UPPER TRIBUNAL (LANDS CHAMBER)

Neutral citation number: [2023] UKUT 32 (LC) **UTLC No: LC-2022-124**

Royal Courts of Justice,
Strand, London WC2A 2LL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – COLLECTIVE ENFRANCHISEMENT – roof development value - prohibition on subletting - deed of variation value – additional property value

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

CHARLES HUNT (HOLDINGS) LIMITED

Appellant

-and-

77-82 BRIDLE CLOSE FREEHOLD LIMITED

Respondent

Re: 77-82 Bridle Close,
London,
EN3 6EB

Judge Elizabeth Cooke and Mrs Diane Martin MRICS FAAV

Heard on: 16-17 November 2022

Decision Date: 7 February 2023

Mr John Yianni for the appellant, instructed by Vanderpump and Sykes
Mr Edward Blakeney for the respondent, instructed by Bonallack & Bishop

The following cases are referred to in this decision:

Duval v Randolph Crescent Limited [2020] UKSC 18
Francia Properties Ltd v St James House Freehold Ltd [2018] UKUT 79 (LC)
Triplerose Limited v Beattie [2020] UKUT 180 (LC)

Introduction

1. The appellant, Charles Hunt (Holdings) Limited, is the freeholder of 77–82 Bridle Close ("the property"), a detached two-storey block of six flats in Enfield, north of London with a surrounding garden area. The appellant also owns two identical blocks adjacent to the property. The respondent, 77–82 Bridle Close Freehold Limited, is the nominee purchaser for the three leaseholders who have exercised their right to collective enfranchisement of the building. This is an appeal from a decision of the First-tier Tribunal ("the FTT") on the price to be paid for the freehold of the property.

2. The appellant was represented by Mr John Yianni and the respondent by Mr Edward Blakeney and we are grateful for their submissions.

3. In this decision we set out first the factual and legal background to the appeal; we explain why permission was granted and why a re-hearing was ordered, and then discuss in turn the grounds of appeal. We will refer to the appellant as the freeholder and the respondent as the nominee purchaser.

4. It is worth saying at the outset that the primary reason for the grant of permission to appeal was that the FTT's decision about the development value of the roof space – which as we shall see is the central issue in the proceedings - rested upon its finding that the freeholder's expert had made an error in his calculations. There had been no suggestion at the hearing that the expert had made a mistake, and the FTT did not give the parties the opportunity to comment after the hearing once it had formed the view that there had been a mistake. The FTT's finding is now agreed to be wrong; there was no mistake, as the FTT would have discovered had it given an opportunity to comment. The appeal is a useful reminder of the need to allow submissions to be made when a court or tribunal has a significant new idea after the hearing is over.

The factual background

5. The property is a two-storey T-shaped block of six flats constructed of brick and concrete under a pitched and tiled roof. There is a communal entrance to the side of the building leading to 77, 78 and 79 on the ground floor, with stairs to 80, 81 and 82 on the first floor. Four of the flats have two bedrooms and a gross internal floor area of between 650 sq ft and 725 sq ft; the other two flats have one bedroom and an internal floor area of approximately 550 sq ft. There are communal grounds to the side, front and rear of the block. The loft space of the block is accessed from a ceiling hatch in the first floor communal hallway. The interior of the roof space has a ridge height of approximately 3.2m, with some timbers between joists and purlins but no water tanks or extensive pipework within the space.

6. Each of the leases is held for a term of 999 years from 25 March 1963. The original ground rent of £15.75 per annum has since been increased to £100 per annum for 77, 79 and 80.

7. Section 1 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") confers upon qualifying tenants the right to acquire the freehold of premises to which the 1993 Act applies. It applies to self-contained blocks of flats such as the one in question here; the qualifying tenants are also entitled to acquire property that the tenants are entitled to use in common with others (section 1(3)). The price to be paid for the block and any such additional property is to be calculated in accordance with the provisions of Schedule 6 to the 1993 Act.

8. The nominee purchaser served an initial notice to purchase the freehold of the property under s.13 of the 1993 Act on 2 April 2020, which is the date of valuation. The plan attached to the initial notice showed the area of communal grounds around the property as "additional property" to be purchased pursuant to section 1(3). The proposed purchase price, or premium, for the property was £9,500 plus £500 for the additional property. In its counter notice the freeholder proposed a total premium of £380,800.

9. An application was made to the FTT for a determination as to whether the initial notice was valid, whether the nominee purchaser was entitled to purchase the additional property, and as to the price to be paid.

10. The FTT determined that the notice was valid and that the nominee purchaser was entitled to buy the additional property, and there is no appeal from those findings. The FTT also determined the price payable by the nominee purchaser. Some elements of the price were agreed; in dispute were the development value of the roof space, the freeholder's claim that compensation was payable because the purchase would make it more difficult to develop its two nearby blocks, and whether the price should include value arising from the potential for the freeholder to sell deeds of variation to permit subletting of the flats.

11. In its decision dated 21 January 2022 the FTT determined that the roof space had no development value; that no compensation was payable due to ownership of the sister blocks and that there was no value arising from the potential for deeds of variation. The FTT determined that the premium payable should be £8,000, the figure put forward by the expert for the nominee purchaser.

The appeal

12. The greatest component of the price claimed by the freeholder was the development value of the roof space of the building. Its case was that either one or two flats could be constructed and sold at a significant profit. Leaving aside the figures for the moment, the primary reason why the FTT decided that there was no development value was that in considering the figures after the hearing it came to the conclusion that the freeholder's expert had made a mistake. It decided that he had omitted from his calculations of the cost of development, on a per square foot basis, the area of the floor of the roof that would fall outside the new flat or flats themselves, under the eaves. There is no dispute that the FTT was wrong about that; the expert had used the correct measurements. Because it did not offer the parties the opportunity to comment on the point the FTT made its decision on the wrong basis.

13. The freeholder sought permission to appeal for that reason, and also on the grounds that the FTT had been wrong about deeds of variation, and about the claim in respect of the planning risk to the sister blocks. The nominee purchaser asked permission to cross-appeal in the event that permission was granted, on the ground that there was no development value in the roof space for other reasons. The Tribunal granted permission to appeal on the procedural ground that the parties had not been asked to comment about the idea that the freeholder's expert was mistaken. Rather than putting the parties at risk of the matter having to be remitted to the FTT if the appeal on procedural grounds was successful, the Tribunal directed that the appeal would be by way of re-hearing on the valuation issues.

14. That meant that the parties were free to argue in the appeal all the elements of the price payable, and to call expert evidence. Mr Jason Mellor of Maunder Taylor in Whetstone, London provided expert valuation evidence for the freeholder. Mr Mellor is an Associate Member of the RICS who has been involved in the preparation of valuations for leasehold enfranchisement for over 15 years. Mr Peter Loizou MRICS of Appraisal Surveyors in Barnet, London provided expert valuation evidence for the nominee purchaser. Both experts had provided reports for the FTT and then supplemental reports in the appeal; Mr Mellor attended the hearing and was cross-examined; by the time of the hearing Mr Loizou was no longer instructed by the nominee purchaser and so did not attend. We bear in mind that it is therefore difficult to attach a great deal of weight to his evidence, but we consider it where relevant.

15. Immediately before the hearing Mr Mellor's assessment of the premium payable for the freehold of the property was £155,000, made up (with some rounding) as follows:

    The value of the ground rents: £5,788
    The ability to grant deeds of variation to permit subletting: £60,000
    The value of the garden: £2,000
    The development value of the roof: £62,000
    Compensation for planning risk to the sister blocks: £25,000

16. Mr Loizou's position, from his report to the FTT as slightly amended in his supplemental report, was that the premium payable was £8,000, made up (again with some rounding) of:

    The value of the ground rents: £7,243
    The value of the garden: £500

17. Because both experts assessed the value of ground rents + garden at a round figure of £8,000, the difference between the two figures for the value of the ground rents was not immediately obvious. It became clear in discussion at the hearing that Mr Loizou's £7,243 appears to have included, in error, a small value for the benefit of the freehold vacant possession value ("FHVP") of each flat recoverable by the freeholder at the end of the 999 year lease. However, when discounted at the agreed deferment rate of 5%, the FHVPs so far in the future would have no value today. We therefore adopt Mr Mellor's figure of £5,788 as the basic value of the freehold based on capitalised ground rent.

18. Prior to the hearing the matters said to be in issue were, according to the skeleton argument prepared by Mr Yianni for the freeholder:

    a. Compensation for diminution in value of the sister blocks

    b. Whether there was value in the ability grant deeds of variation to permit sub-letting

    c. The development value of the roof space

    d. The value of the additional property, to which the FTT had not ascribed a value.

19. At the start of the hearing Mr Yianni said that the freeholder no longer claimed that the purchase would make it less likely that it could get planning permission to develop the sister blocks. That of course removes £25,000 from Mr Mellor's total price; it has a further consequence which we discuss below (paragraph 42). We heard argument and expert evidence about the other three issues.

20. We now turn to the issue about the deeds of variation, which is primarily an issue of law, before examining the development value of the roof space which turns entirely on expert evidence. Finally we consider briefly the value of the additional property.

The value of the ability to grant deeds of variation

21. The leases each contain the following covenant at clause 2(2)(xvi):

> "That the Tenant will at all times during the said term keep and occupy the said flat hereby demised as and for a single private residence in one occupation only."

22. The freeholder's case is that this clause straightforwardly requires the tenant to occupy the flat and therefore prohibits sub-letting. It therefore has the ability to take a premium in consideration of deeds of variation varying the leases so as to remove the prohibition on sub-letting. The freeholder itself has not done so as its firm policy is not to permit sub-letting, but if as a matter of law it is able to do so then that ability adds value to the freehold and must be paid for by the lessees.

23. Mr Blakeney for the nominee purchaser argued that the provision set out above does not prohibit sub-letting; in the alternative he challenges the freeholder's evidence about the value of the ability to vary the leases in return for a premium.

24. We therefore have to decide first whether clause 2(2)(xvi) prohibits sub-letting. The FTT found that it did not prevent sub-letting to a single family, which need not be the tenant's own family, although it prevented sub-letting as a house in multiple occupation.

25. We regard that finding as contrary to the plain words of the covenant. It requires the tenant to occupy. It cannot be equated with covenants seen elsewhere which require the tenant, for example, not to use or permit the flat to be used "for any purpose other than as a private dwellinghouse for occupation by one family at any one time". That was the covenant in issue in *Triplerose Limited v Beattie* [2020] UKUT 180 (LC), to which the FTT referred, where the Tribunal found that short-term Airbnb-type lettings were in breach of covenant. But this covenant goes much further and is quite different in its wording and effect.

26. We note that previous FTT and county court decisions about this covenant have found that it prohibits sub-letting; none of those decisions is binding on the Tribunal but we observe that those decisions were correct.

27. Accordingly, we agree with the freeholder that sub-letting is prohibited in all six leases in the property.

28. There is therefore some force in the freeholder's case that it could release the covenants by deed of variation in return for a premium, and that a hypothetical purchaser of the freehold would pay for the ability to do that.

29. It was Mr Mellor's opinion that the hypothetical purchaser would include a further £60,000 in the price they would pay for the freehold, to account for the ability to obtain payment for deeds of variation when the leaseholds are next offered for sale.

30. Mr Mellor assessed the potential uplift in value which would be achieved by lifting the restriction on subletting at £47,500 for each flat. He arrived at that figure by taking the freehold vacant possession value ("FHVP") of the two-bed flats, which would have no restriction on sub-letting and had been agreed by the two expert witnesses to be £287,500, and then comparing the price paid for actual sales of two-bed flats in the property and the sister blocks in recent years. 77 sold in July 2019 for £260,000, 82 sold in August 2020 for £240,000 and 65 sold in February 2021 for £270,000, giving an average price of £256,000. Mr Mellor then adjusted that average value downwards to £240,000 in view of the condition of two of them. He attributed the difference between that and the agreed value of the freehold, being £47,500, entirely to the absence of a sub-letting restriction; that is 17% of the value of each flat.

31. Mr Mellor then considered in light of that what would be the freeholder's price for a deed of variation; his opinion was that it would be logical for 50% of the uplift to be paid to the landlord in consideration of release, making £142,500 altogether. He took the view, in light of data from Nethouseprices, that in this block of six flats there is one sale every two years, so a hypothetical purchaser will have to wait on average six years to take a premium on any one flat. Taking account of that period and applying a discount of 40% for commercial risk, he reached a figure of £60,000.

32. Mr Loizou did not attribute any value to the ability to sell deeds of variation because he felt that the fee for such a deed would merely cover the landlord's expenses, and in any event the current policy on the estate is not to grant such deeds. As we noted above, that policy is not relevant because the question is what would a hypothetical purchaser pay for the ability

to release the covenants. And there is no reason why such a purchaser could not seek to profit from the release of the covenant against sub-letting if they were minded to do so.

33. Mr Loizou's evidence is therefore of no assistance to us, but we have grave doubts about the accuracy of Mr Mellor's evidence. He has worked on the basis that the entire difference in values between the agreed freehold value of the flats and his adjusted average of the actual sales figures is due to the restriction on sub-lettings. However, we note that before averaging the individual sale prices had a range of £30,000, and that those differences had nothing to do with the ability to sublet. We conclude that Mr Mellor's adjustment is subjective, and we give very little weight to his assessment of value difference arising from the ability to sublet. He assumed that a deed of variation would be sought on every sale, which appears to us unlikely. In cross examination he maintained that the freeholder receives requests for permission to sub-let, but was not aware of any occasion when a tenant had actually asked for a variation of the lease; that might be because the current freeholder is known to have a policy of refusing permission to sub-let, but equally it is likely that while some tenants would like to be able to sub-let not all would be willing to pay a capital sum in order to do so.

34. Finally, there is some legal risk attached to the grant of deeds of variation. *Duval v Randolph Crescent Limited* [2020] UKSC 18 concerned a block of flats where each tenant had covenanted not to alter the structure of the building. The landlord proposed to grant consent to one of the tenants to make such an alteration, and another tenant sought a declaration that the landlord was not entitled to do so. The leases contained a covenant by the landlord to enforce, at their request and at their expense, covenants given by other tenants for the benefit of all. The Supreme Court held that there was an implied term in the lease that the landlord would not put it out of its power to comply with that covenant by releasing one of the tenants from an absolute covenant not to alter the structure of the building. The freeholder in the present appeal has given a similar covenant to all the lessees, not in the original leases but in deeds of variation of the leases.

35. *Duval* was not referred to in the hearing and we asked counsel for both parties to comment on it afterwards, on the basis that it might prevent the freeholder here from granting deeds of variation. We are persuaded by Mr Yianni's argument that the circumstances in this appeal are not on all fours with those in *Duval*; in particular it is not clear that the covenant against sub-letting benefits the tenants rather than just the freeholder. So we are not in a position, in the absence of further argument, to say that the freeholder would be unable to grant deeds of variation. But it is obvious that there would be a risk that if a future freeholder proposed to grant a deed of variation another tenant might challenge that on the same basis as in *Duval*, and the challenge would not be without substance.

36. For all those reasons it seems to us that a prospective purchaser of the freehold would look with considerable scepticism at the prospect of making money out of the release of the sub-letting covenant. The idea that it would pay even a modest sum for the possibility seems to us implausible and we attribute no value to it.

Development value of the roof space

37. It is not in dispute that it would be physically possible to construct one or two small flats in the roof space of the building. If there is development value there, then the price payable by the nominee purchaser must compensate the freeholder for its loss. The experts disagreed fundamentally as to whether there was any such value. Whether there is any depends upon the likelihood of planning permission being obtained, and for what, and upon the profit to be made taking into account the cost of construction and the legal and other risks.

38. We have not been able to derive much assistance on this question from Mr Loizou's evidence. In his initial report to the FTT he expressed the view that there was no significant development value in the roof space since there was no planning permission at the valuation date. In his supplemental report he confined himself to endorsing the FTT's conclusion.

39. The only detailed opinions and calculations on the question of development value in the roof space came from Mr Mellor, and accordingly in what follows we analyse his evidence in light of points put to him in cross-examination.

40. Mr Mellor assessed the prospective development value of two development options prepared by the freeholder's architects: either one two-bed flat with a gross internal area of 667 sq ft and a one-bed flat of 398 sq ft ("option 1"), or a single two-bed, two-bath flat with balcony of 678 sq ft ("option 2").

41. We said above that Mr Mellor's figure for the development value of the roof was £62,000. At the start of the hearing he revised that figure, raising it by £11,000 on the basis that if it was now agreed that the purchase of this block would not cause any planning risk to the sister blocks, then likewise the development value of this single block should be enhanced on the basis that there was no planning risk attached to its being a single block among three similar ones. In light of that he adjusted his figure upwards to £73,000. That took Mr Mellor's total premium to £141,000 (being £155,000 less £25,000 plus £11,000).

42. There was some discussion at the hearing as to whether this was appropriate. Mr Blakeney argued that the freeholder could not make this adjustment and that it did not follow from the abandonment of the "sister block compensation" point. We determined at the hearing that since it was now agreed that no compensation would be payable for any increased planning risk to the sister blocks, it was fair to assess the development value of the roof space on the same basis so that no additional planning risk was to be ascribed to the fact that it was a single block among three. Accordingly we accepted the addition of £11,000 to Mr Mellor's figure for development value, being simply a reversal of the figure he had attributed to that risk. All Mr Mellor's figures in the discussion that follows are those that he provided after that adjustment had been made.

The likelihood of planning permission being obtained

43. At the valuation date of 2 April 2020 there was no planning consent for development at the property and no request had been made for pre-application advice. Thus, any hope value for development would have existed only insofar as the market, in effect a hypothetical

purchaser of the freehold, would have anticipated the prospect of being able to add value by gaining and implementing a planning permission. That hypothesis involves consideration first of the likelihood of gaining planning permission for a development, and then of whether implementing that development would be profitable.

44. Mr Mellor's evidence and assumptions relied on the events after the valuation date. Pre-application advice was sought on 30 November 2020 on a proposal to develop the roof space of the three sister blocks to provide three two-bed and three one-bed flats. Advice given orally on 4 February 2021 and in writing on 15 April 2021 was supportive in principle of the proposed development, subject to a design change to the dormer windows and provision of further details. An application was submitted on 3 March 2021 for planning permission to convert the roof space of the three blocks to provide five flats (two two-bed, one-bath flats with a gross internal area of 667 sq ft, two one-bed flats of 398 sq ft and one three-bed, two-bath flat of 1,076 sq ft). The application was withdrawn on 13 May 2021. On 24 August 2021 a new application was submitted for planning permission to convert the rear portion of roof space on each block to provide a single 678 sq ft GIA two-bed, two-bath flat with balcony. The design statement explained that the revised application sought to address concerns raised following the earlier application over lack of private amenity space, visibility from the street and the need for additional parking spaces. This application gained planning permission on 11 June 2022. A further application for planning permission to convert the roof space of each block into two flats was submitted on 8 August 2022; the outcome of that application was not known at the date of the hearing. Mr Mellor explained his understanding of the principle of "planning creep", whereby applying first for a smaller scheme can make it easier to gain permission for a larger scheme in due course.

45. Mr Mellor considered that a hypothetical purchaser could be assumed to have made reasonable enquiries about planning prospects before the valuation date, although not a formal pre-application enquiry, and to have sought assurance that there were no legal or structural impediments to development. This accords with the RICS definition of market value, where it is assumed that the willing buyer acts knowledgably and that a period of marketing has taken place, which would allow time for enquiries to be made. Mr Mellor concluded that a purchaser would expect planning permission to be achievable, in disagreement with Mr Loizou's blanket denial of any possibility at all. We accept Mr Mellor's evidence, and as we say below (paragraph 61) the figures for planning risk that he derived from it.

Gross development value ("GDV")

46. For each of the two development options Mr Mellor assessed the value using both a "top-down" approach (to assess the residual value after implementation of development) and a "bottom-up" approach (the market value of the development opportunity assessed from comparative evidence). Both approaches require a figure for the gross development value, in effect the sale price of the development, so we look at that figure first.

47. Mr Mellor started with the agreed figures for FHVP of the existing flats at £287,500 for two-bed flats and £240,000 for one-bed flats. He acknowledged that no comparable

evidence had been discussed between the experts to arrive at these agreed values, but maintained that the value of the existing flats on the assumption of an unencumbered freehold was the best starting evidence for the new flats, which would have no restriction on subletting. For option 1 he adjusted the value of a two-bed flat upwards from £287,500 by 12% net (+15% for new condition, +2% for availability of parking, -5% for eaves disadvantage) to arrive at a sale value of £322,000. The value of a one-bed flat was adjusted downwards from £240,000 by 1% net (the same +12%, but -13% for the smaller size of proposed flat) to arrive at a sale value of £238,000. The GDV of option 1 was therefore £560,000 (£322,000 plus £238,000). For option 2, Mr Mellor adjusted the FHVP figure of £287,500 upwards by 16% (the same +12% as before, +2% for a balcony, +2% for an en-suite bathroom) to arrive at a sale value or GDV of £333,500.

48. We mentioned in paragraph 30 above that in support of his assessment of the value of deeds of variation Mr Mellor had supplied evidence of the sale prices of three two-bed flats in Bridle Close between 2019 and 2021, which ranged from £240,000 to £270,000. Mr Blakeney asked Mr Mellor how he justified his much higher figures. He defended his opinion that the market evidence was affected by the restriction on subletting, which he thought the new flats would not have, and his opinion that none of those sold was in as good condition as a new flat. We will return to this in our discussion later in this decision.

49. In written submissions made after the hearing Mr Blakeney has argued that in light of the mutual enforceability clause (referred to in paragraph 34 above) there is implied a building scheme so that the freeholder would be obliged to grant any new leases on the same terms as the current ones, with a restriction on sub-letting. We are not convinced by that argument, again in light of the fact that the restriction on sub-letting is not obviously for the benefit of the tenants but rather for the freeholder's benefit. Accordingly we accept that the new flats are unlikely to have sub-letting restrictions in view of the fact that a purchaser of the freehold is likely to want to maximise the price of the new flat or flats.

50. The figures of £560,000 and £333,5000 for the GDV of each option remained constant throughout Mr Mellor's various computations produced before the hearing. During the hearing he agreed that an addition of 2% for parking would not apply if, as had been conceded, the landlord had no right to create parking spaces on the area adjacent to the flats over which the leaseholders had rights.

Bottom-up approach

51. Mr Mellor provided four pieces of analysis to establish what percentage of GDV would reflect development value using the bottom-up approach. First he analysed the sale of a roof space development lease, with 122 years remaining, at a two-storey purpose built block of flats known as Mint House, 3-11 Grenfell Avenue, Hornchurch. An application made in 2016 for planning permission to provide a two-bed flat of 750 sq ft had subsequently been withdrawn so there was no permission at the date of sale. The lease was sold prior to auction in October 2019 for £25,000. Mr Mellor assessed the likely value of the completed development at Mint House, by reference to sales of flats within the locality, at £280,000 and noted that the sale price of £25,000 was 9% of that assessment. He extrapolated from that evidence to a figure of 15% of GDV at the property because the

prospect of planning permission for development was stronger, and the development value higher for a freehold than a lease of 122 years. This was the first of his four percentage figures derived from evidence.

52. Mr Mellor then referred to a decision of the FTT in November 2019 in respect of 1-36 Fairfield Close, Finchley, where he had provided expert evidence for the enfranchising tenants on the development value of the roof space in each of six identical blocks. At the valuation date of 25 November 2018 pre-application advice had been received and an application for planning permission, to provide a two-bed flat of 750 sq ft in each roof space, had been made but not decided. The experts had agreed a GDV of £441,875 for each block, and the FTT had determined the development value of the roof space in each block at £70,000. Mr Mellor noted that this value was 16% of the GDV and used it as the second of his four percentage figures. However, we note that the FTT did not derive their figure for development value from the GDV and they commented specifically that it was an approach not to be given much weight.

53. Mr Mellor's third percentage figure was also derived from the FTT decision in Fairfield Close, where the FTT commented that if the bottom-up method of valuation were to be considered critical, and based on the evidence analysed before them, they would adopt a rate of 36% of GDV before discounting for planning and legal risks. Mr Mellor adjusted this down to 33% for the property, due to a lack of economies of scale on a single block, to get £184,800 for option 1 and £110,055 for option 2. For option 1 he applied a discount of 45% for planning risk and £5,000 for legal risk (one third of that used by the FTT for Fairfield Close) to get a site value of £96,640 (17% of GDV). For option 2, a smaller scheme with less planning risk, Mr Mellor applied a smaller discount of 35%, plus £5,000 deduction for legal risk, to get a site value of £66,536 (20% of GDV). The average of 17% and 20% is 18.5%, which was Mr Mellor's third percentage figure.

54. Finally, Mr Mellor analysed a tender exercise for the roof development opportunity at Fairfield Close, which had been carried out by his firm in December 2019 after planning permission had been obtained for a two-bed 750 sq ft flat in each block. The best tender achieved by the firm was £900,000 (£150,000 per block or £200 per sq ft) from which some sums would be deducted for improvements to the existing building required by the leaseholders. Mr Mellor applied the figure of £200 per sq ft to the development options for the property, to get £213,000 for option 1 and £135,600 for option 2. He then made downward adjustments to £190,000 and £120,000 to account for a lower value location, before applying his standard planning risk discounts of 45% for option 1 and 35% for option 2. This resulted in figures of £104,500 (19% of GDV) and £78,000 (23% of GDV) respectively, which Mr Mellor averaged at 21% of GDV.

55. Looking at the four percentage figures of 15% (from the Mint House lease sale), 16% (from the final figure in Fairfield Close), 18.5% (from comment in the Fairfield Close decision) and 21% (from the tender exercise at Fairfield Close), Mr Mellor used 17% of GDV for his bottom-up approach to reach development value. This produced rounded site value figures of £95,000 for option 1 and £57,000 for option 2, which were averaged to £76,000. All these percentage figures were those that resulted from the adjustments at the start of the hearing to remove the assumption of higher planning risk for a single block.

56. In cross-examination Mr Mellor was asked how he could justify his figure of £76,000, three times that of the £25,000 achieved six months before the valuation date for the sale of a roof space at Mint House, given that the planning situation at the property was, like that of Mint House, unknown. Mr Mellor maintained his assertion that the freehold at the property was more valuable than a 122-year lease, the planning situation more likely to be positive (although lacking any evidence at the valuation date for this) and the profit likely to be greater.

57. When asked why he had not used any of the evidence of roof development sales which had been provided in the Fairfield Close case, Mr Mellor said that the evidence had been generally for sales of air space on flat roofs over mid-rise buildings with planning permission, so not relevant to a two-storey property with a pitched roof and no planning permission. It was also dated evidence. He agreed that there was a general lack of evidence in the market of sales of roof space development opportunities in pitched roofs, which he attributed to vendors not selling rather than to a lack of demand from prospective purchasers. In Mr Mellor's experience a freeholder would sit tight and carry out the development itself at a time of its choosing.

Top-down approach

58. Having assessed a site value of £76,000 using the bottom-up approach, Mr Mellor turned to the top-down approach, based on deductions from GDV to establish what residual value would remain to a developer after implementation of a planning permission. His calculations for each option are set out below, showing site values of £91,000 for option 1 and £49,000 for option 2. He averaged these at £70,000.

OPTION 1				
2-bed flat + 1-bed flat				
	GIA (sq ft)			**GDV**
Sale value 2-bed flat	667			£322,000
Sale value 1 bed flat	398			£238,000
	1065			**£560,000**
		£/sq ft		
Build costs on GIA:	1065	£235	£250,000	
Profit on GDV		17.50%	£98,000	
Finance			£10,000	
Sale cost etc on GDV		3%	£16,800	
CIL costs			£10,000	£384,800
Site value before risk				£175,200
Planning risk discount		45%	£78,840	
Legal risk deduction			£5,000	£83,840
				£91,360
SITE VALUE			Rounded	**£91,000**

OPTION 2				
2-bed flat				
	GIA (sq ft)			**GDV**
Sale value	678			**£333,500**
		£/sq ft		
Build costs on GIA:	678	£251	£170,000	
Profit on GDV		17.50%	£58,363	
Finance			£6,000	
Sale cost etc on GDV		3%	£10,005	
CIL costs			£6,250	£250,618
Site value before risk				£82,883
Planning risk discount		35%	£29,009	
Legal risk deduction			£5,000	£34,009
				£48,874
SITE VALUE			Rounded	**£49,000**

59. Mr Mellor's estimate of build costs in his report to the FTT was £295 per sq ft of GIA for each option. This was supported by verbal estimates of unit costs obtained from roof space developers, which accorded with the agreement on construction costs between the experts in the Fairfield Close case and had been checked against a BCIS reinstatement cost

calculator. The lower figures in Mr Mellor's supplemental report for this Tribunal were based on written estimates of development costs for the two options from two roof space developers known to his firm. In cross-examination Mr Mellor agreed that it was necessary to consider the view that a hypothetical developer would take of likely construction costs at the valuation date, but maintained his view that a lower estimate of total costs provided in a more detailed assessment by a builder was preferable to a higher figure per unit and not less reliable.

60. Mr Mellor was challenged on his selection of discounts for planning risk, at 45% for option 1 and 35% for option 2, when at the valuation date there was no evidence for a positive planning outcome. These figures had been referenced against the percentage discount adopted in five decisions of this Tribunal between 2006 and 2018, although Mr Mellor acknowledged that earlier decisions of the Tribunal do not necessarily provide a precedent for determining planning risk at a specific property. As the Tribunal had said in *Francia Properties Ltd v St James House Freehold Ltd* [2018] UKUT 79 (LC), no prospective purchaser would have regard to tribunal decisions in forming its own commercial judgment.

61. In effect the figures of 45% and 35% adopted by Mr Mellor were simply his best attempt to apply the thinking of a prospective hypothetical purchaser who, by the valuation date, would have benefited from informal advice similar to that subsequently obtained by the freeholder (paragraph 45 above) following a pre-application enquiry. We accept those figures.

62. Mr Mellor was also challenged on his figure of £5,000 deducted to account for legal risks, which he defended by reference to a figure of £15,000 determined in the Fairfield Close FTT decision, where there had been more potential for problems. Mr Mellor acknowledged that in his calculations he had omitted a deduction of £1,000 for site purchase costs, which had been referred to in his report.

Mr Mellor's conclusions on development value

63. To arrive at his opinion of development value Mr Mellor took an average (or mid-point) between the two development options for each of the bottom-up and top-down approaches, followed by an average of the result for the two approaches. This produced a final average of £73,000 (£76,000 for the bottom-up approach and £70,000 for the top-down approach), which was Mr Mellor's opinion of development value in the roof space.

Discussion of development value

64. We said earlier that the first stage in assessing development value is to ascertain what view a hypothetical purchaser at the valuation date would take of the likelihood of gaining planning permission for a particular development. The valuation date coincides with the very early stage of national lock-down for Covid-19, which Mr Blakeney submitted would have had an impact on those considerations. We note that the valuation date of 2 April 2020 was only 10 days after the announcement on 23 March 2020 of national lockdown. We return to the market value assumption that a period of marketing would have taken

place before the valuation date, during which the hypothetical purchaser would have taken the opportunity to establish some basic information about planning, legal and structural risks to be accounted for. We do not think that this would all have taken place in the last 10 days before the valuation date and, on balance, we therefore see no need to adjust our assumptions for the Covid-19 situation in this case.

65. At the valuation date there was no evidence to support any assumptions as to the type of roof space development which might receive planning permission, but we consider it is feasible that advice from a planning specialist would have been encouraging of the prospect for development of two additional flats in the roof space. We think that a purchaser would have taken a cautious view, based on calculations of development potential for Mr Mellor's development option 1: a two-bed flat of 667 sq ft and a one-bed flat of 398 sq ft.

66. We are mindful that a GDV of £560,000 underpins both figures and we accept Mr Blakeney's submissions that the adopted sale value for the two-bed flat at £322,000 is very high by comparison with the sale prices of two-bed flats in the property and a sister block between July 2019 and February 2021 (paragraph 30 above). Mr Mellor had used the agreed FHVP value of £287,500 because he viewed it as a benchmark for a new two-bed flat without restrictions on subletting. But it was not underpinned by any comparable evidence and we have explained in paragraph 33 that we do not place weight on his opinion that prices achieved on the sale of two-bed flats at Bridle Close were lower than that figure simply because of the restriction on subletting.

67. We therefore accept Mr Blakeney's submission that sales evidence of existing flats is a better starting point. We did not accept Mr Mellor's analysis of value attributable to the ability of a freeholder to sell deeds of variation for sub-letting, but we do accept the premise that the leasehold of a flat with no restriction on sub-letting would be more attractive in the market as it would appeal to investors as well as occupiers. Some adjustment will be made for that.

68. Turning to the three sales in evidence, Mr Mellor said that his conversation with the agent who sold the three flats had revealed differences in condition between the lowest and highest prices which could account for the differences in sale price. However, no indexation for sale date was done and we have no other analysis to assist us in understanding the range of values. We consider that of the three sales, the best starting point is the price of £240,000 achieved in August 2020 for a two-bedroom flat of 683 sq ft in the first floor of the property. This is the closest sale in time to the valuation date, the closest in size to the proposed new two-bed flat of 667 sq ft, and is the only one of the three situated above the ground floor. Using Mr Mellor's approach, but noting his acceptance that no upward adjustment should be made for parking, we make an upward adjustment of 15% to that figure to reflect the modest order of the sale property by comparison with the condition of a new flat, offset by a downward adjustment of 5% for the disadvantage of being under the eaves. The net upward adjustment of 10% gives a figure of £264,000 before adding for the benefit of unrestricted subletting. We have no evidence to assist us in making an adjustment for this but, doing the best we can, adjust upwards by 5% to a round figure of £277,000.

69. There is no sales evidence to assist us in putting a value on the proposed one-bed flat of 398 sq ft, which is considerably smaller than the existing 550 sq ft one-bedroom flats for which a FHVP value of £240,000 was agreed. In the figures which Mr Mellor adopted for GDV (£238,000 and £322,000) a one-bed flat was worth 74% of a two-bed flat. Applying that percentage to our two-bed value of £277,000 would suggest a new one-bed flat value of £205,000 and a total GDV of £482,000.

70. Mr Mellor's evidence on development value using the bottom-up approach involved a construct of adjustments and averages to arrive at a percentage of GDV. We did not find the approach or the outcome to be helpful and we consider that the hypothetical purchaser would be concerned to know what profit could be made from carrying out the development, which would be assessed using the top-down approach.

71. We agree with Mr Blakeney's submission that Mr Mellor's estimate of build costs at £250,000 (£235 per sq ft) would be viewed by the hypothetical purchaser as too optimistic, and therefore risky. We prefer the figure of £315,000 (£295 per sq ft), originally adopted by Mr Mellor in his report to the FTT, but leave the other elements of his top-down calculation unchanged. We do not make any deduction from GDV for site purchase costs since they will be incurred by the hypothetical purchaser in this case irrespective of development value. This gives a top-down site value of £21,500.

72. We acknowledge that Mr Mellor applied some caution to his values by taking a mid-point position between the calculated site values for development options 1 and 2. We do not accept that the hypothetical purchaser would necessarily take the mid-point of the two options, but we agree that he would consider the risk of achieving planning permission for just one flat. The GDV for option 2, that is the sale value of a single 678 sq ft two-bed flat with two bathrooms and a balcony, can be assessed using the two-bed flat sales evidence of £240,000, as for option 1. We make the same net upward adjustment of 10%, for new condition offset by position under the eaves, and add Mr Mellor's upward adjustment of 4% to reflect the additional bathroom and balcony. This gives a figure of £274,560 before adding 5% for the benefit of unrestricted subletting, to reach a GDV for option 2 of £288,000 (rounded). With build costs at £200,000 (£295 per sq ft) the site value is only £5,750.

73. Our calculations for options 1 and 2 are provided below:

OPTION 1				
2-bed flat + 1-bed flat				
	GIA (sq ft)			**GDV**
Sale value 2-bed flat	667			£277,000
Sale value 1 bed flat	398			£205,000
	1065			**£482,000**
		£/sq ft		
Build costs on GIA:	1065	£295	£315,000	
Profit on GDV		17.50%	£84,350	
Finance			£10,000	
Sale cost etc on GDV		3%	£14,460	
CIL costs			£10,000	£433,810
Site value before risk				£48,190
Planning risk discount		45%	£21,686	
Legal risk deduction			£5,000	£26,686
				£21,505
			Rounded	**£21,500**

OPTION 2				
2-bed flat				
	GIA (sq ft)			**GDV**
Sale value	678			**£288,000**
		£/sq ft		
Build costs on GIA:	678	£295	£200,000	
Profit on GDV		17.50%	£50,400	
Finance			£6,000	
Sale cost etc on GDV		3%	£8,640	
CIL costs			£6,250	£271,290
Site value before risk				£16,710
Planning risk discount		35%	£5,849	
Legal risk deduction			£5,000	£10,849
				£5,862
			Rounded	**£5,750**

74. We have expressed our view that a hypothetical purchaser would recognise the potential for development in the roof space and expect to make some allowance for that in his bid. Using the top-down approach that we have set out, based on a cautious assessment of GDV and including discounts for planning risk, the purchaser would see that there is potential for a modest profit, which is sensitive to the development option which can be achieved and to the final build cost. The only market evidence available as a sense check is that £25,000 was paid in October 2019 for a 122-year lease of roof space at Mint House. There was no planning permission for development at Mint House, although plans for a two-bed flat of 750 sq ft had been drawn up and submitted for planning permission in 2016, before being withdrawn. In comparing the property with Mint House, we acknowledge that the property offers a freehold opportunity, which should be more valuable than the Mint House leasehold. However, at the valuation date for the property no plans for development were in existence and planning prospects had not been explored formally, whilst at Mint House a start had been made in exploring the development opportunity. Moreover, the lack of any further evidence of such sales gives little confidence that there is a strong market for untested roof space development opportunities.

75. We therefore consider that a hypothetical purchaser would allow no more than a round figure sum of £10,000 for the hope value of a roof space development opportunity at the property.

Value of additional property

76. Originally Mr Mellor attributed a value of £2,000 to the communal grounds around the flats to be acquired as additional property, on the basis that the garden has a value as a possible location for parking if required for new flats in the roof. He accepted during the hearing that this would not be possible since the leaseholders have rights over that area. Mr Loizou valued the gardens at £500 without explanation, and did not attend the hearing to provide one, but we accept this figure as an appropriate value for transfer of the additional property to the nominee purchaser.

The premium payable for the freehold

77. Putting the above decisions together with Mr Mellor's figure for the value of the ground rents, we assess the premium payable for the freehold as follows:

Value of ground rents	£5,788
Value of granting deeds of variation	Nil
Hope value for roof development	£10,000
Value of additional property	£500
Total premium payable	**£16,288**

Judge Elizabeth Cooke

Mrs Diane Martin MRICS FAAV

7 February 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.