SOUTHERN RENT ASSESSMENT PANEL AND TRIBUNAL

CERTIFICATE PURSUANT TO REGULATION 18(7) OF THE LEASEHOLD VALUATION TRIBUNALS (PROCEDURE) (ENGLAND) REGULATIONS 2003 (SI 2003/2099)

RE GROSVENOR PINES, 23 GROSVENOR ROAD, BOURNEMOUTH BH4 8BQ

CASE NO: CHI/00HN/OCE/2008/0057

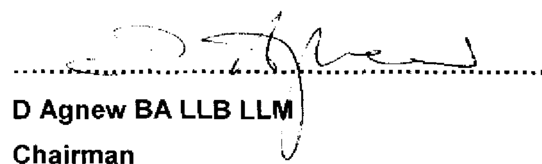
I certify pursuant to the above mentioned Regulations that there is an error in the decision of the Tribunal in this matter issued on 23rd February 2009.

The error is contained within paragraph 7.4. The sentence "The Tribunal decided, however, that the proposed clauses 13.6.3 was not such as materially to enhance the value of the other property" should have read: "The Tribunal decided, however, that the proposed clause 13.6.6 was not such as materially to enhance the value of the other property."

The rest of the decision remains unaltered.

The time within which a party may seek permission to appeal is 21 days from the date of the decision as amended.

Dated this 12th day of March 2009



D Agnew BA LLB LLM
Chairman

SOUTHERN RENT ASSESSMENT PANEL AND TRIBUNAL

Case No: CHI/00HN/OCE/2008/0057

BETWEEN:

GROSVENOR PINES FREEHOLD LIMITED — APPLICANT

AND

ROBERT GEORGE GATES — FIRST RESPONDENT

AND

GROSVENOR PINES MANAGEMENT LIMITED — SECOND RESPONDENT

PREMISES: Grosvenor Pines, 23 Grosvenor Road, Bournemouth, BH4 8BQ ("the Premises")

TRIBUNAL: MR D AGNEW LLB, LLM (Chairman)
MR D EDGE FRICS

HEARING DATE: 29 January 2009

APPEARANCES: Mr A Howard of Coles Miller, solicitors for the Applicant
Mr D Bromilow of counsel for the First Respondent

DETERMINATION AND REASONS

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1. Background

1.1 On 27 October 2008 the Applicant applied to the Tribunal for it to determine the provisions to be contained in the Transfer of the Premises under Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") on the collective enfranchisement of the Premises by the Applicant as nominee purchaser.

1.2 The First Respondent is currently the freeholder of the Premises. He demised the whole of the premises to District and Urban Properties Limited for a term of 99 years from 25th December 1992. That lease is now vested in the Second Respondent. By a lease dated 20 September 1993 District and Urban Properties Limited demised the common parts to the Second Respondent excluding the six flats, garden and garages for a term of 99 years less one day.

1.3 The parties agreed the price for the freehold of the Premises, including the flats garages and garden but have been unable to agree some of the terms to be included in the Transfer, hence the application to the Tribunal.

2. The Premises

2.1 These comprise a modern block of six flats situated in a pleasant residential area of Bournemouth not far from the beach and town centre. It forms part of what is known as the Cooper-Dean estate. This estate originally covered a significant area of land which at one time comprised mainly large Victorian detached villas in substantial grounds. Over the years these large properties have generally either been converted into flats or have been demolished and new blocks of flats constructed in the grounds. Grosvenor Road itself comprises almost exclusively such blocks of flats. They have been built at different times and in different styles. A stranger to the area would not be able to distinguish the Cooper-Dean estate from other properties not within the estate because the Cooper-Dean properties do not share any common characteristics, so there is no sense of a distinct estate feel to the area.

2.2 Grosvenor Pines is a pleasant development but it could not properly be described as being in any way special or exclusive. It is three storeys high constructed of brick under a tiled roof. The windows are dark brown upvc double glazed units. Each flat has a small balcony. A tarmac driveway leads to two

blocks of garages at the rear. The buildings cover a large percentage of the site, the garden area being restricted to a small area at the front and rear and a strip on each side of the block. There are only a few mature trees in the garden described by the Applicant's solicitor as "one ash, one sycamore, one Monterey pine, one half-dead cotoneaster and two leylandii". The Tribunal noted that the stumps of three substantial trees remain in the border on the southern boundary of the plot indicating that these trees had at one time existed but had already been felled. Other trees have been pruned back hard. Trees belonging to the neighbouring property to the north had been pruned back on the Premises' side of the boundary only.

2.3 It did not appear to the Tribunal that any structure on neighbouring properties encroached onto the Premises. There is a brick garage on the property to the west and rear of the Premises but this is positioned far enough from the boundary that its eaves do not overhang and it is unlikely that the garage's foundations encroach onto the Premises. In the garden of the property to the North of the Premises there is constructed a curious tall ornamental wall separating the front of the property from the rear. This wall abuts the boundary and it is possible that if it has foundations they may encroach onto the Premises. This property may also benefit from some rights of support from the Premises.

3. The Clauses in issue

3.1 The following clauses which have been inserted into the draft Transfer by the First Respondent's solicitors are objected to by the Applicant. They are as follows:

3.1.1 "13.4.3 The right to keep as an encroachment upon the Property the walls footings foundations gutters eaves and the like as are now existing and form part or parts of the said adjoining properties which abut upon the Property and the

right of support for the said adjoining properties so abutting (and all buildings thereon) from the Property (and all buildings on it) with power for the Transferor his assigns and successors in title with or without workmen agents and others upon giving reasonable notice to enter upon the Property for the purpose of constructing connecting to cleansing repairing and renewing all pipes drains cables watercourses and the like on the Property and for the purpose of constructing repairing renewing and maintaining the said walls footings foundations gutters eaves and the like (including the power to erect scaffolding upon the Property) the person so entering making good all damage occasioned thereby".

3.1.2 "13.5.1 The free and unrestricted right to develop redevelop alter or otherwise use any of the said adjoining properties in any manner as they shall think fit notwithstanding that rights of light or air to the Property are in any way affected diminished or interfered with.

13.5.2 The right to modify waive or release any of the covenants restrictions or stipulations relating to any part of the adjoining or neighbouring land and properties remaining in the ownership of the Transferor or any property formerly belonging to the Transferor or his predecessors in title whether imposed or entered into before or after the date of this transfer."

3.1.3 "13.6.2 Not to erect upon the Property or permit to be erected thereon any additional building which requires planning consent under the Town and Country Planning Acts or any statutory modification thereof (regardless of whether the same is permitted by virtue of any General Permitted Development Order or the like) except in accordance with plans to be approved by the Transferor whose reasonable surveyors' fees and other expenses plus Value Added Tax shall be paid by the Transferee.

13.6.3 Not to make any alterations in the plans designs and elevations of the existing building which requires planning consent under the Town and Country Planning Acts or any statutory modification thereof (regardless of whether the same is permitted by virtue of any General Permitted Development Order or the like) except in accordance with plans to be approved by the Transferor whose surveyors' fees and other expenses plus Value Added Tax shall be paid by the Transferee".

3.1.4 "13.6.6 Not to cut lop or carry away any of the trees now standing or being or which shall hereafter stand or be upon the Property without the consent in writing of the Transferor unless for necessary thinning out."

3.1.5 "13.8 The Transferee and the persons deriving title under them shall not be or become entitled to any right of light or air which shall in any way affect or diminish or interfere with the free and unrestricted user for building or other purposes by the Transferor or his successors in title of adjoining land retained by him and this transfer shall not imply the grant of any such right."

3.1.6 "13.13 The Transferee and the persons deriving title under the Transferee shall not be entitled to any rights easements or quasi easements over or against the Transferor's adjoining land by virtue of Section 62 of the Law of Property Act 1925 or the Rule in Wheeldon v Burrows save insofar as is specifically granted in the Transfer."

4. The evidence

4.1 The only evidence called was the expert evidence of Mr Harrington, a Chartered surveyor of 40 years' experience of practice within the Bournemouth area, who was called on behalf of the Applicant.

4.2 Mr Harrington's witness statement is dated 12 January 2009 and was served on or about that date, a month after the Applicant's evidence was to have been filed

and served in accordance with the Tribunal's directions. The Applicant's solicitors initially objected to Mr Harrington's evidence being admitted in view of its lateness. At the hearing, however, Mr Bromilow said that although there had been some prejudice to the First Respondent as a result of Mr Harrington's evidence having been received late, the prejudice was not sufficient to warrant him seeking an adjournment of the hearing. He had been able to deal with Mr Harrington's evidence in his skeleton argument and he did not propose to call valuation evidence himself for reasons which he would come to in submissions.

4.3 Mr Harrington began by giving some information about the Cooper-Dean estate, what it comprised in general terms and where it was located. He also described his involvement in various enfranchisements of Cooper-Dean properties. He acted on behalf of the nominee purchaser in agreeing the price for the Transfer of 23 Grosvenor Road. Mr Harrington was not able to give precise figures as to the number of properties remaining in the Cooper-Dean estate but he knew that a significant number had been or were going through the enfranchisement process. He personally had been involved in about 25 enfranchisements over the years. He thought that the nearest Cooper-Dean property to 23 Grosvenor Road was at No 3 Grosvenor Road which was also under negotiation for enfranchisement. He said that as a surveyor he knew roughly where the boundaries of the estate exist but most people would not be able to tell just by looking at the properties. He thought that the proposed restrictive covenants in clauses 13.6.2 and 13.6.3 of the draft Transfer were neutral as to value. He had never seen any estate agents particulars which referred to a property on the Cooper-Dean estate as having a positive selling feature. He stated that the properties in the estate were originally large Victorian detached houses but gradually they have been demolished and replaced in the 1960s, 1970s and

1980s by modern blocks of flats. He thought that the control of building and development exercised by the local planning authority was sufficient and was what people rely on in order to preserve the character of an area such as this, not restrictive covenants. He said that it was usual for conditions with regard to landscaping to be imposed by the planning authority when granting planning permission for development.

5. The parties' respective arguments

5.1 The parties' respective arguments in respect of each clause in issue were as follows:-

5.1.1 Clause 13.4.3

Mr Bromilow's case with regard to this draft clause was that it was intended by the clause to protect the position of owners of adjacent properties and to reduce the possibility of litigation in the future. The rights concerned, if they exist at all were likely to have been acquired by prescription. If so then the proposed clause is justified under paragraph 3(2)(b)(i) of Schedule 7 to the 1993 Act (set out later in this decision). If they have been acquired by prescription Mr Bromilow accepted that the adjoining owners could enforce those rights against the Transferee irrespective of whether this clause was included in the Transfer. Where the necessary 20 years existence of the right had not been established, however, or where the existence of an encroachment was not evident so that the right could not be acquired by prescription he argued that the existence of the drafted clause would assist in resolving possible conflict, because the Transferees would have to accept that they took subject to the encroachment. In answer to the Applicant's argument that the First Respondent had not shown that there were any encroachments and that is was either for the First Respondent to show that encroachment exists or for the Tribunal to find that encroachment

exists before the clause should be permitted is misconceived. Footings and foundations, for example, would not be obvious or apparent on the sort of inspection that the Tribunal could make and in any event a finding of the Tribunal to that effect could not bind the owners of neighbouring properties. Mr Bromilow contended that if no encroachments exist then there is no harm in the clause being included; if they do then the proposed clause is of benefit and should be retained.

5.1.2 Mr Howard conceded that if any encroachments currently exist then such rights can be included in the Transfer. However, if there is no encroachment the clause should be deleted. He considered that the Tribunal should determine on its inspection as to whether or not there is encroachment.

5.2.1 Clause 13.5

Mr Bromilow's case was that proposed clause 13.5.1 provides for the continuation of existing rights. Paragraph 3 of Schedule 7 to the 1993 Act specifically refers to rights of light and air to a building and this clause is appropriate to be included by virtue of paragraph 3(2)(b)(i) of Schedule 7. With regard to proposed clause 13.5.2, although Mr Bromilow conceded that the First Respondent does not own any properties adjacent to the Premises he continues to own other properties in the vicinity which are part of the Cooper-Dean estate. The reservations in Clause 13.5.2 are to the benefit of those properties. This provision therefore comes within paragraph 3(2)(b)(ii) of Schedule 7 to the 1993 Act as it is "necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date".

5.2.2 Mr Howard's response to this was that the First Respondent has produced no evidence that the clause is necessary for the reasonable enjoyment of other property owned by him. Further clause 13.5.1 is stated to be for the benefit of

the Transferor's adjoining property and the First Respondent does not own any adjoining property.

5.2.3 Mr Howard contended that the rights referred to in Clauses 13.5.1 were not a continuation of existing rights but an intensification of existing rights.

5.3.1 Clauses 13.6.2, 13.6.3 and 13.6.6

Mr Bromilow took his arguments with regard to these three clauses together. He stated that the only point in contention with regard to these proposed covenants is whether they enhance the value of other property so as to come within paragraph 5(1)(b) or 5(1)(c) of the 7th Schedule to the 1993 Act. The applicant has not produced expert evidence to show as a valuation exercise that the value of other property has been enhanced but precedent says that this is not necessary. He cited the Lands Tribunal case of Higgs v Paul and Nietoba LRA/2/205 where P H Clarke FRICS stated at paragraph 56: "In my judgement, it is impossible to consider the concept of material enhancement of value as a detailed valuation exercise. It can only be considered in general terms: a matter of impression." The same tribunal expressed the same views in Moreau v Howard de Walden Estates Ltd. LRA/2/2002. Mr Bromilow therefore took the view that the Applicant's approach in adducing valuation evidence from the surveyor, Mr Harrington, was wrong. Mr Bromilow relied upon the Tribunal to form a view as to the nature of the area in which the Premises are situated. He said that restrictive covenants of this nature are habitually included in sales of new-built properties because buyers consider such covenants are valuable in maintaining the character of an area. Such covenants are inherently valuable otherwise developers would not include them in the transfers of their newly built houses.

5.3.1.2 Next, Mr Bromilow submitted that the test was not whether the enhancement in value is "substantial" as Mr Harrington suggested, but whether it is "material". If an enhancement is not nominal or negligible then it is 'material'. The authority for this proposition is Eyre v Kite Properties Ltd, a leasehold valuation tribunal decision of 30 October 2007, which is not, of course, an authority binding on this Tribunal.

Furthermore, Mr Bromilow argued, "material enhancement" does not only mean an increase in value of other property but it also includes preservation of existing value which would be diminished if the covenant(s) in question were not imposed. The authority for this proposition is the Lands Tribunal case of Peck v Trustees of Hornsey Parochial Charities LR/16/1969 and Fuller v Thorpe Estate Limited, again a leasehold valuation tribunal decision. Mr Bromilow contended that it was evident that the imposition of the covenants in question would preserve the value of the properties in the vicinity in the Cooper-Dean estate and without them the value of the properties would diminish because there would be no control to ensure the standards of the area would be maintained.

Mr Bromilow quoted Fuller v Thorpe as authority for the proposition that his argument held good even though a substantial part of an estate might have been sold off. In the case of the Premises, many of the Cooper-Dean properties had been enfranchised, as had most in Grosvenor Road. Mr Bromilow said that in his submission it did not matter that only a few properties remained as long as there was some of the estate left to benefit. The phrase "other property" does not specify how many properties' values may be enhanced. The value of the covenants is cumulative and depends on all the properties having the benefit of them. Mr Bromilow further contended that the Lands Tribunal in the Moreau case and the Leasehold Valuation Tribunal in the case of Erkman v The Earl of

Cadogan (a decision of 16th March 2007) had rejected the Applicant's argument that the advent of statutory planning controls had rendered restrictive covenants controlling development valueless.

5.3.1 Mr Howard said that he would be making no submissions on the authorities with regard to statutory planning control although he would not go as far as accepting Mr Bromilow's argument on the point.

Mr Howard sought to distinguish this case from several of the authorities cited by Mr Bromilow. In those cases such as in the Higgs and Moreau cases the estates concerned were a far cry from Grosvenor Road, Bournemouth and the Cooper-Dean estate. In the cases cited by Mr Bromilow there was a clearly ascertainable area which had a distinct character that would be valuable to preserve. That was not the case here.

Mr Howard relied on Mr Harrington's evidence to the effect that the existence of the covenants or otherwise were neutral to value. They did not enhance the value of other property.

5.4.1 Mr Howard's objection to the proposed clause 13.8 was that the wording did not reflect that of Clause 5 of the headlease. Clause 5 provides that "the demise shall not be deemed to imply the grant of any right to light or air ... which might prejudicially affect the free and unrestricted user of any adjoining land now vested in the lessor for building or other purposes". The objection was to the wording:- "affect diminish or interfere with the free and unrestricted user for building or other purposes by the Transferor". If the meaning of the words was the same in each case, as Mr Bromilow suggested, then there was no reason not to use his preferred wording. Mr Bromilow made the same argument. As neither would give way the matter was left to the Tribunal to decide. In the Applicant's

statement of case Mr Howard made the further point that the Respondent does not retain any adjoining land.

5.5.1 Clause 13.13

Mr Bromilow's argument was that this should be retained because it was better that rights were specifically set out in the Transfer rather than impliedly imported by virtue of Section 62 of the Law of Property Act 1925 or under the rule in Wheeldon v Burrows.

It was Mr Howard's case that Schedule 7 specifically requires that Section 62 is not excluded unless either a) the exclusion or restriction is made for the purpose of preserving or recognising any existing interest of the freeholder in the tenant's incumbrances or any existing right or interest of any person or

b) the nominee purchaser consents.

Here a) does not apply and the nominee purchaser does not consent, so the Section should not be excluded.

6. The Law

6.1 The relevant provisions of Schedule 7 to the 1993 Act which are applicable to this case are as follows:

6.2 Paragraph 1 to Schedule 7 states that in this Schedule –

"(a) ...

(b) 'the freeholder' means, in relation to the conveyance of a freehold interest, the person whose interest is to be conveyed."

6.3 Paragraph 2(1) of Schedule 7 states:-

"The conveyance shall not exclude or restrict the general words implied in conveyances under Section 62 of the Law of Property Act 1925 or the all-estate clause implied under Section 63 of that Act unless –

(a) the exclusion or restriction is made for the purpose of preserving or

recognising any existing interest of the freeholder in tenant's incumbrances or any existing right or interest of any other person; or

(b) the nominee purchaser consents to the exclusion or restriction.

6.3.1 Paragraph 3 of Schedule 7 provides that:-

"3(i) This paragraph applies to rights of any of the following descriptions namely –

a) rights of support for a building or part of a building,

b) rights to the access of light and air to a building or part of a building

c) rights to the passage of water or of gas or other piped fuel or to the drainage or disposal of water" etc.

"d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone ..." etc.

"and the provisions required to be included in the conveyance by virtue of sub-paragraph (2) are accordingly provisions relating to any such rights.

3 (2) The conveyance shall include provisions having the effect of -

...

(b) making the relevant premises subject to the following easements and rights (so far as they are capable of existing in law) namely –

(i) all easements and rights for the benefit of other property to which the relevant premises are subject immediately before the appropriate time, and

(ii) such further easements and rights (if any) as are necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date."

6.4 Paragraph 5(1) of Schedule 7 provides that :-

"5(1) As regards restrictive covenants, the conveyance shall include –

(a) ...

(b) such provisions (if any) as the freeholder or the nominee purchaser may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of any such lease or collateral agreement as is mentioned in paragraph (a) (i) being either –

(i) restrictions affecting the relevant premises which are capable of benefiting other property and (if enforceable only by the freeholder) are such as materially to enhance the value of the other property, or

(ii) restrictions affecting other property which are such as materially to enhance the value of the relevant premises; and

(c) such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which -

(i) will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired, but

(ii) will materially enhance the value of other property in which the freeholder has an interest at the relevant date."

7. The determination

7.1 Taking each of the disputed draft clauses in turn the Tribunal decided as follows:-

7.2 Clause 13.4.3

7.2.1 The Tribunal could not understand why the Transferor should have any interest in seeking to preserve or create rights in favour of adjoining property where the Transferor does not own any adjoining property. If, as Mr Bromilow conceded, such rights had been acquired by prescription then the Transferee would take subject to these rights in any event. If no rights had been acquired by prescription then the Tribunal considered that the Transferee should be able, if it so desired, to take action to prevent the encroachment from becoming a right by

prescription, just as any ordinary purchaser would be able to do. Any such dispute would be between the Transferee and the adjoining owner and would not involve the Transferor. It would be a different matter, and the proposed Clause 13.4.3 would be entirely appropriate, if the Transferor owned adjoining property, but that is not the case here. The Tribunal was not persuaded that the insertion of the clause would necessarily avoid disputes in the future between the Transferee and adjoining owners but that is of no concern to the Transferor. The Tribunal agreed with Mr Bromilow that it was not for the Tribunal to determine whether or not there exist any encroachments (although none were obvious on inspection) but neither would it be right to include such a clause in the Transfer on the off chance that there might possibly be some encroachment that no one knows anything about. If that were the case then such a clause would be standard in every Transfer and there would be no need for paragraph 3 of Schedule 7 to the 1993 Act. Paragraph 3(2)(b)(i) refers to "easements and rights for the benefit of other property to which the relevant premises <u>are</u> (emphasis added) subject immediately before the appropriate time" not to which the premises <u>might</u> (emphasis added) be subject immediately before the appropriate time. Taking all these points into account the Tribunal decided that the proposed Clause 13.4.3 should not be included in the Transfer.

7.3 Proposed clause 13.5.1 and 13.5.2

7.3.1 Dealing first with proposed clause 13.5.1 the Tribunal approached this by dissecting paragraph 3 of Schedule 7 and posing the following questions:-

i) does the right to light and air come within this paragraph?

ii) if so, does clause 13.5.1 purport to secure the same rights (insofar as they are capable of existing in law) for other property as to which 23 Grosvenor Road (the "relevant premises") is already subject? If so, then paragraph 3(2)(b)(i) applies

and the inclusion of a clause such as 13.5.1 is mandatory under paragraph 3(2)

iii) if not, then are the rights necessary for the reasonable enjoyment of other property in which the landlord has an interest? If so then such a clause is mandatory under paragraph 3(2) by virtue of paragraph 3(2)(b)(ii). If not, then there is no requirement that such a clause be included in the Transfer.

7.3.2 This proposed clause purports to reserve to the Transferor his successors in title and assignees the unrestricted right to develop, re-develop alter or otherwise use adjoining properties of the Transferor without affecting any rights of light or air which 23 Grosvenor Road may have acquired. Rights to access of light and air to a building are specifically referred to in paragraph 3 (1) of Schedule 7 to the 1993 Act. The Tribunal therefore answered the first question posed in paragraph 7.3.1 above in the affirmative. As for the second question, on the face of it clause 13.5.1 mirrors clause 5 of the lease. Clause 5 however refers to the free and unrestricted user of "adjoining land (emphasis added) now vested in the Lessor". The Lessor may well have owned adjoining land at the time the lease was entered into but he no longer does so. Clause 5 is, therefore, redundant and of no legal effect. Consequently it cannot be said that the Premises are currently subject to the rights contained in clause 5 of the lease. Alternatively, it might be said that the rights purporting to be granted by clause 13.5.1 of the draft lease are not capable of existing at law. Accordingly, paragraph 3(2)(b)(i) does not apply.

The Tribunal determined that the proposed clause does not come within paragraph 3(2)(b)(ii) of Schedule 7 because it is not necessary for the reasonable enjoyment of the Transferor's other property. This is situated some considerable distance away from 23 Grosvenor Road and cannot possibly be

affected by any rights to light and air which may have been acquired by 23 Grosvenor Road.

7.3.3 With regard to proposed clause 13.5.2 the Tribunal agreed with Mr Bromilow that the right to waive or release the covenants restrictions or stipulations relating to adjoining or neighbouring land are rights which are conferred on the Transferor qua freeholder and not by virtue of the lease and that it is not a requirement of paragraph 3 of Schedule 7 the 1993 Act that they are conferred by the lease. However, paragraph 3 only applies to rights of the description set out in paragraph 3(1) of Schedule 7. The right to modify, waive or release covenants restrictions or stipulations is not included in that list. The Tribunal concludes therefore that the rights sought to be reserved by clause 13.5.2 do not come within paragraph 3 at all and that the Transferor cannot therefore require that they be included in the Transfer.

7.4 With regard to proposed clauses 13.6.2, 13.6.3 and 13.6.6 the Tribunal agreed with Mr Bromilow that, on the authorities, the following propositions apply:-

a) that in seeking to establish whether proposed restrictions "materially enhance the value" of other property, it is not necessary for a party to adduce expert valuation evidence as it is a matter of "impression" for the Tribunal. (Higgs v Paul and Nietoba).

b) that "enhancement of value" can include maintaining value which would otherwise deteriorate if the restriction were not present. (Peck v Trustees of Hornsea Parochial Charities; Fuller v Thorpe Estate Limited)

c) that "material" means "not nominal or negligible".

d) that restrictive covenants can be valuable over and above statutory planning controls. (Moreau v Howard de Walden Estates Ltd; and Erkman v Earl of Cadogan).

Whilst the Tribunal found that the Cooper-Dean estate was not in the same category as, for instance, the area around Weymouth Street in London with which the Moreau case was concerned in that it is not an exclusive area where the appearance of the properties are similar giving it a distinct estate feel, nevertheless the Tribunal decided that proposed clauses 13.6.2 and 13.6.3 did come within paragraph 5(1)(b)(i) of Schedule 7 to the 1993 Act in that they continue restrictions arising by virtue of the headlease, they are capable of benefiting other property and (because they are enforceable only by the freeholder) are such as materially to enhance the value of the other property. The Tribunal decided, however, that the proposed clauses 13.6.3 was not such as materially to enhance the value of the other property. There are few trees left at the Premises and such as there are will not affect the nature or character of the area if they were cut, lopped or carried away in the Tribunal's view and so a covenant seeking to restrain this activity without the Transferor's consent would not materially enhance the value of other property in the vicinity. The Tribunal therefore decided that proposed clause 13.6.6 should not be included in the Transfer.

7.5 Clause 13.8

7.5.1 With regard to proposed clause 13.8 Mr Bromilow in his skeleton argument states that this is merely declaratory and does not affect the parties' legal rights and obligations. In order to be consistent with the Tribunal's decision with regard to proposed clause 13.5.1 the Tribunal does not agree that this clause should be contained in the transfer as there is no adjoining land retained by the Transferor.

7.6 Clause 13.13

7.6.1 Paragraph 2 of Schedule 7 permits the exclusion of Section 62 of the Law of Property Act 1925 only where, inter alia, the nominee purchaser consents to its

exclusion. In this case the nominee purchaser does not consent. The Tribunal finds that it is not necessary for the nominee purchaser to give reasons as to why it does not consent or, if it does, that those reasons have to be reasonable. If that is so with regard to Section 62 of the Law of Property Act 1925 the Tribunal determines that, although paragraph 2 does not specifically refer to the rule in Wheeldon v Burrows, the same result should apply. The Tribunal determines therefore that Clause 13.3 should be deleted from the Transfer.

8. Conclusion

8.1 The Tribunal therefore concluded that the following clauses as drafted shall be included in the Transfer to the Applicants, namely:-

Clauses 13.6.2 and 13.6.3

and that the following proposed clauses shall not be included in the Transfer, namely:-

Clauses 13.4.3, 13.5.1, 13.5.2, 13.6.6, 13.8 and 13.13.

Dated this 20 day of February 2009

D. Agnew LLB, LLM
(Chairman)