

Neutral Citation Number: [2007] EWCA Civ 1042

Case Nos: C3/2006/2178 & C3/2006/2185 & C3/2006/2187

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Lands Tribunal

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2007

Before :

LORD JUSTICE WARD
LORD JUSTICE CARNWATH
and
SIR PETER GIBSON

Ref. No. 2006/2178

ON APPEAL FROM THE LANDS TRIBUNAL LRA/50/2005
Re: Flat 14, 85 Cadogan Gardens, London SW3 2RD

BETWEEN:

- (1) THE RIGHT HONOURABLE CHARLES GERALD JOHN EARL CADOGAN
- (2) CADOGAN ESTATES LIMITED

Appellants

- and -

- (1) MICHELE FRANCESCO SPORTELLI
- (2) KARA-LYNN VICTORIA LEMONT SPORTELLI

Respondents

Kenneth Munro and Philip Rainey for the Appellants (instructed by Pemberton Greenish)
The Respondents were not present or represented

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ref no: 2006/2178

ON APPEAL FROM THE LANDS TRIBUNAL: LRA/9/2005
Re: 27/29 Sloane Gardens, London SW1W 8EB

BETWEEN:

- (1) THE RIGHT HONOURABLE CHARLES GERALD JOHN EARL CADOGAN
- (2) CADOGAN ESTATES LIMITED

Appellants

- and -

- (1) 27-29 SLOANE GARDENS LIMITED
- (2) WAYHIL MAHDI

Respondents

Kenneth Munro and Philip Rainey for the Appellants (instructed by Pemberton Greenish)
Stephen Jourdan for the First Respondent (instructed by Rokeby Johnson Baars LLP)
The Second Respondent was not present or represented

Ref No. 2006/2178

ON APPEAL FROM THE LANDS TRIBUNAL: LRA/117 & 131/2005
Re: 59 Cadogan Square & 105 Cadogan Gardens, London SW1X OHZ

BETWEEN:-

- (1) THE RIGHT HONOURABLE CHARLES GERALD JOHN EARL CADOGAN
- (2) CADOGAN ESTATES LIMITED

Appellant

- and -

GRANDEDEN PROPERTY MANAGEMENT LIMITED

Respondent

Kenneth Munro and Philip Rainey for the Appellants (instructed by Pemberton Greenish)
Tomas Jefferies for the Respondent (instructed by Maxwell Winward LLP.)

Ref Nos: 2006/2185
2006/2187

ON APPEAL FROM THE LANDS TRIBUNAL: LRA/38 & 40/2005
Re: Maybury Court, Marylebone Street, London W1G 8JE

BETWEEN:

HOWARD DE WALDEN ESTATES LIMITED

Appellant (appeal no. 2006/2185)
Respondent (appeal no. 2006/2187)

- and -

MAYBURY COURT FREEHOLD COMPANY LIMITED

Appellant (appeal no. 2006/2187)
Respondent (appeal no. 2006/2185)

Judith Jackson QC & Michael Pryor for Howard de Walden Estates Limited (instructed by
Speechly Bircham LLP)
Stephen Jourdan for Maybury Court Freehold Company Limited (instructed by Rokeby
Johnson Baars LLP)

Hearing dates : 23rd-26th July, 2007

Judgement

Lord Justice Carnwath :

Scheme of judgment

Introduction (paras 1- 8)

The appeals (paras 9-12)

The hope value issue (paras 13-59)

The deferment rate issue (paras 60-90)

The precedent effect of the Tribunal's decision (paras 91-102)

Conclusion (para 103)

Introduction

1. Various statutes since 1967 have conferred on owners of long leases of houses or flats rights to "enfranchise" by buying out (individually or collectively with other lessees) the reversionary interests, or simply to extend their leases for defined periods (50 years for houses and 90 years for flats). The first such statute was the Leasehold Reform Act 1967, which applied only to houses up to a specific value, but subsequent statutes have extended such rights in one form or another to most residential premises. The principal extensions have been effected by the Housing Act 1974 ("the 1974 Act"), the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), the Housing Act 1996, and the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). The resulting legislation is unusually complex, reflecting the draftsman's attempts to realise Parliament's not always consistent objectives within the intricacies of landlord and tenant law.
2. The present appeals are concerned with two preliminary issues, directed by the Lands Tribunal, to determine: (i) "the proper deferment rate to be applied to vacant possession value"; and (ii) "the proper valuation of any 'hope value'". A further general issue has been raised as to the status of the Tribunal's decision in relation to future cases in the Leasehold Valuation Tribunal.
3. A brief introduction is necessary to set the preliminary issues in context. A key feature of the statutory provisions is machinery for the assessment of the price at which the freeholder's interest (or the extended lease) is to be acquired. In principle this is fixed by reference to the market value of the interest, as it would be if unaffected by the existence of the statutory rights. This is in practice treated as including the value of the right to receive a ground rent during the term and the value of the prospective right to vacant possession at the end of the term. The latter, conventionally, is fixed by taking the open market value of the freehold interest with vacant possession at the valuation date and adjusting that value downwards by application of a "deferment rate". The deferment rate, in the definition adopted by the Tribunal, is:

"the annual discount applied, on a compound basis, to an anticipated future receipt (assessed at current prices) to arrive at its market value at [the valuation date]".

That was the subject of the first preliminary issue.

4. The background to the second preliminary issue lies in another familiar valuation concept, that of “marriage value”. The underlying assumption is that the market value of the unencumbered freehold in any property is likely to exceed the aggregate of the values of the interests of tenant and reversioner considered separately; and that (for this, or perhaps other reasons) in the real world a tenant will be willing to pay more for the reversionary interests in his property than other potential purchasers (“the tenant’s overbid”). The following description comes from the second edition of *Hague on Leasehold Enfranchisements* (published in 1987, and edited by N Hague QC himself):

“An occupying tenant is usually anxious to obtain the fullest possible security of tenure for himself and his family. He is also usually anxious to maintain the value of his leasehold interest, which will inevitably depreciate with the passage of time, particularly in the last 40 or so years of its term. The occupying tenant thus has a special incentive to purchase the freehold reversion and is usually willing to offer a higher price for it than other persons. Moreover, if the tenant does purchase the freehold reversion to his leasehold, he will be able to merge, or “marry”, the two interests together and so obtain an unencumbered freehold interest. The tenant thus has a further special incentive to purchase the freehold, for in most cases the market value of such an unencumbered freehold interest exceeds the aggregate of the value of his leasehold interest and the purely investment value of the freehold reversion. The excess is commonly known as “the marriage value”, and the higher offer expected to result from the tenant’s special incentives to purchase is commonly referred to as “the tenant’s bid” or “the tenant’s overbid”.”

5. “Hope value” as used in the second preliminary issue is not a statutory term. It was defined by the Tribunal as follows:

“Hope value, as the term has been used in the present appeals, consists in the option that the freeholder has to sell the freehold or a lease extension to the tenant and thus realise the whole or part of the freeholder's share of such marriage value as exists at the date of the sale” (Decision para 98).

In other words “hope value” represents anticipated marriage value, or the expected product of the “tenant’s overbid”.

6. That definition does not make clear that under the 1993 Act (and after the passage in *Hague* was written) the expression “marriage value” has become a statutory term, separately defined for the purposes of different categories of transaction. It will be necessary in due course to look at the statutory definitions in more detail.
7. Before looking more closely at the issues in the appeal it may be helpful to illustrate the interrelation of the various elements of the valuation by reference to an example.

We were given a convenient summary of the LVT's determination of the price of 13 South Terrace (under the 1967 Act, section 9(1A)):

“The vacant possession value of a freehold interest in the house was put at £2,085,000. This figure was then discounted at a rate of 6% for a period of 22.6 years (that being the unexpired term of the lease) to produce a present value of the reversion of £558,780. That, together with the capitalised ground rents, produced a value for the freeholder's interest of £559,927. This freehold value, together with the value of £1,000,000 for the existing lease, meant that the existing interests had an aggregate value of £1,559,927, whereas the unencumbered freehold reversion which would result from the enfranchisement was worth £2,085,000. The marriage value unlocked by the acquisition was therefore £525,073, being the difference between the two figures. The tenant was liable to pay one half of that figure to the freeholder. Accordingly, the purchase price was calculated as being: (1) £559,927 for the freehold reversion, together with (2) £262,537 for the landlord's share of the marriage value released by the acquisition.”

8. The first question, in short, is whether the purchase price so calculated should be increased to take account of “hope value”; or whether that is to be treated as reflected in the landlord's share of marriage value. There were differing views among the experts as to how “hope value” was to be assessed, assuming it to be an admissible extra item. The Tribunal expressed its preferred approach, following that of Mr Cullum for Cadogan (paras 110-12). However that is not an issue before us in this appeal.

The appeals

9. The cases before the Tribunal were all appeals from decisions of Leasehold Valuation Tribunals. They fell into three categories:
 - i) Collective enfranchisement
 - a) *Cadogan v (1) 27/29 Sloane Gardens Limited and (2) Wayhil Mahdi*

Two adjoining houses, 27/29 Sloane Gardens, London SW1, converted to 7 flats (one of which was caretaker's accommodation), with 4 of the tenants participating and 2 non-participating.
 - b) *Cadogan v Grandeden Property Management Limited*

59 Cadogan Square and 105 Cadogan Gardens, London SW1, an 8 storey mansion block consisting of 24 flats (including 1 caretaker's flat). There are 17 participating and 7 non-participating tenants.
 - c) *Howard de Walden Estates Limited v Maybury Court Freehold Company Limited*

Maybury Court, Marylebone Street, London W1, 5 conjoined blocks totalling 68 flats. There are 44 participating and 24 non-participating tenants.

ii) Lease extension

d) *Earl Cadogan and Cadogan Estates Limited v Sportelli*

Flat 14, 85 Cadogan Gardens, London SW3

iii) Enfranchisement of a single house

e) *Bircham & Co (Nominees) (No 2) Limited and Ms S E Stowell v Mr M C and Mrs S Clarke*

13 South Terrace, Kensington, London SW7

10. For ease of reference I shall refer to the main parties as “Cadogan”, “de Walden”, “Bircham”, “Grandeden” and “Maybury”, all of whom were represented before the Tribunal and before us by counsel.

11. The appeals before us fall into two groups:

i) Appeals by Cadogan (represented by Mr Munro and Mr Rainey) and de Walden (Miss Jackson QC and Mr Pryor) against the Tribunal’s decision that “hope value” should not be included in the price payable for collective enfranchisement or lease extensions. This is opposed by Maybury (Mr Jourdan) and Grandeden (Mr Jefferies).

Mr and Mrs Sportelli (case (d)) were not represented before the Tribunal or before us (although they were represented by Mr Jourdan in the Leasehold Valuation Tribunal, which held that hope value was to be excluded from the valuation). Although theirs was the only lease extension case, it raises similar issues, which have been fully discussed in the course of the argument.

There is no appeal from the Tribunal’s decision in respect of the single house (case (e)), in which it was decided that hope value should be included. However, in a subsequent case, decided in May 2007 (*Pitts and Wang v Cadogan* LRA/79/2006, LRA/4/2007), the President (Mr Bartlett QC) took a different view, holding that the previous decision was *per incuriam* in this respect. Permission to appeal has been granted in that case. Although the appeal is not formally before this court, the parties have made written submissions, to which I will refer when dealing with that issue.

ii) Appeals by Maybury and 27-29 Sloane Gardens Ltd (Mr Jourdan) against the decision to reject “market evidence” in fixing the deferment rate. They are opposed by Cadogan and de Walden.

12. I will deal first with the issue of hope value, which is one of statutory construction. The deferment rate issue is one of mixed law and valuation practice, and is also linked with the third question, that of the status of the Lands Tribunal decision.

The hope value issue

Background

13. Although the answer to this issue must be found in the statute as it now stands, reference to the history, over the 40 years since the 1967 Act, is necessary to set the context.
14. In the 1967 Act, as originally enacted, the right to acquire the freehold was limited to houses below a specified rateable value. The price was to be ascertained under section 9(1), which provided:

"(1) Subject to subsection (2) below, the price payable for a house and premises on a conveyance under section 8 above shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise...."
15. In two early Lands Tribunal decisions (*Custins v Hearts of Oak Building Society* (1969) 209 EG 239 and *Haw v Peek* (1969) 210 EG 347), it was held that under this provision the lessee was assumed to be part of the market, so that account should be taken of the enhanced price he would be willing to bid to achieve an unencumbered freehold interest (in other words, "the tenant's overbid" or "the merger element": *Custins* p 241).
16. The effect of these decisions was quickly reversed by statute (as explained in *Official Custodian of Charities v Goldridge* (1973) 26 P&CR 191, 208, 211). Section 82 of the Housing Act 1969 inserted, after the words "a willing seller", the words "(with the tenant and members of his family who reside in the house not buying or seeking to buy)". The Tribunal held that this wording was apt to exclude not only a present bid by the tenant himself, now or in the future, but also bids by speculators looking to derive a profit from a sale to the tenant (*Harrison v Church of Wales* [1970] RVR 581, 583; *Lake v Bennett* [1971] RVR 415, 420).
17. The 1974 Act (not the 1993 Act, as indicated by the Tribunal at para 103) extended the right to acquire the freehold to higher value houses, by insertion of a new section 9(1A) into the 1967 Act. The price, as under section 9(1), was to be fixed by reference to the open market value, but the words excluding the tenant and his family were not reproduced. In *Norfolk v Trinity College* [1976] 1 EGLR 215, the Lands Tribunal held that under these provisions, by contrast to section 9(1), the tenant's overbid was not excluded.
18. The Tribunal's treatment of hope value in the *Norfolk* case is of particular interest in the light of subsequent statutory developments. Having held that under section 9(1A) the sitting tenant was not to be excluded from the assumed market, the Tribunal (Mr Rees FRICS) considered how the tenant's bid should be valued. He summarised the approach of the landlord's valuer (Mr Hopper):

"To the value of the freehold subject to the tenancy he adds half the difference between (1) the value of the freehold in possession (having deducted the value of the improvements)

and (2) the value of the leasehold interest in the house (similarly reduced by the value of the improvements) plus the value of the freehold subject to the tenancy..." (p 216L)

The Tribunal accepted this approach which it regarded as "wholly logical" (p 216M).

19. The next important changes came in the 1993 Act. This introduced for the first time statutory rights for tenants of flats, either to extend their individual leases, or (collectively) to acquire all the reversionary interests. The two sets of provisions follow a similar pattern. However, in the case of collective enfranchisement, the picture is complicated by the fact that only some of the tenants ("the participating tenants") may be involved in the acquisition of the landlord's interest; and that they will be doing so, not directly, but in the name of a "nominee purchaser" (typically, a company set up for the purpose).
20. In each case, the price payable to the freeholder was governed by detailed provisions, under which a share of "marriage value" (as defined) became a distinct element of the price. The landlord was entitled to the value of his interest, and not less than 50% of the marriage value. The value of his interest was to be fixed by reference to an assumed open market transaction excluding the acquiring tenant, or (in the case of collective enfranchisement) the nominee purchaser and the participating tenants. In the latter case, the assumed market was further restricted in 1996 by excluding, not just the participating tenants, but all the tenants of the relevant premises (Housing Act 1996 s 109).
21. Further important amendments - substantive and procedural - were made by the 2002 Act. In particular, the landlord's share of marriage value was fixed at 50%, and marriage value was to be disregarded altogether for leases with more than 80 years to run.

The statutory provisions

22. I turn to consider in more detail the current provisions, following the amendments made by the 2002 Act, so far as relevant to the issue of hope value.

Collective enfranchisement

23. Schedule 6 to the 1993 Act provides for the ascertainment of the price payable by the nominee purchaser of the freehold. Under paragraph 2, the price payable by the nominee purchaser is the aggregate of three elements, the first two being:

“(a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3,

(b) the freeholder's share of the marriage value as determined in accordance with paragraph 4...”

((c) is not in issue in these cases.)

24. By paragraph 3 the value of the freeholder's interest is defined as -

“... the amount which at the valuation date that interest might be expected to realise if sold in the open market by a willing seller (with no person who falls within sub-paragraph (1A) buying or seeking to buy)”

Those excluded by (1A) are (so far as relevant): “(a) the nominee purchaser, or (b) a tenant of premises contained in the specified premises,...”. The valuation is made 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.”

25. Two of these assumptions deserve comment:

i) Under (b), the exception in relation to “a notice given under section 42” refers to the notice by which a tenant initiates a claim for an individual lease extension. Such a notice is “suspended” during the currency of any claim for collective enfranchisement of the property of which the flat forms part (s 54). The effect of (b) therefore seems to be that the prospect of a bid from a non-participating tenant can be taken into account where he has served a section 42 notice, but not otherwise.

- ii) Under (c), it is to be noted that it is only improvements carried out by a participating tenant that are disregarded. It appears to follow that, insofar as the value of the reversion is enhanced by the value of improvements by non-participating tenants, they are to be reflected in the price.

26. “Marriage value” is covered by paragraph 4:

“(1) The marriage value is the amount referred to in sub-paragraph (2), and the freeholder’s share of the marriage value is 50 per cent of that amount.

(2) Subject to sub-paragraph (2A), the marriage value is any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the participating tenants, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value—

(a) which is attributable to the potential ability of the participating tenants, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term, and

(b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price.

(2A) Where at the relevant date the unexpired term of the lease held by any of those participating members exceeds eighty years, any increase in the value of the freehold or any intermediate leasehold interest in the specified premises which is attributable to his potential ability to have a new lease granted to him as mentioned in sub-paragraph (2)(a) is to be ignored...”

Lease extensions

27. The provisions for fixing the premium payable for a lease extension are set out in Schedule 13, and follow a similar pattern. By paragraph 2 the price again is the aggregate of three elements including:

“(a) the diminution in value of the landlord’s interest in the tenant’s flat as determined in accordance with paragraph 3,

(b) the landlord’s share of the marriage value as determined in accordance with paragraph 4,...”

28. By paragraph 3(1) the diminution in value of the landlord’s interest is—

“... the difference between—

(a) the value of the landlord’s interest in the tenant’s flat prior to the grant of the new lease; and

(b) the value of his interest in the flat once the new lease is granted.”

29. The value of each such interest is:

“(2)... 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 neither the tenant nor any owner of an intermediate leasehold interest buying or seeking to buy) on the following assumptions—

(a) on the assumption that the vendor is selling for an estate in fee simple or (as the case may be) such other interest as is held by the landlord, subject to the relevant lease and any intermediate leasehold interests;

(b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant’s flat or to acquire any new lease;

(c) on the assumption that any increase in the value of the flat 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 paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the relevant lease has effect or (as the case may be) is to be granted.”

Single houses

30. For comparison, I should mention also the provisions for single houses, which follow a different form, but were amended in 1993, 1996 and 2002. By section 9(1A) of the 1967 Act, the price payable is the open market value of the house, subject to the lease (but assuming no right to acquire the freehold). As already noted, the tenant’s overbid is not in terms excluded. However, specific provision is made for the allocation of “marriage value” (s 9(1D), (1E)):

“(1D) Where, in determining the price payable for a house and premises in accordance with this section, there falls to be taken into account any marriage value arising by virtue of the coalescence of the freehold and leasehold interests, the share of the marriage value to which the tenant is to be regarded as being entitled shall be one-half of it.

(1E) But where at the relevant time the unexpired term of the tenant's tenancy exceeds eighty years, the marriage value shall be taken to be nil."

The Tribunal's reasoning

31. The Tribunal accepted that in principle "hope value", as defined by them, was identifiable as a separate "element of value" capable of valuation as such:

"We have identified the three elements of value in the landlord's interest that need to be considered - the right to receive the ground rent, the right to vacant possession at term, and *the option of realising a share of the marriage value by an earlier sale to the tenant*. Each of these elements has to be valued separately. The future income stream of the ground rent and the postponed realisation of vacant possession are such separate elements that their separate valuation is obviously appropriate. The right to vacant possession at term and *the option of an earlier sale to the tenant* are more closely linked, although they are distinct elements and are capable of separate valuation..." (para 50, emphasis added)

32. However, they determined that under the detailed provisions of Schedules 6 and 13 hope value was excluded. Their reasoning started from their view of section 9(1) of the 1967 Act, as amended by the 1969 Act. The purpose of the amendment in their view was "to exclude any element of marriage value from the purchase price" The exclusion of the tenant's bid at the valuation date was to be regarded as applying "not only at the relevant time but also at any future time.." Otherwise it would have to be assumed that, although the tenant was not buying on the valuation date, "the purchaser could assume in accordance with the facts that he would wish to buy the next day". The amendment to section 9(1) must be construed so as to achieve its undoubted purpose, and to exclude all hope value as well as marriage value. (paras 101-2)
33. In relation to extension of leases under the 1993 Act (Schedule 13), the Tribunal considered that the wording of paragraph 3 excluding the tenant's bid was "so manifestly derived from section 9(1) as amended" that it was "inescapable" that it should be given the same effect (para 104).
34. Less categorically, they reached the same conclusion in relation to collective enfranchisement. They recognised that the words were not "well drawn" to exclude the prospect of realising marriage value by the grant of extended leases to tenants, as opposed to sale of the freehold's interest as such. However, they thought the intention of the words must be to the same effect as the similar words first used in the amendment of section 9(1) of the 1967 Act. (paras 105-6)
35. By contrast, they thought it clear that for higher value houses, in respect of which section 9(1A) of the 1967 Act followed the wording of the unamended section 9(1), the valuation in the open market should include the tenant's bid (para 103).

The arguments in the appeal

36. The Tribunal's reasoning is challenged by Mr Munro and Miss Jackson. Their arguments can I think, be summarised under three heads:
- i) The Tribunal has not applied the statutory wording
 - ii) The decision produces unfair and capricious results;
 - iii) (Miss Jackson) The interpretation conflicts with that indicated by Ministers to Parliament in 1993.
37. There is, however, a significant difference in their respective positions in relation to collective enfranchisement. Mr Munro argues that "hope value" is a permissible element in relation to the interests of both participating and non-participating tenants. Miss Jackson argues for hope value in respect only of non-participating tenants, in line with the distinction drawn between the two groups in the provisions relating to marriage value.
38. The argument on the wording of the provisions is simple. The Tribunal, it is said, should have concentrated on the wording of the material provisions themselves, rather than historical analysis. For lease extensions, Schedule 13 requires the valuer to assume that the tenant is not in the market for the reversion on the valuation date, not that he will *never* seek a lease extension. For collective investments, the distortion of the statutory language (as the Tribunal in effect recognised) is still greater. Schedule 6 requires the valuer to assume that neither the nominee purchaser nor any of the tenants is in the market for the whole of the landlord's interest on the valuation date. It says nothing about, and does not exclude, the prospect of individual bids by lessees for lease extensions, at the valuation date or in the future.
39. The result, it is said, is unfair to landlords. While the Schedule gives them a right to a share of the marriage value in respect of participating tenants, there is no such right in respect of non-participating tenants. The landlord's hope of dealing with such tenants is a recognised element of the value of the reversion. There is no reason for Parliament to have wished to deprive a landlord of such value without compensation. The result is also capricious:
- i) Where a tenant has served a notice under section 42, hope value is not excluded. From the landlord's point of view, there is no logical reason for distinguishing between those participating tenants who have actually initiated claims for lease extensions, and those who are intending to but have not yet done so.
 - ii) Section 18 requires the disclosure of any agreements between the nominee purchaser and "a person other than a participating tenant" of any agreements for the disposal of an interest in the property. This implies that, for example, an agreement between the nominee purchaser and a non-participating tenant for a future lease extension *could* be relevant in fixing the value. This would not be the case if the prospect of such an extension has to be disregarded.

40. Finally Miss Jackson relies on statements in House of Lords made by Ministers, when the relevant parts of what became the 1993 Act were being debated in March and May 1993. For example, on 15th March (Hansard col 1317) the Minister, Lord Strathclyde, accepted (in response to a proposed amendment by Lord Boardman) -

“... that some element of the hope value, which is the expectation that new leases and other interests will be granted, should be taken into account when the freehold is valued. I understand that in valuation practice that is already calculated.”

41. This position was reinforced in a series of exchanges in response to “probing amendments” put forward by Lord Coleraine on 22nd March and 19th May 1993. Lord Strathclyde accepted that “hope value” or the “future potential of granting new leases or other interests” was a legitimate part of the price payable, and that it would be “very unfair” to landlords to exclude it. He summarised the position:

“Marriage value, but not hope value, will be payable for the flats of participating tenants and hope value will be payable for the flats of non-participating tenants.” (22nd March 1993 col 42)

42. These arguments are answered by Mr Jourdan and Mr Jefferies by reference both to the history and to a detailed analysis of the provisions as they now stand.

Conclusions on the hope value issue

43. In my view the Tribunal were correct in their conclusion that “hope value” was not a permissible element in the valuations under Schedule 6 or 13. However, I would express my reasoning somewhat differently.
44. The starting point must be to identify what is in issue. For that we have the Tribunal’s own definition of “hope value”. As the definition makes clear, and as appears to be common ground, hope value and marriage value are directly linked. Hope value represents no more than the anticipation of future marriage value. The scheme of the 1993 Act differs from its predecessors in that there is detailed provision for the definition and allocation of marriage value, as a separate element of the price payable to the landlord. The question is whether this leaves any scope for the separate inclusion of hope value.

“Statutory marriage value”

45. The Tribunal’s understanding of hope value needs to be related to the various definitions of marriage value. It is to be noted from the statutory extracts set out above that in each of the three cases (collective enfranchisement, lease extension, and enfranchisement of single houses) “marriage value” has a different definition, tailored to the nature of the particular transaction. Only in relation to single houses does it correspond directly to the ordinary understanding of marriage value (as in the passage from *Hague*, cited earlier in this judgment): that is value arising from the coalescence of freehold and leasehold interests. In the other cases there is no “marriage” in that sense; freehold and leaseholds continue as separate interests.

46. However, by using the same term “marriage value”, the draftsman seems to be signalling that the underlying concept is the same. In each case the statute acknowledges the special value likely to be released for the lessee by the enlargement of his interest: whether by coalescence with the freehold, by control of the freehold (allowing for the grant of 999 leases for no premium), or simply by adding a 90-year extension of the lease. It recognises that in the real world the respective shares of this special value would be a matter for negotiation between landlord and tenant. The purpose of the statute is to reduce uncertainty, by separately identifying this special value, and (since the 2002 Act) by fixing the landlord’s share at 50%, or excluding that element altogether for leases with 80 years to run.
47. In relation to single houses, the draftsman seeks the same objective by a different route. The landlord’s share of marriage value is not a separate element to be added to market value determined under paragraph 3. Rather the assumption is that it has already “fallen to be taken into account” in fixing the price under section 9(1A). To the extent that it has resulted in an increase of the price, that increase is replaced by a 50% share of marriage value. The difference of approach appears to reflect the different historical treatment of higher value single houses. It only makes sense if the marriage value is being treated as the direct counterpart of the tenant’s overbid. In Schedules 6 and 13 market value is defined under paragraph 3 so as to exclude the tenant’s overbid; and a 50% share of marriage value is added under paragraph 4. Under section 9(1A), historically, the tenant’s overbid was not excluded from market value, but under the 1993 Act it is stripped out and replaced by a 50% share of marriage value. It is notable that the approach bears a close resemblance to that adopted by the Tribunal in the *Norfolk* case under the unamended Act, on the basis of the valuation evidence of Mr Hopper. It seems likely that the draftsman of both the 1993 and 2002 Acts would have had that precedent in mind.

The issues in the present appeals

Lease extensions

48. Turning to the present appeals, the position is clearest under Schedule 13, in relation to lease extensions. The price is the aggregate of the value of the landlord’s interest and 50% of marriage value. In valuing his interest the tenant’s overbid is disregarded, but this is made up by giving him a fixed share of marriage value. To include a further element of hope value would involve double counting.
49. Mr Munro objects that the exclusion of the tenant’s overbid, in paragraph 3, is directed only at the present (the valuation date), not at the future. However, such a narrow interpretation leads to absurdity. On that view the market would disregard the prospect of a bid by the tenant himself on the valuation date, but not the prospect of exactly the same bid the following day. In my view, a purposive interpretation is required. The intention is to exclude the tenant’s overbid for all time, that element being properly reflected in the marriage value allowance. The words “the tenant buying or seeking to buy” in paragraph 3(2) must be read as referring to the acquisition of any interest from the landlord, now or in the future. That seems to me the natural reading of the paragraph in context. It is also in line with the interpretation adopted by the Tribunal in the first cases under the 1967 Act (para 16 above), which the draftsman would no doubt have had in mind.

Collective enfranchisement

50. Under Schedule 6, in relation to collective enfranchisement, the position is more complex, because of the various parties involved. However, the pattern of the provisions is similar to Schedule 13, and one would expect the result to correspond. Mr Munro argues that under paragraph 3 the only matter to be disregarded is a bid by the nominee purchaser or the tenants for the whole of the landlord's interest, that is, the freehold, on the valuation date. It is true that there is no express exclusion of bids for lesser interests, such as lease extensions by individual tenants. However, again a narrow interpretation leads to absurdity. For example, on Mr Munro's reading, the market would have to disregard the prospect of a bid by the tenants for the freehold, but not for a 999 year lease, which in valuation terms might be identical. Here again it is necessary to read the words "buying or seeking to buy" in a purposive sense, as covering the prospect of acquisition by the nominee purchaser or individual tenants of any interests from the landlord, now or in the future.
51. It is true that in this case, unlike Schedule 13, there is no exact match between the exclusion of the tenants from the assumed market, under paragraph 3, and the share of marriage value provided by paragraph 4. All the tenants of the specified premises are excluded from the assumed market, but the landlord's share of marriage value is limited to that arising from the interests of the participating tenants. In relation to non-participating tenants, there is no specific provision for a share of marriage value to be taken into account.
52. As has been seen, this is a change from the 1993 Act as originally enacted. In that, there was a direct match between paragraphs 3 and 4. Only the participating tenants were excluded from the assumed market. Potential bids for lease extensions from non-participating tenants were not excluded from open market value. This was in fact consistent with the position as described to Parliament by Lord Strathclyde: that marriage value was payable for flats of participating tenants and hope value for flats of non-participating tenants (see para 41 above).
53. The effect of the 1996 changes seems to have been to leave the position unchanged in respect of participating tenants, but to remove hope value for non-participating tenants. That must be taken as a matter of deliberate legislative policy. There is certainly no basis for the court to seek to redress the balance by bringing back hope value by a different interpretative route – whether generally, or (as Miss Jackson argues) only for non-participating tenants.

Possible anomalies

54. I accept that there remain some problems, particularly in relation to the treatment of the interests of the non-participating tenants. It may seem unfair that, while the landlord is paid for marriage value in respect of the leases of participating tenants, he receives nothing for the prospective marriage value of the other leases, which the nominee purchaser is left free to exploit without having had to pay for it. Nor is it obvious why a specific exception was made only for the interests of non-participating tenants who have served section 42 notices. The answer may simply be the wish to limit uncertainty. Hope value in respect of the interests of tenants who have neither participated in the collective enfranchisement, nor actively sought a lease extension, may have been thought so speculative that it could be disregarded without injustice.

55. As Mr Jefferies points out, the potential unfairness is not necessarily all one way. There is an apparent anomaly in the respective treatment of tenants' improvements in paragraph 3(1)(c) of Schedule 6, as compared to the corresponding provision in Schedule 13. As has been seen, in fixing the price payable by the nominee purchaser, increased value attributable to improvements made by the participating tenants is disregarded; but value attributable to improvements by non-participating tenants is taken into account. Yet, if and when the nominee purchaser comes to negotiate subsequent lease extensions with the same tenants, it will be unable to recoup that value, because the value of the improvements is specifically excluded.
56. It is also difficult to explain fully the legislative intentions in respect of the disclosure of agreements under section 18. The requirement to disclose agreements involving non-participating tenants seems to have little purpose if the additional value reflected in such agreements has no effect on the price payable to the landlord. It would have had more relevance in the 1993 Act in its original form, in which hope value in respect of non-participating tenants was a material factor. However, the section is not confined to agreements with tenants. The fact that an ancillary provision of this kind may now be of limited relevance in relation to part of its original scope is not in my view a reason to alter my view of the substantive provisions.

Hansard

57. The landlords' arguments in this respect are not assisted by Miss Jackson's references to Hansard, even assuming them to be admissible under *Pepper v Hart* [1993] AC 593, as explained in *R v Secretary of State, ex p Spath Holme Ltd* [2001] 2 AC 349. The amendments made in 1996 and 2002 have materially altered the context in which the relevant provisions have to be read. As I have said, the attention given to the concept of hope value in the debates is readily understandable under the Bill in its then form, at least in respect of non-participating tenants. It does not follow that the same statements can be applied to the Act in its amended form. The statement of Lord Strathclyde (quoted in para 41 above) is of interest, since it emphasises the direct relationship between marriage value and hope value, and the need to avoid double counting. (As it was engagingly put in the course of argument: "where there is marriage there can be no hope".)

Single houses

58. Although there is no appeal before us in respect of hope value under section 9(1A), it will be apparent that I have also reached a clear view on this issue, at least on the basis of the arguments we have heard. In simple terms, the Tribunal in the present case erred by having regard only to the exclusion of the tenant's overbid under subsection 9(1A), and ignoring the context of the section as a whole, including the specific provision for allocation of marriage value. As Mr Walker aptly put it (in his written submissions) there is no reason for the landlord to be paid "both for the hope and its fulfilment" in the same transaction.
59. This is in line with the revised view of the Tribunal, as expressed in *Pitts and Wang*. I think it right to indicate our view, since it is likely to be of relevance to cases before the Leasehold Valuation Tribunals, now and in the future. I see no prejudice to the parties to the appeals in that case, since they have had the opportunity to put their submissions in writing, and Cadogan has been represented before us. Although

Cadogan has permission to appeal, it will no doubt wish to reconsider its position in the light of this judgment.

The deferment rate issue

The issue in the Tribunal

60. I turn to the second preliminary issue, which must be seen in its historical context. This was explained by the Tribunal:

“For thirty or more years after the passing of the 1967 Act valuers dealing with leasehold enfranchisements agreed a deferment rate of 6% within the prime central London area (PCL). Somewhat higher rates were adopted in less high quality areas. In about 2003, however, freeholders in the PCL area began to question why, when yields on all other investments had been falling, the deferment rate should be assumed to be static. In *Cadogan Holdings Ltd v Pockney* (LRA/27/2003, 19 May 2004) the Tribunal (N J Rose FRICS) held that a deferment rate of 5.25% in respect of a house in the PCL area was not too low and applied this rate in the valuation. Following this a number of decisions by leasehold valuation tribunals became the subject of appeal to the Lands Tribunal on the deferment rate issue, and the Tribunal decided to hear together a number of these.” (para 3)

61. In *Arbib v Earl Cadogan* [2005] 3 EGLR 139, the tribunal (HH Judge Michael Rich QC and P H Clarke FRICS) considered together five cases. Having heard valuation and financial evidence, they rejected the established rate of 6%, and determined instead a rate for the PCL area of 4.5% for houses and 4.75 % for flats. I return to the tribunal’s account:

“5. By the time that the decision in *Arbib* was published there were appeals outstanding in a number of cases where the LVTs had followed the established rate which the Tribunal in *Arbib* had held to be wrong. The decision, however, left room for further evidence and argument as to what other figure was right. In those circumstances the Tribunal sought to collect up such further cases for hearing together, on the issue of the appropriate deferment rate. This, however, proved more difficult than might have been hoped from the point of view of the Tribunal's providing further guidance on the issue, having heard evidence which filled the gaps upon which it had commented in *Arbib*. A number of the outstanding appeals included other issues which were, in some cases, of greater importance to the parties than the deferment rate. In general, respondents who were concerned with the enfranchisement of a single dwelling were unwilling to incur heavy costs in opposing appeals by freeholders who had more extensive interests, and several appeals were settled.”

62. It was against this background that the Tribunal on 22 February 2006 directed the determination, as a preliminary issue of, “the proper deferment rate to be applied to vacant possession value”. Consistently with the importance which they attached to the case, a three-member tribunal was convened, presided over by the President (George Bartlett QC), sitting with His Honour Michael Rich QC (who had sat in *Arbib*) and PR Francis FRICS. The tribunal heard evidence and argument over a period of 11 days. In the result they increased slightly the deferment rate as determined in *Arbib*, to 4.75% for houses and for 5% for flats.

The Tribunal’s reasoning

Methodology

63. The Tribunal had the assistance of an impressive array of financial and valuation experts, called by the main parties:

Financial experts

Cadogan Mr Clokey (PricewaterhouseCoopers LLP)

de Walden Mr Dumas (Lombard Street Research)

Grandeden Professor Lizieri (University of Reading Business School)

Maybury Mr Francis (Frontier Economics Ltd)

Valuation experts

Cadogan Mr Clark (Gerald Eve); Mr Cullum (Cluttons)

De Walden Mr Clark

Grandeden Mr Orr-Ewing (Knight Frank)

Maybury Mr Beckett (Beckett and Kay LLP)

64. By way of introduction to the discussion I quote Mr Cullum’s comments on the nature of the task facing the valuers, which I found illuminating:

“I am providing my view about what would happen in a hypothetical market; it is a market which has not existed at all (in terms conformable to the Act) for thirteen years. Indeed, for several years before that the market was under the threat of the Act and was already being distorted by anticipation of the legislation. Even before that the market was different from the hypothetical market I am to envisage today. Throughout the 1960’s, 1970’s and 1980’s the entire residential sector was regarded with great suspicion because of the Rent Acts. The hypothetical market today is one in which there is a political consensus against the Rent Act philosophy and so this hypothetical market will be operating with a degree of confidence which I have never experienced in a no Act world

and neither will any of the other experts. At the youngest, one would have to be in one's late 60's or 70's to have had actual experience of the hypothetical market I am to envisage."

65. In other words, the statute requires the landlord's interest to be valued in an assumed open market, for which in the real world, as a result of statutory interventions, there is no counterpart.
66. Not surprisingly, in such circumstances, the methods adopted by the experts varied considerably, as did their proposed deferment rates (ranging from 3.2% to 7%: decision paras 17, 31). The Tribunal summarised the four principal methods used by the experts to arrive at a deferment rate:

"(a) A form of financial valuation known as CAPM. This was the method used by three of the financial experts, Mr Clokey, Mr Francis and Professor Lizieri. It can be expressed by the basic formula $DR = RFR - RGR - RP$ (deferment rate equals risk-free rate minus real growth rate plus risk premium). CAPM assesses RP by applying to the equity market risk premium (EMRP) (the addition for risk that an investor in equities generally would make) a factor, known as beta, that reflects the comparative riskiness of the particular investment under consideration. This would normally be an individual company, but here has to be long-term residential reversions as a whole.

(b) Determination by reference to rack rental yields. This was the method adopted by one of the financial experts, Mr Dumas.

(c) Derivation from an analysis of market sales of long-term residential reversions. This was the method as adopted by one of the valuer witnesses, Mr Beckett.

(d) As in (a) above, but, instead of reaching RP by the application of beta to EMRP, making an independent assessment of what the RP should be. This was the method adopted by this Tribunal in *Arbib*, and it was the method followed by the other valuer witnesses, Mr Cullum, Mr Clark and Mr Orr-Ewing, and Professor Lizieri used this as an alternative method." (para 54)

67. The Tribunal concluded that the first three methods all had "deficiencies that render them inappropriate for use", and they preferred method (d). Applying that approach they arrived at the following:

- i) risk free rate: 2.25%; less
- ii) real growth rate: 2%; plus
- iii) risk premium: (for houses) 4.5%; (for flats) 4.75%; resulting in

iv) deferment rate: (for houses) 4.75%, (for flats) 5%. (The higher rate for flats was intended to reflect “the greater management problems associated with flats” (para 95).)

68. Although the only issue raised by the appeal relates to the rejection of method (c) (market evidence), it is necessary also to understand the thinking behind the adoption of method (d). The Tribunal had earlier summarised their general view of the investment under consideration:

“The nature of the investment being assumed may be analysed thus: the value of the asset consists of its prospect of appreciation; it will appreciate through the lapse of time as the term date gets nearer (inherent growth); if, however, the vacant possession value of the property increases in real terms, the reversion will appreciate through real growth in the same way as the property in possession. On the other hand, set against the relatively secure long-term nature of the investment that the asset represents are the risks and disadvantages that are associated with it. There is volatility in the market in residential property, and there are prolonged periods of downturn. The property is illiquid in the sense that any sale will take time to achieve. While it is a tradeable asset, therefore, the reversion is subject to the risk that a sale may only be achievable after a delay and at a time when the market is low. It is an asset also that may become obsolescent and deteriorate physically.” (para 52)

69. Both methods (a) and (d) required the Tribunal to arrive at a “risk premium” to reflect the “comparative riskiness” of an investment in long-term residential reversions, as compared to the equity market. Under the CAPM (method (a)) this would be arrived at by application of a factor *beta*, representing the volatility of the relevant investment as compared with the market generally. Choice of *beta* proved the main area of disagreement between the experts, attributable, in the Tribunal’s view, to the inherent difficulty of comparing unlike investments, a problem also noted in *Arbib*. The Tribunal said:

“It is in our judgment as impossible to arrive at an appropriate deferment rate for freehold reversions by seeking to assess the risk premium attaching to companies whose business includes some dealing in such reversions as compared with the equity market as a whole as it proved to be for the Tribunal in *Arbib* to draw conclusions from the price of a “financial product”.” (para 58)

70. They accordingly rejected reliance on the CAPM, in favour of method (d), observing that –

“... adjusting the EMRP to reach a risk premium appropriate to residential reversions lies at the interface between the expertise of the financial experts and the valuers...” (para 59)

71. Under method (d), it was necessary -

“... to assess the risk premium by a consideration of the individual components of the risks of investment in long reversions (volatility, illiquidity, deterioration and obsolescence) and to form an overall assessment of the premium that would be required by investors in the type of asset that we have to consider...” (para 75)

72. In considering these factors, the Tribunal preferred the evidence of Professor Lizieri (for Grandeden) to that of the landlords’ witnesses, which they thought “substantially underestimated the risks”. They had earlier summarised Professor Lizieri’s evidence, in which he had explained his approach to assessing the risk premium and concluded that –

“... offsetting the extra volatility of equities against property’s relative illiquidity and some additional allowance for the possibility of physical and functional depreciation,... an appropriate risk premium would fall in a range of 4% to 5%, and that 4.5% was appropriate.” (paras 21-2)

73. The Tribunal commented:

“We agree with Professor Lizieri that, since real house prices are shown to be prone to shocks and to be strongly cyclical, with persistent periods of negative growth, an investor in a long-term reversion would be very conscious of the risk that the market could be depressed at the point at which he wished to sell his interest, even though, as compared with equities, the residential property market is rather less volatile. Reversions would suffer in comparison with equities from illiquidity resulting from high transaction costs and the length of time to complete a transaction, and the latter factor would, we think, be perceived as adding substantially to the risk associated with volatility.” (para 77)

74. Having considered the various “investment comparators” discussed in evidence (“long gilts, equities, individual property companies and the Act-world market in reversions”), they concluded “on the totality of the evidence” and in general agreement with Professor Lizieri that the risk premium should be 4.5% (para 79).

Market evidence

75. Against this background, I turn to their treatment of the market evidence, which is in issue in the appeal. It is notable that, among the experts, this was adopted only by Mr Beckett, for Maybury. The other tenant body, Grandeden, through Mr Orr-Ewing and Professor Lizieri, had supported method (d) (although Mr Orr-Ewing also described Mr Beckett’s methodology as “basically sound”: decision para 43); and Professor Lizieri’s overall approach was closest to that eventually adopted by the Tribunal.

76. In *Arbib* the then Tribunal had noted the experts' failure to identify and agree useful comparables, and had concluded that no assistance was to be gained from market evidence. Mr Beckett had not accepted this conclusion:

“He therefore set about collecting and presenting evidence from auctions of reversions, which, of course, he accepted had been transactions in the real world rather than upon the assumptions required to be made by the Act, but which he proposed with some caveats to apply directly to the ascertainment of a deferment rate, which he placed in the range of 5.5% to 7.0%...

Mr Beckett examined altogether some 200 transactions concerning sales of freehold reversions of flats and houses, including some mixed commercial properties, mostly at auctions, which took place between 2000 and 2004. He found the data available to him in 38 of them useable to derive deferment rates in the real world, in that he had information as to the leasehold interests and the prices paid, and was able to estimate a vacant possession value, from which a deferment rate could be calculated. He capitalised the ground rent in each case at 10%, in order to avoid understating the influence of the income stream, and he chose to use only transactions where the rental income was unlikely to have been the main driver of the transaction.

Discussing how the hope of marriage value interacted with the deferment rate, Mr Beckett concluded that it could be usefully subsumed in the deferment rate – its contribution to it being, he tentatively thought, 1%, meaning that, if it had to be totally excluded for the purposes of this decision, his figure for deferment would become 7.25%. If the hope value was separated out, at 1% it became approximately 20% of marriage value...” (Decision paras 45-8)

77. The Tribunal rejected some of the criticisms of Mr Beckett's approach; they were satisfied -

“...that the material is sufficient to establish the range of relativities in the with-Act world between vacant possession freehold values and the prices in fact paid for reversions of different lengths.”

78. However, this was not sufficient for them to regard the evidence as of value in setting the deferment rate because the market in the real world is “substantially different from the one to be envisaged in the hypothetical no-Act world” (para 64). In paragraphs 65-7 they expanded on their reasons for rejecting the market evidence. In summary, they had three reasons:

- i) That the real world market was fundamentally different from that to be assumed under the Act, because it was driven, not by the perception of the

value of a secure long-term investment, but by the expectation of profit through the early realisation of marriage value.

- ii) That prices in the real world were influenced by the expectations of purchasers about what an LVT might later determine to be the enfranchisement price under the Acts.
- iii) That the real-world prices included hope value, which they had determined should be excluded from valuations under the Act.

The arguments in the appeal

- 79. Mr Jourdan, for Maybury, starts by emphasising, rightly, the importance normally attached to comparable land market evidence (see e.g. *Gallagher Estates v. Walker* (1978) 28 P&CR 113, 117, 120-22; *Curtis v. London Rent Assessment Committee* [1999] QB 92 at 115D to 117A). Credible market evidence, such as Mr Beckett's was found to be, should not have been rejected altogether, particularly where the alternative method, relying on assessment of the risk premium, was "little more than guesswork".
- 80. He characterises the Tribunal's first and third reasons as in substance the same, depending on the effect of hope value as the prime factor driving the real world market. Rather than disregarding the market evidence altogether, it would have been possible (on the evidence of both sides) to have "stripped out" the hope value element to arrive at a deferment rate without hope value. In any event the approach was irrational. If the same freeholds had been sold without hope value, then the prices would inevitably have been much lower, and the deferment rate higher. It was irrational to adopt a methodology which led to a freehold value without hope value substantially higher than that paid in the market for freeholds with hope value. Furthermore, the Tribunal's own findings negated the view (advanced on behalf of the landlords) that the market for long term residential investments was different in kind from the real world market. They had rejected Mr Cullum's assumption of an exclusive market of "pension funds and the great estates" (para 76)
- 81. Mr Jourdan criticises the Tribunal's second reason as unsound, both on the evidence and as a matter of law. It was inherently improbable that purchasers would anticipate LVT valuations. In any event, the Act did not require the real world to be ignored altogether, but merely the effect of the statutory rights to enfranchise.
- 82. In conclusion Mr Jourdan helpfully summarises his submissions in two questions:
 - i) "As in *Curtis* did the Tribunal err by failing to use the best evidence?"
 - ii) "Was it rational for the Tribunal to hold that the freehold reversion on a no-Act building with no prospect of doing deals with the tenants would sell for a substantially higher price (nearly double) than the freehold reversion on a subject-to-Act building where there is a good prospect of doing deals with the tenants?"
- 83. Mr Munro and Miss Jackson support the Tribunal's reasons for rejecting the market evidence. Miss Jackson goes further, in a respondent's notice, which challenges the

Tribunal's limited acceptance of the reliability of the evidence within its own terms. For the reasons which follow it is unnecessary to consider that aspect.

Conclusion on deferment rate issue

84. As he acknowledges, Mr Jourdan can only succeed on this issue if he can establish an error of law in the Tribunal's reasoning. This would include irrationality, or failure to have regard to a material issue (see *Railtrack PLC v. Guinness Ltd* [2003] 1 EGLR 124, para 4). His two questions seem to me to come down to a single point. I accept that, if there had been useful market evidence before the Tribunal, they would have been wrong in law to ignore it. However, if they were rationally satisfied that the evidence was of no practical assistance, nothing in law or common sense required them to take it into account. The only issue therefore is whether that was a rational conclusion.
85. The Tribunal's second and third reasons seem to me subsidiary to the first. Without going into the merits of Mr Jourdan's principal criticisms of the second reason, it is enough to note the Tribunal's observation that the evidence was no more than "weakly suggestive" of a link between LVT decisions and transactions (para 66). I agree also that the third reason adds little to the first. If the only material issue was the need to exclude hope value, some appropriate adjustment might have been considered, rather than excluding the evidence altogether.
86. The key to the Tribunal's reasoning, as I read it, lies in the first reason, which they expanded in paragraph 65:
- "For the purpose of determining the deferment rate we have to consider a reversion that can be held until the end of the lease and can be sold at any time with this potential. Its attraction, therefore, is as a secure long-term investment, and its value consists entirely in the vacant possession value to be realised at the end of the lease. In the real world, by contrast, vendor and purchaser know that, because of the Acts, the reversioner can have no expectation that he will be able to retain the reversion until the end of the lease. Indeed the likelihood is that it will be enfranchised at some point, possibly at an early date. What drives the market, in consequence, is not the perception of the value of a secure long-term investment but the expectation of profit through the early realisation of marriage value. We consider that these differences are so fundamental as to mean that the market evidence cannot be used as the basis for calculating the deferment rate. This was the view that the Tribunal took in *Arbib*, and it is one that in our own minds is confirmed now that we have had the benefit of Mr Beckett's outstandingly thought-provoking evidence."
87. Mr Jourdan does not, I think, challenge the Tribunal's conclusion that the assumed market was substantially different from the real market, mainly because of the longer term nature of the landlord's security. Once that is accepted, the degree of difference, and its relevance to the valuation, must be a matter of judgement for the Tribunal. The apparent paradox implied by Mr Jourdan's second question proves nothing. The

comparison is only surprising if one assumes a direct relationship between the no-Act and subject-to-Act valuations. Unless the comparison is of like with like, the degree of difference cannot of itself show irrationality.

88. The Tribunal's position would of course have been clearer and simpler if they had rejected Mr Beckett's evidence altogether, as Miss Jackson says they should have done. Instead they gave it very careful attention, and regarded it as making a useful contribution to the discussion. They also acknowledged the argument that it could at least provide a starting point, but they dismissed it:

“Notionally, of course, the prospect of early profit ought to enhance the price paid for the reversion, so that, as Mr Beckett claimed, the factor calculated from such market evidence should provide a minimum figure for a deferment rate for the purpose of a valuation under the Acts. But in our judgment Mr Beckett's calculation is not only rendered unreliable, because it is not the same thing that is being calculated, but it is inevitably distorted as a result.” (para 67)

89. Irrationality sets a high hurdle. This is not a case where the Tribunal were indulging in a frolic of their own without regard to the weight of the evidence. Their general approach was in line with that of the majority of the experts, and very close to that of Professor Lizieri, an acknowledged expert in the field, who gave evidence on behalf of the other group of tenants. It was Mr Beckett who was somewhat isolated. This does not of course mean that he was wrong. But it makes it very difficult to hold that the alternative view was so wrong as to be irrational.
90. Accordingly, attractively and forcefully as Mr Jourdan has argued his case, I remain unpersuaded that he has established such an error of law. I would dismiss this appeal also.

The precedent effect of the Tribunal's decision

91. Finally I should comment on the Tribunal's guidance on the future effect of its decision as a precedent for LVTs. This is not strictly an issue in the appeal, since it does not affect the result in the instant cases. However, Mr Jourdan has criticised the Tribunal as going beyond its proper role:

“The Tribunal took the unprecedented step of stating that its decision, on a factual valuation issue, must be followed by all LVTs in subsequent cases unless there are shown to be particular features warranting a departure from it.... This was a fundamental misconception of the role of the Lands Tribunal and the status of its decisions. It may well have influenced the Tribunal's decision to reject the land market evidence, as a decision based on land market evidence would have rendered the prescription of a deferment rate impossible...

The decision, which LVTs all over the country will feel bound to follow, is at odds with the basis on which enfranchisement prices outside PCL have been arrived at in the past. If the

decision stands then it will effect a massive nationwide shift of the value in residential property away from tenants to landlords.”

92. In my view these criticisms are unjustified at least as far as concerns future decisions within the PCL. I agree that some qualification is needed in respect of future decisions outside that area.

Within the PCL

93. The Tribunal invited LVTs to adopt the deferment rates determined by them in the absence of compelling evidence to the contrary. They explained:

“This is justified because, as we have explained above, the deferment rate is unlikely to vary according to factors particular to the individual case. Some factors, including in particular the prospect of long-term growth, will not vary from case to case, while other factors, such as location and obsolescence, will already be reflected in the vacant possession value. Hope value would be a factor that could lead to different deferment rates for different lengths of term if it was not reflected elsewhere in the valuation; but we have concluded that hope value is excluded as a matter of law. The case for adopting a single deferment rate (with a standard adjustment for flats) for all reversions in excess of 20 years is thus, in our view, strong. Indeed we think that statutory prescription could well be appropriate and could usefully give a greater certainty to the market than a decision of the Lands Tribunal setting a guideline is capable of doing.” (para 121)

94. They added that the stability was necessary to the concept of a guideline, and that accordingly:

“In our judgment the deferment rate may be treated as stable over time unless a trend movement in the risk-free rate can be identified or it can be established that the long term prospects of growth in residential property have changed or that, for some other reason, the attraction of investment in residential reversions can be shown to have increased or diminished.” (para 122)

“The application of the deferment rate of 5% for flats and 4.75% for houses that we have found to be generally applicable will need to be considered in relation to the facts of each individual case. Before applying a rate that is different from this, however, a valuer or an LVT should be satisfied that there are particular features that fall outside the matters that are reflected in the vacant possession value of the house or flat or in the deferment rate itself and can be shown to make a departure from the rate appropriate.” (para 123)

95. They likened the task of determining a “guideline” deferment rate to that of the courts in determining a discount rate in the context of damages for personal injury (before the rate was statutorily prescribed by the Damages (Personal Injury) Order 2001). This was explained in *Wright v British Railways Board* [1983] 2 AC 773 (followed in *Wells v Wells* [1999] AC 345), in which Lord Diplock said:

“A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach. But though guidelines change, too frequent alteration deprives them of their usefulness in providing a degree of predictability in the litigious process and to facilitating settlement of claims without going to trial.” (p 785C)

“...the guideline, if it is to serve its purpose in promoting predictability and so facilitating settlements and eliminating the expense of regularly calling expert evidence at trials of personal injury actions, should continue to be followed for the time being...” (p 785H)

96. In the past this approach has not been expressly applied to the role of the Lands Tribunal. The Tribunal noted a comparable issue which arose in 1984, concerning the “decapitalisation rate” for rating assessments made on the “contractor’s basis”. In *Imperial College of Science and Technology v Ebdon (VO)* [1984] RA 213, the Lands Tribunal (C R Mallett FRICS) heard expert evidence from economists and valuers over 18 days in order to arrive at a rate of 3½%. Although this was upheld in the Court of Appeal ([1986] RA 233), Glidewell LJ emphasised that it was not to be taken as determining that 3½% is necessarily the correct rate to be applied to all similar cases:

“Each case depends upon its particular facts and the evidence called. My judgment is that the facts established and the opinion evidence called justified the Lands Tribunal’s decision in this case.” (p 242)

97. Since that time the role of specialist appeal tribunals in providing guidance on factual as well as legal matters has become more clearly recognised. A comparable example, from a very different field of law, is found in the practice of the former Immigration Appeals Tribunal (and its successor) of identifying suitable cases to provide authoritative guidance on conditions in particular countries (“country guidance cases”) for use in asylum appeals. The status of such guidance was described by Laws LJ in *S v Home Secretary* [2002] INLR 416:

“While in our general law this notion of a factual precedent is exotic, in the context of the IAT’s responsibilities it seems to us in principle to be benign and practical. Refugee claims vis-à-vis any particular State are inevitably made against a political backdrop which over a period of time, however long or short,

is, if not constant, at any rate identifiable. Of course the impact of the prevailing political reality may vary as between one claimant and another, and it is always the appellate authorities' duty to examine the facts of individual cases. But there is no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence. ” (para 28)

98. Although the present context is very different, there is an equal public interest in avoiding wasted expenditure, and the risk of inconsistent results, in successive LVT appeals on an issue such as that of deferment rates. The Tribunal could hardly have done more to ensure that the issues were fully ventilated and exhaustively examined. They had already been discussed in detail in *Arbib*. I have already referred to the steps taken by the Tribunal to bring together the present group of cases. Furthermore it is difficult to envisage a better qualified panel of experts for the purpose than those called in this case, or of specialist counsel on both sides of the argument.
99. I agree with the Tribunal that an important part of its role is to promote consistent practice in land valuation matters. It was entirely appropriate for the Tribunal to offer guidance as they have done in this case, and, unless and until the legislature intervenes, to expect leasehold valuation tribunals to follow generally that lead. Mr Munro invited us to go further, and to consider the status of Lands Tribunal decisions respectively on issues of law, valuation and fact. However, I bear in mind that under the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the Lands Tribunal is likely in the near future to be subsumed into that of the new Upper Tribunal, which will be a “superior court of record” under the Act. It will be principally for the new tribunal to lay down guidelines as to the precedent effect of its decisions for different purposes.

Outside the PCL

100. The cases before the Tribunals related entirely to properties within the Prime Central London area, and the evidence was directed principally to the market within that area. It seems that the Tribunal of its own motion invited the experts to say whether the deferment rate would vary with location (para 86). A variety of views was offered. For example Mr Dumas and Professor Lizieri thought there would be no variation “since the compounding effects of different growth rates would eventually lead to differences in value that were unsustainable and would accordingly correct themselves”. On the other hand, Mr Clark accepted that different deferment rates might apply in different locations in London and in other parts of the country “having regard to local prospect for growth and local factors affecting risk”. Both Mr Orr-Ewing and Mr Beckett thought that location would make a difference, but could not provide evidence or “statistical justification” for such differences (para 86-7).
101. The Tribunal concluded:

“While we accept the view of the valuers that the deferment rate could require adjustment for location, *on the evidence before us* we see no justification for making any adjustment to reflect regional or local considerations either generally or in relation to the particular cases before us. The evidence of the financial experts suggests that no adjustment to the real growth rate is appropriate given the long-term basis of the deferment rate, and locational differences of a local nature are, in the absence of clear evidence suggesting otherwise, to be assumed to be properly reflected in the freehold vacant possession value.” (para 88, emphasis added)

102. The Tribunal’s later comments on the significance of their guidance do not distinguish in terms between the PCL area and other parts of London or the country. However, there must in my view be an implicit distinction. The issues within the PCL were fully examined in a fully contested dispute between directly interested parties. The same cannot be said in respect of other areas. The judgement that the same deferment rate should apply outside the PCL area was made, and could only be made, on the evidence then available. That must leave the way open to the possibility of further evidence being called by other parties in other cases directly concerned with different areas. The deferment rate adopted by the Tribunal will no doubt be the starting point; and their conclusions on the methodology, including the limitations of market evidence, are likely to remain valid. However, it is possible to envisage other evidence being called, for example, on issues relevant to the risk premium for residential property in different areas. That will be a matter for those advising future parties, and for the tribunals, to consider as such issues arise.

Conclusion

103. For the reasons given above I would dismiss the appeals, in respect of both the hope value and deferment rate issues. There also remains outstanding an application for permission by Cadogan to cross-appeal on the deferment rate issue, which was adjourned pending this decision. As I indicated when dealing with that application in open court, I was minded to refuse the application, but was willing to defer a final decision until now. The purpose was to allow for the possibility of arguments about the scope of the issues which might be reopened, if we were to allow the appeal on the deferment rate issue, and remit the matter to the Tribunal. In the event that contingency has not arisen, I would accordingly simply dismiss Cadogan’s application.

Sir Peter Gibson :

104. I agree.

Lord Justice Ward :

105. I also agree.