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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	LON/00BG/OCE/2012/0222
Property:	Cascades and Quayside, 2 - 4 Westferry Road, London E14 8JL
Applicant:	Cascades and Quayside Freehold Limited
Representative:	Anthony Radevsky, instructed by Forsters LLP, solicitors
Respondent:	Cascades Freehold Limited
Representative:	Edwin Johnson QC, instructed by Lorrells LLP, solicitors
Type of application:	Section 24, Leasehold Reform, Housing and Urban Development Act 1993
Tribunal members:	Margaret Wilson Helen Bowers BSc (Econ) MSc MRICS
Date and venue of hearing:	19 and 20 March and 17 April 2013 (inspection 16 May 2013) 10 Alfred Place, London WC1 E 7LR
Date of Decision :	24 July 2013

DECISION

Introduction and background

1. This is an application by a nominee purchaser, Cascades and Quayside Freehold Limited, under section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") to determine the terms of acquisition of the freehold of a development known as Cascades. The respondent, Cascades Freehold Limited ("CFL"), is the registered owner of the freehold. The case is an unusual one in that it is contended by the nominee purchaser that a number of leaseholders have already acquired a share of the freehold interest and have the benefit of a permanent right to pay no ground rent.

2. Cascades comprises two blocks of flats: Cascades Tower and Quayside. Cascades Tower is a multi-storey storey block comprising 165 flats; Quayside is a six storey block comprising nine flats and three shops. There is also an underground car park, a parking area near the entrance of the development with 18 marked parking spaces, a garden, tennis court and an indoor leisure centre with a swimming pool. There is a telecommunications mast on the roof of Cascades Tower. The development is adjacent to the River Thames and a short distance from Canary Wharf.

3. All the flats are held on long leases, originally for terms of 125 years and with 99.52 years unexpired at the valuation date. All the leases reserve rising ground rents, the majority with initial rents of £300 doubling every 25 years and a minority with initial ground rents of £350 or £400, also doubling every 25 years. The management of the property is carried out by Rendall & Rittner Limited as manager appointed by a leasehold valuation tribunal under section 24 of the Landlord and Tenant Act 1987. The appointment was made on 12 October 1999 for an initial period of two years and has been extended from time to time since then. It was most recently extended, unopposed, until 31 December 2015 by order of a tribunal dated 26 July 2010.

4. The notice of claim under section 13 of the Act was given on 14 June 2012, which is the valuation date, and the nominee purchaser's application under section 24 of the Act was considered at a hearing on 19 and 20 March and 17 April 2013. The nominee purchaser was represented by Anthony Radevsky, counsel, instructed by Forsters LLP, solicitors, who called Matthew Rittner of Rendall & Rittner and Marcia Linch, the joint leaseholder of Apartment 212, Cascades Tower, to give evidence of fact and Eric Shapiro BSc (Est Man) FRICS FCIArb of Chesterton Humberts to give expert valuation evidence. CFL was represented by Edwin Johnson QC, instructed by Lorrells LLP, solicitors, who called Andrew Christou MA MRICS, of Robert Irving Burns, to give expert valuation evidence. At the suggestion of the parties, on 16 May 2013, unaccompanied, we externally inspected the exterior of the development in order to see the 18 parking spaces in respect of which there is a dispute.

5. The following matters were agreed:

i. The total gross internal area ("GIA") of all the flats in Cascades Tower is 125,300 square feet, an average of 760 square feet for each flat; the total GIA of all the flats in Quayside is 8880 square feet, an average of 986 square feet for each flat; and the total GIA of all the flats in the two buildings is 134,180 square feet.

ii. The total freehold capital value of all the flats in Cascades Tower is £71,546,356, an average of £433,614 per flat, and the total freehold capital value of all the flats in Quayside is £5,070,522, an average of £563,391 per flat. The total freehold capital value of the shops is £650,000 and the total capital value of the development is therefore £76,617,351.

iii. The total freehold value of the 18 parking spaces, if, which is not agreed, they have a capital value, is £200,000.

iv. No marriage value falls to be paid because the leases had more than 80 years unexpired at the valuation date.

v. There is no development potential which falls to be valued.

vi. The appropriate capitalisation rate for the ground rents, subject to any appropriate adjustment for risk, is 6.5%.

6. The issues were:

i. Whether the valuation should be made on the assumption that some, and, if any, how many, of the leaseholders are not liable to pay ground rent.

ii. Whether the valuation should be made on the assumption that some, and, if any, how many, of the leaseholders had already acquired a share of the freehold.

iii. Whether the 18 car parking spaces fall to be valued as part of the price for the freehold and, if so, their value.

iv. The deferment rate.

v. The value of Vodafone's right to have a telecommunications aerial on the roof.

vi. One of the terms of the transfer.

7. References in this decision to the hearing bundles are by bundle number followed by tab number if appropriate, and by page number thus: 1/1/1 or 1/1.

The issues

i and ii. Should the valuation be made on the basis that some, and, if any, how many, of the leaseholders are not liable to pay ground rent, and/or that some, and, if any, how many, of the leaseholders have already acquired a share of the freehold

The facts

8. It is convenient to consider together the background facts to the first two issues, and we regard it as necessary to set them out in some detail. The following, much of which is not controversial, is taken mainly from the documents, but also from the evidence of Mr Rittner and Mrs Linch, which we accept.

9. CFL was incorporated on 23 June 1989 with a view to purchasing the freehold of Cascades from the developer, Kentish Homes Limited, which was in financial difficulties. The memorandum and articles of association of CFL are at 3/1/from 35.

10. Kentish Homes Limited went into receivership in about August 1989.

11. A letter dated 28 September 1989 (3/1/from 1) was written by Martin Ebbs, a leaseholder, signed "for and on behalf of Cascades Residents' Society", to all leaseholders. It said that the receiver was keen to sell the freehold and was obliged by law to offer the freehold to the leaseholders before dealing with any other prospective purchasers. It included the following:

> *The committee is in favour of purchasing the freehold for the following reasons:*
>
> *1. to exercise control over expenditure in the building;*
> *2. to obtain better value for money in contracting for services to the building;*
> *3. to promote expenditure that is in the interests of the lessees;*
> *4. to resist adverse or speculative development of the grounds or common parts;*
> *5. to ensure a high standard of management with representatives on the spot in the building;*
> *6. to enhance the value of the individual flats;*
> *7. to encourage the prompt payment of ground rents and service charges.*
>
> *However, the ownership of the freehold will be vested in a limited company, to be known as Cascades Freehold Ltd, and the proposal is to allow the owners of each flat to purchase one share in the company that must be sold on any sale of the flat.*
>
> *To purchase the freehold we are arranging a loan for the majority of the price but more funds are required, both for the balance of the price and all costs involved, and then to help pay off the loan as soon as possible.*
>
> *As there are 164* [sic: in fact 165] *units in Cascades, 9 in Quayside and 3 shops, we propose to issue 176 shares in total. We need the commitment of at least 60 lessees before 14 October failing which we will not safely be able to proceed with the purchase. Thereafter the receiver will be entitled to consider other offers - at least one has already been made - and will undoubtedly sell to a company interested mainly in the investment value of the site.*

This may result in limited attention to leaseholders' interests, leading to a deterioration in standards of upkeep. We can only avoid this situation by having the commitment of a substantial number of leaseholders allowing us to buy the freehold now.

Each lessee will be offered a share at a price being 7 times the value of their ground rent ...

The terms under which shares will be sold are:-

i. those who pay the full price by 14 October will be by contract excused payment of all future ground rent due under their leases,

ii. those who commit themselves to share purchase by stage payments by 14th October will pay the ground rent in 1990 and then be excused ground rent thereafter.

Stage payments will consist of:
- £125 for 3 months, first payment by 14th October
- equal payments of the residual amount over the following 10 months
- those will be paid by bankers order (see attached form)

With the letter was included a form to be signed by the proposed shareholder which included *I wish to proceed with the purchase of my share of the freehold,* and giving options for payment.

12. A letter dated 8 April 1990 (3/1/from 5) signed by Dr William Supple as "director, Cascades Freehold Limited", to the leaseholders included:

You may recall that late last year you were approached with an invitation to subscribe for a share in the company ... formed by the lessees to bid for the freehold of the Cascades and Quayside development from the liquidator.

This initiative last year generated a considerable interest as a result of which more than 70 lessees have presently paid towards a share. We now expect to be in a position to proceed next month with the acquisition but at a higher price than that originally agreed. We would therefore like once again to invite those leaseholders who have not yet subscribed to indicate their willingness to do so.

Each lessee will be offered a share at a price being 7 times the value of their ground rent:- ie if that is £150 per annum the share will cost £1050 and so on.

The terms under which shares will be sold are as follows:-

(i) those who pay the full price by 11th May will be by contract excused payment of all future ground rent due under their leases after 1990.

(ii) *those who commit themselves to share purchase after that date or by instalments will pay the ground rent in 1991 and then be excused ground rent thereafter.*

13. On 12 June 1990 Mr Aris Savvides, whose company, Refrose Properties plc ("Refrose"), owned a lease of a flat in Cascades Tower, became a director of CFL.

14. On 13 May 1991 (3/1/from 7) Mr Ebbs wrote to the leaseholders a letter headed "Cascades Freehold Ltd", although signed "for and on behalf of Cascades Residents Society", which included:

> *As you may or may not be aware, the Cascades Residents Society set up a company in late 1989 - Cascades Freehold Ltd - whose purpose would be to acquire the freehold of the building. ...*
>
> *After somewhat protracted negotiations, we are now poised to effect an exchange of contracts for the acquisition with the liquidator responsible for Kentish Homes Ltd and we are now hoping to complete the purchase by 30th June.*
>
> *The way shareholdings have been arranged is for the owners of each flat to purchase one share in the Company that must be sold on any sale of the flat.*

The letter urged leaseholders who had not already become shareholders to do so, again set out the terms upon which they could do so and said:

> *No ground rent will be excused for any leaseholder subscribing after 1st June until 1st January 1992. Ground rent would only be excused thereafter from the end of the half yearly period in which fully paid up subscriptions are made*

The letter concluded:

> *We hope those of you who are not yet shareholders will respond to this offer positively as this is a unique opportunity to share in the ownership of an increasingly valuable asset at the same time collectively control the standards and costs of running the building.*

15. A handwritten document dated 3 June 1991 (3/1/10), signed by Mr Savvides, Dr Supple and Christopher Evans, a solicitor and leaseholder who was the secretary of CFL at the time, provided:

> *The directors of CFL hereby irrevocably agree to issue to Aris Savvides promptly following completion of the purchase by CFL of the freehold of Cascades and Quayside ... ALL unallocated shares in CFL provided that Aris Savvides shall have paid to Evans Butler Wade solicitors the sum of £94,000 ... in sufficient time to be applied towards the purchase price of £165,000 payable to the liquidator of Kentish Homes Ltd with completion intended to take place on Friday 28th June 1991, in consideration for which Aris Savvides has paid £4000 as a deposit for not less than 103 shares.*

16. A letter to "all shareholders" dated 3 July 1991, headed "Cascades Freehold Ltd" and signed by Mr Ebbs as Chairman "for and on behalf of Cascades Freehold Ltd", (3/1/11), included:

> *... I am delighted to inform you that following protracted legal disputes and negotiations, we have successfully completed the purchase of the freehold of Cascades. ...*
>
> *An important decision we have taken is to accept the financial backing of Mr Aris Savvides, a leaseholder and also a director of CFL, as an alternative to taking on bank funding, the terms of which had been revised on less attractive terms. In this way, we are avoiding exposure to risks associated with high interest rates and annual capital repayments which could otherwise be detrimental to the venture.*
>
> *Mr Savvides will hold all unsold shares, but under the condition that any leaseholder may still buy his share of the freehold, but at 8 times ground rents from 1 July to 30 September, or at a negotiated price thereafter and that all other conditions set out in my letter of 13 May 1991 are complied with. We welcome Mr Savvides' backing, which has put the Company in a far stronger financial position. ...*
>
> *With regard to financial arrangements, subscribers should note the following:*
>
> > *printed share certificates will be issued; you should expect to receive these within 6 - 8 weeks*
> >
> > *ground rent rebates will be issued by way of a credit note from [the managing agent] or if applicable its successor ...*

17. The purchase of freehold was completed on 28 July 1991 at a price of £165,000.

18. Either 177 (namely one for each unit, including the three shop premises) or 176 shares (see letter at 3/1/29) - the difference is immaterial - were issued. A sample letter dated 20 December 1991 (3/1/from 13), signed by Mr Evans and headed "Cascades Freehold Ltd" and addressed to a leaseholder, included:

> *I am pleased to be able to pass on to you the share now issued by the Company that relates to your flat. ...*
>
> *In the event that you sell your flat it should be offered to a prospective purchaser. The Company will advise, upon enquiry, as to the current recommended price for the share but this is a matter for negotiation between yourself and any purchaser. You will recollect that the share certificate indicates the entitlement to be excused payment of ground rent otherwise payable in accordance with the terms of your lease.*

19. The share certificate allotted to the Linch family, produced at the hearing by Mrs Linch (1/10/227a), is dated 26 November 1991 and includes:

This is to certify that ... is the registered holder of one share in the above named company numbered ... . This represents an interest in the Company owning the freehold rights of the Cascades and Quayside buildings and lands attributable to Flat 212 subject to the memorandum and articles of association of the company. Upon such share the sum of £1050 has been paid.

The share certificate was accompanied by a letter in the same form as that at 3/1/from 13.

20. At bundle 3/1 from 14 there is a register of shareholders, undated but marked as amended on 16 November 1992. It shows 72 shareholders, including Refrose. 105 leaseholders did not take up a share and Mr Savvides duly acquired those 105 shares in accordance with his agreement with CFL dated 3 June 1991.

21. In circumstances which were not explored at the hearing, a company called Cascades Freehold Management Limited, controlled by Mr Savvides, took over the management of the block.

22. The minutes of the annual general meeting of CFL, at which Mr Savvides was present, held on 17 November 1992 include (3/1/22 at 23):

The terms of the arrangements involving the purchase of shares by Mr Savvides was raised by Mr O'Riordan [a leaseholder] *and the board asked to comment. Mr Evans commented that Mr Savvides paid the sum of £94,000 and purchased all unallocated shares in CFL - not less than 103 shares and this payment would include any shares where lessees fail to complete their share purchase by the freehold purchase completion date or would wish for a refund as did [Flats] 509 and 1007. It was confirmed that as part of this agreement, Mr Savvides would be entitled to collect and benefit from ground rents attributable to those flats where the lessees are not the owners of a share attributable to those flats. It was further confirmed that the ground rent income payable to Mr Savvides from those flats where leaseholders do not own a share in the company is the same arrangement and the benefit enjoyed by all other shareholders*

23. In answer to our question about the meaning of the last sentence of that extract, Mr Radevsky said that his client considered that it meant that Mr Savvides could collect ground rents from those who did not have a share in the same way that the shareholders as a whole had previously been entitled to collect the rents. Mr Johnson did not disagree.

24. On 12 October 1999 after a hotly contested hearing lasting many days, spread over several months, a tribunal appointed Rendall & Rittner as manager of the development under section 24 of the Landlord and Tenant Act 1987. In the course of its decision (2/1/ from 4) the tribunal said (2/1/5) that "*the majority and controlling shareholder in [CFL] is ... Refrose Limited which company is, in turn and in effect, controlled by a Mr Savvides. Mr Savvides is also the sole director and shareholder in [Cascades Freehold Management Ltd]. Accordingly, in substance the ownership and management of Cascades is vested in Mr Savvides*". And, at 2/1/29, it said "*The clear*

evidence of all [CFL's] witnesses was that Mr Savvides, the ultimate directing mind of [CFL] worked on a very 'hands on' basis".

25. After the appointment, the manager demanded, as one would expect, ground rents from all leaseholders and were met, as one would also expect given the circumstances set out above, with a chorus of protests from many leaseholders who said that they had been released from the obligation to pay ground rents. Accordingly, on 14 January 2000 the manager wrote to CFL asking, it is assumed (the letter was not available at the hearing), for its comments. The reply from CFL, dated 16 January 2000, is at bundle 3/1/60A and includes:

> *It is quite correct for you to have raised ground rent demands for all lessees for Cascades and or Quayside. There is no payment holiday for any lessee.*
>
> *With regard to the background, in 1991 a number of lessees invested in CFL the sum of seven times their ground rent and as a result purchased a share in CFL, they were given relief from payment of ground rent at CFL's discretion equal to the amount invested.*
>
> *However this discretionary relief is not an entitlement. The share does not attach to the flat and never has done. CFL has made it clear in the past that at some stage ground rents would be charged to all lessees, whether or not CFL in turn continues to rebate ground rent payment to shareholders is for itself to decide in due course.*
>
> *In the meantime we confirm that ground rent is to be charged to and collected from all lessees, CFL will then in turn deal with its own internal matters.*

26. The manager then took legal advice from Alastair Panton of counsel on issues which included the question whether the manager was were entitled to demand ground rents and to recover arrears of ground rent from leaseholders who had a share in CFL. Mr Panton's written advice is at 3/1/from 61. In relation to ground rent it is unequivocal. Having set out the history as it had been relayed to him he said:

> *It is now being argued by the landlord that the tenants had not purchased a share which entitles them not to pay ground rent for the remainder of the lease. It is said that they purchased a right, subject to the fact that the company has a discretion to cancel this right. It is also said that the shares are non-transferable. ... I have seen the letters to the tenants at the time when this freehold was purchased ... I am therefore of the view that the contention that someone who initially purchased a share now has to pay ground rent and/or cannot sell his share to whoever buys his flat is unarguable.*

27. In the light of that advice, the manager wrote to all leaseholders on 22 December 2000 (sample letter at 3/1/77) to say that the manager had been advised to grant a ground rent holiday in favour of all the shareholders who subscribed to the freehold purchase.

28. In a report to the tribunal dated December 2001 from Duncan Rendall, the person with the main responsibility for the management, he said (3/3/89):

Numerous lessees have maintained that they should not have been charged ground rent, yet when I took over the management of the development Mr Savvides was very clear that all lessees should be charged ground rent. This I did, which provoked a very large number of lessees to object in writing in the strongest terms. I have consulted counsel for advice ... on whether the ground rent demands from shareholders in CFL were lawful, and I have been advised that they are unlawful. ...

A separate but related issue, but one that I have refrained from becoming involved in, is the process by which shares in the company are transferred. Essentially, Mr Savvides seems to believe that he can legitimately refuse to transfer a share from any leaseholder wishing to sell their flat. I believe he may have purported unilaterally to cancel some shares. Some owners refuse to agree to this, which has resulted in a few non-owners of flats remaining shareholders in CFL. This is tending to disperse the shareholders. This may well become an issue in the long term.

29. In circumstances which were not explored at the hearing, Mr Savvides at some stage acquired a substantial further shareholding in CFL. According to CFL's annual return declaration as at 23 June 2008 (3/1/54) Mr Savvides at that date held 177,115 shares, Refrose held one share, and 61 shares were held by leaseholders other than Mr Savvides or Refrose.

30. A report to the tribunal by Mr Rendall dated March 2010 in respect of the management of the development included (3/3/105 - 6):

It is of course recognised that the landlord has historically maintained that when we took over the management of the property the ground rents should have been reinstated in full (ie reverting to the figure stated in the leases). He argued that the sums that lessees had paid to finance the initial freehold purchase only entitled the contributors to a short-term ground rent holiday, which was over by the time the first management order was awarded.

In order to address this issue we accordingly initially reinstated all ground rent demands as the landlord suggested but it soon became evident that this was going to generate yet further serious disputes with lessees who were adamant that they were entitled to an indefinite ground rent waiver as part of the initial freehold purchase, and we took legal advice on whether our stance (following the landlord's view) was lawful in this regard. We were advised that such a cancellation of the ground rent holiday was not supported by the documents in existence and so we have allowed ground rent holidays for the specific flats which contributed, which has now resulted in the stable position ... whereby a recurring income of £21,525 is generated by the property. One further point we wish to make is that the landlord also sought, on the transfer of a flat, to cancel the ground rent holiday. We have not followed this practice, as we received advice that such a practice was not supported by the available documents either.

31. Because questions arose in argument as to whether any waiver or estoppel relating to ground rents or to any proprietary estoppel or other circumstances giving

rise to an equitable interest was an overriding interest which would benefit only a leaseholder in actual occupation at the valuation date, a schedule was, with Mr Johnson's consent, submitted by the nominee purchaser's solicitors after the hearing. It identifies 18 leaseholders, including assignees, who were both in actual occupation and receiving a rent waiver at the valuation date. Only two of them (the leaseholders of Flats 607 and 609) appear to be original shareholders still in occupation.

32. Mr Rittner of Rendall & Rittner gave evidence. He said that although his colleague Mr Rendall, who was unfortunately not available to give evidence, was the person with main responsibility for the management of Cascades, he was kept fully in the picture and was aware of events relating to Cascades as they happened. He said that most of the documents and correspondence relating to events in the early years of the management had been destroyed under the manager's document management policy which was that documents generated more than ten years earlier were destroyed. Mr Rittner said that after the manager had received counsel's advice it was decided to grant ground rent waivers on an *ad hoc* basis when people came forward with evidence of their participation in the original freehold purchase, or when a leaseholder could show that his flat had been formerly owned by a participant and that they were entitled to a share, and that the manager regarded production of a share certificate as evidence of such entitlement. He said that a number of leaseholders satisfied the manager that they had or were entitled to a share, and they were accordingly granted ground rent waivers. He said that at the valuation date the leaseholders of 40 flats were not paying ground rent and, he understood, had not done so since they acquired their share. He was not able to give first-hand evidence of the circumstances in which only 40 leaseholders had come forward to claim a ground rent waiver when, according to the share register as at 16 November 1992 (3/1/14), there were then 72 leaseholders.

33. Mr Rittner said that in March 2013 the leaseholders of two further flats, Flat 702 and 1701, had enquired of the manager about their right to a ground rent waiver, and that since the previous owners of those flats were on the register of shareholders, the manager would agree to waive their future ground rents. He said that he had not yet considered what the manager's position would be if any leaseholder made a claim for restitution in respect of ground rents which they might allege to have been wrongly demanded in the past. He said that the ground rents paid in respect of the units of which the ground rents had not been waived had been applied to making good a deficit of about £600,000 in the service charge funds which had accrued during Mr Savvides' management of the development due, as had been found by the tribunal which made the management order, to Mr Savvides' mismanagement of the development.

34. Mrs Linch gave evidence. She said that she and her family had paid for a share on the understanding that they would be acquiring a share in the freehold and not just a share in the company, that they would never have to pay ground rent, and that if the flat was sold the share should be transferred to the purchaser of the flat who would also be entitled to a permanent ground rent waiver. She said that her family felt that their flat would be more valuable if they bought a share because they would effectively own the freehold of their flat, and that they understood that their share would "go through the line of subsequent purchasers who would never have to pay ground rent". She said that they had no idea that Mr Savvides would end up

controlling the freehold company and that they had understood that he would sell on the unallocated shares to tenants as and when they approached him to buy them. She said that that understanding had come from what she and other leaseholders had been told at a meeting. She said that her family had not taken legal advice before purchasing their share, but she believed that, at the time, seven times the ground rent was "the going rate", and she said that, at the time, purchasing a share of the freehold was "quite a new concept".

35. When Mr Johnson asked Mr Linch to explain a statement in paragraph 8 of a draft witness statement which had been supplied to the landlord's solicitors before the hearing which said that when they bought a share in CFL her family "also understood that we would be entitled to an extended lease at no cost should this be required in the future", she said that she had deleted the whole sentence from the final version of the witness statement.

The valuation evidence

36. Mr Shapiro's primary valuation was made on the basis that neither the ground rents of nor the reversions to any of the 72 flats owned by the persons listed as shareholders on the register of shareholders dated 16 November 1992 or their successors in title should form part of the price. On that basis his proposed price for the freehold, excluding the value of the telecommunications mast and parking spaces, was £941,026.

37. He said that he did not believe that a purchaser in the market would pay a capitalised sum for ground rents or reversions either where no rents had been charged for many years or where it could be shown that no rents were properly payable. A purchaser would in his opinion pay a sum for ground rents only where ground rents were certain to be collectable and he did not consider that a third party purchaser would pay for rents that were contested. He said that a prudent and well-advised purchaser at the valuation date would easily discover that 72 leaseholders were entitled to a waiver of rent, even if they were not presently benefiting from one. He did not consider that proof of such entitlement ought to depend on the ability to produce a share certificate. Share certificates were, he said, easily lost, and the prudent purchaser would look at the register of shareholders to see who was entitled to a ground rent waiver.

38. In relation to the reversions he said that notwithstanding that none of the leases had been extended since the acquisition of the freehold by CFL it appeared clear from the documents that all 72 of the shareholders thought that they were buying a share of the freehold and, whatever the exact legal position, an investor would worry that the owners of all the flats who, or whose predecessors in title, had bought a share could come forward to claim a share of the freehold, and the investor would therefore not be prepared to pay for the reversionary value of their flats. He said that at the valuation date the reversion was over 99 years away which was a long period of time during which leaseholders might argue that they already owned a share of the freehold and went some way to explaining why, so far, no-one had claimed a new long lease at no premium.

39. Mr Shapiro agreed in cross-examination that what a purchaser would pay for the ground rents of and reversions to the 72 flats would depend on the legal advice he was given, but, he said, an investor would have his own views as well. He said that if the legal advice which the hypothetical investor received was equivocal, the correct valuation tool with which to adjust the bid was the capitalisation or deferment rate, and that it was "all a question of risk". He said that even if the investor received advice that the 40 leaseholders of flats in respect of which no ground rent had been paid since 1989 ought to have paid, he did not believe that he would pay anything more than a "gambling chip", at most, for the ground rents or reversion to those 40 flats. In respect of the 32 flats the leaseholders of which were on the register of shareholders but who were at the valuation date paying ground rents, he said that any of them could at any time approach the manager with a copy of the register of shareholders and assert that they were not liable to pay. He said that seven times the ground rent was what ground rent investors were paying in the market for freeholds at the time when CFL was incorporated. He said that although no leaseholder had yet claimed a 999 year lease, as the leases became shorter the leaseholders would become concerned and would start to say that they considered that they had already bought the entitlement to a 999 year lease.

40. Mr Christou had in his primary valuation included the full freehold reversion for all the flats and shops in the development and the capitalised ground rents of all the flats and, on that basis, his proposed price for the freehold, excluding the value of the telecommunications mast and any value attaching to the parking spaces, was £1,720,999.93.

41. Mr Christou said that he had been advised that a purchaser of the freehold would not be subject to an enforceable obligation to grant new leases to the tenants for no premium and that in those circumstances he could see no reason why a purchaser would omit from his bid the reversionary value of any of the units.

42. Cross-examined, he agreed that a prospective purchaser would take legal advice and would discover that 40 leaseholders had paid no ground rents for decades and had not been sued for them and he agreed that that would raise a doubt in the purchaser's mind. He agreed that the leaseholders who had acquired a share had "probably" assumed that they had bought a share of the freehold. He also agreed that a prudent purchaser would also discover that there were 72 original shareholders and that that would raise questions in his mind about the status of the shareholders who were paying ground rents. He agreed that if there was no chance of recovering ground rents the purchase price would "probably" have to reflect that, that if an investor was faced with uncertainty he might make an adjustment to his bid, and that if the legal opinion that the purchaser received was evenly balanced "it would have to be reflected in the price because there is a risk." He agreed that if the prudent purchaser's lawyer advised that the chances of recovering ground rent were 60:40 that did not mean that the purchaser would pay 60% of the price.

The argument

Introduction

43. Mr Johnson drew our attention to a recent decision of the Court of Appeal in *Kutchukian v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon* [2013] EWCA Civ 90, (Lloyd, Sullivan and Lewison LJJ) in which it had been held that the Upper Tribunal had been wrong to make a discount for risk in relation to "legal problems" representing the perceived uncertainty as to the legal position under section 61 of and paragraph 5 of Schedule 14 to the Act (which relate to redevelopment rights), and that the Upper Tribunal should have decided the legal questions and factored the answers into the valuation rather than treating them as uncertainties in respect of which a valuer would provide a discount. He submitted that the Court of Appeal's decision, which is subject to an application for permission to appeal to the Supreme Court but at present represents the law, required us to decide the legal position of the 72 leaseholders who held shares in CFL rather than to regard them as uncertainties which affected the valuation risk.

44. Mr Radevsky submitted that *Kutchukian* was distinguishable from the present case on the basis that the question in *Kutchukian* related principally to the construction of the Act whereas in the present case the issues relating to leaseholders' liability to pay ground rent and to have already acquired the reversionary interest in their flats were not questions of construction which could be answered by a tribunal but involved the evaluation of risk. He said that the basis of the statutory valuation we have to make is an assumed sale in the open market. Such a sale, he submitted, would be affected by all kinds of imponderables, including planning risk, in respect of which the Court of Appeal had, in *Kutchukian,* not disagreed with the decision of the Upper Tribunal that it should be regarded as a question of risk rather than of law to be decided by the Tribunal. He submitted that Lewison LJ had gone too far when he said in his concurring judgment *The freeholder's interest in the premises is the bundle of rights that he has in his capacity as freeholder. Whether those rights are rights exercisable against a neighbour (such as a right of way) or against a lessee* ***(such as the right to ground rent)*** *[emphasis added] does not matter. Nor does it matter whether the origin of those rights is to be found in contract or in statute. Either way the rights must be identified before the valuer can set about his task.* Mr Radevsky submitted that the correct approach for us to take in relation to the issues in respect of ground rents and the reversion was to treat them as affecting the valuation risk. He said that in the present case the hypothetical purchaser's enquiries would reveal that 40 leaseholders had, without litigation against them, paid no rent for over 20 years and that a further 32 had a legal argument open to them that they ought not to be doing so, and that questions such as whether the 32, or some of them, would seek to take the point in the future and whether, if they did, hard-fought litigation would follow, was not a legal question which could be answered as at the valuation date but a question of valuation risk.

45. In our view Mr Radevsky's submission is correct. We consider that a purchaser at the valuation date could not be sure as to the number of ground rents he would receive or as to the number of leaseholders who would successfully claim a new long lease at no premium. He would consider the facts as he knew them and would conclude that to establish the position would probably require litigation, the costs of which might exceed the amount at stake and the delays and the outcome of which would be uncertain. He would assess all the risks and factor them into his bid as a deduction from the price he would pay if there were no risk. Such risks as arise in the present case are, we believe, essentially different from points of construction such as the

interpretation of a statute or, say, of a lease, which can and should be carried out by the tribunal as at the valuation date. They involve uncertainties as to human behaviour rather than clear-cut questions of law which, however difficult, a tribunal must resolve. Nevertheless, both Mr Radevsky and Mr Johnson agreed that in the light of *Kutchukian* we ought to consider the issues on the alternative bases of the legal position as we found it to be and on the basis of valuation risk, and we therefore do so.

The nominee purchaser's case

The legal position

46. Mr Radevsky based his argument relating to the ground rents primarily on waiver and alternatively on promissory estoppel. He submitted that it was clear from the correspondence that CFL had granted to all leaseholders who purchased a share a permanent waiver of their liability to pay all future ground rents which bound not only CFL and its original shareholders but also purchasers of the freehold reversion and assignees of the flats from the original shareholders.

47. He submitted that the letter signed by Mr Ebbs dated 28 September 1989 (see paragraph 11) was clearly sent on behalf of the recently incorporated CFL and that the letters dated 8 April 1990 (see paragraph 12), 13 May 1991 (see paragraph 14), 3 July 1991 (see paragraph 16), and the letter to shareholders accompanying the share certificate (see paragraphs 18 and 19), taken together, made it quite clear that CFL intended waive all future ground rents for everyone who purchased a share and their successors in title. He said that it was quite clear from the correspondence that the waiver was intended to be permanent and was not intended to be capable of withdrawal on reasonable notice as Mr Johnson suggested, and he submitted that if CFL had sought to change that position the shareholders would have asked for their money back.

48. It support of his argument that the waiver was binding on assignees of the freehold and leasehold interests Mr Radevsky relied on the well-known decision of the Court of Appeal in *Brikom Investments Ltd v Carr* [1979] QB 467. In that case the lease contained a covenant by the landlord to maintain the roof and a covenant by the tenants that they would pay a service charge for doing so, but the landlord's managing director gave to the chairman of the residents' association and to some of the tenants an oral assurance that the landlord would repair the roof at its own expense. The landlord later changed its mind and demanded service charges from the tenants in respect of the repair of the roof. They refused to pay and the landlord sued them. The defendants included an original leaseholder, assignees from an original leaseholder and an assignee from the first assignee. The Court of Appeal (Lord Denning MR, Roskill and Cumming-Bruce LJJ) dismissed the landlord's appeal. Lord Denning based his decision primarily on promissory estoppel, the benefits and burdens of which he considered to pass to assignees. Roskill and Cumming-Bruce LJJ did not rest their decisions on promissory estoppel but held that defendant who was an original leaseholder could rely on a collateral contract that the landlord would not enforce its strict legal rights against her and that assignees from original leaseholders could rely on waiver. Mr Radevsky said that the waiver in the present

case was supported by consideration, and he drew our attention to a discussion of *Brikom* in Treitel's *The Law of Contract* 13th edn, 2012 at paragraph 3-115 where the learned editor, Professor Peel, said *it is possible to account for the extinctive effect of the landlord's promise even on the liability of the assignees and sub-assignees. The variation was supported by consideration and so extinguished the liability of the original tenants to contribute to the cost of the repairs in question; and once it had been so extinguished it was not revived on assignment of the leases.* Mr Radevsky also relied on a decision of the New Zealand Court of Appeal in *Bay of Plenty Electricity Ltd v Natural Gas Corporation Energy Ltd* [2002] 1 NZLR 173, in which an estoppel was held to bind an assignee.

50. In relation to the reversion Mr Radevsky submitted that the documents showed that there was a binding agreement that, in return for a multiple of the ground rent, the purchasers of shares would acquire a share of the freehold, and that although it would have strengthened the nominee purchaser's case if some shareholders had, on the strength of the agreement, asked for long leases at no premium, the fact that none had done so could be explained by the length of their current leases. He submitted that the right of each shareholder to a share of the freehold was derived, by way of a resulting or constructive trust, from their provision of part of the purchase price (see, for example, *Megarry and Wade's Law of Real Property* (eighth edn, 2012) at para 11-016), or alternatively was based on promissory estoppel, on the basis that they had been given the promise of an interest in the freehold of the development which it would be unconscionable for the landlord to refuse, and the equity could best be satisfied by the grant of a new long lease. He accepted that to establish a right, as against a purchaser, to a new lease based on proprietary estoppel the participating tenants had to show an overriding interest in the reversion, which, in view of paragraph 2 of Schedule 3 to the Land Registration Act 2002, required them to be in actual occupation of the flat at the date of the hypothetical disposition, and that the receipt of rent from a subtenant did not amount to actual occupation for that purpose. He conceded that the nominee purchaser's case that the shareholders had, in buying a share, acquired a share of the freehold was less strong than their case in respect of the ground rent because there was limited clear evidence of a representation that they would acquire a share in the freehold as distinct from a share in the company.

Valuation risk

51. However, Mr Radevsky's primary case was based on valuation risk. He submitted that Mr Shapiro's evidence should be accepted. The effect of his evidence was, he said, that investors did not like risk, that litigation was a risk, and that an investor would on the valuation date have significantly discounted his bid, both in respect of the ground rents and in respect of the freehold, because he would know that 40 leaseholders had without legal challenge paid no ground rent for more than 20 years, that when asked to pay ground rents they had adamantly refused to do so, that 72 of them held leases of flats in respect of which shares had been issued in return for a multiple of the ground rent, and that those of them who were paying ground rents at the valuation date might well in the future assert that they were entitled to a permanent ground rent waiver and to a share in the freehold value. Similarly, he submitted, the hypothetical investor would discount his bid for the reversion along the lines which Mr Shapiro had suggested because he would be of the opinion that there

was a real risk that any or all of the shareholders would come forward and demand a new lease without premium.

The landlord's case

The legal position

52. Mr Johnson said that there was a huge gap between the legal arrangements which were put in place in 1991 and the presentation of them in the nominee purchaser's evidence. Of, he said, the 72 leaseholders who participated in the purchase of the freehold from Kentish Homes, the tribunal had heard from only one of them, and neither Mr Rittner nor Mr Shapiro was involved in the purchase. He said that there was no documentary evidence that the participating tenants entered into any formal agreement with the landlord as to their rights following the acquisition of the freehold, and that there was certainly no formal agreement on the basis of which the participating tenants could assert, as against a third party purchaser of the freehold, that they had the right not to pay their ground rent and a right to the grant of a new extended lease at no premium, let alone anything registered against the freehold title. He said that the manuscript agreement dated 3 June 1991 whereby Mr Savvides agreed to contribute £94,000 towards the purchase of the freehold in return for the unallocated shares said nothing about Mr Savvides being obliged to transfer the shares to any other tenant or about the transfer of the shares by participating tenants to their successors in title. Nor did it say anything about how Mr Savvides, or the holder of the shares which he was to acquire, should direct the company in which he was to acquire a majority shareholding, clause 7 of the articles of association of which gave the directors an absolute discretion, without giving reasons, to refuse to register the transfer of any share.

53. Mr Johnson said that Mr Savvides was not responsible for Mrs Linch's lack of understanding of the terms on which he agreed to participate in the purchase of the freehold, the responsibility for which lay with others, not least Mr Ebbs, whose letter to shareholders dated 3 July 1991 (3/1/11 - quoted at paragraph 16 above) bore no relation to what had been agreed between CFL and Mr Savvides.

54. In relation to the alleged right to the grant of a new lease, Mr Johnson submitted that the participating tenants had, at the valuation date, no rights which could be enforced against a purchaser of the freehold because such rights would require a contract compliant with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (which provides that *a contract for the sale or other disposition of an interest in land can only be made in writing*) and protected by registration against the registered freehold title, neither of which existed. For, he submitted, such a right to be the subject of an equity enforceable against a purchaser it would be necessary for the participating tenants to show some form of proprietary estoppel or constructive trust, which they could not do. He said that it was clear that those who bought a share did not agree to participate in the acquisition of the freehold on the basis that they would be entitled to new long leases at a nil premium, but, rather, that they would acquire a share in the company which would own the freehold, and the question of when and on what terms new leases might later be granted was a matter for the company, although the participating tenants would, as shareholders, obtain the benefit

of future profits the company might make from, for example, payments for new leases. He also submitted that in any event CFL was not bound by agreements or promises made in the letter dated 28 September 1989 (3/1/1) because it was written by Cascades Residents Society, and the form of application for a share (3/1/4) was addressed to the Cascades Residents Society.

55. He submitted, relying on *Cobbe v Yeoman's Row* [2008] UKHL 55, that the participating tenants could not rely on proprietary estoppel because the concept could not be used as a means of enforcing rights which were contractual in nature but were unenforceable because of the absence of a contract compliant with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 because, in the words of Lord Scott (at paragraph 29 of *Cobbe*) *proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void.*

56. He further submitted that, even if an equitable right to the grant of a new lease existed, it could be enforced against a third party purchaser only if it was an overriding interest within the meaning of paragraph 3 of Schedule 3 to the Land Registration Act 2002, which applied only to the rights of those in actual occupation of the relevant land at the time of the relevant disposal, and that a successor in title to a participating tenant could not take the benefit of an equity entitling the original participating tenant to the grant of a new long lease at no premium.

57. In relation to the ground rent waiver, Mr Johnson submitted that no contract excusing payment of ground rent was entered into with any of the tenants. He submitted that the letter dated 28 September 1989 (see paragraph 11) did not promise that ground rent would not be payable and in any event was written by Cascades Residents' Society and did not bind CFL. He submitted that in any event any promissory estoppel was suspensory rather than permanent and was capable of withdrawal by CFL on reasonable notice. But, he said, the third and most fundamental point was that, if a right not to pay ground rent, whether based on contract or estoppel or waiver, was established between the participating tenants and CFL, it would be a personal right and not an interest in land and, as such, it would not bind a third party purchaser of the freehold and would not qualify as an overriding interest, even assuming that any of the participating tenants were in actual occupation of their flats at the valuation date, and could not be passed to assignees of the original shareholders.

58. Mr Johnson said that no regard should be had to the advice which the manager had received from counsel to the effect that the ground rent waiver was binding on the landlord for a number of reasons, which included the fact that he had not been asked to advise as to the position in relation to a third party purchaser of the freehold.

Valuation risk

59. Mr Johnson submitted that the hypothetical third party purchaser would obtain competent legal advice, which would be to the effect that he would not be obliged to grant new leases at no premium to any of the leaseholders and that he could enforce the covenant to pay ground rent in respect of all the flats, and he would therefore not discount his bid for risk. He submitted that that would be the position even if the

tribunal was entitled in reaching its decision to regard the matter as one of risk rather than on the basis of its decision as to the strict legal position because, he submitted, on any proper analysis, with the benefit of competent legal advice the purchaser would not perceive that a risk existed.

Decision: the legal position

60. In relation to the ground rent waiver, our conclusions are as follows:

i. A ground rent waiver was granted to the 72 shareholders listed in the register of shareholders as amended on 16 November 1992. It was granted by CFL and is binding on that company. The letter dated 28 September 1989, though written by Mr Ebbs and signed by him "for and on behalf of Cascades Residents' Society" was, on a correct analysis, written on behalf of the recently incorporated CFL. That letter is to be read together with the letter dated 8 April 1990 signed by Dr Supple and the letters dated 13 May 1991 and 3 July 1991 signed by Mr Ebbs. Together they contain the terms of the contract between CFL and those who purchased shares, and the subsequent letter dated 20 December 1991, signed by Mr Evans, is consistent with those terms. The terms included a ground rent waiver in favour of every shareholder in consideration of the payment in advance of an agreed multiple of the ground rent. The handwritten document dated 3 June 1991 signed by Mr Savvides, Dr Supple and Mr Evans does not contain the terms of the agreement between CFL and the shareholders but records a separate agreement between CFL and Mr Savvides to issue the unallocated shares to Mr Savvides in return for his agreement to provide £94,000 towards the purchase price.

ii. The ground rent waiver was intended by CFL to be permanent and was not intended to be revocable on reasonable notice as Mr Johnson submitted. There is no suggestion in the correspondence that it was intended to be other than permanent and that it was so intended is much the most likely explanation for the decision of 72 leaseholders to pay a multiple of the ground rent in advance. There is no evidential support for CFL's suggestion in its letter to the manager dated 14 January 2000 that the waiver was discretionary and that CFL had *made it clear in the past that at some stage ground rents would be charged to all lessees, whether or not CFL in turn continues to rebate ground rent payment to shareholders is for itself to decide in due course.* Had it been made clear that *at some stage ground rents would be charged,* we would have expected evidence to show how it was made clear. Mr Savvides, the controlling director of CFL at the time the letter was written, and now, was present throughout the hearing and provided no such evidence.

iii. We also consider that it was a term of the contract between CFL and each shareholder that the shares in CFL, carrying with them the benefit of the ground rent waiver throughout the term, would pass to purchasers of the leases. That emerges from the letter from Mr Ebbs dated 13 May 1991 which includes: *the way shareholdings have been arranged is for the owners of each flat to purchase one share in the Company that must be sold on any sale of the company.* The term was reaffirmed in Mr Ebbs's letter dated 3 July 1991 which included that the unsold shares held by Mr Savvides will be *under the condition that any leaseholder may still buy his share of the freehold, but at 8 times ground rents from 1 July to 30 September, or at a*

negotiated price thereafter and that all other conditions set out in my letter of 13 May 1991 are complied with. Mr Savvides had been a director of CFL since 12 June 1990, and there is no suggestion that he disavowed what Mr Ebbs said, although, in any event, Mr Ebbs was a director with, we consider, ostensible authority to bind CFL. In any event we have no reason to suppose that his letters did other than accurately set out the company's promises on the company's behalf.

iv. The common intention of CFL and the shareholders was that the ground rent waiver would be not only permanent as between the original shareholders and CFL but that it would also bind a purchaser from CFL. No leaseholder in his right mind would part with seven times the ground rent as a lump sum in advance if CFL could immediately sidestep the arrangement by transferring its interest to another company, and we are satisfied that the directors of CFL and the shareholders had the common intention at the time that the ground rent waiver would endure throughout the terms of the existing leases.

v. But it is not clear that, as a matter of law, that result has been achieved. The merits of the case certainly require that the purchaser of the freehold, including the hypothetical purchaser whose bid we are required to assess, should be bound by the agreement, because otherwise CFL would obtain an enhanced price which is entirely contrary to the merits of the case. If *Brikom* is to be followed the ground rent waiver will bind a third party purchaser. But *Brikom* a difficult case which has been much criticised and might not be followed, and, on a narrow balance, our view is that, in strict law, the waiver was a personal right which does not, in the absence of registration, bind the third party purchaser we are required to assume.

vi. In reaching the above conclusions we have not been influenced by Mr Panton's written advice to the manager because we do not know what instructions he was given and his advice was directed to the manager, who is in a different position from the landlord and from a third party purchaser from the landlord.

61. In relation to the entitlement of shareholders to an interest in the freehold, our conclusions are as follows:

i. We do not consider that it has been established that any of the shareholders acquired such an interest. Although it is possible to read some of the contractual correspondence (particularly the reference in the letter dated 13 May 1991 to *a unique opportunity to own a share in the ownership of an increasingly valuable asset* and, in the form to be signed by those who wished to purchase a share, *I wish to proceed with the purchase of a share in the freehold*), as showing that what was offered was a share in the freehold of the development, read as a whole, the contractual correspondence appears to us to offer a share in the company and not a share in the freehold. The share certificate itself (*this represents an interest in the Company*) reinforces that view. In any event there is no support for the suggestion that shareholders would become entitled to a new long lease at no premium. Mrs Linch's honest admission that she removed from her draft witness statement the reference to her family's entitlement to a new long lease at no premium is, as Mr Johnson said, telling, as is the fact that none of the shareholders has in the course of the last two decades come forward to demand a new longer lease as of right. Bearing in mind the value of such

an entitlement we do not consider that their failure to do so can be explained by the length of the existing leases or the existence of the management order.

ii. The possible effect of Mr Savvides' acquisition of a controlling interest in CFL was not, we think, properly foreseen or considered by the other directors of CFL at the time that CFL agreed to accept Mr Savvides' financial help. Nor, we assume, was the effect of the issue to Mr Savvides, on a date unknown to us between 1991 and June 2008, of about 177,000 shares, an effect of which has been, we assume, to reduce enormously the entitlement of the other shareholders to share with CFL such profits as it may make from, for example, the sale of the freehold or of new long leases.

iii. Even if CFL had made a clear promise to future shareholders that they would be entitled to a new long lease at no premium, we are satisfied that a third party purchaser from CFL would not be bound to give effect to the promise, save in respect of the very few original shareholders who remained in actual occupation of their flats at the valuation date. We accept Mr Johnson's submission that since no leaseholder had at the valuation date registered any equitable interest against the freehold title, the only leaseholders who would be entitled to the benefit of an overriding interest arising from a resulting or constructive trust based on their provision of part of the purchase price would, by virtue of paragraph 2 of Schedule 3 to the Land Registration Act 2002, have been the very few original shareholders in actual occupation of their flats at the valuation date. The very fact that none of the shareholders had at that date sought to protect his interest by registration is in itself telling.

Decision: valuation risk

62. As we have said, in our view the correct approach to the valuation of the freehold reversion and of the capitalised ground rents is to consider the risks which the hypothetical purchaser at the valuation date would perceive and how he would adjust his bid to reflect such risks.

63. We accept Mr Shapiro's evidence, reluctantly supported by Mr Christou, that, certainly in relation to the ground rent income, the prudent purchaser would perceive a risk. In our view the prudent purchaser, despite the good legal advice which we accept that he would be given, would consider that, in respect of the 40 flats where no rents were paid, the risks of an outcry from the leaseholders and of litigation if ground rents were to be demanded would be such that he would pay nothing for the capitalised ground rents of those flats. He would consider that the probable costs of litigation would come close to or exceed the capitalised rents for the 40 flats and that not only the expense, but also the time and delay attendant on litigation which might not succeed, would eliminate the value of that part of the investment. He would, we consider, regard all the 40 ground rents in the same light and would not distinguish between original leaseholders and assignees but would be confident of very great difficulties in the way of recovering ground rent from any of them.

64. In respect of the 32 flats owned by assignees from former shareholders who were paying ground rent at the valuation date, the prudent and well-advised investor would, we consider, take a different view. For reasons at which we can only guess the

leaseholders of those flats, or their predecessors in title, have in effect conceded that they must pay ground rent by, for whatever reason, relinquishing the shares which went with the flats, and the investor would take the view that such leaseholders would be likely to experience considerable difficulty in reviving the right to a waiver, certainly in the event that the order appointing the manager is discharged. He would be aware of the share register and would advised that there was a real risk, but not a substantial one, that some of the leaseholders in this category might at some stage assert their right not to pay ground rent, as a few of them have in fact done (though after the valuation date and only, we assume, as a result of the present proceedings). Our conclusion is that he would discount the value of the capitalised ground rents of the 32 flats by 25% to reflect the risk that at some stage the leaseholders of those flats might claim not only that they ought not to pay future ground rents but that they were entitled to recover past ground rents as wrongly demanded and paid.

65. In relation to the freehold reversion we are satisfied that the purchaser would be advised and would accept that there was no real risk that any of the leaseholders was entitled to a new lease at no premium and that he would not discount his bid to reflect such a risk.

iii. Do the 18 car parking spaces fall to be valued as part of the price for the freehold and, if so, their value?

66. The dispute relates to 18 marked spaces just inside the main entrance to the development. They are not demised and it is not in dispute that at the valuation date and for many years before it the parking spaces have been used by the leaseholders and residents for workmen and visitors. At the time of our inspection and, we understand, for some time before it, notice boards in the car parking area provided that visitors who wish to park must buy and display a valid permit for which, Mr Rittner said, a charge of £20 is made, not for profit but to cover the costs of the security company which administers the parking regime. Mr Rittner said that an estate agent with an office on the site has the use of two spaces without charge and uses a third space from time to time.

67. The parking spaces are not demised, but are *retained parts* within the meaning of the standard flat lease. Schedule 2 to the lease (1/3/24 at 33) lists the rights appurtenant to the flat. Paragraph 2 of schedule 2 contains:

> *The right (in common as aforesaid) to use for quiet recreational purposes only the common garden area and any other common facilities upon the estate PROVIDED THAT such rights shall only be exercisable as from the date which the common gardens and other such facilities shall have been completed by the landlord and designated by the landlord for general use by occupiers of the block (with or without others).*

68. There was no evidence as to whether the 18 parking spaces had prior to the appointment of the manager been either formally or informally designated by the landlord for general use. The tribunal found as a fact in 1999 that parking charges had been levied since 1996 (2/1/66). One of the leaseholders in proceedings relating to his service charges challenged the landlord's right to charge for parking and to keep

the proceeds rather than to credit them to the service charge fund, and his challenge was adopted by the applicants in the manager application.

69. The tribunal in that application decided that the landlord could not charge for parking as a matter of law because the parking spaces were common parts over which the leaseholders had been given rights and that the landlord could not derogate from its grant. It said (at 2/1/67): *it was not in dispute ... that there were designated visitors parking spaces for use of visitors to Cascades* and concluded that the spaces were *common facilities upon the Estate ... designated for general use by occupiers of the Block* within the meaning of the lease and that (2/1/68)*[CFL] has not been entitled to charge visitors visiting leaseholders in Cascades for parking in the designated visitors' parking spaces. Nor has it been entitled to hire out such spaces ... Both activities constitutes* [sic] *interference with the rights that it has already granted to its leaseholders and a breach of the implied term not to derogate from grant.*

70. Mr Radevsky submitted that not only was the tribunal's decision correct but that it was *res judicata* and binding on us so that we were obliged to hold that the parking spaces were for communal use and, as such, could not be sold or let for profit. Mr Johnson submitted that it was nothing of the kind because the question arose in service charge proceedings between a single leaseholder and CFL. We have misgivings about approaching the construction of the lease as one we cannot consider for ourselves because another tribunal, exercising an entirely different jurisdiction, in proceedings between different parties, has expressed a view about it. We doubt whether the doctrine of *res judicata* applies in these circumstances and we prefer to consider the question afresh.

71. Mr Radevsky submitted (and we accept) that the words *for quiet recreational purposes* clearly related only to the garden and not to other communal facilities. He submitted that even if the construction which he proposed was not *res judicata* the hypothetical purchaser would be aware of the tribunal's decision and would pay nothing for the alleged right to sell the parking spaces or charge for parking. He relied on the use to which the spaces were put at the valuation date and the unchallenged evidence of Mr Shapiro that the spaces had been used for visitor parking for many years and submitted that no purchaser would in the circumstances pay for the ability to sell them or let them for profit.

72. Mr Johnson submitted that it was important to remember that the leaseholders of flats have demised parking spaces in the basement car park. (In fact that submission was, unintentionally, not completely correct because, as Mr Radevsky pointed out, it is apparent from the entries on the register of title that although most leaseholders have a demised parking space in the basement car park, not all of them do so.) He said that there was nothing in the flat leases which obliged CFL to make the 18 spaces available for visitor parking and a purchaser of the freehold would be under no obligation to continue the current arrangements, that we should beware of treating the practice of the manager as representing the actual legal position, and so it was entirely appropriate to include a price to cover a purchaser's right to exploit the spaces.

73. Mr Shapiro attached no value to the parking spaces because he had been advised that they could not be sold, but he agreed that if they could be sold on long leases they had a value, which he put at £200,000 in all, allowing for transactional costs. Mr

Christou had valued the spaces at £15,000 each, or £270,000 in all, but he agreed that it would not be unreasonable to allow for transactional costs and that on that basis £200,000 was not unreasonable.

74. As we have said, we consider that we are not bound by the decision of the tribunal in the manager application that the parking spaces are common facilities which cannot be sold or let for profit and that it is for us to decide whether the lease permits the parking spaces to be exploited commercially or whether the leaseholders have permanent rights over them which prevent such exploitation. We have been given no evidence that CFL has ever *designated* the spaces *for general use by occupiers of the block* and in the absence of such evidence we cannot be satisfied that it is not, in theory at any rate, open to a future landlord to exploit them commercially. Even if they had been so designated it is our view that it would be open to a landlord to change the designation. We accept that we cannot take the manager's actions into account in deciding whether commercial exploitation would be regarded as possible as some time in the future by a purchaser of the freehold. However, having inspected the parking spaces we are satisfied that at least some visitor spaces would be regarded by any reasonable person as absolutely essential and that any potential purchaser would be aware that he would face an outcry, and probably litigation, if he tried to sell off any of the spaces or to let more than, perhaps, a few of them commercially. Cascades is a very large development in an area where street parking is, we imagine, very difficult to find, and expensive if it can be found. We consider that the hypothetical purchaser would not be satisfied that he could dispose of any of the parking spaces on long leases, that he would accept that he would have to retain several of the spaces for general use, but he would be of the view that he might be able to let out others for a fee which involved an element of profit. We regard £200,000 as much more than in investor would pay for the opportunity for profit which he would foresee but we have concluded that he would pay more than a nominal sum for it. Our estimate is that the investor would pay a capital sum of £50,000 for the parking rights as part of his price for the freehold.

iv. Deferment rate

75. Both valuers started with the generic deferment rate of 5% for flats derived from the decision of the Lands Tribunal in *Earl Cadogan v Sportelli* [2007] 1 EGLR153. Mr Shapiro added a further 0.25% for management risks, following the decisions of the Upper Tribunal in *Zuckerman v Trustees of the Calthorpe Estate* [2010]1 EGLR 187, [2009] UKUT 235 and *City and Country Properties Ltd v Yeats* [2012] UKUT 227. He said that the manager's appointment had to be ratified from time to time and might be terminated if a third party purchased the development. He said that it was quite possible that in the future the manager, if he was still in place, might find that he could not manage the block with the funds available and might then apply to the freeholder for funds. He said that there was a demonstrable history of antagonism between leaseholders and the owner of the development and that a purchaser might foresee trouble ahead.

76. Mr Christou said that the rate should be 5%. Cross-examined, he said that he was aware of the decisions in *Zuckerman* and *Yeats*, although, unaccountably, he had not referred to them in his written statement made for the purpose of the hearing. He said

that he did not consider there was a significant management risk because Cascades was "management-intensive" and any purchaser would employ a managing agent who would be aware of the risks. He agreed to Mr Radevsky's suggestion to him hat the starting point for the choice of deferment rate should be *Zuckerman* and *Yeats*.

77. Mr Radevsky submitted that *Yeats* provided general guidance that the deferment rate should be 5.25% for blocks of flats unless there were compelling reasons to the contrary. Mr Johnson agreed in his closing submissions that *Yeats* did indeed provide general guidance to that effect and that we were obliged to follow that guidance unless it was established that *Yeats* was wrongly decided.

78. We are satisfied that the appropriate deferment rate is 5.25%. This is not only because of the decision of the Upper Tribunal in *Yeats*. Even without such general guidance as it contains we would have concluded that there were good reasons in the present case for adding a further 0.25% to the *Sportelli* rate for management risk. This block has a particularly troubled history. It is by no means certain that the management order will last for ever - indeed it is most unlikely that it will - and we are satisfied that a purchaser of the freehold would see management problems ahead which he would take into account in formulating his bid. In our opinion an increase of 0.25% to the *Sportelli* rate is certainly not too great in the circumstances.

v. The value of Vodafone's right to have a telecommunications aerial on the roof

79. By virtue of an agreement dated 19 April 1996 between CFL, Refrose and Vodafone (3/4/238), Vodafone has since the date of the agreement maintained a telecommunications mast at Cascades Tower, at first on the balcony of a flat owned by Refrose and later, as now, on the roof. The agreement was for a period of 15 years which expired in 2011. By an agreement dated 4 September 2001 the local authority confirmed that the erection of two telecommunications areas was permitted development which did not require planning permission. Vodafone continues to hold over under that agreement which, on expiry, produced an annual rental income of £14,893.63. Since the agreement expired the mast has remained in place. Heads of agreement have been prepared, subject to contract, dated 14 May 2012 (at, for example, Mr Shapiro's tab 13) between Rendall & Rittner and Vodafone, the proposed agreement stated to be for a period of ten years at an annual rent of £14,000, with Vodafone having the right to terminate the agreement at any time on six months' notice. Mr Rittner gave evidence that the reason why Vodafone had not signed the agreement was the need to separate the electricity supply to the mast from the landlord's electricity supply to the common parts of the block.

80. Mr Shapiro said that he did not believe that the site was significant for Vodafone in the long term because although when Vodafone set up its equipment Cascades Tower was a landmark 20 storey building, its landmark status had since been superseded by adjacent 40 storey buildings, and planning consent had recently been granted for a 75 storey building and two buildings of over 40 storeys nearby. He said that in his opinion a purchaser would take the view that the future potential rent was very uncertain and that there was a considerable risk that Vodafone would either not renew the licence agreement or, if it renewed it, it would determine it on six months' notice shortly thereafter. He said that having regard to the rapid changes in the

technology of mobile telephones, the consolidation of operators, the trend towards site-sharing and the obvious alternative locations, there was no certainty that Vodafone would renew the agreement. He said that investors would see the licence income as uncertain and he accordingly valued the licence at £14,000, based on one year's rent. Cross-examined, he agreed that such a view was perhaps pessimistic and that the value could be up to a maximum of 18 months' rent. He considered Mr Christou's valuation to be completely unrealistic.

81. Mr Christou valued the licence at £140,000, based on ten years' rent. He said that as Vodafone had been using the mast for over 15 years he considered it unlikely that it would remove it, especially because it had the option to share its use with O2. He said that the fact that the local authority had granted a certificate of permitted development demonstrated that there was potential income which could be obtained not only from Vodafone but from any other network operator.

82. Mr Radevsky invited us to accept Mr Shapiro's evidence and to regard his suggestion that a purchaser would pay 18 months' rent as generous.

83. Mr Johnson said that Vodafone had had the right to break the agreement at any time since the first agreement in 1996 and had not done so, that it had been in occupation of the roof space for many years without the slightest sign of its being affected by any of the considerations put forward by Mr Shapiro, and the right to place a mast or masts on the roof would be regarded by any purchaser as a valuable income source.

84. We accept that the right to place a mast or masts on the roof is a valuable source of income and that a purchaser would be satisfied that it will continue to be so for some time to come. He would see that the development is on site with an open aspect towards the Thames and in our view he would not be unduly concerned that taller buildings would imminently take away its value as a site for a mast or masts. However, having regard to the rapid changes in technology in the telecommunications industry we are satisfied that he would not be prepared to pay more than three years' potential rent at £14,000 per annum for the right, which we accordingly value at £42,000.

vi. ***The terms of transfer***

85. There is a dispute as to whether a clause in panel 11 of the draft transfer (1/8/204) should be included in the transfer. The disputed clause provides *In the event that there are any arrears of ground rent or service charges lawfully due on completion from the lessees under the leases, the transferee shall pay to the transferor a sum equal to such arrears.*

86. Mr Radevsky submitted that it was not appropriate to include such a provision in the transfer. He said that he had never seen such a term in any transfer made in a collective enfranchisement, that it was not known whether there were any arrears of service charges, that any arrears should be dealt with in the completion statement, and that in any event any arrears of service charges were not owed to CFL but were the property of the leaseholders.

87. Mr Johnson said that CFL's concern was that once the freehold had been assigned to the nominee purchaser the right to sue for arrears in respect of leases granted prior to the Landlord and Tenant (Covenants) Act 1995 would pass to the nominee purchaser and CFL would have no right to pursue such leaseholders.

88. In our view Mr Radevsky's submission is correct. We see no reason to include this unusual provision in the transfer, and, indeed, no warrant for the proposition that CFL is, given the management order, entitled to recover any arrears of service charges and ground rent which there may be. The matter should be addressed in the completion statement.

Determination

89. Accordingly, we determine that the price to be paid for the freehold is £1,381,055 in accordance with the valuation which is attached to this decision.

JUDGE.....

DATE: 24 July 2013

Cascades
2-4 Westferry Road
London, E14 8JL

LON/00BG/OCE/2012/0222

Valuation Date	14/06/2012			
Lease 125 years	from 25/12/1986			
Years unexpired	99.528			
	24/12/2036	24/12/2061	########	24/12/2111
No. years to review	24.528	25	25	25
Rents under lease	£55,080	£109,760	£218,820	£436,640
Rents collected	£42,650	£84,800	£168,800	£336,500
Non Shareholders	£32,600	£64,800	£128,900	£256,800
32 Paying S/holders	£10,050	£20,000	£39,900	£79,700
Capitialisation Rate	6.50%			
Deferment Rate	5.25%			

FLATS
Term

Non Shareholder
Flats

Term 1				
Rent Reserved		£32,600		
YP to 1st Review		12.1001		
			£394,463	
Term 2				
Rent Reserved		£64,800		
YP to 2nd Review	12.1979			
PV of £1	0.2135			
		2.6043		
			£168,759	
Term 3				
Rent Reserved		£128,900		
YP to 3rd Review	12.1979			
PV of £1	0.0442			
		0.5391		
			£69,490	
Term 4				
Rent Reserved		£256,800		
YP to 3rd Review	12.1979			
PV of £1	0.0092			
		0.1122		
			£28,813	
Shareholder				£661,525
32 Flats				
Term 1				
Rent Reserved		£10,050		
YP to 1st Review		12.1001		
			£121,606	

Term 2					
Rent Reserved		£20,000			
YP to 2nd Review	12.1979				
PV of £1	0.2135				
		2.6043			
			£52,086		
Term 3					
Rent Reserved		£39,900			
YP to 3rd Review	12.1979				
PV of £1	0.0442				
		0.5391			
			£21,510		
Term 4					
Rent Reserved		£79,700			
YP to 3rd Review	12.1979				
PV of £1	0.0092				
		0.1122			
			£8,942		
				£204,144	
Less 25%					£153,108
Reversion					
Flats	£76,617,351				
Shops	£650,000				
		£77,267,351			
PV of £1 @ 5.25%		0.00614			
					£474,422
TELECOMMS MAST					
Rent Reserved		£14,000			
Years Purchase		3			
					£42,000
CAR PARKING					
					£50,000
PRICE					**£1,381,055**