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LON/ENF/833/03

THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S24 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Re Kingsway Mansions, 23A Red Lion Square, London WC1

Applicant: Kingsway Mansions Limited (nominee purchaser)

Respondent Daejan Properties Limited (freeholder)

Date of hearing: 30 September, 1 October and 15 October 2003

Appearances:

Mr Jonathan Small (counsel)
Mr T J Curran BA MSc MRICS MRTPI (Stiles Harold Williams, chartered surveyors)
Mr A Ilsley C Eng MIStruct E (Packman Lucas, structural designers)
Dr B Blandford (tenant of Flat 5 and chairman of the Residents' Association)
Mr I Murray (tenant of Flat 8)

for the applicant

Mr Barry Denyer-Green (counsel)
Miss J Ellis FRICS (Langley-Taylor, chartered surveyors)
Mr D J Morris BSc Est Man FRICS (Langley-Taylor, chartered surveyors)
Mr D W Neill MRICS (Langley-Taylor, chartered surveyors)
Mr S Serota (Wallace & Partners, solicitors)

for the respondent

Members of the leasehold valuation tribunal:

Lady Wilson
Mrs E Flint DMS FRICS IRRV
Mrs L Walter MA (Hons)

Date of the tribunal's decision: 22 December 2003

Background

1. This is an application by the nominee purchaser for the collective enfranchisement of a block of 17 flats. All the tenants participate in the enfranchisement.

2. Kingsway Mansions is a Victorian purpose built block which is situated on the corner of Red Lion Square and Princeton Street, its entrance door in Princeton Street. The flats are on basement, ground and four upper floors, with two flats at basement level and three on each of the upper floors, two to the west of the staircase and one to the east. There is no lift and there are no parking facilities.

3. Flat 1, in the basement, has three rooms, a kitchen, bathroom and separate wc. All the other flats have two rooms, kitchen and bathroom/wc. The flats to the west of the staircase are similar to each other in layout, as are the flats to the east of the staircase. Flat 1 has a floor area of 692 sq ft, and the floor areas of the other flats range from 333 sq ft to 407 sq ft. The two fourth floor flats which face Red Lion Square have small balconies. The building has a flat roof which accommodates the water tank for the building and a fire escape route.

4. The freehold interest in the block is owned by Daejan Properties Limited. The whole block is subject to a headlease dated 15 March 1988 for a term expiring on 25 June 2074 at an annual ground rent of £567 which increases so that increases in the rents paid by the underlessees are added to the rent and the profit rent remains at a constant £68 per annum. The underleases of the flats, made on various dates between 1976 and 1988, all expire on 24 June 2074. 71.42 years remained unexpired on the valuation date, which is agreed to be 16 January 2003, the date of the landlord's counter-notice.

5. It was agreed that the value of the ground rents to the freeholder was £11, 865, that the value

of the intermediate landlord's interest was £755, that a yield rate of 7.5% should be adopted to defer the reversion, that the "spot" value of Flat 1 was £150,000 (a value which, it was accepted, did not assist in determining the values of the other flats), and that no adjustment was, in this particular case, required to be made to the comparable transactions to reflect rights under the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act").

6. The issues were:

i. the values of the existing leases of each of the flats save Flat 1,
ii. the relativity between the values of the existing leases and the freehold,
iii. whether the value of the freehold was enhanced by the potential for developing the roof, and
iv. the freeholder's recoverable legal costs.

7. Mr Small represented the nominee purchaser and called Mr T J Curran BA MSc MRICS MRTPI, of Stiles Harold Williams, chartered surveyors and Mr A Ilsley CEng MI Struct E, of Packman Lucas, structural designers, to give expert evidence. Mr Denyer-Green represented the freeholder and called Miss J Ellis FRICS, Mr D J Morris BSc (Est Man) FRICS and Mr D W Neill MRICS, all of Langley-Taylor, chartered surveyors, to give expert evidence. The hearing occupied two and a half days, and after the hearing, in the afternoon of 15 October 2003, accompanied by Mr Murray, the tenant of Flat 8, we inspected the block, including the roof, and we internally inspected Flats 1, 5, 6, 7, 8, 10, 11, 14, 15, 16, 17, 19 and 20.

Decision

i. The values of the existing leases

The nominee purchaser's case

8. Mr Curran relied on four recent sales in the block:

Flat 8, a first floor flat on the west side of the staircase, with a floor area of 401 sq ft, sold on a 71.5 year lease on 12 November 2002 for £220,000;

Flat 7, a ground floor flat on the east side of the block, with a floor area of 346 sq ft, sold on a 71.5 year lease on 28 November 2002 for £235,000;

Flat 6, a ground floor flat on the west side of the block, with a floor area of 391 sq ft, sold on a72.1 year lease on 3 May 2002 for £222,000, and

Flat 16, a third floor flat on the west side and at the rear of the block, with a floor area of 407 sq ft, sold on a 73.25 year lease on 30 March 2001 for £152,000.

9. His approach was to establish the value in terms of the price per square foot of a first floor flat on the west side of the staircase and of a first floor flat on the east side of the staircase, each with no tenant's improvements, and to apply that rate to each flat after making suitable adjustments for its location in the block. In relation to improvements, he provided particulars in respect of each flat, mostly in the form of photographs and the tenant's answers to a questionnaire, which he included in Volume II of the appendices to his proof and summarised in Appendix 5 to Volume I.

10. He first considered three sales of flats to the west of the staircase: Flats 16, 8 and 6.

11. He described Flat 16 as totally unimproved at the date of sale and its sale as the only recent

sale of an unimproved flat. (Miss Ellis regarded this transaction as too old to be of use). He adjusted the rate per sq ft, £373, for passage of time in accordance with the FPD Savills PCL Flats Index ("the Savills Index") and arrived at £427, which he decreased by 1 per cent for the shorter lease length at the valuation date, giving £423. He regarded a second floor flat as having a value of about 97 per cent, a third floor flat as worth 95 per cent and a fourth floor flat as worth 90 per cent of the value of a first floor flat. He thus arrived, on the basis of this transaction, at a rate per square foot for a first floor flat on the west of the staircase, after adjusting for time, lease length and floor level, of £445.

10. Mr Curran then considered the sale of Flat 8, which had been used as an office before it was sold. It had some limited improvements at the date of sale, making it, he said, habitable but fairly basic, with a modernised but basic kitchen and bathroom. He assessed the contributory value of the improvements at the date of sale at about £20,000, or £50 per sq ft, giving, he considered, a rate per square foot, adjusted for time and improvements, of £487 derived from this transaction.

11. He then considered the sale of Flat 6, described by its owner in her answers to the questionnaire as "well maintained" and with "newly installed modern kitchen". He adjusted the rate of £567 per sq ft to £564 to reflect the valuation date, and said that this indicated to him a value, by comparison with the rate he had derived from Flat 16, of £141 per square foot for improvements, showing, he said, that an unimproved flat had a value of about 75 per cent of the value of an improved flat. He thus concluded that this comparable supported the rate for an unimproved flat which he had derived from Flat 16.

12. Mr Curran said that the average of the three adjusted rates per square foot which he had derived from these comparables was £459, but he concluded, taking a broad view, that the unimproved rate per square foot for a first floor flat to the west of the staircase was about £475.

13. For his valuation of the flats to the east of the staircase he considered the sale of Flat 7, which he described as in good, improved condition at the date of sale. (The previous owner's description of the works which he had carried out prior to the relevant sale is included in Mr Curran's appendices.) On the assumption that the unimproved value was likely to be 75 per cent of the improved value, he concluded from this comparable sale that a first floor flat to the east of the staircase had an unimproved value of £525 per sq ft.

14. Mr Curran said that the information included in Volume II of the appendices to his proof showed that, with the exception of Flats 7 and 12, which were refurbished badly and to a basic standard before the leases were granted in 1988, the flats were totally unmodernised by contemporary standards when the leases were first sold. He adjusted the value of Flats 7 and 12 upwards by £5000 to reflect the limited improvements at the date of the grants of the leases. He adjusted the values of Flats 18 and 19, on the fourth floor, to reflect their balconies and the fact that there were no flats above them, and he adjusted the value of Flat 5 at 95 per cent of the rate he had adopted for other ground floor flats to reflect the proximity of the kitchen and bedroom to the street.

15. Mr Curran regarded Flat 1, a basement flat, the value of which is not agreed, as significantly different from the other flats. He said that, according to its tenant, the flat was uninhabitable when the lease was granted. He arrived at a value of £229, 000 for the existing lease of this flat by applying his chosen relativity of 93 per cent to the average of:

i. £211,192, the value of a share of the freehold which he derived from the sale of Flat 2, Kingsgate, (another block in Red Lion Square), a basement flat sold in fair condition in May 2001 for £260,000, equating to £308 per square foot, from which he deducted 10 per cent for condition, and for time by reference to the Savills Index; and

ii. £282,000, derived from reducing his first floor west rate of £475 per sq ft by 20 per cent for the flat's basement location.

16. The values at which Mr Curran arrived for the existing leases of each flat he set out in a revised Appendix 10 to Volume I of his proof. This gave a total value of £3,084,605 for the existing leases.

17. In his oral evidence, Mr Curran said that he considered that decoration could be an improvement to be disregarded, because it could add value, and that repair could involve an element of improvement. He agreed in cross-examination that the starting point for valuation should be the current condition of the flats on the valuation date. He had attributed about £12,000 to the value of a modern kitchen in Flat 8 and about £8000 to the value of its modern bathroom, even though the tenant's answers to the questionnaire showed that only £3000 had been spent on the kitchen and £2000 on the bathroom. He regarded totally unimproved flats in the block as particularly unappealing. He accepted that Holborn was not an area covered by the Savills Index; however, he said, had no evidence that prices in the Holborn area had out-performed other areas in Central London and he therefore assumed that the rises in values, over and above those indicated by that Index, shown by the more recent sales of flats in the block, were attributable to improvements. Research he had carried out on the contributory value of improvements showed that their contribution to value was considerable.

The landlord's case

18. Miss Ellis based her values on the sales of Flats 6, 7 and 6 listed in paragraph 8 above. She disregarded the sale of Flat 16 as too old to be of use.

19. She said that, although at the time of these sales the lease terms were longer than they were at the valuation date, the difference was insignificant and required no adjustment. Nor did she regard any adjustment for passage of time as appropriate because, she said, the market was static between May 2002 and the valuation date.

20. As for the flats' location within the block, Miss Ellis said that the disadvantages of walking up to the upper floors were offset by the improved light and views and by the balconies to two of the top floor flats. She deducted 80% for the lower ground floor flats but made no other adjustments for location.

21. She made no adjustment for size, other than for Flat 1, which was, she said, nearly as large as two rectangular flats and which she regarded as 80 per cent more valuable, in terms of size, than the other flats. She said that although the fourth floor flats were slightly smaller than the other flats, their balconies, giving outside space, offset the smaller size. (In fact, only two of the three fourth floor flats have balconies).

22. She made no adjustment for size and shape between the slightly larger rectangular flats to the west of the staircase and the slightly smaller square flats to the east of the staircase, but she made a deduction of £5000 to arrive at the value of those flats at the rear of the block (Flats 6, 9, 12, 16 and 19), the bathrooms of which were too small to accommodate a bath.

23. As for condition and improvements, Miss Ellis said that she was required to assess the values of the flats on the assumption that the tenants had complied with their repairing and decorating covenants because she was valuing the reversion in the flats at the end of their leases, at a time when the tenants would, if necessary, have had to comply with a schedule of dilapidations, and because to value the flats in any other condition would allow the tenants to take advantage of their own wrong, a principle supported, she said, by *Family Management v*

Gray (1980) 253 EG 369. She had therefore assumed in her valuation that each tenant had redecorated internally every seven years and had repaired and maintained the flat as clauses 2(8) and (9) of their leases required. She considered that the original parties to the leases must have anticipated that there would be periodic renewals and changes to the original specification of the flats to more exacting standards than at the date of the leases, and these types of change, which included increasing the number of power outlets, should not be classed as improvements to be disregarded.

24. Miss Ellis said that none of the theoretical allowances which she would make in fact applied to the sales of Flats 7 and 8, but Flat 6 was a rear flat with no bath, and in arriving at her value for a "standard" flat on an upper floor, with a bath (or space for one) she added £5000 and was thus left with adjusted prices of £235,000 for Flat 7, £220,000 for Flat 8 and £227,000 for Flat 6. She said that Flat 8 was in need of work, and was modernised after purchase, though to a poor standard, while Flat 7 had been the subject of a recent scheme of works, which would account for their different sale prices. The adjusted Flat 6 fitted well, she said, into her pattern, and taking the three comparables in the round and erring on the side of caution, she valued a typical flat with space for a bath at £225,000, and a rear flat without space for a bath at £220,000. Flat 1 she valued at £325,000, based on an addition of 80 per cent for size and a deduction of 20 per cent for floor level, as set out above. Her valuation of all the flats on their existing leases was £3,825,000.

Decision

25. We have based our valuation on the four comparables on which Mr Curran relied, although the sale of Flat 16 is of relatively limited assistance in view of the length of time since its date because we do not have precise evidence about market movement in the Holborn area since the

sale of Flat 16 in March 2001.

26. There is no evidence that the market in Central London or in Holborn moved to a significant extent between the sales of Flats 6, 7 and 8 and the valuation date and, like Miss Ellis, we have made no adjustment to those sales for passage of time. The Savills Index shows that the Central London market moved upwards by over 15 per cent between the sale of Flat 16 and the valuation date, suggesting, if the Savills Index is a reliable indicator of market movement in Holborn, an adjusted price of about £180,000 derived from Flat 16. However, we suspect that Miss Ellis's may be correct to say that the market in Holborn was tending to rise faster than that in some other areas between March 2001 and the latter part of 2002, although we do not have the information to enable us to be precise on this issue.

27. We agree with Miss Ellis that, since the lease lengths at the time of the comparable sales were only marginally shorter than the existing leases at the valuation date, no reduction is required to be made to the sale prices achieved for Flats 6, 7 and 8 to reflect lease length. The lease of Flat 16 was somewhat longer and we assume that this would have had some slight effect on the price.

28. We also agree with Mr Denyer-Green and Miss Ellis that we should value the leases on the assumption that the tenants have complied with their repairing and decorating covenants. Mr Small argued that Schedule 6 to the Act does not require us to make that assumption. He also argued that it is open to a landlord at any time to enforce a tenant's repairing covenants, and not to do so is a commercial decision which should not penalise the tenant or help the landlord. But the fact that we are not required to make assumptions does not preclude us from doing so (paragraph 3(2) of Schedule 6), and enforcing the tenant's covenants relating to the internal repair and decoration of their flats prior to the end of the term is almost impossible in practice. In our view, the assumption that Mr Denyer-Green and Miss Ellis ask us to make is one that

should be made, because to do otherwise would permit the tenants to take advantage of their own wrong (see, for example, *Alghussein Establishment v Eton College* [1988] 1 WLR 587 (HL) and other cases cited in *Lewison on The Interpretation of Contracts* at pages 174 - 177). In practice, making this assumption makes little difference in this case since it appears that almost all the tenants have complied with their covenants.

29. On the issue of improvements, we have to value the flats as we see them, but on the assumption that any increase in their value which is attributable to an improvement carried out at his own expense by a tenant or by any predecessor in title is to be disregarded. Not all works to a property add value, however, and we consider that Mr Curran has exaggerated the values of improvements to the relevant comparables, but that Miss Ellis has underestimated them. We had the advantage of inspecting most of the flats and all the comparables. From what we saw, we concluded that the extensive tenant's improvements to Flat 6, which included a very good modern kitchen, some improvements to the bathroom (which was further improved after the valuation date), new hardwood floors throughout and security grilles and locks, added about £15,000 to its value at the valuation date; that the tenant's improvements to Flat 7, which included a new central heating system, a new fitted kitchen and fitted cupboards, added about £20,000 to its value; and that the tenant's improvement to Flat 8, which included, fitted cupboards and new tiling and fittings in the shower room, all to a lower standard than in Flats 6 and 7, added about £5000 to its value. Mr Curran distinguished between Flats 7 and 12 which were modernised by the landlord at the commencement of their leases, and the other flats, which were not, but we consider that such modernisation as was carried out by the landlord would be fairly dated at the valuation date, and would add little to the value of the flats at that time.

30. We consider that some adjustments require to be made to reflect the floors on which the flats are situated. Both Mr Curran and Miss Ellis agreed that 20 per cent should be deducted from the otherwise appropriate value of Flat 1 for its basement location, and we agree, with

some misgivings. We consider that the ground floor flats at the front of the block, which can be overlooked from the street, are less valuable than those on the upper floors, and that the ground floor flat at the rear, Flat 6, is less valuable than the rear flats on the upper floors because it has less natural light, and we have deducted 5 per cent from the value of the three ground floor flats. We regard the first and second floors as the best locations in the building, and have made those floors our standard for the purpose of the valuation. Given the absence of a lift, we consider the third and fourth floor flats are marginally less valuable than those on the first and second floors, and we have deducted 2.5 per cent from the first and second floor values to reflect their location.

31. As to the shape, layout and outlook of the flats, the rectangular flats to the west of the staircase tend to be larger than those to the east. The flats on the fourth floor west are somewhat smaller than the other flats to the west, but their open views and balconies and the absence of flats above compensate for that. The flats on the west have a less conventional shape but give scope for imaginative improvements and can become, with good design, very attractive units. The flats to the west also have a better outlook over Red Lion Square than those to the east. Mr Curran valued the flats to the east at a higher rate per square foot than those to the west, but, all in all, we have concluded that, where there is room for a bath in the bathroom, no distinction should be made between the flats to the east and the flats to the west of the staircase.

32. However, Miss Ellis took the view that the value of the flats at the rear of the block (Flats 6, 9, 12, 16 and19) should be discounted by £5000 because their bathrooms are too small to accommodate a bath. Mr Curran made no such distinction. We agree with Miss Ellis on this issue. Although we consider that the likely profile of the purchaser of a flat in this block is such that he or she might well opt for a shower room rather than for a bathroom, we do accept that a small bathroom is a disadvantage, and, in addition, these flats tend to have a poorer outlook than those which face the Square or Princeton Street, and we have adopted her proposed

discount of £5000 for both these factors.

33. Mr Curran allowed for size by valuing the flats on the basis of a rate per square foot. Miss Ellis considered that no adjustment for size required to be made to the values on the flats on the ground to the third floors, and that the smaller fourth floor flats had the compensating advantage of balconies. We have decided that, in this block, a purchaser of any of the flats except Flat 1 would not distinguish the value of the flats on grounds of size alone, and we have therefore adopted Miss Ellis's approach on this issue.

34. We have therefore, in arriving at the values of the existing leases of what we consider to be a standard flat, namely a flat on the first or second floor at the front of the building, adjusted the comparable sales of Flats 6, 7, 8 and 16 as follows. The sale price of Flat 6, which was £222,000, if adjusted for improvements, the small bathroom and its ground floor location, produces a figure of £223,150. The sale price of Flat 7, which was £235,000, when adjusted for improvements and its ground floor location, produces £226,300. Flat 8, sold for £220,000, when adjusted for improvements, produces £215,000. Flat 16, adjusted for its third floor location, for lease length and, for time, by reference to the Savills Index, produces only about £185,000 - £190,000, but we consider that we should draw from this that the local market has risen more than the Savills Index suggests, rather than that we have undervalued the improvements to the other comparable flats. Taking a broad view, we have valued a standard flat at £220,000 at the valuation date.

35. We regard Flat 1, though a two bedroomed flat, as worth only about 50 per cent more than a standard flat on grounds of size alone. It is very subterranean in feel, and, but for the agreement of the valuers that a deduction of 80 per cent should be made for its basement location, we might have considered a larger deduction for this factor. We have also borne in mind that it was said to be in poor condition, indeed "uninhabitable" and suffering from rising

damp at the date of the lease (not disputed by Miss Ellis), and that it is not suggested that it was a term of the lease that it be brought up to a habitable standard. We do not regard Mr Curran's use of Kingsgate as a comparable as helpful because it requires so many adjustments. Taking all the relevant factors into account, we have come to the conclusion that the value of Flat 1, unimproved, is £260,000.

36. Applying the adjustments we have set out above, we have concluded that the total value of the existing leases is £3,619,000, as follows:

Flat 1	£260,000
Flat 2	£150,000
Flat 5	£209,000
Flat 6	£204,000
Flat 7	£209,000
Flat 8	£220,000
Flat 9	£215,000
Flat 10	£220,000
Flat 11	£220,000
Flat 12	£215,000
Flat 14	£220,000
Flat 15	£214,500
Flat 16	£209,500
Flat 17	£214,500
Flat 18	£214,500
Flat 19	£209,500
Flat 20	£214,500

ii. The relativity between the values of the existing leases and the freehold

The nominee purchaser's case

33. Mr Curran proposed a relativity of 93 per cent between the existing lease and freehold values. He first considered a table of relativities produced by Savills and included in appendix 9 to his proof. This showed a relativity of about 89.5 per cent for an enfranchiseable 71.4 year lease. He then considered 14 sales of flats in other blocks in the locality, of which he gave details in his appendix 8. One of them was with a share of the freehold and six others were of leases of over 100 years. He said that these sales indicated that the maximum price which might be paid for a one bedroomed flat of similar size to those in Kingsway Mansions was about £255,000. He continued that he considered that the virtual freehold of a flat on the first floor of Kingsway Mansions would sell, if the flat was in excellent condition, for about £265,000, and that an unimproved flat would sell for about 75 per cent of that figure, or £198,750, showing a relativity to his existing lease of 96 per cent. He then took an average of the 89.5 per cent relativity which he had derived from the Savills table, and 96 per cent derived from his own calculations, giving 93 per cent.

34. Miss Ellis adopted a relativity of 87.5 per cent, based on a graph showing the combined researches of a number of firms of valuers which she attached to her proof as appendix 5. She said that the range of opinion shown by this graph was about 85 per cent to about 90.5 per cent for a lease of this length and that she had adopted a relativity slightly below the mid point of that range.

35. We have doubts about Mr Curran's approach on this issue. It is not clear to us why he chose to rely only on the Savills table, which, he said, does not cover Holborn, and which appears to relate to leases which are enfranchiseable, whereas the Act requires us to assume otherwise.

And we do not consider either his conclusion that the virtual freehold of an improved flat in Kingsway Mansions would sell for £265,000, or his conclusion that, unimproved, it would sell for 75 per cent of that figure, to be soundly based on market evidence. In our view Miss Ellis's approach is the more likely of the two to produce an accurate result, and, in the absence of good market or settlement evidence, we have adopted a relativity of 87.5 per cent as she proposed.

iii. Development potential

36. The headlease reserves to the freeholder the right to construct additional flats on the roof, although the occupational underleases do not. The nominee purchaser's case is that a purchaser would not pay any, or at any rate other than a nominal, amount for such a right in the circumstances of this case The case for the landlord is that the value of the freehold is significantly enhanced by the hope or potential that one further flat can be built on the flat roof of the block.

The nominee purchaser's evidence

37. Mr Curran said that he was a chartered town planner but that he did not practise as such or hold himself out as having any specialist expertise in the field of planning. He said that it was difficult to be precise about the chances of obtaining planning consent without a detailed scheme, but, on the information available, he considered the chances of obtaining planning permission for any development on the roof to be probably significantly less than 50 per cent. He said that no such application had ever been made by the freeholder, and that, if an application were made in the future, he had been informed that all the existing leaseholders would object to it. He produced a letter from the planning authority, Camden, confirming that they would

consult adjoining occupiers if a planning application was received, and a letter from the "Red Lion Tenants & Residents Association Leaseholders Group", whose co-ordinator is based in Culver House, a nearby block, stating that they would object to such an application.

38. Mr Curran produced and referred to the relevant policies in Camden's Unitary Development Plan and in the Bloomsbury Conservation Area Statement, and concluded that any rooftop development would face, in particular, problems posed by Policy EN19 of the Unitary Development Plan (loss of privacy posed to adjacent buildings), Policy EN24 of the UDP (eroding or not preserving the existing roof line), and Policy 9.13 of the Bloomsbury Conservation Area Statement (the provision of a roof extension which might result in an imbalance to the proportions of the existing building). All things considered, he believed that planning consent would be difficult to achieve. The best chance would be for a one bedroomed flat. The larger the size of the flat, the more difficult he considered that it would be to obtain consent.

39. Mr Curran said that if an additional flat or flats were built on the roof it was likely that a lift would have to be installed. This would not be possible within the existing staircase, although it might be possible to attach a lift to the exterior of the building at the rear. He produced a note of a discussion which he had held with an officer of Camden who had indicated that there might be issues of ventilation and smoke extraction to be dealt with if windows had to be blocked in to provide access to the lift, and that the fire escape route on the roof would have to be maintained in any event.

40. Mr Ilsley, a structural engineer, produced a report and gave evidence on the question of whether the existing structure was capable of sustaining the load from any additional storey or storeys at roof level. He explained that in September 1941 the block was hit by a bomb which destroyed the original timber mansard roof. After the war, the top floor was rebuilt with solid

brickwork which was heavier than the previous structure, representing an increase in the total dead load of about 18 per cent. To sustain any further increase in loading, the capacity of the existing brickwork at roof level and foundation level, the capacity of the existing foundations, and the bearing capacity of the underlying soils would have to be assessed. He considered that the existing brickwork at roof level would be able to support a rooftop extension, but that the existing rear side elevation at basement level, which was already showing signs of compression failure at the brick piers, could not. Any significant load would require the strengthening of the existing foundations by underpinning in one of a number of different ways, all of which would involve disrupting the tenants of the basement flats, and probably requiring them to vacate their flats. (He considered that it would in any event be desirable to strengthen the brick piers, which would disrupt the tenants of the basement, though, presumably, less than would be the case with full underpinning.)

41. Mr Ilsley also said that the eastbound tunnel of proposed Crossrail link across London, which would pass directly under Red Lion Square, less than 10 metres from Kingsway Mansions, would cause additional problems. He said that, even if the existing foundations and load bearing brickwork structure did have enough excess capacity to support the additional rooftop loads, the stringent Crossrail rules, contained in their Guidelines for Developers, would not allow any additional loading to take place. However, on the second day of the hearing, the landlord's advisers produced a letter dated 29 September 2003, which they had just obtained from Crossrail, which stated that in practice, there was considerable flexibility in the criteria set out in their brochure for developers, and that it was "very unlikely" that the minor works mentioned would be of concern to Crossrail. In the light of this letter, Mr Small accepted in his final submissions that, at the valuation date, an informed purchaser would know that such a letter could probably be obtained and that the Crossrail link was not a significant consideration in assessing the development value of the roof.

The landlord's evidence

42. Mr Morris said that he advised on planning policies, planning strategy, the making of planning applications and planning appeals and related matters. Much of his work over the past 30 years had been involved in town planning and in the effects of town planning on investment and valuation. He considered the relevant policies in the Camden Unitary Development Plan in the context of the Council's objective to create more residential accommodation wherever that was reasonable. He described the character and scale of the surrounding area, observing that two neighbouring blocks had an extra storey and were taller than Kingsway Mansions. He said that the corner buildings round Red Lion Square tended to be "landmark" buildings, forming "bookends" to the terraces between them, and that in the context of current planning policies, an additional storey on the subject block would be appropriate. He concluded that it should be possible to achieve some additional development on the roof, but that, having regard to the lower level of Omnium Court, the adjacent block in Princeton Street, there might be a particular need to set back the roof extension at that end of the building, and that his estimate of the planning gross area of an appropriately mansarded roof extension was thus in the order of 70 sq m, or 750 sq ft.

43. Mr Neill said that he had experience in the provision of additional floors to buildings and that his role in such projects had included the preparation of feasibility reports. He said that he had been instructed to advise the freeholder on the feasibility of constructing additional accommodation on the roof of the block. He had observed the cracking to the brick piers at basement level on which Mr Ilsley had commented, and, in his written proof, he said that he considered that the cracks had been caused by the load of the water tanks and their housings. However, in his oral evidence he agreed that Mr Ilsley might have been right to say that the additional load from the fourth storey which replaced the original timber structure had caused the cracks. Mr Neill said that he had discussed with Mr Morris the form which the new flat

might take, and he produced, as his exhibit 3, a plan showing the footprint of the new flat as they envisaged it. He considered that the cost of building such a flat would be £140,000, excluding professional and local authority fees and VAT on those fees, and that the gross cost would be about £170,000.

44. Mr Neill, though not a structural engineer, considered the structural implications of such a development. In his written statement, he concluded that it was extremely unlikely that structural difficulties would be encountered which would prevent the construction, but that none of the final details could be ascertained until destructive investigations had been undertaken into the nature of the roof structure and of the foundations. He also said in his written statement that, if strengthening of the foundations was found to be necessary, this could be undertaken without access to either of the basement flats, but in his oral evidence he said that he did not stand by that. He also said in his oral evidence that, in general, he agreed with Mr Ilsley's loading calculations.

45. Cross-examined, Mr Neill agreed that it would be unwise to spend a large sum to get a small return, and that, on the valuation date, it was "odds-on" that the project would run into difficulties and it would be difficult to advise a client to spend serious money without a serious chance of a good return. He agreed that he would certainly not advise a client to spend £130,000 to buy the right to develop the roof (the figure then suggested by Miss Ellis as its "hope" value).

46. Miss Ellis said that a purchaser, with the benefit of Mr Morris's advice that it should be possible to obtain planning consent for a dwelling with a gross external area of 70 sq m, would increase his bid to reflect the development potential. She said that, after allowance had been made for a mansard roof on the Princeton Street and Red Lion Square frontages and the necessary walls on the other two sides, the gross internal area of the flat would be likely to be 56.2 sq m, or 605 sq ft. She considered that the new penthouse would be readily saleable, even

without a lift, and she "conservatively" valued it at £450,000. She believed that the roof with planning consent would sell for at least half the value of the built unit. She produced a residual valuation, based on building costs of £170,000, showing a value of £146,249 for the roof without planning consent. She then, in her written statement, assumed that a purchaser would make a further deduction of £15,000 for the uncertainty of obtaining planning consent and concluded that he would pay £130,000 for the development potential. In her oral evidence she accepted that she had underestimated the risks and that her figure was unrealistic in the light of the evidence which had been given, particularly by Mr Neill. She also accepted that, if a developer found that he would have to do work to the foundations, he would not carry out the development. She revised to £138,500 her valuation of the roof without planning consent, and increased her discount for risk to £40,000, and thus concluded that the development value of the roof on the valuation date was around £100,000.

Counsel's submissions for the nominee purchaser

47. Mr Small submitted that, at the valuation date, the additional value attributable to development potential was nil. At that date, he submitted: no-one had attempted a rooftop development, although the present freeholder, part of the Freshwater Group of companies, had owned the property for about 30 years; no-one had applied for planning permission; no-one had carried out any tests to see whether an extra storey could be sustained; and no-one had obtained an assurance from Crossrail. It was agreed between the experts that, if the extra storey was to be built, the foundations to the building would need to be upgraded, that this would be impossible without obtaining vacant possession of the basement. The problem, he said, at the heart of the suggested speculative development was that the return was all or nothing. A developer would not spend £100,000 or thereabouts for the right to develop the roof, with the risk of losing it all, unless the possible return was very high. Mr Neill had conceded that the

suggested development was not commercially feasible. In any event, he said, the development would not be possible because there was no reservation in the leases by the landlord permitting such development, that to develop the roof would involve a breach of the landlord's repairing covenant (as in *Devonshire Reed Properties v Trenaman* [1997] 1 EGLR 45), and it would be impossible to carry out the works without creating serious disturbance, at least to the occupants of the top floor, which would amount to a breach of the covenant of quiet enjoyment.

Counsel's submissions for the landlord

48. Mr Denyer-Green reminded us that the tribunal does not have to decide whether the foundations would require strengthening or whether planning consent would be granted, but only how much extra a hypothetical purchaser in the open market would pay for the freehold in the light of the evidence he had heard. *Devonshire Reed Properties v Trenaman* could be distinguished along the lines of *Hannon v 169 Queensgate* [2000] 1 EGLR 40. All the risks were fully reflected in the price advanced by Miss Ellis

Decision

49. We have come to the conclusion that no sensible purchaser would pay for the prospect that this roof might be developed. While we acknowledge that it is not our task to decide whether planning consent would be granted, or precisely what the other risks and the costs would be, we have seen the roof and inspected the rooflines from the street below and from across Red Lion Square and Princeton Street. It is clear from the plan appended to Mr Neill's report, and, indeed, it was not disputed, that the flat drawn on the plan would extend almost to the edges of the roof overlooking both Red Lion Square and Princeton Street, and it would, we are satisfied, extend

above the height of the chimneys which are a significant feature of the Princeton Street frontage. We are quite satisfied that a sensible purchaser who conducted a similar inspection of the property would conclude that any flat which might be built on the roof might have to be, if anything, smaller than that envisaged in the plan, and that it would be in any event so small, probably with no lift, and the costs and other obstacles would be so great, that he would decide not to waste his money. We agree with Mr Small that developers are generally neither fools nor gamblers, and that they would neither risk a large sum nor throw away a small one, given the risks that planning consent might not be granted at all, and/or that the foundations might need to be strengthened, involving vacating the basement flats, which was agreed not to be feasible, and/or that the tenants of the top floor might obstruct or prevent the development. Had this development been the potentially profitable one which the landlord's advisers describe, we think the present landlord would already have taken steps towards carrying it out.

iv. Legal costs

50. We are asked by the nominee purchaser to determine at this stage the reasonable legal costs recoverable by the freeholder under section 33(1) of the Act. Mr Serota, of Wallis & Partners, the freeholder's solicitors, addressed us on this issue and said that he did not object to a determination of the costs recoverable under sections 33(1)(a) (b) and (c), because these costs have already been incurred. He did, however, object to a determination of the conveyancing costs. Indeed, Mr Denyer-Green submitted that we had no jurisdiction to determine the conveyancing costs, because the tribunal's jurisdiction under section 33(1) extends only to costs *to the extent that they have been incurred.* Mr Small said that it was plain from section 91(2)(d) of the Act that the tribunal had jurisdiction to determine *the amount of any costs payable*, and that we could thus determine the conveyancing costs even though they have not yet been incurred, and that we should do so to avoid delay. We are inclined to agree with Mr Small that

we have jurisdiction to determine the conveyancing costs at this stage, but we prefer not to do so until the conveyancing has been done and we can decide, if they cannot be agreed, whether the costs are reasonable. Such a decision need not cause significant delay and can be determined by this tribunal on the basis of written submissions.

51. The freeholder's costs schedule for the legal costs apart from conveyancing showed work carried out by a partner charging £300 per hour, and by an assistant charging £180 per hour. Mrs Israel agreed in her written submission on costs that a reasonable charging rate for a partner was £250 per hour and, for an assistant, £180 per hour. We accept that £300 per hour is not unreasonable for a partner in a Central London firm with expertise in the field, and we consider the costs set out in the schedule prepared by Wallis & Partners to be reasonable and recoverable under section 33(1).

Determination

52. Accordingly, we determine that the price to be paid for the freehold is £276,623, in accordance with the valuation which is attached to this decision, and that the freeholder's legal costs recoverable from the nominee purchaser, excluding conveyancing costs, are £1908 plus VAT of £333.90, a total of £2241.90.

CHAIRMAN.....

DATE 21 December 2003

Kingsway Mansions Red Lion Square London WC1
Valuation date 16 January 2003

Value of Freeholder's interest

Term				
Agreed value of rent			11,865	
Reversion in June 2074 (existing leases = 87.5% reversion)				
Exising lease value	3,619,000			
Capital value		4,136,000		
PV of £1 71.42 years @ 7.5%		0.00571	23,626	
Value of Freeholders Interest				35,491
Value of Intermediate Lessees Interest				
Agreed at				754
Vendors share of marriage value				
After marriage				
Tenants near freehold interests			4,136,000	
Before marriage				
Freeholders interest		35,491		
Intermediate Lessee's interest		754		
Nominee Purchaser's interests				
Flat 1	260,000			
Flat 2 agreed at	150,000			
Flats 5 and 7 @ £209000	418,000			
Flat 6	204,000			
Flats 8, 10-11,& 14 @ £220000 each	880,000			
Flats 9 & 12 @ £215000 each	430,000			
Flats 15, 17, 18 & 20 @ £214500 each	858,000			
Flats 16 & 19 @ £209500 each	419,000			
Capital value		3,619,000	3,655,245	
Gain on marriage of interests			480,755	
share @ 50%				240,378
Enfranchisement price				276,623

Apportionment of price

	Interest	Marriage Value	Total
Daejan	£35,491	£235,378	£270,869
Fencott	£754	£5,000	£5,754
	£36,245	£237,379	£276,623