



**ALEP**

ASSOCIATION OF LEASEHOLD  
ENFRANCHISEMENT PRACTITIONERS

# ALEP SPRING CONFERENCE 2012

*Development Value*

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# Retaining Development Value

The options:

- Exploit the value now
- Leasebacks
- Offering rights over amenity land
- Creation of new leases
- Restrictive covenants in transfers



# Leasebacks under s36 & schedule 9

- Right to leaseback of any unit which is:
  - In the specified premises
  - Not a flat let to a qualifying tenant other than a resident landlord
- Must be claimed in counter notice
  - Cawthorne v Hamdan [2007] Ch 187



# Unit s38

- (a) A flat;
- (b) Any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling; or
- (c) A separate set of premises let, or intended for letting, on a business lease

## Excludes:

- Storeroom, parking space
  - Admirals Walk LVT 2001
- Caretaker's flat, newly created flat after notice
  - Barrie House, LVT (Feb 2012)



# Amenity areas



Gardens, drives  
and sports facilities



# Rights over amenity land

- The tenants can claim the freehold of ‘property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises’ Section 1(3)(b)
- The freeholder of that property can instead offer s1(4) to grant permanent rights ‘as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease’ over that property, or any other property



# Amenity land (2)

- If s1(4) satisfied, LVT has no discretion to order transfer
  - Shortdean Place v Lynari [2003] 3 EGLR 147
- Cannot seek new right to develop
  - Ulterra v Glenbarr [2008] 1 EGLR 103
- Tenants cannot prevent interference with rights unless substantial



# Creation of new leases

- Before any s13 notice, any leases can be granted, but may be liable to acquisition
- After s13 notice is registered, leases void under s19 if would have been liable to acquisition
- Landlord and Tenant Act 1987





# What leases can be acquired? (s2)

- Leases superior to QT leases (mandatory)
- Tenants can acquire all or part (Hemphurst v Durrells House [2011] UKUT 6) of leases of
  - Common parts or
  - Appurtenant property demised to QT or
  - Property which tenant is entitled to use in common with others if
- Acquisition reasonably necessary for proper management or maintenance of those parts



# Common parts

- S101 “includes the structure and exterior of that building .. and any common facilities within it”
- Cadogan v Panagopoulos [2010] EWCA Civ 1259
  - Means for shared use or benefit
  - No need for tenants to have right of access
  - Facilities extend to plant and equipment
  - Includes caretaker’ s flat
  - Need for legal entitlement unresolved



# Other common parts

- Boiler room in specified premises
- Storage cupboard for cleaning equipment
- Lightwell
  - Panagopoulos [2010] EWHC 422, Roth J
- Roof and airspace
  - Meadowside, (LON/ENF/1177/04); Buttermere Court (2006/0312); Kintyre [2006] 1 EGLR 67
  - No: Daphne Court 2007/0218 (loftspace)



# Reasonably necessary?



for proper management or maintenance of those parts



# Acquisition reasonably necessary

- Insufficient in airspace cases
  - Buttermere Court: firework displays on Guy Fawkes night or launching hot air balloons
  - Meadowside: tenants need right to build on or break through the roof
- Rights may be sufficient for tenants
  - Panagopoulos “vague speculation is not sufficient” (obiter)



# Restrictive covenants in transfer

- Restrictions on use and alterations
- Need to show material enhancement of the value of retained land
- Ransom value not sufficient
  - Kutchakian v John Lyon [2012] UKUT 53
    - Proposed restriction to four flats

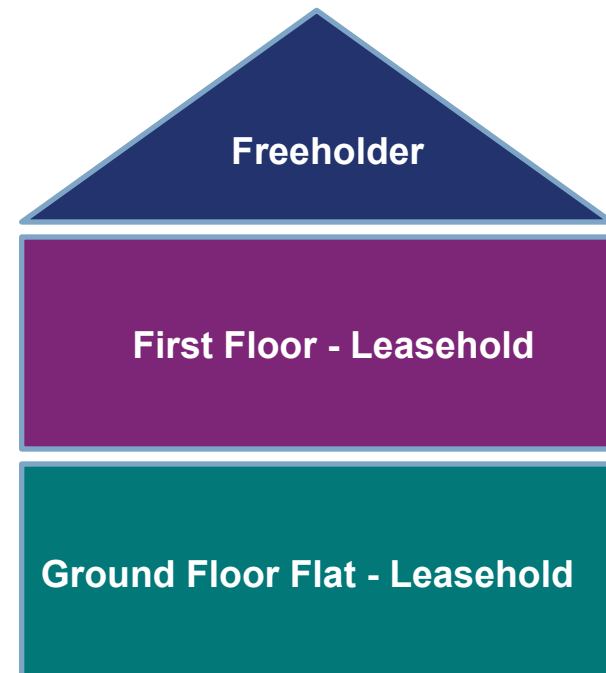


# Roof space

## 1. Freeholder owns space

*Assume:*

- £50 fixed ground rent
- 70 years unexpired
- £500,000 long lease flat values
- Built loft adds £250,000
- Cost of conversion £100,000
- 50:50 split between freeholder & first floor flat



# Restrictive covenants in transfer

## Example 1

No development potential (£67,805)

## Example 2

With development potential (£140,340)

## Result:

- Development value in existing freeholder's value as the loft is outside the demise of first floor flat
- Not in marriage value
- Paragraph 3 of Schedule 6 Valuation (value of freeholder's interest)





# Limits to marriage value

Themeline v Vowden [2011] UKUT 168

- 2 out of 3 flats participating
- NP will secure VP in 2 years
- Uplift of £2.8m from conversion to house
- Claimed as part of marriage value

Held

Marriage value limited to ability of PTs to grant new long leases of their flats, not the whole building.



# Hope of a deal with a tenant

- Schedule 6 requires assumption that no tenant is buying or seeking to buy
- Issue in 38 Wilton Crescent (UT 2012, awaited)
  - Hope of tenant selling or joint venture
  - Hope of deals other than new leases of NP flats?
- Hope of deal to vary covenants is permissible
  - 38 Cadogan Square [2011] UKUT 154
    - User restriction for caretaker's flat



# Example 3

Since we are dealing with the “hope” of a future deal, an adjustment for risk may be required, for example:

- Planning consent
- Delays
- Disagreement over values of split
- Securing a deal
- Legal obstacles

**Therefore:** Adjust to reflect “hope of development value”

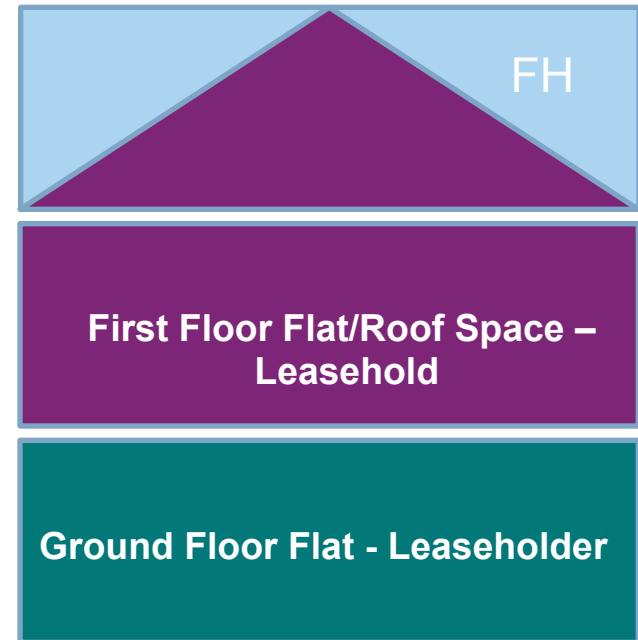
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# Roof space

## 2. Leaseholder owns roof space & air space – covenant against alterations

- Development entirely within PT flat, so value included in Marriage Value as part of lessee's interest after enfranchisement
- Principle is the same as 45 Holdings [2010]
- Leaseholder requires consent from freeholder to alterations so freeholder has development value
- Valuation falls under Para 3 (freeholder's interest) & 4 (freeholder's marriage value) of Schedule 6
- Both existing interests should include hope of a deal to vary the covenant.



# Examples 4 & 5

## Example 4

- Assumes it is going to happen and with no hope of deal in the meantime

## Example 5

- Includes hope of alteration of covenant to release development value
- Adjusted development values by, say, 40% for risks
- Adjust for risk in landlord's interest (both in diminution & Marriage Value) and existing leasehold values in Marriage Value



# Supporting your case

## 1. Assess Development Value

- What, for example, is the roof space worth?
- Direct Evidence: comparables of roof spaces
- Evidence of flats with roof space/structure demised, i.e. freehold flats with roof spaces & unrestricted lease
- Evidence can be difficult to confirm without a copy of the lease or the comparable
- Check that comparables exclude any roof spaces
- Comparables of similar completed developments to assess G.D.V



# Supporting your case

## 2. Residuals

- If no evidence of roof space sales then residual – well established that LVTs do not like them but if that is all that is available then use one
- Will need to prove each element, i.e. building costs, finance, profit, professional fees – every element is up for discussion
- In a perfect world (& where the value justifies it) get plans drawn up, engineer's report and the works professionally priced up (QS)



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# Supporting your case

## 4. Legal obstacles to development

- Trespass
- Tenants' rights
- Covenants
- Reservation of right to build



# Trespass

- Demise of roof and loft includes airspace above.
  - Davies v Yadegar (1990) CA
- Demise of flat on 2<sup>nd</sup> floor normally limited to that level.
  - Rosebery v Rocklee [2011] HC; Munt v Beasley [2006] EWCA Civ 370
- Can steel beams be erected without trespass?
- Can scaffolding be erected to front and rear?



# Roofspace issues



Demise of tanks in  
loftspace?  
Accretions to tenancy?



# Tenants' rights

- Easements to use wires and pipes
- Rights to light
- Right to use common parts
- Test for substantial interference
  - B & Q v Liverpool [[2001] 1 EGLR 92:  
“one of convenience not necessity. Providing what the grantee is insisting on is not unreasonable, the question is: can the right...be substantially and practically exercised as conveniently as before?”



# Devonshire v Trenaman [1997]1EGLR 45

- Mutually enforceable scheme of covenants
- Four flats with identical covenants
- FH covenant to repair roof
- Service charges payable 25% each
- Held that extra floor could not be built
- Breach of covenant to repair roof
- Implied limitation to 4 flats



# Hannon v 169 Queen's Gate

[2000] 1 EGLR 40

- Express mutual scheme of covenants
- Fair proportion of service charge payable
- Reservation of right to build without liability for loss
- Held extra storey could be built
- No breach of covenant to repair
- No implied restriction on building



# Reservations of right to build

- Narrowly construed
  - Paragon v City of London [2002] 1 E.G.L.R. 97
- Does not permit destruction of right
  - Overcom v Stockleigh (1989) 58 P. & C.R. 1
- No help for third parties



# Dorrington v McGlashan [2010] L&TR 3

- The Lessors and the Superior Lessors and all persons authorised by them respectively shall have power without obtaining any consent from or making any compensation to the Lessee to deal as they may think fit with any of the lands and hereditaments adjacent or near to the demised premises and to erect or suffer to be erected upon such adjacent or neighbouring premises any buildings whatsoever whether such buildings shall or shall not affect or diminish the light or air which may now or at any time during the term hereby granted be enjoyed by the Lessee or the Tenants or Occupiers of the demised premises





# Dorrington v McGlashan – the decision

- To “deal with” means disposal or grant of rights, not carrying out works
- Adjacent or neighbouring premises do not include the roof
- Diminution of light does not extend to extinguishment



# Conclusions

- High risk adjustments tend to be applied by the LVT
- 90% adjustment is common, i.e. 10% hope value
- So hard to justify cost of planning expert, QS, etc. at LVT
- Risky and expensive
- Rarely worth doing in relatively small development value cases, unless risk is minimal

