamon now said that he did not want any changes in the lease terms relating to the service charges, and argued that the tribunal had no power to alter those terms. He also sought to persuade the tribunal to redefine the Building in the residential leases in question, to separate out the residential and commercial parts. However, notwithstanding any difficulties in drafting that would face the tribunal (in the absence of such a draft from the Respondent), and taking into account that the residential and commercial parts together form a single structure which would have some common services, such an amendment the tribunal concludes is outside of its statutory jurisdiction and is in any event inappropriate.

32. The Applicants relied on the tribunal's jurisdiction under s.57(6) of the Act, which provides:

Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or an agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as—

(a) it is necessary to do so in order to remedy a defect in the existing lease; or

(b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

33. However, no detailed representations on the jurisdiction of the tribunal with reference to the Applicants' proposed amendments were made. In truth, the Applicants' draft before the tribunal represented the best case scenario for the

modernisation of the lease terms that it sought in the context of negotiations between the parties.

34. The tribunal includes here an extract from Hague on Leasehold Enfranchisement 6th Edition on the meaning of s.57(6):

32-10

Other than with both parties' agreement, the scope for modifying the terms of the existing lease is limited. Either of them may require that any existing term may be excluded or modified on two grounds:
(a)If it is necessary to do so in order to remedy a defect in the existing lease.

The word "necessary" has been construed strictly and is not equivalent to "convenient". The word "defect" is not defined, but given the use of the word "necessary", a strict or narrow interpretation seems the proper one. Accordingly, the use of this provision to attempt to modernise the terms generally in the face of opposition from the other party would not be permissible.

(b) If it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

The word "changes" is not defined and would appear to include, for example, physical changes in the property used by the tenant, as well as changes in acceptable conveyancing practice. It has been held that the enactment of the Landlord and Tenant (Covenants) Act 1995 is a change falling within s.57(6)(b). Accordingly, a qualified covenant against assignment in the last seven years of the term of the existing lease was reproduced in the new lease without the restriction relating to the last seven years. The landlord would thus be able to seek an authorised guarantee agreement on an assignment during the whole of the term. The onus is on the person proposing the change to show that there are grounds for deleting or modifying the term in question.

35. Mr Mamon said that the lease was not defective and that its flexible terms had been applied fairly to date. He said that the landlord (or commercial tenant) had always contributed 25% to building repairs, and paid a contribution of 25% to the insurance. In his revised position Mr Mamon considered that the existing lease terms were sufficient, since they referred to a reasonable proportion.

36. However, the tribunal has no difficulty in rejecting Mr Mamon's new principal submission that no amendment to the lease terms is necessary or indeed permitted in law. The tribunal forms the view that it would be unreasonable to include without modification the existing service charge provision referring to rateable value, since the new flats have not and could not have a rateable value and the lease terms would thus be uncertain.

37. It is therefore for the tribunal to consider what modifications are appropriate. By merely removing from the leases the reference to the rateable proportion but leaving Clause 3(b)(ii) otherwise intact, the service charge apportionment would be subject only to the test of reasonableness and increase the scope of the landlord's discretion beyond that contemplated by the original parties to the

lease. On balance therefore the tribunal considers that Clause 3(b)(ii) should be amended to apportion service charges as shall be fair and reasonable based on the number of flats in the building. It does not seem likely that rateable values, if they still existed, would have created a substantial variation between the service charge apportionment of each flat, or that such differential could be determined on the available evidence. The residential flats are all of a small size and thus the tribunal's amendment represents a reasonably fair solution.

38. Mr Mamon had aims to separate the management of the shop from that of the rest of the building, but the tribunal declines to do this as it does not reflect the existing structure of the service charge terms and is not referable to the mischief that makes amended terms necessary. Similarly the tribunal declines to amend the definition of the Building in the leases, or to make other wholesale amendments to the structure of the service charge provisions and the items of expenditure to which the tenants are liable to contribute. The tribunal's jurisdiction under section 57(6)(b) is engaged in relation to the proportion payable of expenditure set out in Clause 3(b)(ii), and that proportion should be amended.

39. Clause 5(b)(ii) places maintenance obligation on the landlord in respect of the structure of the other flats not leased so as to provide proper and adequate support to the Flat at the Building. As Mr Joia observed, the lease is defective in imposing no similar obligation on the landlord in respect of the maintenance of the commercial premises on the ground floor and it is necessary that this is amended under s.57(6)(a).

40. The tribunal directs the parties to seek to agree new lease terms to incorporate the above two changes which the tribunal determines above under s.57(6)(a) and (b).

41. The Applicants also sought a variation of the lease terms with regard to payment of on account service charges. However the tribunal finds this is outside of its jurisdiction, as are the other modifications sought which, while they may be desirable, but are not referable to the tribunal's powers under s.57(6).

42. The tribunal accepts neither of the draft variations put before it and, considering it likely that the parties will now be able to agree such terms in light of its conclusions in this decision, and that they may on reflection decide to agree to additional modernising variations, directs the parties each to file draft lease variations (if not agreed) within 28 days of the date of issue of this decision for determination of the tribunal without a further hearing. If the lease terms are agreed, the tribunal must be notified in writing.

F. DICKIE 5 December 2016

Appendix 1

LON/00AJ/OLR/2016/0722

FIRST TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

S48 Leasehold Reform Housing and Urban Development Act 1993

Determination for the premium payable for an extended lease of 2nd Floor Flat, 149 The Vale, London W3 7RH

Valuation date: 18 November 2015 – Unexpired term 70 years

Diminution in Value of Freehold Interest			
Capitalization of ground rents for term			
Agreed at		£1,547	
Reversion to F/H value with VP	£260,000		
Deferred 70 years @ 5%	0.0328	£8,528	
		£10,175	
Less value of F/H after grant of new lease	£260,000		
Deferred 160 yrs @5%	0.0004	£104	£10,071
Marriage Value			
After grant of new lease			
Value of extended lease	£260,000		
Plus freehold value	£104	£260,104	
Before grant of new lease			
Value of existing lease @92% f/h	£239,200		
Plus freehold value	£10,175	£249,375	
		£11,729	
		50% share to Freeholder	£5,864

Premium Payable £15,935

Appendix 2
LON/00AJ/OLR/2016/0722
FIRST TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

S48 Leasehold Reform Housing and Urban Development Act 1993

Determination for the premium payable for an extended lease of 3rd Floor Flat, 149 The Vale, London W3 7RH

Valuation date: 1st December 2015 – Unexpired term 70 years

Diminution in Value of Freehold Interest			
Capitalization of ground rents for term			
Agreed at		£1,547	
Reversion to F/H value with VP	£260,000		
Deferred 70 years @ 5%	0.0328	£8,528	
		£10,175	
Less value of F/H after grant of new lease	£260,000		
Deferred 160 yrs @5%	0.0004	£104	£10,071
Marriage Value			
After grant of new lease			
Value of extended lease	£260,000		
Plus freehold value	£104	£260,104	
Before grant of new lease			
Value of existing lease @92% f/h	£239,200		
Plus freehold value	£10,175	£249,375	
		£11,729	
		50% share to Freeholder	£5,864
		Premium Payable	**£15,935**