Neutral Citation Number: [2023] EWHC 1154 (Admin)

Case Nos: CO/889/2022; CO/2389/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2023

Before :

THE HON. MR. JUSTICE HOLGATE

- -

Between :

THE KING on the application of

(1) ANNINGTON PROPERTY LIMITED **Claimants**
(2) ANNINGTON LIMITED
(3) ANNINGTON HOLDINGS (GUERNSEY) LIMITED

- and -

THE SECRETARY OF STATE FOR DEFENCE **Defendant**

- and -

(1) UK GOVERNMENT INVESTMENTS LIMITED
(2) DEFENCE INFRASTRUCTURE HOLDINGS LIMITED
Interested Parties

- and -

Neutral Citation Number: EWHC 1155 (Ch)

Claim No: PT-2022-000206

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CH D)

ANNINGTON PROPERTY LIMITED

Claimant
(Defendant to Counterclaim)

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant
(Counterclaimant)

- -
- -

Monica Carss-Frisk KC, Jason Pobjoy and Emmeline Plews (instructed by **Linklaters LLP**) and **Zia Bhaloo KC**, **James Maurici KC**, **Toby Watkin KC**, **Mark Sefton KC** and **Tamsin Cox** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Sir James Eadie KC, Ivan Hare KC, David Lowe, Tom Cleaver and Daniel Cashman (instructed by **Slaughter and May**) and **Joanne Wicks KC**, **Philip Rainey KC**, **Adam Rosenthal KC**, **Ceri Edmonds** and **Daniel Petrides** (instructed by **Forsters LLP**) for the **Defendant**. The **Interested Parties** did not appear and were not represented.

Hearing dates: 13, 14, 15, 16 and 17 February 2023

- -

JUDGMENT APPROVED

This judgment was handed down remotely at 12 noon on 15 May 2023 by circulation to the parties or their representatives and by release to the National Archives.

Mr. Justice Holgate

1. This judgment is set out under the following headings: -

Introduction

2. The central issues in these claims are whether the Secretary of State for Defence ("the SoS") is entitled to enfranchise 8 properties under the Leasehold Reform Act 1967 ("the 1967 Act") and, if so, whether his decisions to exercise those rights are unlawful on public law grounds. There are additional issues about whether the SoS has adopted a wider scheme for serving further enfranchisement notices to acquire the "married quarters estate" ("MQE") and, if so, whether that scheme is unlawful.

3. In 1995 the Ministry of Defence ("MoD") decided to pursue a bulk sale to the private sector of about 80% of its service family accommodation ("SFA"). There were excluded from the sale properties in Scotland and Northern Ireland and about 6,300 properties in England and Wales. The MQE refers to the portion of the SFA which in due course was sold. The MoD's objects included raising funds to enable it to upgrade the condition of the accommodation, to dispose of surplus properties and to secure "value for money" ("VFM") through a competitive sale.

4. A tender exercise took place attracting 19 bidders. On 3 September 1996 the MoD announced that Annington Properties Limited ("APL") was the successful bidder. Contracts for a sale and leaseback agreement were exchanged on 24 September 1996 ("the sale agreement") and completion took place on 5 November 1996. The commercial documents are complex and what follows is based upon an agreed summary.

5. On 5 November 1996 the SoS granted 740 999-year headleases of 765 sites across England and Wales compromising 55,060 residential units. The SoS retained the freehold reversion to those headleases. APL paid a purchase price to the SoS of £1.662 billion.

6. On the same date APL leased back each of the sites to the SoS by underleases, each for a term of 200 years. For the first 25 years of this term the rent payable by the SoS was, in effect, the aggregate open market rental value of the residential units on each site, discounted by 58% to reflect MoD's responsibility for maintenance and the cost of voids, the bulk nature of the transactions and the strength of the MoD's covenant.

7. The SoS disposed of surplus properties through two routes. First, the SoS immediately transferred the freehold of over 55 sites comprising over 2,350

residential units to APL. Second, the SoS has the right (subject to various conditions) to terminate an underlease of a site or part thereof at any time on 6 months' notice. These are referred to as "released units" or "handbacks". Upon termination APL has the right to purchase the SoS's freehold reversion of the premises handed back for a nominal sum of £500. Although the underleases do not impose on the SoS a repairing obligation during the 200-year term, he is obliged to ensure that any premsies handed back is in good and tenantable repair.

8. Pursuant to the "master agreement" between SoS and APL dated 5 November 1996, the SoS was obliged to hand back a total of 13,213 residential units by 2021 in staged releases. This took place under the SoS's break clause in the underleases. The SoS satisfied that obligation by 2007.

9. Under a profit-sharing agreement entered into on 5 November 1996 the SoS was entitled to receive a share of the increase in property values on certain disposals by APL, but only for the first 15 years and on a decreasing scale. This resulted in the SoS receiving a further £161.2m.

10. The rent payable by the SoS under the underleases was subject to two different review mechanisms. First, "beacon rent reviews" were to be carried out on a 5-year rolling basis beginning in 1999. A review would be carried out for 4 roughly equal tranches of the MQE in each of four years (with no review in the fifth year). The open market rent was assessed for a representative unit, the "beacon unit", specified in each underlease and the percentage change in that rent applied to the site rent as a whole, subject to the 58% reduction.

11. Second, a "site review" was to be carried out of approximately 25% of all sites in each of the years 2021 to 2024. Each review was to determine the open market rent which a hypothetical lessee would pay for a lease in substantially similar terms as the underlease, but subject to certain assumptions and disregards.

12. Mr. Stephen Leung is the Chief Financial Officer of APL. He explains in his first witness statement that the MQE is the core asset of the Annington Group (to which the claimants belong). Most of the Group's revenue, and its value to investors, derives "from the high degree of cash flow certainty of its interest in the MQE portfolio", including the rental income from SFA leased to the SoS. Terra Firma manages the funds which represent the majority owners of the Group. Terra Firma intended that Annington Limited and its subsidiaries (including APL) would be sold before the end of 2022 when those funds were due to expire, rather than seeking to extend the life of those funds by up to one or two years (i.e. end 2023 or 2024). To that end Terra Firma has been preparing for the sale since 2017. The site rent reviews were one of the key steps in those preparations (paras. 1.1, 2.2, 2.4, and 3.1 to 3.4). Not surprisingly, Mr. David Thomas, the in-house counsel of Terra Firma, states that the company viewed the conclusion of the rent review process as a pre-condition for the sale (third witness statement para. 5.5).

13. As the first "site review" approached there remained 488 underleases. On 7 March 2019 APL and the SoS entered into two agreements. First, an arbitration agreement was intended to provide a faster process for the site review. The 488

sites were divided between 27 "baskets", each of which was judged to share similar characteristics, and a "representative site" identified for each basket. An adjustment factor was to be derived from the reviewed rent for each representative site and then applied to determine the site rents for the other sites in the same basket.

14. Second, the parties entered into a "Dilapidations and Handback Agreement" ("the D&H Agreement"), whereby the SoS agreed to release to APL a minimum of 3,500 residential units at a rate of 500 units a year for 7 years (i.e. to 31 March 2026). APL agreed to waive liability for dilapidations of up to £7,000 per unit, up to a maximum of £3.5m a year. After 31 March 2026 the defendant is to continue to release units at the same rate (clause 2.3), but either party may request an increase or decrease in that rate, which is to be considered by the parties in good faith having regard to their respective commercial interests (clause 2.4). The dilapidations relief is to continue beyond 2026, provided that the SoS continues to release units at the agreed rate (clauses 3.2 and 3.4).

15. The arbitral tribunal comprised Lord Neuberger of Abbotsbury, Professor Graham Chase FRICS and Mr. Martin Butterworth FRICS. They issued 5 awards between December 2019 and July 2021. The rent reviews proceeded on an agreed assumption that neither APL nor the SoS could be considered as parties to the hypothetical letting.

16. In September 2019 the solicitors for APL and the MoD had agreed that the bid of the hypothetical lessee could take into account any entitlement to enfranchise under the 1967 Act. In their third award (dated 18 June 2020) the tribunal set out the approach to be taken to that issue.

17. In their fourth award (dated 6 October 2020) the tribunal determined the site review rents for the representative sites in "batch 1", comprising 4 of the 27 representative sites to be dealt with in the arbitration. One of those sites was located at Cranwell and included two of the dwellings in respect of which enfranchisement notices have been served. In their fifth award (dated 5 July 2021) the tribunal determined site review rents for the eight sites in "batch 2."

18. At this point site rents for the remaining 15 representative sites were still to be assessed. It was expected that the process would continue until 2023. The arbitration proceedings were hard fought. The parties exchanged over 50 expert reports and hearings took place over many days. The legal submissions were extensive. APL alone has spent around £60m in costs. Accordingly, in April 2021 Mr. Guy Hands, Chief Executive Officer of Terra Firma, the fund manager controlling all the voting rights of the shares in Annington Holdings (Guernsey) Limited ("AHGL") (see below), proposed that the parties should work together to find an alternative solution for resolving the site reviews.

19. Following negotiations, APL and the SoS executed the "settlement agreement" dated 15 December 2021. The parties agreed to dispose of the arbitral proceedings by consent. The site rent reviews already determined by the tribunal were treated as being null and void. The parties agreed a "global adjustment factor" of 49.6% for all representative sites, which would apply from the relevant review date until the date of the next site review. That review would

take place in 30 years' time in place of the 15 years provided for in the underleases. The D&H Agreement was varied so that with effect from 1 April 2022, the minimum number of residential properties to be released by the SoS would be reduced from 500 to 375 units a year on a 2-year average (subject to a minimum of 250 units in any one year). The SoS also agreed to release 85 dilapidated units at Uxbridge, with APL waiving the SoS's liability for dilapidations, and 87 "demolished units" at Brize Norton.

20. On 16 December 2021, the day after the settlement agreement, the SoS served the first of his 8 enfranchisement notices under s.5 of the 1967 Act. The first related to 1 Sycamore Drive, Cranwell, Sleaford. It was addressed to APL as the immediate landlord and to the SoS as the registered legal proprietor of the freehold reversion. A second s.5 notice dated 28 March 2022 was served by the SoS in relation to 3 Sycamore Drive, Cranwell (1 and 3 Sycamore Drive are referred to as "the Cranwell properties"). Between 8 and 13 April 2022 there followed 6 notices in relation to 6 houses which together formed the site 16 to 21 Belvedere Road, Bristol ("the Bristol properties"). All 8 notices claimed a right to enfranchise pursuant to s.1AA of the 1967 Act (see below).

21. APL had no indication from the MoD before 16 December 2021 of its intention to serve enfranchisement notices. The MoD treated the matter as being strictly confidential within the department. Subsequently, APL served notices in reply disputing the SoS's right to enfranchise. I note that the claimants had previously taken advice in 2005, 2012, between 2017 and 2019 and in 2021 on the risk of the SoS pursuing a claim for enfranchisement (Agreed Statement of Facts ("ASF") paras. 48 and 56).

22. Mr. Leung explains in his witness statements that service of the enfranchisement notices has caused the sale of Annington Limited and its subsidiaries to be deferred. This is because of the uncertainty generated by the risk of enfranchisement. For example, investors with a low cost of capital seeking an income stream with relative certainty in the long term are unlikely to bid for the company and other bids would be at a significantly reduced level. In addition, for so long as the sale is delayed the value of APL's cashflows is sensitive to increases in interest rates which further reduce valuations.

23. In May 2019 internal MoD documents began to explore the possibility of an enfranchisement claim in the context of buying out APL's interest in the MQE. It is necessary to understand how this had come about.

24. In 1996 the MoD had been satisfied that the agreements entered into that year represented VFM. In August 1997 the National Audit Office ("NAO") issued a report "The Sale of the Married Quarters Estate." It concluded that the sale process had been "well managed" and "competitive". "Proceeding with the sale rested ultimately on securing a competitive price for assets that the Department did not need to own and other policy benefits". The NAO noted that in most respects risks were transferred to APL, that is risks associated with the release of surplus SFA and with future property values. The MoD would continue to be responsible for maintenance "and bear the risk associated with possible volatility in market rents."

25. From at least 2009 the NAO were expressing concerns about poor maintenance of the MQE and the high proportion of SFA properties that were void.

26. In 2016 the NAO stated in "Delivering the Defence Estate" that budgetary pressures had resulted in the MoD making decisions that had offered "poor value for money in the longer term, including the 1996 decision to sell and lease back the majority of Service Family Accommodation, which is now limiting the Department's ability to manage this element of the estate cost-effectively." The NAO noted that the MoD had had to pay higher rental costs to APL and had not benefited from the rise in house prices. Because of a lack of investment in SFA, the average dilapidation payment on residential property "handed back" to APL was about £14,000 per unit, which was limiting its ability to manage the SFA cost-effectively.

27. In January 2018 the NAO published its report "The Ministry of Defence's arrangement with Annington Property Limited". On the topic of the "original value for money of the sale" in 1996, the report stated that the MoD had committed itself to paying rent for up to 200 years, in return for an up front cash payment, when it would have been cheaper to retain ownership. So the merits of the deal had rested on policy benefits, such as improving the estate and incentives to dispose of surplus properties. Since then the MoD had incurred a loss of between £2.2 billion and £4.4 billion, owing to significantly higher increases in house prices and rentals than had been expected. That loss would increase if rents and house prices increased above the level of general inflation over the remainder of the 200-year term. The main external risks to APL had been significant falls in house prices and rents. Originally the MoD had expected APL to achieve an annual rate of return of 9.7% (including inflation), whereas the actual rate of return to end March 2017 had been 13.4%. The then current valuation of the MQE portfolio in APL's 2016-2017 accounts was £7.3 billion.

28. The NAO stated that the MoD had retained a number of risks and responsibilities, such as maintenance and voids, that would normally be taken on by a landlord of a residential lease. The estate had not been kept in good repair and the vacancy rate was 19%, almost twice the MoD's target. The MoD pays for empty properties and had not managed those risks well. Most of the properties handed back to Annington had been declared surplus before 2004 and the size of the estate had not fallen in line with more recent reductions in the armed forces. The NAO also expressed the view that APL and the MoD had not worked together to generate greater value from the MQE. The report noted that the upcoming rent reviews could significantly increase the MoD's rental costs. Achieving VFM in the future would be closely linked to the level of ongoing adjustments in the rents paid on the MQE.

29. On 13 July 2018 the Public Accounts Committee published its report "The Ministry of Defence's contract with Annington Property Limited". In their summary the Committee said:

> "In 1996, the Ministry of Defence sold most of its married quarters estate (now referred to as service family estate) to Annington Property Limited and agreed to rent it back for up to

> 200 years. The deal has turned out to be disastrous for taxpayers, offering no protection against the private sector making excessive gains at the taxpayer's expense. Worse could follow because the rent, which has been subject to a 58% downwards adjustment to date, is to be reviewed from 2021. Depending on the outcome of negotiations, the Department's costs could increase significantly at a time when the defence budget is already stretched."

30. The Committee's conclusions and recommendations began with the following:

> "**1. The Department's 1996 deal with Annington Property Limited provided little protection for taxpayers, who have lost billions of pounds, while enabling Annington to make excessive returns.** The deal comprises a sale and leaseback arrangement with the private sector involving over 55,000 residential properties. The Department expected Annington to make a reasonable return, but the current annual return of 13.4% is significantly out of line with the limited risks that Annington took on, fuelled by greater than forecast house price rises. In contrast, as a result of rent payments and the loss of the house price gains, the Department is between £2.2 billion and £4.2 billion worse off so far, than if it had retained the estate. The Department has also not done enough to protect long-term value for money; clawbacks on increases in the value of house prices ended 15 years into the 200 year deal, it is paying rent on around 20% of the retained Annington estate which it holds vacant, and it has only surrendered a small number of properties since 2004. The Department and Annington have failed to collaborate for mutual benefit to identify opportunities for developing the estate in line with the objectives of the deal, although both sides told us relations had improved recently.
>
> **Recommendations:**
>
> ***In its response to this report, the government should confirm that all its future deals will contain effective protections for the taxpayer that were noticeably absent in this sale. In respect of the Annington deal, the Department must make the most of a bad situation. As well as securing the best possible outcome from the rent negotiations, it should work with Annington to extract the maximum value from the estate, including via estate development opportunities, options to release sites, and agreements around the use of utilities***." (original emphasis)

31. On behalf of the MoD Ms. Kate Harrison[1] summarises the Ministry's consideration of VFM issues in relation to the MQE (e.g. paras. 3.10, 4.4 to 4.20, 12.1 to 12.4, 13.10 to 13.13, and 21.1 to 21.6 of first witness statement). It was important to achieve VFM in the site rent reviews. But achieving VFM

[1] See [62] below.

from the provision of SFA from the MQE in the long term posed problems. The MQE is too large for the MoD's current SFA requirements. In 2015 the MoD announced that the size of the armed forces would be reduced to 82,000 and then on 23 March 2021 that target was further reduced to 72,500 by 2025. Not all members of the armed forces require SFA and many are based overseas. There are 48,000 SFA units of which about 38,000 currently form the MQE provided by APL. The MoD struggles to meet the huge expense of maintaining MQE properties. There are two consequences. First, the standard of repair may be unsatisfactory and second, disrepair has operated as a disincentive for the MoD to hand back SFA to APL. Even with the relief available under the D&H Agreement (see [14] above), liability to APL for dilapidations is a budgetary constraint resulting in high numbers of vacant units, for all of which the SoS must pay rent to APL. The sale and leaseback arrangements represented increasingly poor VFM for the taxpayer and the SoS lacked commercial levers to improve that value.

32. Ms. Harrison explains that there were two potential methods for exiting the lease arrangements. The first was to hand back units to APL that were no longer required. The second was to buy back SFA from APL which continue to be required, either at open market values or by enfranchisement. In the rent review proceedings the hypothetical underlessee's right to enfranchise had stimulated investigation by the MoD of the possibility of the SoS being entitled to enfranchise in the real world. If the result of the 8 initial notices, treated as test cases, was that the price payable to APL would be less than the SoS's liabilities for renting SFA from APL, the public sector net debt ("PSND") would be reduced and there would be VFM. This would offer the SoS an alternative means of financing the provision of SFA to leasing. The concern was how best to manage the MoD's financial obligations in the future, regardless of the profits that APL were making (see also Mr. Razzell's witness statement paras. 8.1 to 8.3). Decisions to enfranchise would be taken on a site-by-site basis and considered as one strategy amongst others, including accelerated handback to APL and building SFA on MoD-owned land. These strategies were not mutually exclusive. The MoD considered that the existing contractual arrangements gave the Ministry no commercial leverage in its dealings with APL and that enfranchisement could provide that leverage. An ability to acquire properties at less than open market value would put significant commercial pressure on APL, particularly if its owners were intending to dispose of their interests.

33. The MoD has accepted that aspects of the arbitration agreement in 2019 and the settlement agreement in 2021 represented VFM as far as they went. But they did not alter the fundamentals of the sale and leaseback arrangements nor the view that those agreements were a bad deal and did not represent VFM (see e.g. paras. 4.20, 7.2 and 26.5 to 26.8 of the first witness statement of Ms. Harrison and paras. 5.4 to 5.8 of the witness statement of Mr. Razzell[2]).

34. At a meeting with officials on 5 May 2020 the SoS recognised that the deal with APL was "not a good one" and was keen to explore how the MoD could extricate itself by enfranchisement or by buying back the properties. In a submission dated 20 May 2020, the Minister was advised that leasehold

[2] See [63] below.

enfranchisement could be a potential tool for the MoD either to negotiate better terms with APL or to buy out its interest in some or all of the estate.

35. It is common ground that at the time of the 1996 sale and leaseback the SoS could not make an enfranchisement claim because the 1967 Act required the tenant to occupy the home as his only or main residence. Plainly, the SoS could not satisfy that test. But the residence requirement was abolished by s.138 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

36. However, the decision of the Court of Appeal in *Gratton-Storey v Lewis* [1987] 19 HLR 546 presented the SoS with a different problem. The Court held that on a proper construction of the legislation, a sub-tenant who does not own the freehold reversion of the property can serve a notice to enfranchise in order to acquire both the freehold and any intermediate interest. But where the subtenant already owns the freehold, the 1967 Act does not enable him to enfranchise simply in order to buy any intermediate interest. The SoS reserves the right to argue in a higher court that *Gratton-Storey* was wrongly decided but, of course, it is binding on me. The court suggested that the inability to enfranchise in that situation might have been an unintended omission. But if so, Parliament has not intervened to fill that perceived lacuna, despite having made amendments to the 1967 Act on several occasions.

37. Nevertheless, the court recognised (at p.548) that a sub-tenant who owns the freehold could overcome this issue by transferring his freehold to a nominee who would, of course, be under the control of the sub-tenant. Mr. Sefton KC accepted on behalf of APL that that proposition is correct.

38. Accordingly, the SoS decided to create an analogous structure. He decided to incorporate a private limited company under the Companies Act 2006, Defence Infrastructure Holdings Limited ("DIHL"), as a special purpose vehicle ("SPV") to hold the freehold of the properties to be enfranchised. DIHL is under the absolute control of the SoS. The SoS was and remains its sole shareholder. The initial two directors, and the subsequent directors, were or are senior civil servants in the MoD. On 18 December 2020 the Minister of State for Defence Procurement ("MinDP") wrote to the Chief Secretary to the Treasury asking for approval of the establishment of DIHL as a SPV and for proceeding with a test case involving a small number of dwellings. On 1 February 2021 the Chief Secretary gave that approval on the basis that the SPV was to be used solely as a "proof of concept".

39. In the meantime 1 and 3 Sycamore Drive, Cranwell had been identified as initial test cases. They were chosen because the tribunal's award determining rent for the representative sites in batch 1, included the Cranwell site and the rent determined for that site included any upward effect on rental value of a potential claim by the hypothetical lessee to enfranchise (Mr. Razzell's witness statement para. 9.6).

40. On 12 February 2021 the SoS transferred the freehold of the Cranwell properties to DIHL for the nominal sum of £1.

41. In a submission dated 8 October 2021 the MinDP was provided with a long-term commercial strategy for dealing with APL which included exiting the arrangements with Annington as far as possible. It was also explained how enfranchisement could reduce the PSND. On 19 October 2021 the SoS and the MinDP gave approval to pursue enfranchisement of the Cranwell properties.

42. On 20 October 2021 Terra Firma sent the MoD its detailed settlement proposals for the site review arbitrations. The MinDP and the Chief Secretary approved the settlement on 24 November and 6 December 2021 respectively.

43. On 2 December 2021 officials advised the MinDP that Terra Firma might be intending to sell its interest in Annington in the market soon after reaching a settlement with the SoS. The SoS should not agree a settlement with Annington and then Terra Firma sell its interest before the service of any enfranchisement notices. A purchaser would be likely to be more highly leveraged than Terra Firma thus reducing the SoS's room for further negotiation. It would also expose the SoS to questions as to why Terra Firma had been allowed to crystallise such significant profits. Accordingly, the MoD should launch its initial test enfranchisement cases immediately after the settlement agreement had been completed.

44. On 16 December 2021, having already served the first s.5 enfranchisement notice in respect of 1 Sycamore Drive, Cranwell earlier that day, the SoS applied to HM Land Registry to register the transfer of the freehold of the two Cranwell properties from the SoS to DIHL. That transfer was registered on 26 January 2022, showing the date of registration as 16 December 2021.

45. On 28 January 2022 the SoS served on APL (as immediate landlord) and DIHL (as freeholder) a s.5 enfranchisement notice in relation to 3 Sycamore Drive, Cranwell.

46. Having obtained the approval of the MinDP to pursue further test cases, the SoS transferred the freehold of the Bristol properties to DIHL. On 1 April 2021 DIHL was registered by HM Land Registry as the freehold owner of those properties and the 6 enfranchisement notices were served between 8 and 13 April 2022 on APL and DIHL.

47. A further potential obstacle to the enfranchisement of the eight properties lay in s.1(1B) of the 1967 Act. If the SoS's underlease of either the Cranwell site or of the Bristol site was a business tenancy, that is a tenancy to which Part II of the Landlord and Tenant Act 1954 applies ("the 1954 Act"), then the relevant s.5 notices served in relation to dwellings on that site would be invalid. If the underlease is a business tenancy, it is common ground that the SoS is unable to satisfy the residence requirement contained in s.1(1B) of the 1954 Act.

48. The Bristol site comprises only the 6 dwellings and their gardens the subject of the enfranchisement notices.

49. The Cranwell site contains in addition to 1 and 3 Sycamore Drive, 95 other dwellings and 37 separate garage units. There are also common parts comprising *inter alia* estate roads (which are agreed to be adopted public

highways), footpaths, areas of landscaping, amenity areas, parking areas, electrical, water and gas services and drainage. On 14 December 2021 the SoS granted a sub-underlease to DIHL of those common parts for a term of 6 years at a peppercorn rent. The object was to avoid the SoS occupying areas under his 200 year underlease for purposes which could result in that underlease being treated as a business tenancy within Part II of the 1954 Act. The arbitral tribunal had suggested the use of this model in the context of the hypothetical letting it had to apply (see para. 121 of its fourth award). Schedule 1 of the sub-underlease describes the common parts as including those areas of the land in HM Land Registry title LL136823 which are used in common by DIHL, owners and occupiers of the estate, the SoS and those permitted by them to do so.

50. The sub-underlease requires DIHL to keep the common parts in good and substantial repair and condition, to maintain plant and machinery forming part of the demise in good working order (employing contractors for that purpose) and to replace any landlord's fixtures in need of replacement and beyond economic repair.

51. At the date of the sub-underlease there were already long-established arrangements for the maintenance and management of SFA units and the common parts of MQE sites across the country. On 1 May 2014 the SoS had entered into the National Housing Prime Contract ("NHPC") with Carillion Amey (Housing Prime) Limited ("Amey"). Amey was responsible for *inter alia* the maintenance and management nationally of common parts on SFA sites. Accordingly, on 14 December 2021 the SoS and DIHL also entered into an "Agreement for the outsourcing of facilities management services". The contract defined the SoS as the supplier of services and DIHL as the customer. The SoS is obliged to provide services equivalent to those provided under the NHPC (or any successor contract) in relation to the common parts demised to DIHL by the sub-underlease, but no more. Clause 5 of the outsourcing agreement requires DIHL to pay charges to the SoS equivalent to those payable under the NHPC. The SoS is to invoice DIHL for those charges and DIHL is to settle them within 30 days. Paragraph 89 of the ASF notes that, in order to address the range of services provided by Amey across the whole of the MQE, the pricing methodology under the NHPC was very detailed and complex. Amey would invoice the SoS monthly in respect of forecast prices and within 3 months of the end of each contract year the account would be reconciled to the costs actually incurred.

52. The NHPC expired on 31 March 2022 and was replaced by the National Accommodation Management Services contract and Regional Accommodation Maintenance Services contract.

53. At the time when each of the enfranchisement notices was served, DIHL had no capital, no income, no bank account and no employees. Furthermore, no invoices had been rendered or paid under the facilities management agreement dated 14 December 2021.

54. In a MoD briefing note dated 26 September 2022 proposals were made for funding DIHL in relation to the common parts of the Cranwell site. The company needed an injection of equity so that it could meet its obligations for

maintenance charges. It was estimated that the charges would amount to around £20,000 a year. In response to a request from the SoS, on 13 October 2022 the directors of DIHL resolved to allot 75,000 ordinary shares of £1 each to the SoS. Because DIHL did not yet have a bank account, the SoS held the subscription price of £75,000 to the order of DIHL. The SoS says that this working capital was required to meet the costs associated with the purpose of DIHL's business, namely property holding and management. DIHL needed working capital for the maintenance and management of the common parts demised by the sub-underlease of 14 December 2021, including landscaping and trees, communal areas (e.g. playgrounds) and parking areas and replacement of equipment.

55. The arrangements regarding DIHL could give rise to three issues: (i) whether the veil of incorporation should be pierced, (ii) whether DIHL should be treated as part of the Crown, and (iii) whether the "*Ramsay* principle" applies.

56. The circumstances in which the veil of incorporation may be pierced are limited (see *Prest v Petrodel Resources Limited* [2013] 2 AC 415). The claimants accept that DIHL's corporate veil should not be pierced, whether in relation to the transfer of the freeholds of any of the Cranwell or Bristol properties, or the sub-underlease of the common parts of the Cranwell site, or the outsourcing agreement.

57. However, APL and the claimants do contend that in view of the complete control which the SoS has over DIHL, that company should be regarded as part of, and indivisible from, the Crown or the Government (see *Town Investments Limited v Department of the Environment* [1978] AC 359). On that basis the claimants say that the freeholds of the Cranwell and Bristol properties have remained in the ownership of the Crown throughout, whether in the form of the SoS or DIHL, and that both the underlease to the SoS and the sub-underlease to DIHL are held by the Crown. The subject of the indivisibility of the Crown affects a number of the issues which the court has to decide and so I will deal with it as a discrete topic before coming to the individual grounds of challenge.

58. Separately, the claimants contend that DIHL is a SPV under the absolute control of the SoS without any separate functions, such that it cannot be treated as being in actual occupation of the common parts of the Cranwell sites. Accordingly, it is argued that those parts are in the occupation of the SoS.

The parties, participants and proceedings

59. APL was established by Nomura International plc for the purposes of the acquisition in 1996. It is the entity that holds the portfolio of properties acquired from the SoS. Its primary business consists of selling or letting out units released by the MoD from time to time and renting out the remaining units of the portfolio to the SoS. Currently the MoD leases about 38,000 units of SFA from APL. This represents about 95% of APL's properties and generates over 90% of the rental income of the Group to which APL belongs.

60. Annington Limited ("AL") is the parent company of the Annington Group. It is a holding company and does not carry on any business. AHGL is the "indirect parent entity" of AL.

61. On 11 March 2022 APL, AL and AHGL brought their first claim for judicial review (CO/889/2022) challenging the validity of the enfranchisement notices on the Cranwell properties and the decision to issue them. The SoS was the defendant.

62. The MoD's land estate is managed by the Defence Infrastructure Organisation ("DIO"), which is an operating arm of the Ministry. Mr. Graham Dalton was Chief Executive of the DIO until April 2022 and Ms. Kate Harrison remains its Finance Director. Both were directors of DIHL during the relevant period.

63. UK Government Investments Limited ("UKGI") is wholly owned by the Solicitor for the Affairs of HM Treasury as nominee for HM Treasury. It is an arm's length body with the objectives of providing corporate finance and corporate governance advice to government departments and their arm's length bodies. UKGI supplied the MoD with corporate finance and commercial advice in relation to the site rent review process and advice to the MoD on enfranchisement issues and the test cases. Mr. Robert Razzell is an Executive Director and the Chief Financial Officer of UKGI.

64. UKGI and DIHL are interested parties in the judicial review CO/889/2022.

65. On 9 May 2022 Choudhury J granted permission for the claimants to apply for judicial review in CO/889/2022.

66. On 5 July 2022 the claimants brought their second claim for judicial review (CO/2389/2022) challenging the validity of the enfranchisement notices on the Bristol properties and the decision to issue them. These proceedings are between the same parties as in the first judicial review.

67. On 11 March 2002 APL also issued a claim in the Chancery Division against the SoS under CPR Part 8 seeking *inter alia* declarations that the SoS was not entitled to enfranchise the Cranwell properties and that the notices are void and of no effect (PT-2022-000206).

68. On 9 June 2022 the SoS issued a claim in the Bristol County Court against APL under CPR Part 8 seeking an order that the SoS is entitled to enfranchise the Bristol properties. On 30 June 2022 the County Court transferred this claim to the Chancery Division. On the same day the High Court made a "boomerang order" in respect of PT-2022-000206. In order to overcome any jurisdictional issues this order transferred the High Court claim to the County Court and then immediately back to the High Court. The two Part 8 claims were then consolidated under the reference PT-2022-000206, with the SoS's claim standing as a counterclaim.

69. On 21 July 2022, sitting in the Chancery Division and the Queen's Bench Division, I gave directions for both judicial review claims and the Part 8 claim and counterclaim to be case managed and heard together, and for the parties to be able to rely in each claim upon the evidence served in any of the proceedings. The court also granted permission for the claimants to proceed with the second judicial review. Given the substantial degree of overlap between the claims, the parties were ordered to produce a single list of issues which they ask the court

to determine covering all proceedings. The parties were also directed to produce the ASF and agreed analyses of the agreements, property transactions, and statutory provisions.

70. I am most grateful to the parties and their respective legal teams for the very helpful agreed documents they produced. This material enabled the skeleton arguments to focus on the issues in the case and the oral advocacy to be completed in five days, albeit covering a wide range of issues. I would also like to express my gratitude to all counsel for the considerable assistance they provided through their written and oral submissions.

The issues

71. In summary, the claimants advance the following grounds of challenge (with cross references to the relevant issues in the List of Issues agreed by the parties):

Ground 1 (Issue 1) – Whether the consent of APL to enfranchisement was required

All eight of the enfranchisement notices are invalid because, on a true construction of s.33 of the 1967 Act and s.88 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), the SoS may not enfranchise any of the units held from APL as underlessor without the consent of APL; and/or

Ground 2 (Issues 2 to 9) - Whether the Secretary of State satisfied the requirements in the 1967 Act for having a right to enfranchise

(i) Issue 2 – The effect of the decision in Gratton-Storey v Lewis

Applying the decision in *Gratton-Storey v Lewis*:

(a) the notice relating to 1 Sycamore Drive was invalid because at the time when the s.5 notice was served, DIHL was only the beneficial owner of the freehold but was not the registered proprietor of the legal estate; and/or

(b) all 8 of the enfranchisement notices are invalid because, by reason of the indivisibility of the Crown, the SoS and DIHL are the same entity and therefore the Crown remained the freeholder of the residential units at all material times; and/or

(ii) Issues 3 to 5 – Whether the Secretary of State's underleases were business tenancies (areas other than the common parts of the Cranwell site)

Each of the 8 enfranchisement notices is invalid because at the date when it was served the relevant underlease held by the SoS included property occupied for the purposes of a Government department within s.56(3) of the 1954 Act and was therefore a business tenancy to which Part II of that Act applied (s.1(1B) of the 1967 Act); and/or

(iii) Issue 6 – Whether the Secretary of State's underleases were business tenancies (the common parts of the Cranwell site)

Each of the Cranwell enfranchisement notices is invalid (s.1(1B) of the 1967 Act) because the sub-underletting of the common parts of the Cranwell site to DIHL did not prevent the Cranwell underlease held by the SoS from being a tenancy to which Part II of the 1954 Act applied. In summary, the claimants contend that:

(a) by virtue of Crown indivisibility DIHL and the SoS were to be treated as the same entity; and/or

(b) occupation of any common part and/or the carrying on of a business by DIHL was to be treated as occupation by and/or the business of the SoS (s.23(1A) and (1B) of the 1954 Act); and/or

(c) occupation of any part by DIHL constituted occupation for "any purposes of a Government department" (within s.56(3) of the 1954 Act), whether the purposes of DIHL's occupation were all or any of the SoS's purposes or those of DIHL's own business; and/or

(iv) Issue 7 – The *de minimis* principle

Whether the *de minimis* principle alters any conclusions under issues 5 and/or 6 as to whether the Cranwell underlease is a tenancy to which Part II of the 1954 Act applied; and/or

(v) Issues 8 and 9 – Section 1AA of the 1967 Act and the adjoining land test

Each of the Cranwell enfranchisement notices is invalid because the SoS's tenancy of each of the Cranwell properties is an "excluded tenancy" within the meaning of s.1AA of the 1967 Act; and/or

Ground 3 (Issue 11) – Tests applicable to compulsory acquisition

The exercise of a right to enfranchise by a public authority such as the SoS involves a form of compulsory purchase or acquisition which is subject to a legal requirement that (i) the SoS be satisfied that there is a compelling case in the public interest for the exercise of that right and (ii) the right be exercised for the statutory purposes of the 1967 Act and not for a collateral purpose. The SoS did not comply with requirement (i) and so the decision to serve the 8 enfranchisement notices was unlawful. As to requirement (ii), see ground 4; and/or

Ground 4 (Issues 12 to 14) – Improper motives

The decision to serve each of the 8 enfranchisement notices was unlawful because it was made for improper purposes which were significantly material or so intertwined with any lawful purpose as to be inseparable; and/or

Ground 5 (Issues 15 to 18) – Breach of legitimate expectations

> The SoS's decision to serve each of the 8 notices unlawfully breached the claimants' substantive legitimate expectations
>
> (a) By virtue of the 1996 agreements and subsequent agreements between the parties, up to and including the 2021 settlement agreement, that APL will continue to receive rents for the MQE sites and continue to be able to acquire the freehold of all or part of these sites for a nominal amount; and/or
>
> (b) By virtue of guidance published by the Crown Estate in January 2016 "Non-excepted areas – policy and guidance" ("the 2016 Guidance"), the SoS cannot enfranchise the whole or any part of the MQE sites without the consent of APL as the immediate landlord of the SoS; and/or

Ground 6 (Issues 19 to 20) – Whether there has been a breach of Article 1 of the First Protocol to the ECHR

> In exercising any right under the 1967 Act to enfranchise the Cranwell and Bristol properties the SoS has acted in a manner which constitutes an unlawful interference with the Claimants' right to peaceful enjoyment of their possessions contrary to Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("ECHR"). The relevant possessions comprise (i) APL's leasehold in the MQE, (ii) APL's contractual rights to acquire released units, (iii) APL's marketable goodwill and legitimate expectation and (iv) the shares held by AHGL in APL.

72. Grounds 1 and 2 are common to the Part 8 claims in the Chancery Division and the two claims for judicial review. They are concerned with whether the SoS was entitled under the 1967 Act to enfranchise some or all of the Cranwell and Bristol properties, so that the interests acquired by the SoS would include APL's leasehold in those properties. Ms. Carss-Frisk KC on behalf of the claimants confirmed that the legal arguments under grounds 1 and 2 in the claims for judicial review are the same as those advanced in the Chancery Division for the purposes of establishing any entitlement to relief (Transcript Day 1 pp.27-28).

73. To the extent that the claimants succeed on grounds 1 and/or 2 in relation to any s.5 notice, the court would determine in the Chancery Division proceedings that the notice is invalid and set it aside. The SoS submits that the issues raised by grounds 1 and 2 are matters of private law concerning the interpretation and application of the 1967 Act. Although the indivisibility of the Crown is a matter of public law, its only impact in these proceedings is on whether a private law right to enfranchise has arisen. I agree with those submissions. In any event, if the SoS was not entitled under the 1967 Act to enfranchise a particular property, the claimants have not identified any difference between a decision in the Chancery Division that a s.5 notice is invalid and a decision in the Administrative Court that that notice is unlawful (Transcript Day 1, p.28). The effect on whether the SoS may pursue a claim to enfranchise is the same.

74. By contrast grounds 3 to 6 all involve public law grounds of challenge and arise solely in the claims for judicial review. Those grounds arise if, and in so far as, it is decided that one or more of the s.5 notices is valid in relation to grounds 1 and 2.

75. Although ground 4 alleges that the decision to serve each of the 8 enfranchisement notices was vitiated by improper purposes, the claimants have confirmed that they do not allege bad faith, fraud or corruption on the part of the defendant or anybody else. Ms. Carss-Frisk said that it was unnecessary for the claimants to go that far in this case.

76. Sir James Eadie KC confirmed on behalf of the defendant that if any of the public law grounds of challenge should succeed, the court is not asked to consider s.31(2A) of the Senior Courts Act 1981.

77. Issues 21 and 22 address the claimants' allegation that the SoS has adopted a wider scheme to override their contractual rights under the agreements, of which the 8 notices form a part. I will return to that issue after grounds 1 to 6.

Statutory framework

The Leasehold Reform Act 1967

78. Section 1(1) begins:

> "This Part of this Act shall have effect to confer on a tenant of a leasehold house … a right to acquire on fair terms the freehold or an extended lease of the house and premises where …"

There then follows a number of qualifying conditions in a complex set of provisions.

79. Originally, the right to enfranchise was only conferred where the tenant held a "long tenancy" at a "low rent" in respect of a house with a rateable value not exceeding certain limits and which was occupied by the tenant as his only or main residence. However, successive amendments to the 1967 Act have extended the scope of the right to enfranchise considerably.

80. It is common ground that at the date of each of the s.5 notices, the SoS held a long tenancy in relation to each of the Cranwell and Bristol properties, which he had held for at least 2 years before giving those notices (s.1(1)(a), s.1(1)(b)(i) and s.3). It is also agreed that each of the properties qualifies as a "house".

81. The SoS's tenancies are not at a low rent (s.4). But s.106 of and sched.9 to the Housing Act 1996 amended the 1967 Act so as to confer "an additional right to enfranchisement in relation to tenancies which fail the low rent test…". Section 1AA of the 1967 Act provides:

> "(1) Where—

> (a) section 1(1) above would apply in the case of the tenant of a house but for the fact that the tenancy is not a tenancy at a low rent, and
>
> (b) the tenancy … is not an excluded tenancy,
>
> this Part of this Act shall have effect to confer on the tenant the same right to acquire the freehold of the house and premises as would be conferred by section 1(1) above if it were a tenancy at a low rent."

82. It is common ground that the SoS's tenancy of the Bristol properties is not an "excluded tenancy" (see s.1AA(1)(b)). But under issues 8 and 9 the claimants contend that the tenancy of the Cranwell properties is an "excluded tenancy" and so s.1AA does not confer any right to enfranchise in respect of the Cranwell properties.

83. A tenancy is an excluded tenancy if three conditions are all met. It is common ground that two of the conditions are satisfied. First, the Cranwell properties are located in an area designated by the Secretary of State as a "rural area" for the purposes of s.1AA(3)(a). Second, the SoS's underlease was granted on or before 1 April 1997 (s.1AA(3)(c)). The issue is whether the condition in s.1AA(3)(b) is satisfied. If it is, the SoS's tenancy of that house is an excluded tenancy and he has no right to enfranchise in respect of that property. Section 1AA(3)(b) provides:

> "(b) the freehold of that house is owned together with adjoining land which is not occupied for residential purposes and has been owned together with such land since 1st April 1997 (the date on which section 106 of the Housing Act 1996 came into force)"

This is referred to as "the adjoining land test".

84. As originally enacted the 1967 Act had made the right to enfranchise subject to a residence test. In most cases the 2002 Act repealed that requirement with effect from 26 July 2002. But where the tenancy of a house is a business tenancy, that is one to which Part II of the 1954 Act applies, s.1(1B) of the 1967 Act still requires the tenant to satisfy a residence test:

> "(1B) This Part of this Act shall not have effect to confer any right on the tenant of a house under a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies unless, at the relevant time, the tenant has been occupying the house, or any part of it, as his only or main residence (whether or not he has been using it for other purposes)—
>
> (a) for the last two years; or
>
> (b) for periods amounting to two years in the last ten years."

The SoS accepts that he cannot satisfy the residence requirement in relation to any of the 8 properties the subject of the s.5 notices.

85. Section 5 is entitled "General provisions as to claims to enfranchisement or extension." Section 5(1) provides:

> "(1) Where under this Part of this Act a tenant of a house has the right to acquire the freehold or an extended lease and gives notice of his desire to have it, the rights and obligations of the landlord and the tenant arising from the notice shall inure for the benefit of and be enforceable against them, their executors, administrators and assigns to the like extent (but no further) as rights and obligations arising under a contract for a sale or lease freely entered into between the landlord and tenant; and accordingly, in relation to matters arising out of any such notice, references in this Part of this Act to the tenant and the landlord shall, in so far as the context permits, include their respective executors, administrators and assigns."

Thus, where a tenant has the right to enfranchise his property, the service of a s.5 notice is binding on successors in title of both landlord and tenant.

86. Section 5(4) applies sched.1 where a tenant serves an enfranchisement notice in respect of a subtenancy, or there is a tenancy reversionary on his tenancy:

> "(4) The provisions of Schedule 1 to this Act shall have effect in relation to the operation of this Part of this Act where a person gives notice of his desire to have the freehold or an extended lease of a house and premises, and either he does so in respect of a sub-tenancy or there is a tenancy reversionary on his tenancy; but any such notice given in respect of a tenancy granted by sub-demise out of a superior tenancy other than a long tenancy at a low rent shall be of no effect if the grant was made in breach of the terms of the superior tenancy and there has been no waiver of the breach by the superior landlord."

87. Where a sub-tenant serves a notice to enfranchise, sched.1 applies relevant provisions of the 1967 Act, with modifications, to the rights and obligations of the owner and each tenant superior to the sub-tenant. Paragraph 1(1) provides:

> "(1) Where a person (in this Schedule referred to as "the claimant") gives notice of his desire to have the freehold or an extended lease of a house and premises under Part I of this Act, and does so in respect of a sub-tenancy (in this Schedule referred to as "the tenancy in possession"), then except as otherwise provided by this Schedule—
>
> (a) the rights and obligations of the landlord under Part I of this Act shall, so far as their interests are affected, be rights and obligations respectively of the estate owner in respect of the fee simple and of each of the persons in whom is vested a

> concurrent tenancy superior to the tenancy in possession (and references to the landlord shall apply accordingly); and
>
> (b) the proceedings arising out of the notice, whether for resisting or giving effect to the claim to acquire the freehold or extended lease, shall be conducted, on behalf of all the persons referred to in (a) above, by and through that one of them who is identified by this Schedule as "the reversioner"."

88. Where there is a reversionary tenancy on the tenancy in relation to which an enfranchisement notice is given ("the tenancy in possession"), para. 1(2) applies sched.1 as if the reversionary tenancy were a concurrent tenancy intermediate between the tenancy in possession and any superior interests.

89. The effect of sched.1 is that the rights and obligations of the landlord under Part I of the 1967 Act are deemed to be respectively the rights and obligations of the freeholder and also of any person holding a tenancy superior to that of the enfranchising tenant. The legislation designates one of the persons with a superior interest to be the "reversioner", who may then act on behalf of all those persons in relation to the subtenant's claim to acquire the freehold. Thus, all such parties are bound by the operation of Part I of the 1967 Act, without them being required to give their consent to enfranchisement.

90. By s.8 the landlord must convey the freehold of the house to the tenant, subject to the tenancy and the tenant's incumbrances, but otherwise free of incumbrances. Schedule 1 (paras. 1 to 7) adapts those requirements where a notice to enfranchise is given by a subtenant. The effect of s.8(1) and para. 1(1)(a) of sched.1 is that the landlord is bound to make, and the enfranchising subtenant to accept, a transfer of the freehold and intermediate interests on the prices and conditions laid down by the Act.

91. Paragraph 14 of sched.1 applies the provisions of that schedule where the tenancy in possession (that is the tenancy of the subtenant who served a notice to enfranchise) is a tenancy from the Crown (see Issue 1 below).

92. Section 9 lays down the basis upon which the purchase price is to be determined. There are three different regimes. Because the entitlement of the SoS to enfranchise depends upon s.1AA of the 1967 Act, the price payable by virtue of s.9(1C) is the sum of two components: first the price payable under s.9(1A) and second any additional amount payable under s.9A. In summary, the price payable under s.9(1A) is the open market value of the freehold of the house subject to the sub-tenancy and any intermediate interests, on the assumption that the subtenant has no right to enfranchise, but does have the right to remain in the property at the expiration of his term paying a rent. It is also assumed that the tenant has no liability to repair. Improvements for which the tenant has paid are disregarded. Under s.9A the landlord may be paid a reasonable sum to compensate him for (1) any diminution in the value of his interest in other property resulting from the enfranchisement and (2) any other loss or damage resulting from enfranchisement to the extent that it is referable to the landlord's interest in any other property. Paragraph 7(1)(b) of sched.1 requires a separate

purchase price to be determined for each interest superior to that of the subtenant.

93. In England, if the parties do not agree the amount of the purchase price under s.9, the dispute is generally to be determined by the First-tier Tribunal ("FTT") (s.21).

94. By s.20 of the 1967 Act, the County Court has jurisdiction to determine disputes about *inter alia* whether a person is entitled to enfranchise in respect of a house, to what property his right extends, and the performance or discharge of obligations arising out of a s.5 notice.

95. Section 33 of the 1967 Act deals with Crown land. Issue 1 is concerned with the extent to which s.33 confers a statutory right to enfranchise on a tenant who "holds a lease from the Crown". In cases where such a tenant does not have a statutory right to enfranchise he may be able to rely upon a published undertaking by the Crown to abide by the 1967 Act. But that undertaking does not bind other parties with an interest in the land superior to that of the tenant. The claimants say that s.33 does not confer a right to enfranchise on the defendant and so the consent of APL to enfranchisement pursuant to the Crown's undertaking is required. They also rely upon s.88 of the 1993 Act (see Issue 1 below), which enables all relevant parties to agree to confer jurisdiction on the FTT to determine *inter alia* the prices payable on enfranchisement, as supporting their interpretation of s.33.

Part II of the Landlord and Tenant Act 1954

96. Section 23 defines tenancies to which Part II of the Act applies:

> "(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.
>
> (1A) Occupation or the carrying on of a business—
>
> (a) by a company in which the tenant has a controlling interest; or
>
> (b) where the tenant is a company, by a person with a controlling interest in the company,
>
> shall be treated for the purposes of this section as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant.
>
> (1B) Accordingly references (however expressed) in this Part of this Act to the business of, or to use, occupation or enjoyment by, the tenant shall be construed as including references to the business of, or to use, occupation or enjoyment by, a company

> falling within subsection (1A)(a) above or a person falling within subsection (1A)(b) above.
>
> (2) In this Part of this Act the expression "*business*" includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate.
>
> ….. "

97. Section 24 provides for a business tenancy to continue unless and until terminated under Part II of the 1954 Act. A landlord may serve a notice to terminate under s.25. A tenant may serve a request for a new tenancy under s.26 specifying the date on which that tenancy is to begin. Under s.27 a tenant under a fixed term tenancy may give at least 3 months' notice that he does not wish the tenancy to continue under s.24 beyond the date on which it expires by effluxion of time. Where a landlord has given notice under s.25 or a tenant has given notice under s.26, the tenant may apply to the court for an order granting a new tenancy (s.24(1)). The landlord may oppose the grant of a new tenancy on the grounds set out in s.30(1).

98. Any tenancy which the court orders to be granted under s.29 is limited to the "holding" (s.32). Certain of the grounds of opposition set out in s.30(1) are expressed by reference to "the holding" (e.g. grounds (f) and (g) where the landlord intends to demolish or reconstruct the holding or to occupy the holding for certain purposes). The "holding" is also the unit of property by reference to which compensation is determined under s.37 where the landlord opposes the grant of a new tenancy on certain grounds and the tenant quits.

99. Section 23(3) defines "the holding":

> "In the following provisions of this Part of this Act the expression "*the holding*", in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

Generally the holding refers to that part of a tenant's demise which he or his employees occupy for business purposes.

100. Part IV of the 1954 Act contains "Miscellaneous and Supplementary provisions". Section 56 deals with the application of various parts of the 1954 Act to the Crown. In relation to Part II section 56(1) to (4) provides: -

> "(1) Subject to the provisions of this and the four next following sections, Part II of this Act shall apply where there is an interest belonging to Her Majesty in right of the Crown or the Duchy of Lancaster or belonging to the Duchy of Cornwall, or belonging to a Government department or held on behalf of Her Majesty

> for the purposes of a Government department, in like manner as if that interest were an interest not so belonging or held.
>
> (2) The provisions of the Eighth Schedule to this Act shall have effect as respects the application of Part II of this Act to cases where the interest of the landlord belongs to Her Majesty in right of the Crown or the Duchy of Lancaster or to the Duchy of Cornwall.
>
> (3) Where a tenancy is held by or on behalf of a Government department and the property comprised therein is or includes premises occupied for any purposes of a Government department, the tenancy shall be one to which Part II of this Act applies; and for the purposes of any provision of the said Part II or the Ninth Schedule to this Act which is applicable only if either or both of the following conditions are satisfied, that is to say—
>
> > (a) that any premises have during any period been occupied for the purposes of the tenant's business;
> >
> > (b) that on any change of occupier of any premises the new occupier succeeded to the business of the former occupier,
>
> the said conditions shall be deemed to be satisfied respectively, in relation to such a tenancy, if during that period or, as the case may be, immediately before and immediately after the change, the premises were occupied for the purposes of a Government department.
>
> (4) The last foregoing subsection shall apply in relation to any premises provided by a Government department without any rent being payable to the department therefor as if the premises were occupied for the purposes of a Government department."

Issues 3 to 6 include matters relating to section 56(3) and (4).

The Ramsay principle

101. During argument the claimants submitted that both the transfer of the freeholds of the eight properties to DIHL and the sub-underlease of the common parts of the Cranwell site were artificial transactions and that this was a factor to be taken into account when applying certain statutory provisions. The claimants made it clear that they were not alleging that any of these transactions was a sham, applying the test in *Snook v London and West Riding Investments Limited* [1967] 2 QB 786. It was therefore necessary to clarify whether the claimants were relying on the *Ramsay* principle and, if so, to what extent.

102. On Day 4 (Transcript pp.3-4) Ms. Joanne Wicks KC (who appeared on behalf of the defendant) announced that it had been agreed with Ms. Zia Bhaloo KC (who appeared on behalf of the defendant) that the claimants were not relying

upon the *Ramsay* principle as a "separate issue". Ms. Bhaloo did not disagree But ton the issue of "occupation" for the purposes of Part II of the 1954 Act, the claimants continued to rely upon *Rossendale Borough Council v Hurstwood Properties (A) Limited* [2022] AC 690, which expressly applied the *Ramsay* principle. In the circumstances, I should deal briefly with the subject.

103. The *Ramsay* principle has been explained in *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC 684, *UBS AG v Revenue and Customs Commissioners* [2016] 1 WLR 1005 and *Rossendale*. The principle is not confined to tax law, but is based upon the modern purposive approach to the interpretation of legislation (*Rossendale* at [9]). It is important to consider the context and the scheme of the legislation. Likewise, in *Barclays* at [32] the House of Lords stated that it is necessary to give the relevant provision a purposive construction to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which may include the overall effect of a number of elements) answers to that statutory description. At [36] the House agreed with the statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] 6 HKCFAR 517 at [35]:

> "the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

104. In *Rossendale* the Supreme Court decided that the main purpose of s.45 of the Local Government Finance Act 1988, which imposed a liability for business rates on the owners of unoccupied premises, was to encourage such owners to bring their properties back into use for the benefit of the community ([22]-[30]). "Owner" was defined as the person entitled to possession of the property (s.65(1)) because the legislature's object was to impose liability on the person who had the ability in the real world to bring an unoccupied property back into use. Parliament could not have intended the term "owner" to refer to a SPV which is voluntarily wound up, or allowed to become "dormant", and so has no real or practical ability to exercise its right to possession.

105. Drawing upon *Rossendale*, the claimants submit that the purpose of Part II of the 1954 Act is to protect a tenant who makes actual use of his premises for the purposes of his business. They say that DIHL's occupation of the common parts of the Cranwell site does not answer to that description. Instead, I will address this contention under Issue 6 below.

106. The claimants do not rely upon the *Ramsay* principle in relation to the application of the "adjoining land test" in s.1AA(3)(b) of the 1967 Act. Nor do they rely upon the principle in relation to the application of the decision in *Gratton-Storey*. A subtenant cannot acquire a freehold interest which he already owns. The Court of Appeal decided that the 1967 Act does not entitle such a person to enfranchise so as to be able to acquire intermediate interests. But the claimants accept that this ruling does not apply where a subtenant has

transferred his freehold interest to a nominee or to a SPV. It is common ground that, as a matter of private law, a subtenant can acquire intermediate interests under the 1967 Act in that way. Such an arrangement does not offend the ruling in *Gratton-Storey*. The position is analogous to *Westbrook Dolphin Square Limited v Friends Life Limited (No.2)* [2015] 1 WLR 1713 in which the court held that a SPV was a qualifying tenant entitled to exercise a right to enfranchise, notwithstanding the fact that the company had been set up and a lease granted to it solely to enable an enfranchisement claim to be made. The *Ramsay* principle did not defeat that arrangement.

107. The question arises why should the legal analysis be any different where the subtenant is the Crown, or more particularly a Government minister? The claimants respond that because of the principle that the Crown is indivisible, the minister and DIHL are not different legal entities. They both form part of the same entity, the Crown or the Government, and *Gratton-Storey* cannot be distinguished. I turn next to examine the arguments on Crown indivisibility.

The indivisibility of the Crown

108. The claimants seek to apply the doctrine of Crown indivisibility by submitting that DIHL is not a separate legal entity from the SoS. They say that the legal consequences are:

(i) The transfer of the freehold reversions to the 8 properties to DIHL did not result in there ceasing to be a Crown interest in the land for the purposes of section 33 of the 1967 Act and so the defendant is not entitled to rely upon the first limb of s.33(1) (Issue 1 below);

(ii) The underleases of the Cranwell and Bristol sites and the freehold of the Cranwell and Bristol properties are both vested in the same entity, the Crown, and so applying *Gratton-Storey* the SoS is not entitled to enfranchise any of those properties under the 1967 Act (Issue 2 below);

(iii) The occupation of the common parts of the Cranwell site pursuant to the sub-underlease amounts to occupation by the SoS for business purposes, applying s.56(3) of the 1954 Act, so that the underlease vested in the SoS is a business tenancy to which Part II of that Act applies and the SoS is not entitled to enfranchise the Cranwell properties (Issue 6(2)(i) below);

(iv) When applying the adjoining land test in s.1AA(3)(b) of the 1967 Act, the common parts of the Cranwell site sub-underlet to DIHL and the freehold of the Cranwell properties transferred to DIHL are to be treated as owned by the SoS (Issues 8 and 9 below).

109. The leading cases in this jurisdiction on Crown indivisibility are *Town Investments Limited v Department of the Environment* [1978] AC 359 and *M v The Home Office* [1994] 1 AC 377. They establish two fundamental points. First, Crown indivisibility is a matter of public law, not private law (*Town Investments* at p.380F and 397B). Second, whether Crown indivisibility is applicable must depend on the legal context (see *M* at p.415B-D).

110. In *Town Investments* legislation imposed a limit on rent payable under a tenancy which included premises occupied by the tenant for the purposes of a business carried on by him. Two leases were granted to the Secretary of State for the Environment "for and on behalf of Her Majesty". That Minister was responsible for acquiring and managing buildings for occupation by other government departments. The two buildings were so occupied. They were not used by civil servants working for the Department of the Environment. The House of Lords held that the lessee in each case was the Crown and the use of the buildings by civil servants in other Government departments constituted occupation by the Crown. Accordingly, the tenant and the occupier were the same, the Crown, and the rent control legislation was applicable.

111. Lord Diplock gave the leading speech with which three other Law Lords agreed. He said that instead of referring to "the Crown" it would be preferable to speak of "the Government", a term apt to embrace both ministers and the civil servants carrying on the work of departments under their direction (p.381B):

> "Where, as in the instant case, we are concerned with the legal nature of the exercise of executive powers of government, I believe that some of the more Athanasian-like features of the debate in your Lordships' House could have been eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' - a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law."

The executive act of the Secretary of State had been to accept the grant of the leasehold interests. The tenant here was the Government, or the Crown, acting through that Secretary of State. The persons working in the office buildings were "government servants" or "servants of the Crown". The use of the premises by government servants for government purposes constituted occupation by the Crown (p.382H-383A).

112. Accordingly, in *Town Investments* there was no issue as to whether a company incorporated by a Secretary of State and which he controls completely through owning all the shares and appointing the directors, is to be treated as forming part of the Crown and therefore indivisible from the Secretary of State or his department. Lords Diplock, Kilbrandon and Edmund-Davies expressed no view on that issue. *Town Investments* is only an authority on Crown indivisibility in the context of the relationship between different Government departments and their ministers.

113. Lord Simon of Glaisdale agreed with Lord Diplock (p.396H) before going on to set out his reasoning in some detail. However, no other member of the House agreed with his speech. Mr. James Maurici KC (on behalf of the claimants) focused on a number of passages between p.399A and p.400B, but that discussion was concerned with the treatment of servants or agents of the Crown.

114. It was at p.400B that Lord Simon began to refer to the constitutional doctrine that the Crown in the United Kingdom is "one and indivisible." In that context, he stated that departments of state with ministers at their head form part of the Crown. He too regarded the Crown as a single entity, in his view a corporation aggregate (p.400C). But he did not suggest that an entity outside his explanation of the Crown, such as a company, itself forms part of the Crown. That was not the issue before the House of Lords.

115. It is also significant that at p.400F Lord Simon said that "*prima facie* in public law a minister or Secretary of State is an aspect or member of the Crown". In other words, the indivisibility of the Crown is not an absolute principle.

116. This last point was emphasised by the House of Lords in *M v The Home Office*. Lord Woolf stated that there is no reason in principle why, if a statute places a duty on a specified minister (or other official) which creates a cause of action, an action cannot be brought for breach of that duty claiming damages or an injunction against the specified minister personally. He considered that there are likely to be few situations in which a duty is placed on the Crown in general rather than on a specified minister (pp.412H to 413A). He went on to distinguish *Town Investments* as dealing with a very different situation, namely the consequence of the grant of a lease to a named department "which can make the Crown and not the department the tenant" (p.415B).

117. It is apparent that the doctrine of Crown indivisibility is capable of being disapplied or modified, for example, by Act of Parliament. This much is common ground. Mr Rainey provided an example. Section 10 of the Military Lands Act 1892 empowers the Crown Estate Commissioners, or the Duchies of Lancaster or Cornwall to lease land to the SoS.

118. Standard principles of public law also demonstrate that Crown indivisibility may not apply even within a single Government department. For example, where the law requires a minister himself to take into account a particular consideration in making a decision, the knowledge of his officials about that matter is not to be imputed to him (*R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154). Often it is necessary for information to be communicated to the minister by some form of briefing.

119. So the claimants' case depends upon establishing two propositions: firstly, that Crown indivisibility has a wider ambit than was identified by the House of Lords in *Town Investments* and secondly, if so, that a corporate body with a separate legal identity established by a Government minister is to be treated as indivisible from, or part of, the Crown or the Government because the minister controls the company and the company carries out Government functions. On the first proposition, the claimants have not identified any authority which supports the wider application of Crown indivisibility which they assert. On the

second proposition, I take as a starting point one of the foundations of our company law, that a company incorporated under the Companies Act 2006 as a corporation aggregate has a separate legal existence and personality from persons who control the company and its shareholders.[3] A company is not to be treated, for example, as an agent of its shareholders. I also understood Mr. Maurici to accept that, even on the claimants' case, there is no principle to the effect that Crown indivisibility prevents a minister from setting up a structure to discharge governmental functions as a separate entity outside the Crown. For example, he accepts that a minister may incorporate a company as an arm's length body with sufficient independence so as not to form a part of the Crown or Government.

120. On the first proposition, Sir James Eadie referred to *British Medical Association v Greater Glasgow Health Board* (1998) SLT 538, a decision of the Second Division of the Inner House. The issue was whether the Board formed part of the Crown and was entitled to Crown immunity under s.21 of the Crown Proceedings Act 1947. Under the relevant legislation the Board had been set up by the Secretary of State to exercise certain of his functions for the administration of the health service. The Secretary of State had "virtual control" in that the Board had to comply with regulations made by him and any directions he might give, but he had less control over day to day operations (p.539 K-L).

121. The Lord Justice Clerk held at p.540J-L:

> "In my opinion, even although a health board falls to be regarded as providing services on behalf of the Crown, it does not follow that the health board falls to be accorded Crown status. The respondents contended that if a body was performing functions of the Crown and only functions of the Crown, then they were Crown bodies. In my opinion, however, that submission is fallacious. *It is necessary to distinguish, as the Lord Ordinary did, between the nature of the functions performed on the one hand and the status of the person who performed them on the other hand. It is not every body which performs functions on behalf of the Crown which falls to be treated as the Crown. A body which is acting on behalf of the Crown may be entitled to claim Crown immunity so long as it is acting on the instructions and at the direction of the Crown, but that does not mean that such a body falls to be treated as being the Crown*. In *Lord Advocate v. Strathclyde Regional Council*, Lord Cullen held that Crown immunity could only be claimed in respect of the actions of an independent contractor who had been engaged by the Crown to carry out work and who was acting at the direction of representatives of the Crown. That does not mean, however, that the independent contractor falls to be treated as the Crown or accorded the status of the Crown." (emphasis added)

[3] Such a company is a different entity from the Secretary of State incorporated as a corporation sole by s.2 of the Defence (Transfer of Functions) Act 1964 (see [254] below).

He referred to Lord Diplock's speech in *Town Investments* at [1978] AC p.380 and continued (p.541 G-H):

> "In my opinion what Lord Diplock states regarding English public law is also true of Scottish public law. In Scotland as in England I am of opinion that "the Crown" covers ministers of the Crown and members of the civil service acting under the direction of ministers. However, I see no justification for holding that "the Crown" also covers bodies such as health boards which exercise some of the functions which have been delegated to them by the Secretary of State. In my opinion, for the purpose of determining who are included in the expression "the Crown" it is important to draw a distinction between government departments on the one hand and bodies like health boards on the other. Counsel for the respondents expressly stated that they were not contending that a health board was a government department or part of a government department. The Crown and a minister who requires to discharge statutory duties can only act through servants or agents, but I see no justification in principle for holding that every agent or servant of the Crown falls to be equiparated with the Crown itself. As Lord Diplock pointed out in *Town Investments v. Department of the Environment*, the Crown will embrace certain civil servants employed in various government departments, but I see no justification for holding that every body or person who is a servant or agent of a Secretary of State should be held to have Crown status."

At p.542 B-C the Lord Justice Clerk concluded:

> "To hold that a health board is the Crown would be to extend Crown status further than it has been extended before. No doubt a health board is performing functions on behalf of the Secretary of State, but it is not everyone who performs functions on behalf of the Secretary of State who is the Crown. I see no justification in principle or on authority for extending the concept of the Crown beyond those persons comprehended in the description of the Crown given by Lord Diplock in *Town Investments v. Department of the Environment*."

Lord Dunpark and Lord Mayfield delivered concurring opinions.

122. Thus, the decision of the Inner House is persuasive authority against the ambit of Crown indivisibility being any wider than was identified in *Town Investments*. The House of Lords dismissed an appeal by the Health Board ([1989] 1 AC 1211). Lord Jauncey, delivering the leading speech, decided the case on a narrower basis, namely that Parliament had legislated that health boards were made liable as principals, and to be sued in their own name, in respect of any liabilities incurred in the exercise of their functions (p.1226 H). Accordingly, the claim fell outside the scope of s.21 of the Crown Proceedings Act 1947 altogether. Having reached that conclusion he did not find it necessary

to decide the case on the basis adopted by the Inner House, while making it clear that he was not in any way criticising their analysis (p.1227 E-F).

123. Mr. Maurici relied heavily upon a decision of the New Zealand Court of Appeal, *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297. In that case the issue was whether the Council was entitled to rely upon a statutory exemption from income tax as a "public authority", an expression which the legislation defined as including "every *other department or instrument* of the Executive Government of New Zealand." So the issue was whether the Council was entitled to rely upon an immunity conferred upon an "instrument of the Executive Government", not whether it formed an indivisible part of the Government. It was in that context that Keith J considered the concept of Crown agency to be relevant (p.328-330).

124. In a passage in *Medical Council of New Zealand* cited by Mr. Maurici, the court relied upon Professor Hogg's book "Liability of the Crown". In the second edition he had said that "…the question of whether a public corporation is an agent of the Crown depends upon the nature and degree of control the Crown exercises over it" (see [1997] 2 NZLR at p.327). Rather more pertinent is this passage at p.462 of the fourth edition in the chapter devoted to the same subject:

> "The term "agent of the Crown" has become the common usage for a public corporation that enjoys *the attributes* of the Crown. Agent of the Crown in this context is a synonym for "servant of the Crown", and the latter phrase is sometimes used. Occasionally, the question is said to be whether the corporation is "within the shield of the Crown" or is an "instrumentality of the Crown" or an "emanation of the Crown". *These graphic phrases falsely suggest that the issue is whether the corporation is the Crown or a part of the Crown. It is more accurate to accept that the corporation is a separate entity from the Crown itself*." (emphasis added)

I agree with that approach. It is consistent with *Town Investments* and with the decision of the Inner House in the *Greater Glasgow Health Board* case.

125. For the same reasons I do not think that the authorities cited in Lord Simon's speech in *Town Investments* at p.399A to p.400A assist the claimants. As I have said, this passage precedes the point in his speech where Lord Simon turned to Crown indivisibility. It largely dealt with agents of, or trustees for, the Crown or analogous situations and *in that context* the degree of control exercised by the Crown (see e.g. *Commissioner of Public Works v Pontypridd Masonic Hall Company Limited* [1920] 2 KB 233; *The Hornsey Urban District Council v Hennell* [1902] 2 Ch 377; *Bank voor Handel en Scheepvaart N.V. v Administrator of Hungarian Property* [1954] AC 584). No one would suggest that, for example, a person in the position of Colonel Hennell forms an indivisible part of the Crown. Typically those cases were concerned with whether a person or body was able to reply upon the immunity of the Crown from a statutory liability or obligation and not whether that person should be treated as a part of the Crown. Mr. Maurici accepted, rightly, that an agent of the Crown can be an entity separate from the Crown (Transcript Day 5 p.144).

126. Mr. Maurici emphasised this passage in Lord Simon's speech at p.399H-400A:

> "The mere fact of incorporation, which is only for administrative convenience, does not make a Secretary of State or a minister or a ministry an entity separate from the Crown".

But the issue Lord Simon was considering there was whether the incorporation of a Secretary of State (i.e. as a corporation sole), which is one mechanism by which a minister may hold title to property, had the effect of separating the *Minister* from the Crown. He was not dealing with the setting up of a company by a Minister with the deliberate aim of creating an entity outside the Crown.

127. In any event, the two cases cited by Lord Simon do not assist the claimants' case. First, *Pontypridd* simply decided that the Commissioners of Public Works, as agents of the Crown, could reply upon the Crown's immunity from the Statute of Limitations.

128. Second, the issue in *Baccus S.R.L. v Servicio Nacional Del Trigo* [1957] 1 QB 438 was whether the defendant was entitled to rely upon state immunity. The Spanish Ambassador gave evidence that the defendant was a department of the Spanish state. The plaintiffs did not deny that point (p.472). The question was whether the fact that the defendant had been incorporated, had a legal personality and was entitled in its own name to enter into contracts, to sue and be sued, was inconsistent with it being a department of state. The court held that it was not, pointing out that many UK ministers are constituted corporations sole (pp.466 and 472). Thus, Jenkins LJ considered that whether a particular ministry is a corporate or an unincorporated body is "purely a matter of governmental machinery" (p.466) or, as Lord Simon put it, "administrative convenience". That approach is entirely consistent with Lord Diplock's analysis in *Town Investments* that a Government department is part of the Crown. The circumstances and reasoning in *Baccus* have nothing to do with whether an incorporated body which is *not* itself a department of state or Government department is indivisible from, or forms part of, the Government or the Crown. *Baccus* does not lend any support to the suggestion that the ambit of the Crown indivisibility principle may be wider than the explanation given by Lord Diplock.

129. I also note that in *Town Investments* Lord Kilbrandon did not consider the concepts of agency or trusts to be relevant to the status of ministers in their relationship to the Crown, even as analogues ([1978] AC at p.402A).

130. Mr. Maurici sought to rely upon other authorities concerned with whether state immunity applies to "state controlled enterprises with legal personality". They do not assist with the question of whether a body forms part of the Crown or the Government, or with the ambit of the indivisibility of the Crown principle.

131. The claimants have not referred to any authority which treats the Crown as an entity embracing more than the departments and their ministers which make up the Government. Although the claimants have failed on that first issue, I turn to address their second proposition.

132. The DIHL arrangements which the SoS has put in place do not involve any reliance upon Crown immunity. Instead, the SoS has sought to replicate measures which private individuals and companies may lawfully put in place in order to be able to claim a right to enfranchise in accordance with the legislation (for example, transferring the freehold reversion to a SPV and granting a subtenancy to that company of those parts of a tenanted property which may be treated as occupied for business purposes).

133. The claimants rely upon the statement by Laws J (as he then was) in *R v Somerset County Council ex parte Fewings* ([1995] 1 All ER 513 at 524) that the actions of a public body, unlike those of a private person, must be justified by "positive law". The Court of Appeal restated this principle more precisely by reference to the position of a local authority, the issue with which the case was concerned ([1995] 1 WLR 1037, 1042G-H).

134. However, the position of a Minister of the Crown is different. He may rely not only upon any relevant statutory powers, but also prerogative powers. In addition he may do anything that a natural person may do, unless prohibited by statute from doing so or by public law constraints or the competing rights of other parties (*R v Secretary of State for Health ex parte C* [2000] 1 FCR 471, 476; *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548 at [44], [48]-[49], [72]-[74] and [78]-[81]; and see also Wade & Forsyth's Administrative Law (12th Edition) pp.38-9).

135. The ability of the Crown to do anything that a natural person may do, subject to the constraints referred to, is linked to the Crown's entitlement to exercise contractual, property and other private law rights and to participate in the commercial market. This was considered recently by the Privy Council in *The State of Mauritius v The (Mauritius) CT Power Limited* [2019] UKPC 27, dealing with a legal challenge to a decision by the Minister of Energy to refuse to enter into an agreement guaranteeing prices payable for the electricity to be supplied by a new power station project. At [63] Lord Sales JSC said:

> "63. The power of the Minister of Energy to undertake negotiations with CT Power as part of the conduct of the business of the Government is a wide one, conferring on the Minister a very wide discretion as to how best to proceed. The implication is that the Minister is permitted to participate in the commercial market in the usual way, i.e. through the exercise of the full bargaining power available to the Government in order to secure the best commercial deal possible and thereby promote the public interest. With that end in view, a court should be astute to ensure that application of public law standards in relation to the Minister does not cut down or undermine that bargaining power. Nor should public law standards be applied in such a way as to give a potential contracting counterparty a negotiating advantage which has not been bargained for."

The relevant "standards" are addressed under Issues 12 to 14 below.

136. Mr. Maurici emphasised undisputed facts relevant to this issue. The SoS is the sole shareholder. Its directors are senior civil servants within the MoD and under the control of the defendant. The SoS has complete control of DIHL. It had capital of only £1, no employees and no bank account. It is funded by the MoD. DIHL is not an arm's length body operating with any degree of independence from the MoD and its Secretary of State.

137. Mr. Maurici accepted that the claimants' case has to be that whenever a minister or Government department incorporates a company to carry out a Government function and the minister or department has full control of that company, the effect of the principle of Crown indivisibility is that the company is part of the Crown and not a separate entity (Transcript Day 5 p.128). Consequently, where as a matter of private law, an individual would be able to comply with or take advantage of a statutory scheme, such as the 1967 Act, whether by transferring his freehold reversion to a SPV or to a bare nominee, the Crown is unable to do so. Mr. Maurici accepts that that would be the consequence of his argument on control whenever a SPV holds land for a Government purpose, here MQE held for the purposes of the armed forces. But he suggests that there may be cases where the SPV does not carry out a Government function (Transcript Day 5 pp.151-154). However, in my judgment it is difficult to envisage a situation where such a company would hold land for a non-governmental purpose.

138. But the real issue here was identified by Sir James Eadie. What is the normative principle of public law which would justify the operation of the Crown indivisibility principle in this way? Likewise, why is it justified to borrow the concepts of control and function from the law on Crown agency (which Mr. Maurici accepts does not preclude an agent being treated as a separate entity – Transcript Day 5 pp.144-145) or from the law on state immunity, in order to determine the ambit of Crown indivisibility? With respect, the claimants did not satisfactorily address these questions.

139. Ultimately, the claimants are asking the court to widen the ambit of Crown indivisibility beyond that laid down by the House of Lords in *Town Investments*, but they have not provided a coherent justification for doing so, certainly not in the circumstances of this case. For these reasons I am unable to accept the claimants' submissions on the doctrine as a matter of legal principle. Nevertheless, I will revisit the subject where it has been raised on a particular legal issue to see whether the relevant statutory context points to a different conclusion.

Issue 1 (Ground 1) – Whether the consent of APL to enfranchisement was required

140. The claimants submit that by virtue of s.88(2)(c) of the 1993 Act, the consent of APL as the landlord of the SoS is required to confer jurisdiction on the FTT to determine any issues falling within the scope of s.21 of the 1967 Act, notably the price payable for APL's interest in the Cranwell and Bristol properties. The claimants say that this provision applies where a tenant under a lease from the Crown wishes to enfranchise but has no right to do so. It is a situation in which the tenant needs to rely upon the voluntary undertaking given by the Crown to act in accordance with the 1967 Act. That undertaking does not bind any other owner of an interest superior to the tenant's lease and so s.88(2)(c) recognises

that enfranchisement will not proceed pursuant to the Crown's undertaking unless other parties with superior interests agree to that course.

141. This issue raises the question to what extent does a tenant or subtenant holding a tenancy from the Crown have a *right* under s.33 of the 1967 Act to enfranchise and so does not need to rely upon the Crown's undertaking.

142. A statute does not bind the Crown unless it says so expressly or by necessary implication (*BBC v Johns (Inspector of Taxes)* [1965] Ch 32; *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580).

143. On 31 May 1967 the Minister of Housing and Local Government gave an undertaking that Crown authorities would agree to enfranchisement and extensions of leases for qualifying leaseholders holding from the Crown on the terms provided for in the 1967 Act, except in certain cases, for example, where the house is of special architectural or historical interest.

144. On 2 November 1992 (during the passage of the Bill which became the 1993 Act) the Secretary of State for the Environment gave an undertaking superseding the 1967 undertaking. The Government undertook that the Crown would agree, subject to certain exceptions, to the voluntary enfranchisement or extension of long leases held from the Crown under the same terms and qualifications as provided by the legislation. Often this undertaking is relied upon by tenants of leases holding directly from the Crown.

145. Section 33 of the 1967 Act defines specific circumstances in which the Act does apply to a tenancy held from the Crown:

> "**33. Crown land.**
>
> (1) In the case of a tenancy from the Crown this Part of this Act shall apply in favour of the tenant as in the case of any other tenancy if there has ceased to be a Crown interest in the land, and as against a landlord holding a tenancy from the Crown shall apply also if either—
>
> (a) his sub-tenant is seeking an extended lease and the landlord, or a superior landlord holding a tenancy from the Crown, has a sufficient interest to grant it and is entitled to do so without the concurrence of the appropriate authority; or
>
> (b) the appropriate authority notifies the landlord that as regards any Crown interest affected the authority will grant or concur in granting the freehold or extended lease.
>
> (2) For purposes of this section "tenancy from the Crown" means a tenancy of land in which there is, or has during the subsistence of the tenancy been, a Crown interest superior to the tenancy, and "Crown interest" and "the appropriate authority" in relation to a Crown interest mean respectively—

> (a) an interest comprised in the Crown Estate, and the Crown Estate Commissioners;
>
> (b) an interest belonging to Her Majesty in right of the Duchy of Lancaster, and the Chancellor of the Duchy;
>
> (c) an interest belonging to the Duchy of Cornwall, and such person as the Duke of Cornwall or the possessor for the time being of the Duchy appoints;
>
> (d) any other interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, and the Minister in charge of that department."

These provisions have not been amended since the 1967 Act was passed. At the time the 1967 Act was enacted there was no provision corresponding or similar to s.88 of the 1993 Act. There was simply the general provision in s.1(5) of the Lands Tribunal Act 1949 for that Tribunal to act as an arbitrator under a reference by consent, for example, where enfranchisement took place on a non-statutory basis pursuant to the Crown's undertaking.

146. Paragraph 14 of sched.1 to the 1967 Act applies where a s.5 notice to enfranchise is given by a subtenant holding "a tenancy from the Crown":

> "14(1) This Schedule shall apply notwithstanding that the tenancy in possession is a tenancy from the Crown within the meaning of section 33 of this Act; and, where under section 33(1)(b) the appropriate authority gives notice that as regards a Crown interest the authority will grant or concur in granting the freehold or an extended lease, then in relation to the Crown interest and the person to whom it belongs this Schedule shall have effect as it has effect in relation to other landlords and their interests, but with the appropriate authority having power to act as reversioner or otherwise for purposes of this Schedule on behalf of that person:
>
> Provided that paragraph 4(1)(a) above shall not apply to the execution of a conveyance or lease on behalf of the person to whom a Crown interest belongs.
>
> (2) A conveyance or lease executed in pursuance of paragraph 4(3) above shall be effective notwithstanding that the interest intended to be conveyed or bound is a Crown interest or a tenancy from the Crown."

147. Section 88 of the 1993 Act provides:

> "**88. Jurisdiction of .... tribunals in relation to enfranchisement etc. of Crown land.**
>
> (1) This section applies where any tenant under a lease from the Crown is proceeding with a view to acquiring the freehold or an extended lease of a house and premises in circumstances in which, but for the existence of any Crown interest in the land subject to the lease, he would be entitled to acquire the freehold or such an extended lease under Part I of the Leasehold Reform Act 1967.
>
> (2) Where—
>
> (a) this section applies in accordance with subsection (1), and
>
> (b) any question arises in connection with the acquisition of the freehold or an extended lease of the house and premises which is such that, if the tenant were proceeding as mentioned in that subsection in pursuance of a claim made under Part I of that Act, the appropriate tribunal ... would have jurisdiction to determine it in proceedings under that Part, and
>
> (c) it is agreed between—
>
> (i) the appropriate authority and the tenant, and
>
> (ii) all other persons (if any) whose interests would fall to be represented in proceedings brought under that Part for the determination of that question by such a tribunal, that that question should be determined by such a tribunal,
>
> the appropriate tribunal shall have jurisdiction to determine that question."

In England the "appropriate tribunal" is generally the First-tier Tribunal (s.88 (6A)). Section 88(6) defines "lease from the Crown" in terms which are not materially different from the definition of "tenancy from the Crown" in s.33(2) of the 1967 Act.

148. Section 33(2) of the 1967 Act defines a "tenancy from the Crown" as a tenancy of land in which there is, or has during the subsistence of the tenancy been, a Crown interest superior to the tenancy. So the expression covers the situation where the Crown disposes of its superior interest at some point during the tenancy.

149. It is common ground, and I agree, that section 33(1) has three limbs. The first limb provides that where there ceases to be a Crown interest in the land before the tenant wishes to enfranchise, Part I of the 1967 Act applies in favour of the tenant as in the case of any other tenancy. This limb was enacted in order to prevent the principle in *Clark v Downes* from applying. In that case it had been

held that the immunity of the Crown from the Rent Act legislation applied to the dwelling *in rem* and so a purchaser of the Crown's interest was also not bound by the legislation. It will be noted that the first limb of s.33(1) applies in favour of both a tenant who held directly from the Crown as well as a subtenant.

150. I also agree with the parties that under the first limb of s.33(1) the tenant is able to exercise a *right* to enfranchise under the statute once there ceases to be a Crown interest in the land, subject to meeting the relevant conditions for enfranchisement. He has no need to rely upon the published undertaking given on behalf of the Crown and s.88 of the 1993 Act is not engaged (Transcript Day 1 pp 101 and 114). Section 88 only applies where a tenant does not have a right to enfranchise and so is relying upon the Crown's undertaking. It follows that where the first limb of s.33(1) applies, the enfranchising tenant does not need to obtain the consent of any other party and there would be no requirement for APL to consent to enfranchisement by the SoS.

151. The defendant says that by virtue of the transfer of the freehold of the Cranwell and Bristol dwellings to DIHL there ceased to be a Crown interest in those properties superior to his underlease and so the first limb of s.33(1) enables him to exercise any right to enfranchise conferred by the 1967 Act.

152. The claimants disagree. Firstly, in relation to 1 Sycamore Drive, Cranwell they say that at the time when the SoS served his s.5 notice, his Crown interest in the freehold reversion had not ceased to exist. The application to register the transfer of the SoS's freehold interest in 1 Sycamore Drive, Cranwell to DIHL was made on 16 December 2021, the same day as the s.5 notice was served, but after that service had taken place. The transfer of ownership was registered on 26 January 2022 and backdated to 16 December 2021. However, it is common ground that because the application to register was made after the s.5 notice had been served, when that notice was given the SoS, not DIHL, was the legal owner of the freehold reversion to 1 Sycamore Drive. At that point in time the SoS held the legal estate on trust for DIHL. I therefore agree with the claimants that (a) technically there had not ceased to be a Crown interest in the freehold reversion of 1 Sycamore Drive when the s.5 notice relating to that property was served and (b) the defendant was not entitled to rely upon the first limb of s.33(1). Instead, for that property he needs to rely upon s.33(1)(b).

153. Secondly, in relation to all 8 properties the claimants say that because of Crown indivisibility, DIHL's interest at the time of the s.5 notice was a Crown interest. For the reasons set out above and under Issue 2 below, this argument fails.

154. Thirdly, and as an alternative to their second point, the claimants argue that, applying s.33(2)(d), DIHL held the freehold reversions in respect of the 8 properties "on behalf of Her Majesty for the purposes of a government department" and so there had not ceased to be a Crown interest in those properties. On this basis the claimants say that the SoS cannot rely upon the first limb of s.33(1) and has to rely upon s.33(1)(b).

155. Section 33(2)(d) requires that the owner holds his interest in property "on behalf of Her Majesty" and not merely "for the purposes of a Government department". It is common ground that DIHL was set up as a SPV and separate entity from

the SoS (or the Crown). It is also common ground that DIHL did not hold its property in trust for the SoS (or Her Majesty). It follows that as a matter of ordinary private law when the SoS transferred the freeholds of the 8 houses *away from the Crown* to DIHL there ceased to be a Crown interest in the properties superior to the SoS's underleases. In *Town Investments* Lord Diplock dealt with a different situation at [1978] AC 381F to 382F: property held *by a Minister* on behalf of, or "on trust for", Her Majesty or the Crown should be understood in the public law sense. That is where the indivisibility of the Crown principle applies. Accordingly, on the facts of this case, the claimants' third argument does not add anything to their second. The language in s.33(2)(d) simply describes one type of Crown interest as that of a Government department in a manner entirely consistent with *Town Investments*. Section 33(2) does not treat property belonging to an entity which does not form part of the Crown as a Crown interest. Section 33(2) should not be interpreted or applied in such a way as would extend the concept of Crown indivisibility by the back door.

156. The upshot is that the defendant is entitled to rely upon the first limb of s.33(1) in relation to 3 Sycamore Drive and all 6 of the Bristol properties and APL's consent was not necessary under s.88(2)(c) of the 1993 Act. However, in case my conclusions in [154]-[155] are incorrect, I shall consider the application of s.33(1)(b) to those properties as well as to 1 Sycamore Drive.

157. The second and third limbs apply where there continues to be a superior Crown interest in the land.

158. The second limb (see s.33(1)(a)) applies where a subtenant seeks an extended lease, not the freehold, and a superior landlord holding a tenancy from the Crown has a sufficient interest to grant such a lease (a term of 50 years) and is entitled to do so without the agreement of the "appropriate authority" (in this instance the SoS). The second limb of s.33(1) fits with para. 10 of sched.1 to the Act which provides that, in general, a lease extension "shall be granted by the landlord having an interest in point of duration which is not superior to another such interest." Thus, the second limb does not require any consent by or on behalf of the Crown or, indeed, any other party.

159. I agree with Mr. Mark Sefton KC, who appeared on behalf of the claimants, that the second limb of s.33(1), like the first, enables a subtenant to exercise a right to enfranchise under the 1967 Act. In this situation, the subtenant has no need to rely upon the Crown's undertaking and so s.88 of the 1993 Act does not apply.

160. So where either the first limb or second limb of s.33(1) applies, the legislation does not require consent to be given by the owner of any interest superior to that of the enfranchising tenant, including a mesne landlord in the position of APL.

161. The third limb (see s.33(1)(b)) applies where:

(i) Either a subtenant seeks an extended lease of a length which a superior landlord is not entitled to grant without the Crown's consent, or the subtenant seeks the freehold, and

(ii) The "appropriate authority" for the relevant Crown interest (here the SoS) notifies the landlord holding a tenancy from the Crown (here APL) that "as regards any Crown interest affected the authority will grant or concur in granting the freehold or the extended lease."

In this case the SoS did serve s.33(1)(b) notices in relation to each of the 8 properties.

162. Mr. Sefton submits that the third limb, unlike the first or second limbs, does not enable a subtenant to exercise a right to enfranchise under the 1967 Act. Instead, he contends that where the third limb applies, the subtenant has to rely upon the Crown's undertaking to comply with the Act. Consequently, the notification of consent under s.33(1)(b) refers to the operation of that undertaking. He then submits that it follows that a case within the third limb (i) also falls within s.88(1) of the 1993 Act and (ii) the consent of other owners of interests superior to the subtenancy is required by s.88(2)(c). This applies to parties whose interests would fall to be represented in proceedings under s.21 before the FTT. If that consent is not given the Tribunal will have no jurisdiction to determine the price(s) payable for enfranchisement and effect cannot be given to the undertaking. On this analysis it is said that the consent of APL is required and, if that is so, plainly it will not be given.

163. How does Mr. Sefton arrive at this outcome? He says that it all depends upon the meaning of the words which immediately precede sub-paragraphs (a) and (b) of s.33(1). Those words operate so as to apply Part I of the 1967 Act "as against a landlord holding a tenancy from the Crown", but not as against the Crown. He contrasts those words with the way in which Part I of the 1967 Act is applied to cases falling within the first limb of s.33(1): "shall apply in favour of the tenant as in the case of any other tenancy." He says that that language is apt to confer a right to enfranchise under the 1967 Act, but not so the language which immediately precedes sub-paras. (a) and (b) in s.33(1). With respect, this argument is untenable for a number of reasons.

164. Sub-paragraphs (a) and (b) of s.33(1) apply where there is a subsisting Crown interest in the land superior to the subtenant's interest. The words upon which Mr. Sefton's argument depends apply both to sub-para. (a) and to sub-para. (b). In the absence of any indication in the 1967 Act to the contrary, those words have the same meaning and effect in relation to each sub-paragraph. There is no such contra-indication. They create a *right* to enfranchise.

165. Section 33(1) provides for Part I of the 1967 Act to apply as against a landlord holding a tenancy from the Crown in order to prevent the ruling in *Rudler v Franks* [1947] KB 530 having effect when a case falls within either sub-para. (a) or sub-para. (b). In that case the court held, following the approach taken in *Clark v Downes*, that because Crown immunity from the Rent Acts attaches to a dwelling *in rem*, that legislation did not apply to the subletting of a property held under a head tenancy from the Crown. Both the claimants and the defendant agree that that ruling is disapplied in relation to the second limb of s.33(1). Mr. Rainey KC submitted on behalf of the defendant that that is also the case for the third limb. Mr. Sefton made no submission to the contrary. In my view Mr. Rainey must be correct.

166. In relation to the second limb of s.33(1) it is necessary to make Part I of the 1967 Act apply to a mesne landlord in order to prevent him from relying upon *Rudler v Franks*. However, the concurrence of the Crown to the grant of an extended lease under the second limb is, by definition, unnecessary.

167. The third limb applies where the Crown's concurrence is necessary and the Crown has notified its consent to a mesne landlord under s.33(1)(b). Part I of the 1967 Act applies as against that intermediate landlord to prevent him from relying upon *Rudler v Franks*. Section 33(1)(b) read together with its introductory language makes it plain that such a landlord is bound by Part I of the Act irrespective of whether he consents to enfranchisement. That is the very purpose of s.33(1)(b). Parliament has made it clear that only the consent of the Crown is required.

168. It is unnecessary for the text immediately preceding sub-paragraphs (a) and (b) of s.33(1) to bind the Crown. Section 33(1)(a) is predicated on there being no requirement for the Crown to consent to an extended lease. Where under s.33(1)(b) the Crown gives its consent, it thereby becomes bound to dispose of its freehold or other superior interest to the sub-tenant in accordance with the 1967 Act. That is confirmed by para.14 of sched.1. First, that schedule is applied notwithstanding that the subtenant holds a tenancy from the Crown within the meaning of s.33. Second, where an "appropriate authority" gives a notice of concurrence under s.33(1)(b), sched.1 operates by the owner of the Crown interest having power to act as "reversioner" (see para. 2) or otherwise as one of the "other landlords" (see para.1(3)). Paragraph 1 of sched.1 confers the rights and imposes the obligations of a landlord under Part I of the 1967 Act as rights and obligations of the owner of the freehold and the owner of the tenancies superior to the subtenant's interest, including the owner of any Crown interest. Those obligations include the obligation under s.8 to execute a conveyance of the freehold in favour of the enfranchising subtenant.

169. On this analysis, the third limb of s.33(1) confers a right to enfranchise on the subtenant just as the first and second limbs do. There is no basis for distinguishing the third limb in this respect. The subtenant has no need to rely upon the Crown's undertaking.

170. The claimants accept that in the ordinary case where there is not (and has not been) a Crown interest in a house, a subtenant is entitled to exercise a right to enfranchise (pursuant to s.5(4) and sched.1) without the consent of a mesne landlord, such as APL. The claimants did not provide any explanation as to why Parliament should have intended in s.33(1)(b) to introduce such a requirement simply because the Crown has a superior interest in the land and its consent to the enfranchisement of its interest is required and given under the 1967 Act.

171. The claimants' interpretation of the legislation lacks coherence. There is no reason to think that Parliament intended the third limb of s.33(1) to apply where the Crown gives its consent to enfranchisement of its interest, and then expressly makes a landlord holding from the Crown bound by Part I of the 1967 Act, only to end up with that landlord's consent being necessary under s.88(2).

172. There is no basis for treating the arrival of s.88 of the 1993 Act as having altered any part of the above analysis. The 1993 Act made no alteration to s.33 or to sched.1. Section 88 simply deals with the jurisdiction of a tribunal in relation to issues falling within s.21 of the 1967 Act, by providing for consensual arbitration before that tribunal where a tenant can only enfranchise pursuant to the Crown's undertaking, as opposed to exercising a right to enfranchise conferred by the Act. In particular, s.88 did not alter the relationship between the three limbs in s.33(1), or alter the third limb so as to make that the subject of the Crown's undertaking rather than a provision conferring a right binding on the mesne landlord.

173. I do not accept Mr. Sefton's submission that s.94 of the 1993 Act is an aid to the construction of s.33 of the 1967 Act. It addresses Crown land in the context of two new regimes introduced by that statute, collective enfranchisement of flats in buildings (chapter 1) and lease extensions of flats (chapter II). He points to the fact that where there has ceased to be a Crown interest in land, s.94(1) (similar to the first limb of s.33(1) of the 1967 Act) applies to cases falling both within chapter I and chapter II, whereas s.94(2) (similar to the second and third limbs of s.33(1)), dealing with mesne landlords where there continues to be a Crown interest in the land, applies only to chapter II and not to chapter I. He then reads those provisions with s.94(9) and (10) of the 1993 Act (which operate in a similar way to s.88), in order to submit that Parliament has decided that in the case of collective enfranchisement it is necessary for the mesne landlord as well as the Crown to give his consent before the FTT has jurisdiction to assess a price. Without that consent the subtenant may not acquire the freehold (Transcript Day 1 pp.107-8).

174. This argument does not support the claimants' interpretation of s.33. Section 94(9) and (10) only apply where there is no right to enfranchise and so a tenant or subtenant can only rely upon the Crown's undertaking. Where a subtenant wishes to pursue collective enfranchisement of premises in which there is a superior Crown interest he cannot rely on s.94(2). For collective enfranchisement there is no equivalent in s.94 to s.33(1)(a) and (b), the second and third limbs of s.33(1). There is no equivalent dealing with, for example, a situation where the Crown agrees to transfer its freehold interest. Section 94(2) does not apply chapter I in that situation whether "as against a landlord under a lease from the Crown" or in any other form. By definition that is a situation where no right to enfranchise is conferred by the 1993 Act and so a subtenant has no choice but to rely upon the Crown's undertaking.

175. In any event, the relationship between s.94(2) and s.94(9) and (10) of the 1993 Act depends upon the meaning of the words "applies as against a landlord under a lease from the Crown", which is effectively the same language as the phrase in s.33(1) upon which the claimants' argument really hinges:

> "as against a landlord holding a tenancy from the Crown shall apply … "

The claimants' excursion into s.94 of the 1993 Act throws no light on the issue which the court has to address, the true meaning of s.33(1)(b) of the 1967 Act.

176. The claimants go on to submit that the principle of legality requires s.33 of the 1967 Act and s.88 of the 1993 Act to be read so that "the defendant's ability to exercise any statutory right must be subject to APL's consent" (para. 60 of skeleton and Issue 1(2)). That submission has not been formulated correctly. It is clear from s.88(1), and now common ground, that s.88 only applies where a tenant or subtenant does *not* have a statutory right to enfranchise and therefore has to rely upon the Crown's undertaking. What the claimants must mean is that applying the principle of legality to s.33(1), a case falling within the third limb does not involve a statutory right to enfranchise.

177. The claimants rely upon the following statement by Lord Hoffmann in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 131E:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

178. Similarly, in *S. Franses Limited v Cavendish Hotel (London) Limited* [2019] AC 249 Lord Sumption JSC stated at [16] that where protection conferred on a tenant interferes with a landlord's proprietary rights, that protection should extend no further than the statutory language and purpose require (see also *J v Welsh Ministers* [2020] AC 757 at [24]).

179. The principle of legality does not alter the conclusions I have reached on the meaning and effect of s.33(1) of the 1967 Act and s.88 of the 1993 Act. The language in the legislation with which we are dealing is not ambiguous. That language, like the submissions in this case on both sides, is highly specific. The carrying out of detailed analysis does not mean that the words used by Parliament are unclear. Properly read they are not. Ultimately the narrow question is whether there is some ambiguity in the text of the 1967 Act which could lead the court to treat the third limb in s.33(1) as describing a situation in which a subtenant can only rely on the Crown's undertaking rather than a statutory right to enfranchise. There is no such ambiguity. The interpretation I have adopted accords with the approach set out in *Cadogan v McGirk* [1996] 4 All E.R. 643, 648 and *Hosebay Limited v Day* [2012] 1 WLR 2884 at [6].

180. I conclude under Issue 1 that:

(i) The SoS is entitled to rely upon the first limb of ss.33(1) in relation to 3 Sycamore Drive and the 6 Bristol properties;

(ii) In any event, the SoS has served notices under s.33(1)(b) in relation to those 7 properties as a precautionary measure and is entitled to rely upon the third limb of s.33(1);

(iii) The SoS has served a notice under s.33(1)(b) in relation to 1 Sycamore Drive and is entitled to rely upon the third limb of s.33(1);

(iv) Section 88 of the 1993 Act does not require the SoS to obtain the consent of APL to enfranchisement pursuant to the 8 notices under s.5(1).

Issue 2 (Ground 2(i)) – The decision in *Gratton-Storey v Lewis*

181. There are two issues for the court to determine:

(i) Whether by reason of the indivisibility of the Crown, the SoS and DIHL are to be treated as the same entity and therefore, applying *Gratton-Storey v Lewis*, all 8 notices are invalid; and

(ii) If DIHL does not form part of the Crown for the purposes of the 1967 Act, whether the notice in respect of 1 Sycamore Drive, Cranwell was invalid, applying *Gratton-Storey v Lewis*, because at that time the SoS remained the registered proprietor of the freehold, and DIHL was only the freeholder in equity entitled to be registered as the legal proprietor of the property.

182. I have already addressed the main arguments on the principles dealing with Crown indivisibility. The conclusions I have drawn now need to be applied in the context of the 1967 Act and the decision in *Gratton-Storey v Lewis*.

183. A private person who is both freeholder and subtenant is able to overcome the ruling in *Gratton-Storey* by transferring his freehold to a bare nominee and then serving his s.5 notice on both that nominee and the mesne landlord. The fact that his object is to acquire the interest of the mesne landlord does not render the notice invalid. The nominee in this situation has a separate legal personality, separate from that of the subtenant. So much is common ground.

184. Accordingly, the issue here is relatively narrow: does the doctrine of Crown indivisibility have the effect that where a minister (or government department) transfers his freehold interest either to a SPV or to a bare nominee so as to be able to rely upon the 1967 Act, that interest must nevertheless be regarded as being held by the Crown and not by a separate legal entity not forming part of the Crown.

185. It is well established that the Crown may take the benefit of a statute, unless the contrary intention appears in the legislation (Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition) at p.223, s.31(1) of the Crown Proceedings Act 1947 and *Town Investments* in the Court of Appeal at [1976] 1 WLR 1126,

1142, 1146). There is no dispute that the Crown is entitled to rely upon a statutory right to enfranchise in accordance with the terms of the 1967 Act.

186. Nothing in the 1967 Act, its purposes or statutory context has been identified which would alter the way in which the general principles on Crown indivisibility apply, whether generally or in relation to Issue 2. There is nothing to indicate that the transfer by a government minister either to a SPV or to a bare nominee under his direction for the purpose of overcoming the effect of *Gratton-Storey* must be treated as a transfer to an entity of the Crown rather than to a separate entity.

187. Accordingly, I conclude in relation to all 8 notices that DIHL's freehold interest is not to be treated as being in the ownership of the Crown or the SoS for the purpose of the principle in *Gratton-Storey v Lewis*.

188. I turn to the second issue. The application to register the transfer of the SoS's freehold interest in 1 Sycamore Drive, Cranwell, to DIHL was made on 16 December 2021, the same day as the s.5 notice was served, but after that service had taken place. The transfer of ownership was registered on 26 January 2022 and backdated to 16 December 2021. However, it is common ground that because the application to register was made after the s.5 notice had been served, at the time when that notice was given the SoS, not DIHL, was the legal owner of the freehold reversion to 1 Sycamore Drive, holding the legal estate on trust for DIHL.

189. The defendant submits that it is legally possible for a person to transfer an interest in land held in one capacity, for example a freehold reversion held subject to a trust, to himself as the holder of an interest in a different capacity, for example a subtenancy held absolutely. Likewise, it is legally possible for a subtenant to make a claim to enfranchise against himself in a different capacity, for example as the owner of the freehold subject to a trust. At the time the s.5 notice was served the SoS had succeeded in altering his absolute ownership of the freehold reversion of 1 Sycamore Drive to holding that reversion as a bare trustee for the benefit of DIHL. But the claimants submit that a person cannot transfer a freehold which he already owns to himself.

190. In *Gratton-Storey* the subtenant owned the legal estate in the freehold reversion. The Court held that in the normal situation where the enfranchising subtenant does not own the freehold, the effect of s.8(1) is that the freeholder must convey to the subtenant an estate in fee simple absolute free of incumbrances, which term includes the intermediate interests of mesne landlords. The 1967 Act does not enable a subtenant to enfranchise where he is already the owner of the freehold.

191. But in the present case, unlike *Gratton-Storey*, the SoS is not the absolute owner of the freehold reversion. His ownership is subject to the trust for the sole benefit of DIHL. Here at the time when the s.5 notice was served, the beneficiary was entitled to become the registered proprietor of the legal estate and was bound by that notice, if otherwise valid. In the real world, the transfer of title has been registered and the notice would be carried into effect by DIHL as freeholder,

not the SoS. Accordingly, the claimants' legal argument does not reflect the reality of the legal relationships which existed when the s.5 notice was served.

192. Mr. Sefton placed emphasis on the decision in *Rye v Rye* [1962] AC 496 for the principle that A cannot convey or lease a property to A. But he accepted that the House of Lords did not have to consider, and did not decide, whether it is possible in law for A holding an estate in one capacity to convey that estate to A in a different capacity. I agree with Mr. Rainey's analysis of *Procter v Procter* [2021] Ch 395 at [22], [27], [35] and [74] to [79], *Ingram v Inland Revenue Commissioners* [2000] 1 AC 293 at 305 D-H, 310 G-H and Millett LJ in the Court of Appeal at [1997] 4 All ER 395 at 419h to 427j. Accordingly, I accept his submission that a transfer of the freehold by the SoS in his capacity as bare trustee for DIHL to the SoS as the underlessee, or in other words an acquisition by the SoS of the freehold held by him in a materially different capacity, would be legally possible. For these reasons the s.5 notice in relation to 1 Sycamore Drive did not offend the principle in *Gratton-Storey*.

193. I conclude in relation to Issue 2 that the defendant was not precluded by *Gratton-Storey* from making a claim to enfranchise under Part I of the 1967 Act in relation to any of the 8 properties.

Issues 3 to 5 (Ground 2(ii)) – Whether the Secretary of State's underleases were business tenancies (areas other than the common parts of the Cranwell site)

194. The overall issue is whether the underlease of either the Cranwell site or the Bristol site is a business tenancy falling within Part II of the 1954 Act. If the answer is "yes" then, because it is common ground that the SoS has not occupied any of the houses as his only or main residence, there would be no right to enfranchise (s.1(1B) of the 1967 Act). It is common ground, and I accept, that the parties' agreement to exclude ss.24 to 28 of the 1954 Act (authorised by court orders under s.38) does not have the effect of preventing Part II of the 1954 Act from applying to either underlease.

195. The claimants seek to argue that Part II of the 1954 Act is applicable in a number of different ways (Issues 3 to 7). Before addressing those issues it is helpful to consider the legislation and certain key principles as they apply in relation to business tenancies, before considering how the legislation is modified to deal with Crown land.

General principles in Part II of the 1954 Act for the protection of business tenancies

196. Section 23(1) applies Part II of the 1954 Act to any tenancy where the demised property is or includes premises "occupied" by the tenant for the purposes of a business carried on by him or for those and other purposes. To satisfy that test any business occupation must constitute a significant purpose of the occupation and not be merely incidental to a non-business purpose, such as residential occupation (*Cheryl Investments Limited v Saldanha* [1978] 1 WLR 1329, 1333H, 1338H-1339A).

197. Section 23(2) defines a "business" as including a "trade, profession or employment" and "any activity carried on by a body of persons, whether

corporate or unincorporate." A similar definition in the rent freeze legislation considered in *Town Investments* led to an issue in that case as to whether accommodation used by civil servants to conduct public or government business was a relevant "activity" (see s.56(3) considered below). But that definition did not purport to be exhaustive and Lord Diplock emphasised the breadth of the ordinary meaning of "business".

198. As set out above ([98]-[99]), the ambit of certain grounds for a landlord to oppose the grant of a new tenancy, the court's order granting a new tenancy and a tenant's entitlement to compensation upon termination are delimited by reference to the tenant's holding. The definition of "holding" in s.23(3) excludes from the property comprised in the tenancy any part which is not occupied by the tenant, or by a person employed by him, for business purposes.

199. Accordingly, the concept of "occupation" lies at the core of the provisions dealing with the circumstances in which Part II of the 1954 Act applies, and the entitlement to the grant of a new tenancy after the expiration of the existing tenancy.

Occupation

200. The leading authority remains *Graysim Holdings Limited v P&O Property Holdings Limited* [1996] AC 329. Lord Nicholls, with whom all the other Law Lords agreed, stated that "occupation" is not a legal term of art. Its meaning may depend on the statutory context in which it is being used. Both the purposes of drawing a distinction between occupation and non-occupation and the consequences of applying that test will throw light on what sort of activities are, or are not, to be regarded as occupation in that particular context. "Occupation" in Part II of the 1954 Act carries "a connotation of some physical use of the property by the tenant for the purposes of his business" ([1996] AC at p.334G to 335C). In the context of s.23(1), the purposes of the occupation are those of the tenant as occupier.

201. In some cases the issue may be whether property is occupied at all or is simply unoccupied ([1996] AC 335C). The question of whether the tenant has shown a sufficient degree of presence on a property may depend on the nature of the premises, as in the case of *Wandsworth London Borough Council v Singh* [1991] 62 P&CR 219, 230.

202. Where there are two potential candidates to be treated as the occupier, it may be necessary to consider the nature and degree of control exercised by each over the premises for a business purpose ([1996] AC 335E) as in the case of *Groveside Properties Limited v Westminster Medical School* (1983) 47 P&CR 507.

203. Cases where the business of one person consists of allowing others to use his tenanted property for their business purposes, so that both exercise rights over the same property for the purposes of their own separate businesses, form a spectrum between at one end, the tenant remaining in occupation of the whole of his premises and at the other, a tenant subletting the whole. The question whether the tenant is sufficiently excluded and the other is "sufficiently

present", for the latter to be regarded as the occupier in place of the former, is one of fact and degree ([1996] AC 335F to 336C). As Lord Nicholls put it:

> "The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusion, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question."

204. Where a landlord grants a tenancy, the tenant will normally be the occupier, not the landlord. This is because the tenant normally has "a degree of sole use of the property sufficient to enable him to carry on his business there to the exclusion of everyone else." In the case of a licence the rights granted to a licensee may be less extensive and it may be easier for the licensor to establish that he still occupies the premises ([1996] AC 336D-F).

205. The scheme of Part II of the 1954 Act does not allow for two parties holding different interests both to be occupiers of the same property for business purposes, and thus both able to obtain the grant of a new tenancy of the same premises ([1996] AC 336G-338C and 341F). This is referred to as the "single business tenancy principle."

206. Where a tenant sublets flats or offices and simply retains common parts in order to manage and provide services to those sublet areas, that business purpose will cease once those areas are excluded from his holding, he will not be entitled to the grant of a new tenancy of his holding and he will cease to be tenant of the sublet areas. A qualifying business purpose cannot be one which is brought to an end by the process of ascertaining the holding ([1996] AC 338H to 340B; *Bagettes Limited v GP Estates Limited* [1956] Ch 290, 301).

Deemed occupation

207. There are a number of provisions in the 1954 Act where occupation of the demised premises and the carrying on of business by someone other than the tenant is deemed to be occupation by that tenant for the carrying on of his business. In such cases the continuation provision in s.24 applies and the tenant may apply for an order granting a new tenancy. Each of these examples conforms to the "single business tenancy principle" established in *Graysim.*

208. By s.41(1) of the 1954 Act where a tenancy is held on trust, occupation and the carrying on of a business by all or any of the beneficiaries of the trust is treated for the purposes of s.23 as equivalent to occupation and the carrying on of a business by the tenant trustees, and so their tenancy continues under s.24 and they may apply for the grant of a new tenancy when an existing tenancy is about to expire.

209. Ms. Wicks relied upon *Frish Limited v Barclays Bank Limited* [1955] 2 QB 541. There the Court of Appeal had to deal with the parallel provision in s.41(2) which enables trustees who hold the landlord's interest to oppose the grant of a new tenancy to their tenant by relying upon ground (g) of s.30(1), the intention of a *beneficiary* of the trust to occupy the holding for the purposes of his

business. The Court held that some limit had to be placed upon the ambit of "beneficiary." It does not cover all beneficiaries however remote. A beneficiary must have such an interest in the trust as would either entitle him to be put into occupation, or justify the trustees letting him into occupation without more. So, a person who was simply one of the objects of a discretionary trust, and to whom the trustees intended *to grant a tenancy*, did not have an interest engaging s.41(2). He would be occupying *qua* tenant and not *qua* beneficiary under the trust. The Court of Appeal rejected the landlords' submission that they could rely upon intended occupation by any beneficiary as falling within ground (g) even if that occupation would in reality depend upon the trustees granting that beneficiary a tenancy (pp.547-551).

210. In order to reach that conclusion the Court of Appeal found it necessary to consider s.41(2) in the context of s.41(1) and similar provisions in s.42 dealing with groups of companies. It is that analysis which is so illuminating for the purposes of the present issue.

211. At pp.549 to 550 Lord Evershed MR stated:

> "It is, to my mind, quite plain, with all respect to Mr. Blundell's argument, that subsection (1) of section 41 is dealing, and dealing only, with the case where, although the tenancy is vested in someone who is properly described as the tenant, nevertheless it is found that the tenant himself happens to be a trustee and the premises are actually occupied by, and the business is actually being, carried on, not by the tenant trustee himself, but by the beneficiary or beneficiaries, or one of them, for whom the tenant is a trustee. Inevitably, as it seems to me, the occupation by the beneficiary is an occupation which derives its existence from the fact of the trust and the interest of the beneficiary under the trust. It was suggested by Mr. Blundell that section 41(1) contemplated a beneficiary subtenant, a person being a beneficiary to whom the tenant had granted a subtenancy to put him in occupation. In my judgment, that cannot be right. *If there was found in possession AB carrying on a business there and owing his right of occupation to his subtenancy, then that subtenancy would be the tenancy, and the only tenancy, to which Part II of the Act applied.*
>
> I therefore approach subsection (2), which deals with the corresponding case of the landlord, bearing in mind that what subsection (1) has said, putting it quite shortly, is that a tenancy shall not be taken out of the Act and lose the benefit of renewal which the Act gives by reason of the circumstance that the actual occupant, the person carrying on the business, is, in truth, a beneficiary under a trust and is doing so because he is such a beneficiary. If that is right, then I think one naturally approaches subsection (2) with exactly the same notion. What the second subsection is doing is not to deprive the landlord of his chance of successful opposition merely because in the case of the landlord's interest, as had been set out in the case of the tenant's

> interest, the legal and equitable interests are distinct and the actual reversioner, the person who under section 44 is the landlord because he owns the reversion, does so as trustee for someone else, and it is that someone else, *by virtue of his beneficial interest*, who intends to carry on the business in the future. If one reads this section in its context, that inevitably seems to be the parliamentary intention, and the way in which the subsection is expressed supports that view." (emphasis added)

212. Under s.42(2) where a tenancy is held by a member of a group of companies (as defined in s.42(1)) occupation of, and the carrying on of a business on, the property by another member of the group of companies is treated as equivalent to occupation or the carrying on of a business by the tenant. But, as in the case of s.41(1), that provision does not apply where the second company occupies the property pursuant to a subtenancy. Instead, that subtenancy itself qualifies for separate protection under Part II of the 1954 Act. As Lord Evershed MR said in relation to s.42(2) at p.551:

> "That makes it plain, in my view, that what is intended is that the protection for the tenancy is not to be lost by the circumstance that the tenant is company A, but the actual occupant is company B, not by virtue of a subtenancy (*because, as I have said in the case of a trust, if there was a subtenancy, then that subtenancy would qualify as the tenancy for section 23*), but by virtue of the commercial association between companies A and B." (emphasis added)

213. Section 23(1A) and (1B) provide that occupation or the carrying on of a business by a company in which the tenant has a controlling interest or, where the tenant is a company, by a person with a controlling interest in that company, shall be treated as equivalent to occupation or the carrying on of a business by the tenant. I accept the submission of Ms. Wicks that, following the analysis in *Frish* of s.41 and s.42, s.23(1A) and (1B) only apply where either the company in which the tenant has a controlling interest, or the person with a controlling interest in the tenant company, does not hold a sub-tenancy. However, if either such party holds a subtenancy by which they occupy the property and carry on a business, it is that subtenancy is protected under Part II of the 1954 Act. In those circumstances there is no scope for the deeming provision in s.23(1A) and (1B) to apply. That would be contrary to the statutory scheme, in particular the single business tenancy principle. If the deeming provision were to apply, there would be two tenants entitled to an order granting a new tenancy of the property. Part II of the 1954 Act contains no machinery for selecting between two or more competing rights to be granted a new tenancy, because it proceeds on the basis that only one tenant can be so entitled.

214. On the basis of the clear language of the legislation, I consider the analysis by Ms. Wicks of s.23(1A) and (1B) to be correct. But it is also supported by the decision of HHJ Matthews in *Smyth-Tyrrell v Bowden* [2018] L&TR 313 at [60]-[62]. The authors of Reynolds & Clark: Renewal of Business Tenancies

(6th ed) agree with that decision (see para. 1-094 drawing a parallel with s.41 and s.42 and see also paras. 1-110 to 1-112).

215. The claimants addressed the interpretation of s.23(1A) and (1B) in para. 43 of their skeleton and through oral submissions in reply by Ms. Bhaloo (Transcript Day 5 pp. 209 to 215). She criticised the analogy drawn by the Court of Appeal in *Frish* between ss.41 and 42 of the 1954 Act. Even if it were to be appropriate for me to do so, which it is not, I see no basis for criticising that part of the decision. The single business tenancy principle, as subsequently explained in *Graysim*, underlies both s.41(1) and s.42(2). Ms. Bhaloo did not suggest otherwise.

216. Instead, Ms. Bhaloo relied upon a passage in *Frish* at pp.551 to 552. But that deals with a difference between the wording of s.41(2) and s.42(3). Those provisions deal with a *landlord's* entitlement to rely upon ground (g) in s.30(1) to oppose the grant of a new tenancy, and not the *tenant's* entitlement to rely upon s.23. Lord Evershed MR explained the difference of language between s.41(2) and s.42(3) as relating to "machinery". It is plain that that part of the judgment in *Frish* does not in any way undermine the analogy drawn by the Court of Appeal between s.41(1) and s.42(2) in relation to a tenant's right to rely upon s.23. It does not undermine the principle which the defendant drew from *Frish* and applied to s.23(1A) and (1B). I note that Lord Evershed said this at p.552:

> "But if the conception is to be uniform - as I feel myself clearly it is - then just as the essential thing by virtue of which the occupation is to be had under section 42 is the qualification as an associated company, so, I think, if the intended occupation is to be that of a beneficiary, it must be shown that it is the intention that he should so occupy by virtue of his quality or right as a beneficiary."

217. Ms. Bhaloo did not challenge the application of the single business tenancy principle to cases falling within s.23(1A) and (1B). There is no reason why that principle should not apply in relation to s.23(1A) and (1B) just as in the case of s.41(1) and s.42(2). These deeming provisions simply enable the actual tenant to treat the occupation and/or the carrying on of a business by a related party as entitling them to rely upon s.23(1) and the consequential rights to continuation of the existing tenancy and the grant of a new tenancy. They do not apply where the related party is in occupation pursuant to its own subtenancy.

218. Lastly, the claimants criticise the correctness of the decision in *Smyth-Tyrrell* because it is said to be inconsistent with the principle that the "premises" which may be occupied by a tenant for business purposes are not confined to land, but may include an incorporeal hereditament. The claimants did not explain or develop the point, either in their skeleton or oral submissions. In *Pointon York Group v Poulton* [2007] 1 P&CR 6, the Court of Appeal held that an incorporeal right to use car parking spaces contained in a lease of offices was capable of being occupied and fell within s.23(1), contrasting a lease simply of a right of way (*Land Reclamation Co. Limited v Basildon District Council* [1979] 1 WLR 767). It has not been shown that the reasoning in *Smyth-Tyrrell* ignored any

relevant incorporeal right. The decision flowed from a straightforward reading of s.23(1A) and (1B). Furthermore, the claimants have not relied upon any incorporeal right in the present case which could affect the operation of s.23(1A) and (1B) of the 1954 Act.

Section 56 of the 1954 Act – the application of Part II of the 1954 Act to the Crown

219. Section 56(1) applies Part II of the 1954 Act *inter alia* where there is an interest belonging to a Government department or held on behalf of His Majesty for the purposes of a Government department, as if it did not so belong. Part II applies to the Crown as so defined, whether as a landlord or as a tenant, subject to the remainder of s.56 and ss.57-60 which make specific provisions for the Crown.

220. Section 56(3) falls into two parts. They both modify the application of provisions in Part II of the 1954 Act in relation to a department's position as a tenant, not as a landlord.

221. The first part of s.56(3) applies where two conditions are satisfied. First, the tenancy must be held by or on behalf of a Government department. Plainly that condition is satisfied in relation to the underleases held by the SoS. Second, the property comprised in the tenancy must be or include property occupied for the purposes of a Government department. Where both conditions are satisfied the tenancy is one to which Part II of the 1954 Act applies. Section 56(3) does not require the occupier of the premises for the purposes of a Government department to be the tenant. One object of this provision is to extend protection to a tenant which is a Government department but where another Government department is in occupation for its purposes. Section 56(3) therefore reflects the principle of Crown indivisibility as explained in *Town Investments.* Both departments form part of a single entity, the Crown or the Government. This approach also allows necessary flexibility to accommodate the reorganisation of Government departments from time to time. The first part of s.56(3) also avoids any issue as to whether the activity of a Government department qualifies as a "business" for the purposes of s.23(1), s.23(3) and related provisions.

222. The second part of s.56(3) relates to those specific provisions in Part II of the 1954 Act which *only* apply if either or both of two conditions apply:

(a) Any premises have *during any period* been occupied for the purposes of the tenant's business; and/or

(b) On any change of occupier of any premises the new occupier succeeded to the business of the former occupier,

Condition (b) relates to the compensation provisions in s.37 (see s.37(3)). Where condition (a) applies, the second part of s.56(3) deems that condition to be satisfied "during that period" when "the premises were occupied for the purposes of a Government department". Like condition (b), condition (a) relates very precisely to specific provisions in Part II, in this instance to provisions where it is relevant to apply the business occupancy test over a period of time. One such provision is s.37(3). Another is the five-year bar to a landlord's ground of opposition (g) in s.30(1) (see s.30(2) and (2A)). Condition (a) could also

apply to s.43(3). The second part of s.56(3) does not apply more generally in the application of Part II of the 1954 Act.

223. It is the first part of s.56(3) which is relevant to the issues in this case. Where the whole or part of the premises let to a Government department is occupied for the purposes of that department or another Government department, "the tenancy shall be one to which Part II of [the 1954 Act] applies". That is essentially the same language as we find in the exclusion of houses from Part I of the 1967 Act (in s.1(1B)). It is necessary to tread carefully here. The protagonists in this case are looking at this issue to see whether a right to enfranchise is or is not excluded. But the approach taken by the court to this question of interpretation affects the interests of landlords and tenants in relation to Part II of the 1954 Act more generally. The wider the scope given in this case to s.56(3) (and also s.56(4)) so as to exclude a claim to enfranchise under the 1967 Act, the wider the protection given to Government departments as business tenants as against their landlords.

224. As Ms. Wicks submitted, s.56(3) was intended to avoid Government departments being put at a disadvantage relative to other business tenants, owing to the flexible nature of the ways in which Government property is occupied for Government purposes. But where the effect of a legal agreement would be to extend protection for a Government department substantially beyond that normally available to business tenants, it is necessary to ask whether that was the intention of Parliament as expressed through the language of the statute.

225. I have already referred to the significance of the single business tenancy principle. I see nothing in s.56 or any other provision of the 1954 Act, to disapply that principle where a tenancy granted to the Crown or a Government department falls within the scope of Part II of that Act. I return to this subject under Issue 6 below.

226. There are two issues between the parties:

(i) Is the test in s.56(3) whether premises are "occupied for any purposes of a Government department" to be considered from the viewpoint, or through the lens, of the occupier (as the defendant contends) or through the lens of the tenant Government department or the Crown (as the claimants contend)? and

(ii) The true interpretation and effect of s.56(4).

Section 56(3) of the 1954 Act

227. The claimants say that the difference in language between s.23(1) and s.56(3) reflects different statutory purposes. The purpose of s.23(1) is to protect occupation by a tenant for the purposes of his business. The purpose of s.56(3) is to provide protection in respect of "the purposes of the Government served by the occupation, not the purposes, of the occupant." In this respect the claimants seek to draw a parallel with s.57. If the claimants are correct, they say that occupation may serve the purposes of a Government department without

that being the purpose of the actual occupier (claimants' skeleton para. 25). Indeed, Ms. Bhaloo submits that the effect of s.56(3) is that it does not matter who is in occupation of the premises, provided that they are occupied for any purposes of the Government (Transcript Day 1 p.186).

228. The defendant submits that s.56(3) requires that the purposes of the occupation of the premises, as viewed from the perspective of the occupier, be those of a Government department.

229. The claimants submit that the effect of the defendants' submission is to reword s.56(3) as if it read "premises occupied *by* a Government department" instead of "premises occupied for any purposes of a Government department." The defendants submit that the effect of the claimants' submission is to reword s.56(3) as if it read "premises which it serves the purposes of a Government department to have occupied."

230. Ms. Wicks illustrated the difference between the parties by reference to the 6 Bristol properties. They comprise 6 semi-detached houses with their gardens. If the SoS were to sublet each of the properties in the open market to civilians, the defendant would say that the subtenants are the occupiers and the purpose of their occupation is residential for their own benefit. The purpose would not be that of a Government department. However, the claimants would say that, irrespective of whether the occupier of each property is a civilian tenant, the purpose of the occupation has to be looked at from the perspective of the relevant Government department, here the MoD. On their case it is a Government or MoD purpose to sublet on the open market void properties which are not currently required for service personnel. They rely upon *Territorial and Auxiliary Forces Association of the County of London v Nichols* [1949] 1 KB 35, 47 which treated this as a Crown purpose when deciding that the Association was an emanation of the Crown benefiting from the Crown's immunity from the Rents Acts. I will return to *Nichols* under Issue 5(3) below.

231. I have no hesitation in rejecting the claimants' approach. It involves an unjustifiable disconnect between the requirement that the tenanted premises be occupied for the purposes of a Government department and the occupier the subject of that occupation.

232. Neither s.56(1) nor s.56(3) are entirely freestanding provisions. They operate within the context of Part II of the 1954 Act. Section 56(3) does not refer to the requirement in s.23(1) that the qualifying purpose of the occupation of the premises be that of the tenant. But whether we are dealing with s.23(1) or s.56(3) there must still be occupation for a qualifying purpose. That requirement has not been disapplied by s.56(3). The usual tests for occupation, such as physical presence or absence of the occupier, and the exercise of control of the use of the premises by the occupier, can only be applied in relation to someone who is in occupation, the occupier. This is so obviously the natural import of the word "occupied" that it was unnecessary for the draftsman to spell that out by expressly referring to the "occupier" in s.56(3). The defendant's interpretation does not involve rewriting s.56(3) as if to require that the premises be "occupied by a Government department."

233. The question under s.56(3) remains whether the occupier of premises is in occupation for the purposes of a Government department. An occupier who is not a Government department may still be in occupation for such purposes. But if the wrong lens is used the answer given to the statutory question will be flawed by improper reasoning. It can lead to results which cannot have been the intention of Parliament.

234. Where a tenant which is not part of the Crown sublets the whole of office premises to a subtenant which occupies those offices to the exclusion of the tenant, the tenant will not be protected by Part II of the 1954 Act. There is nothing in s.56 to suggest that Parliament intended the result to be any different if a Government department sublets surplus office accommodation to a subtenant in the private sector which occupies the whole of the property. But on the claimants' interpretation of s.56(3), it would be irrelevant to ask what are the purposes of the occupation as viewed by the occupier. The court would be confined to asking what are the purposes of the Government department which sublets. If the purposes of the actual occupier were to be disregarded, and the matter considered only from the perspective of the relevant Government department, the test in s.56(3) would generally be satisfied.

235. There is a further, fundamental problem with the claimants' interpretation. In the example where offices are sublet by a Government department, s.56(3) would confer protection under Part II of the 1954 Act on the department's head tenancy. The sub-tenant would also qualify for protection under s.23(1) in relation to the subtenancy. There is nothing in the legislation to indicate that the single business tenancy principle does not apply in the context of s.56 ([225] above and [374]-[375] below). There is no machinery in the Act for dealing with the grant of two new tenancies in respect of the same property. The solution provided by Parliament is to apply the occupation test in s.56(1) and (3) from the perspective of the subject of the occupation, the occupier.

236. The claimants also seek to rely upon s.57 of the 1954 Act as an aid to the construction of s.56(3). Under s.57 where the interest of a landlord or any superior landlord belongs to or is held for the purposes of a Government department, or is held by a local authority (or certain other statutory bodies), the Minister or Board in charge of any Government department may certify that it is requisite for the purposes of the Government department or the authority that the use or occupation of the property shall change by a specified date. The general effect is that the tenant cannot be granted a new tenancy lasting beyond that date. The claimants submit that the concept of "purposes of the Government department" used in the certification provision does not depend upon that department resuming occupation of the demised premises. The claimants then say that the same phrase when used in s.56(3) is not dependent upon occupation by a Government department. Thus, the focus of "occupation" in s.56(3) is the purposes of the relevant department, not those of the occupier.

237. I do not accept that s.57 provides any assistance in construing s.56(3). The object of s.57 has nothing to do with the object of s.56(3). Section 57 is concerned with the position of a Government department (or certain other public bodies) as a landlord (or superior landlord) seeking to change the use or occupation of property in the public interest on some future date. The fact that

this certification provision does not depend upon the landlord resuming occupation tells us nothing about how the qualifying condition in s.56(3) "occupied for the purposes of a Government department" is to be understood in the context of the operation of s.23 and related provisions.

238. The defendant's construction of s.56(3) accords with the approach taken by Scott J (as he then was) in *Linden v Department of Health and Social Security* [1986] 1 WLR 164 at 175C to 177A when he decided that the district health authority in that case was the occupier of the premises and that their occupation was in furtherance of one of the functions or purposes of the Secretary of State. That involved looking at occupation from the perspective of the occupier, but did not involve rewriting s.56(3) so as to require the Secretary of State or his department to be in occupation.

Section 56(4) of the 1954 Act

239. As is clear from the opening words of s.56(4), that subsection has to be read in conjunction with s.56(3). It affects the way in which s.56(3) is to be applied. Section 56(4) is not a freestanding provision. The claimants have not contended in their pleadings that Part II of the 1954 Act applies to either the Cranwell or the Bristol underleases by applying s.56(4) (see e.g. Transcript Day 4 p.3). Nevertheless, because Ms. Bhaloo says that s.56(4) illuminates s.56(3), and because both parties made submissions about the interpretation of s.56(4), I will deal with the matter.

240. In *Linden* Scott J rejected the submission for the Secretary of State as tenant that s.56(4) applied simply because he had "provided" the premises to the district health authority rent-free and so it was to be presumed that the premises were occupied for the purposes of a Government department, without more. As we have seen, he went on to decide in favour of the Secretary of State by applying s.56(3) to the facts of the case and the occupation of the district health authority. He did not rely upon s.56(4).

241. The effect of the tenant's submission in *Linden* on the interpretation of s.56(4) was that if premises are simply provided for no rent by a Government department, Part II of the 1954 Act applies whether or not those premises are occupied for any purpose of a Government department. The judge said that would be a very odd result which could not be right (p.172 C-E). I agree.

242. Although Ms. Bhaloo criticised the particular way in which the judge expressed himself, that does not go to the essence of what he was saying. Indeed, the broad interpretation which the claimants in this case sought to give to s.56(4) amply demonstrate why Scott J was right to be concerned about an over-literal interpretation of this provision. Ms. Bhaloo submitted that the qualifying condition in s.56(4) is simply that the Government "provides" its tenanted premises to "someone" without any rent being payable. Occupation does not form part of that condition. The premises only need to be "provided rent free" by a Government department. So, she submits that where a department holds a long lease of land to meet some future needs and, in the meantime, provides it to a local youth football club for their use, the department's tenancy is protected by virtue of s.56(4) (Transcript Day 1 p.204).

243. On the claimants' interpretation of s.56(4), I do not see why that provision would not be applicable irrespective of whether the relevant Government department intended to use the land for its purposes at some point in the future. Section 56(4) does not impose any restriction to that effect. On Ms. Bhaloo's reading s.56(4) simply requires a government department to provide its tenanted land to someone else rent free.

244. Like Scott J, I do not think that this is how Parliament could have intended s.56(4) to operate. In practical terms the reading which Ms. Bhaloo advances would operate as a freestanding route to protection under Part II of the 1954 Act. The only requirement derived from s.56(3) would be that a tenancy must be held by or on behalf of a Government department. The claimants' approach would extend protection for the Crown way beyond the scope of the general protection afforded by s.23(1), even as extended by s.23(1A) and (1B), s.41, s.41A and s.42. Although the object of s.56(3) is to facilitate protection for Government departments where premises are occupied for the purposes of a department, according to the claimants s.56(4) could extend the protection to cases where premises are not used by the occupier for any Government purpose.

245. Scott J sought to provide an alternative reading of s.56(4) at [1986] 1 WLR 172G to 173F, although he recognised that there were difficulties with it, not least that it did not accord with the analysis in *Town Investments*. He suggested that s.56(4) applied where one government department grants a tenancy to another government department rent free.

246. Ms. Bhaloo invited the court to decide that the interpretation proffered by Scott J in *Linden* is incorrect. Ms. Wicks asked me to do the same, albeit on a different basis. She submitted that whatever s.56(4) means, it is not concerned with a subtenancy created by a tenant department as Scott J appears to have suggested. When the draftsman wished to refer to a tenancy he did so. This, after all, is legislation dealing with property law. Ms. Wicks submits that s.56(4) does not apply to the subletting by the SoS of the Cranwell common parts to DIHL (Transcript Day 3 pp.211 to 212).

247. For my part, and with great respect, I have difficulty in agreeing with the judge's construction in *Linden*. It does not accord with the language used by Parliament and would offend the single business tenancy principle. I also accept the submissions of Ms Wicks. But this does not mean that the court is driven to accepting the claimants' interpretation.

248. In my judgment s.56(4) has to be read in the context of s.56(3) properly construed. The tenanted property must be held by or on behalf of a Government department. Section 56(3) requires that the property must be occupied, or must include premises which are occupied, for the purposes of a Government department. The occupation test in s.56(3) requires there to be an occupier and is to be applied from the perspective of that occupier. Section 56(4) is a modest provision which makes it clear, for the avoidance of doubt, that s.56(3) applies to rent-free occupation for Government purposes by a department or other occupier. In other words, s.56(4) simply facilitates the satisfaction of the occupation test in s.56(3) by informal arrangements of that kind. The draftsman appears to have thought it advisable to acknowledge in s.56(3) and (4) both

Crown indivisibility and the ways in which Government property is used in practice for Government purposes. What the draftsman did not do was to introduce a nonsensical regime which would allow for a non-Government purpose of an occupier to be treated as occupation for a Government purpose, *a fortiori* given that a tenant department in occupation would only be protected by s.56(3) if its occupation was for a Government purpose.

249. At all events, my conclusion that s.56(4) of the 1954 Act does not assist the claimants' case rests upon my rejection of their interpretation of that provision. It does not depend upon the interpretation I have set out in [248] above.

250. In the final analysis, given that the claimants do not contend that s.56(4) is a freestanding provision, the key point for this case is that in applying s.56(3), occupation and its purposes must be assessed from the perspective of the occupier. For the reasons I have given, it is unnecessary to read the words "premises occupied for the purposes of a Government department" as meaning "premises occupied by a Government department" (see Issue 4).

251. I now turn to consider the various questions raised under Issue 5. In doing so I reject the suggestion that those questions should be answered disregarding who was actually in occupation.

Issue 5(1) – Houses occupied by service personnel

252. In relation to this and other types of property the ASF provides much useful information which need not be set out in detail in this judgment. In the light of that agreed material the parties did not find it necessary to take the Court to many of the source documents in their submissions.

253. Essentially the issue is whether a service person is to be treated as the occupier of his or her house and to be occupying the property for residential purposes, or whether the SoS is to be regarded as the occupier, being in occupation for the governmental purpose of providing accommodation to service personnel. This is agreed to be a question of fact and degree. However, the claimants also submit that, in any event, occupation of any of the 8 properties by a service person is akin to that of a service licensee and so deemed as a matter of law to be occupation by the SoS. The claimants' oral submissions placed a good deal of emphasis on this second point, which I will deal with before addressing the issue of occupation. But first I will summarise certain aspects of the legal and policy framework.

Legal and policy framework

254. By an Order in Council made under the Defence (Transfer of Functions) Act 1964 the SoS has general responsibility for defence and for establishing a Defence Council to exercise on behalf of the Crown its powers of command and administration over the armed forces. By s.2(1) the SoS was incorporated as a corporation sole for all purposes relating to the acquisition, holding, management or disposal of property. By s.2(3) of the 1964 Act the purposes for which land may be taken, purchased or used under various statutes includes any purpose of his department or any of the armed forces. Part II of the Military

Lands Act 1892 (which provides for the making of byelaws in connection with the use of land for "military purposes") applies to land under the management of the SoS as if any such purpose were a "military purpose" within Part II of the 1892 Act.

255. Section 1 of the 1892 Act gives the SoS power to purchase land for the "military purposes" of any part of the armed forces. By s.23 "military purposes" includes "the building and enlarging of barracks and camps" and "other accommodation" and "any other purposes connected with military matters approved by the Secretary of State." There appears to be no dispute that the provision of SFA is a "military purpose." Section 14 confers power on the SoS to make byelaws regulating the use of land for any military purpose to which it is appropriated. "Appropriated" means allocated for a particular purpose. It has nothing to do with the current use of land (*DPP v John* [1999] 1 WLR 1883, 1890).

256. In my judgment these statutory provisions do not lend any support to the claimants' case. The most that can be said is that they authorise the acquisition and holding of land to provide *inter alia* SFA and potentially to regulate the use of land. They do not address the nature and degree of control over land or the question whether the SoS is the occupier of SFA units.

257. Service personnel are Crown servants appointed by the Crown under the Royal prerogative. There is no contract of employment.

258. The Armed Forces Act 2006 ("the 2006 Act") creates a single system of law for the three services. Parts 1 to 13 deal with service discipline including criminal offences, service courts, powers of arrest, entry search and seizure, detention, trial and punishment. Parts 14 to 17 deal *inter alia* with terms and conditions of enlistment and service (pursuant to regulations – see s.329) and the discharge of enlisted service personnel. In broad terms members of the regular forces are subject to service law. Persons residing or staying with service personnel are not subject to service law and are only "civilians subject to service discipline" in certain designated areas outside the British Isles" (ss.467 and 470 and sched.15).

259. Part 3 of the 2006 Act is concerned with powers of arrest, entry, search and seizure. Section 96 defines "service living accommodation" for the purposes of Part 3 of the Act. Such accommodation includes "any building or part of a building which is occupied for the purposes of any of His Majesty's forces but is provided for the exclusive use of a person" subject to service law (s.96(1)(a)). The definition also includes any other room or structure "which is occupied for" the same purposes and is used to provide sleeping accommodation. Thus, "service living accommodation" will include various types of accommodation, including barracks. By way of example, for the purposes of arresting a person in relation to a service offence, s.90 gives a service policeman power to enter and search "service living accommodation" and, indeed, other "premises occupied as a residence" by *inter alia* a person subject to service law. Some powers in Part 3 of the Act (e.g. the power in s.75 to stop and search for stolen articles or controlled drugs) are not exercisable in service living accommodation. Plainly powers conferred by Part 3 of the 2004 Act are not

dependent upon the SoS (or a service policeman) being in "occupation" of the premises where the power is exercised.

260. Accordingly, I do not consider that s.96(1)(a) of the 2006 Act indicates that the SoS, rather than a service person, is in occupation of an individual unit of SFA for the purposes of Part II of the 1954 Act. A definition section for the sporadic use in SFA of criminal investigation powers of this nature does not really go to the issue of who is the occupier of each individual house.

261. King's Regulations have been made for each of the three services, with which service personnel are required to comply. The Regulations address a wide range of subjects, including the structure of the services, the roles and duties of personnel, failings in professional or personal standards, misconduct, recruitment and assignment.

262. Not surprisingly, the Regulations go into considerable detail on matters which affect performance within the service (e.g. command structure and wearing of uniforms) and standards of behaviour more generally). For example, service personnel wishing to take up business appointments or off-duty employment must obtain approval from their commanding officers because of the need for each service to provide immediate and constant operational capability (para. J5.075 to J5.076 of King's Army Regulations). Requirements of this nature, which are typical of the King's Regulations, do not go to the question of who is present in any single unit of SFA or the nature and extent of their control over those premises.

263. The ASF states that service personnel have "inherently mobile lifestyles" and full-time regular service personnel have "100% liability for duty, which while not used all the time, means [they] may be called upon to work whenever and wherever the service requires as directed by their commanding officer." Service personnel and their families have no real choice where they serve, or when and how frequently they move.

264. However, these requirements apply irrespective of where a service person has his or her home. Paragraph 22 of App. F to the ASF states:

> "In recognition of this, SFA accommodation is offered to eligible and entitled service personnel, located in close proximity to the service person's duty station. Service personnel are however generally free to live where they want, regardless of the nature of their role, provided that they are able to carry out their duties. In complying with this requirement, service personnel can choose whether they live in SFA or private (owned or rented) accommodation. Indeed the MoD supports service personnel who wish to buy their own properties through the Armed Forces Help to Buy Scheme. According to a 2022 Armed Forces survey, 20% of service personnel live in property which they own, 29% live in SFA, 44% live in SLA with the remaining marked as other/ on board ship or submarine. ….."

265. In relation to the 8 properties, the Court has not been shown any evidence that any of the service persons in residence has been specifically required by their service to live at that particular address or in SFA.

266. Joint Service Publications ("JSPs") are authoritative rules, policy and guidance applying across the services and/or MoD. JSP 464 is the overall policy document for the provision of SFA, single living accommodation ("SLA") and substitutes therefor in the UK and overseas.

267. JSP 464 Volume 1 Part 1 Chapter 1 sets out general principles and responsibilities. Paragraph 0101 states:

> "**0101. Provision of Service Accommodation**. It is a condition of service in recognition of their inherently mobile lifestyles, frequently remote bases and terms of service, that Regular Service (including FTRS(FC)) personnel are provided with high quality subsidised accommodation."

This was one of a number of references which Ms. Bhaloo put forward as indicating requirements imposed on service personnel about the location of their residence (see e.g. Transcript Day 2 p.36 *et seq*). Instead the paragraph is describing an obligation *imposed upon the SoS* to *provide* accommodation as part of the conditions of service (see e.g. *Lai v Secretary of State for Defence* [2011] EWHC 145 (Admin) at [33]). Indeed, the Foreword to JSP 464 uses essentially the same language as para. 0101 and describes the accommodation as "a fundamental part of the package for service personnel."

268. Where a service person is provided with SFA he is required to abide by JSP 464 and to sign the licence to occupy as set out in the JSP and to abide by its terms and conditions. But "JSP 464 does not impose any obligation on service personnel to occupy SFA … SFA is instead one of a range of occupation options open to service personnel, which may include the service person renting private accommodation, or owning their own home" (ASF App.H paras. 18, 20 and 33).

269. SFA is provided to service personnel who are either "entitled" or "eligible." "Entitled" persons are those who are married or in a civil partnership and living with their spouse or partner, or single parents residing with a child for whom they have prime responsibility. Generally an entitlement to SFA is exercisable at the service person's "duty station", the location specified on their assignment order (JSP 464 Vol.1 Part 1 Para.0326 and ASF App. H para. 24). Entitled persons must have at least 6 months to serve at the duty station at which they qualify for SFA. "Eligible" service personnel may apply to occupy temporarily surplus SFA where it is available. All personnel who are single or in long-term relationships but not married or in civil partnerships are "eligible" (ASF App.H paras. 21 to 22 and 30). In addition "entitled" service personnel who choose not to take up their entitlement to SFA at their duty station may apply for surplus SFA at an alternative location in the UK (ASF App. H paras. 25 and 31 and JSP 464 Vol.1 Part 1 para. 0326).

270. Paragraph 0203 of JSP 464 states that SFA is to be provided as close as possible to the service person's duty station. The MoD seeks to make the initial offer

within a 10-mile radius. A local service commander can agree to SFA within a radius of up to 20 miles (subject to exceptional allocations beyond that distance with the approval of policy staff). Normally where SFA is not available within a 20-mile radius, a "Non-Availability Certificate" is issued, unless the service person has property available within the appropriate radius. The DIO is then responsible for procuring a suitable property in the private sector to offer to the service person as "substitute SFA" (App.H paras. 75 to 76). The arrangements for substitute SFA are to equate "as far as possible" to equivalent procedures for SFA, including location within an appropriate radius of the place of duty (JSP 464 Vol.1 Part 1 para. 0501).

271. In general, entitlement to the SFA in which a person resides ceases in relation to a duty station when he or she is assigned to a different duty station (JSP 464 Vol.1 Part 1 pac.0707). At that point they *may* make an application for SFA at the new station (JSP 464 Vol.1 Part 1 section II). A timescale is set for the making of any such application, but there is no obligation to make it.

272. In her first witness statement Ms. Harrison states at para. 3.4:

> "SFA is a fundamental part of the MoD's offer to service personnel. It is viewed as crucial to the MoD's ability to attract and retain talented personnel to deliver its objectives. Therefore, there is, and will continue to be, a long-term, large-scale requirement for the provision of accommodation to service personnel and their families."

273. In paras. 5.4 and 5.5 of his second witness statement, Mr. Richard Sewter, Central Regional Manager in the Accommodation Team at the DIO, says this:

> "5.4 However, I wish to make it clear that the MoD does not place any obligation on service personnel to live in SFA, or to live in SFA at the site of the base at which [they] serve. This would run contrary to JSP 464 which is designed to increase the flexibility and choice around where service personnel make their home, rather than restrict it.
>
> 5.5 To my knowledge, a service person and their family are free to live where they want, regardless of the nature of their role, provided they are able to carry out their duties. However, in complying with this requirement, they could choose to either live in SFA (provided they are eligible or entitled) or alternatively they could equally decide that is preferable for them and their family to live in private civilian accommodation. Service personnel who do not meet these criteria tend to live in Single Living Accommodation which are accommodation blocks near MoD bases. In my experience it is common for service personnel with families to elect to live in private civilian accommodation. Indeed, the MoD actively supports this choice. By way of an example, regular service personnel (subject to certain qualification criteria) can apply to the Forces Help to Buy scheme. This enables servicemen and women to borrow up to

> 50% of their salary, interest free, to buy their first home or move to another property on assignment or as their families' needs change ... ”

274. It is common ground that “JSP 464 does not impose any obligation on service personnel to live within 10 or 20 miles (or any other distance) of their duty station” (ASF App.H para. 28). A key reason for the provision of SFA is that service personnel are liable to be moved to different postings in the UK and overseas during their career. The absence of SFA from the offer would make it more difficult to attract and retain personnel. As a matter of common sense, the policy in JSP 464 seeks to offer SFA in reasonable proximity to a person’s duty station. Convenience of location generally benefits all personnel occupying SFA. It *may* also be advantageous for the service concerned in some circumstances. But this would be insufficient to demonstrate that the SoS occupies any of the properties (see e.g. *Chapman v Freeman* [1978] 1 WLR 1298).

275. Ms. Bhaloo submitted that the provision of accommodation to service personnel is “fundamental to the way service personnel are enabled to perform their duties”, relying upon paragraph 29 of the claimants’ skeleton but without taking the court to the sources referenced. They need to be read carefully and not out of context:

(i) The statement in *Lai* at [32] that para. 0101 of JSP 464 is a “general rule of fundamental importance to the way service personnel are enabled to perform their duties, and are treated while doing so,” was in the context of a complaint by a service person that the SoS had failed to provide accommodation in accordance with his obligation;

(ii) The next reference purports to be the UK Armed Forces Defence Accommodation Strategy published in October 2022. Not all the snippets provided come from that document. One comes from an offering circular relating to APL. The relevant quotation from the Strategy states:

> “Defence provides Service personnel with subsidised accommodation and support to *aid workforce mobility, operational readiness and capability. Service personnel change jobs frequently, sometimes at short notice and in multiple, and sometimes remote locations.* To mitigate the impact of this, Defence provides subsidised high-quality housing and support to Service personnel and their families. It is a key part of our offer as is the help we give to Service personnel who wish to buy their own properties through the Forces Help to Buy scheme. In supporting our people through the scheme, Defence gives them greater choice over their accommodation. (emphasis added).”

For the claimants’ skeleton to have relied selectively on the words I have emphasised gave a misleading impression;

(iii) The quotation from JSP 770 is concerned with "welfare" in a very broad sense, not simply the provision of SFA.

276. The claimants have asked the court to consider a large number of references. It would not be appropriate in this judgment to refer to each and every one of them. I have taken all of them into account. It is reasonable for the court to assume that they represent the best points that the claimants can advance in support of their case.

Service Licence

277. A person who lives in a house is a service licensee and, as a matter of law, the licensor is deemed to be the occupier if either (1) it is essential to the performance of his duties that, as a matter of fact, he should occupy the particular house or a house within a particular perimeter, or (2) he is required by contract to occupy the house and, as a matter of fact, by doing so he is better able to perform his duties to a material degree (*Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1WLR 1708, 1722 and *Ludgate House Limited v Ricketts* [2021] 1WLR 1750 at [64]). Ms. Bhaloo stated that the claimants rely upon the second and not the first of those two principles.

278. Ms. Wicks submits that because a service licence deems the licensor to be the occupier as a matter of law, it is incompatible with the factual nature of the enquiry required by the occupation test according to *Graysim*. I do not need to decide this interesting point as the claimants' argument fails in any event.

279. I accept Ms. Bhaloo's submission that it is not essential to the second principle for there to be a contract of employment between the licensor and licensee (see *Ludgate House* at [65] to [67]). Similarly in *Langley v Appleby* [1976] 3 All ER 391 Fox J held that there is no requirement for the relationship to be that of master and servant. The holder of an office can be a service licensee (p.406f-407b). Although a police officer is not a servant of the police authority, the judge considered the relationship to be analogous to that of master and servant (p.402j). The same applies to service personnel. It is therefore necessary to consider the terms of service. In *Langley* the court considered the relevant regulations governing police officers (p.411j to 412b).

280. Ms. Bhaloo relied upon a declaration which appeared at the end of each licence for SFA:

> "I have read and agreed to the terms of this Licence. I understand that this Licence is to be granted because my occupation of the Property is required for the better performance of my service with the Crown and that this Licence is not a tenancy."

This does not assist the claimants' case. It is not a requirement in the terms of service for service personnel. It is a provision in the licence which a service person signs *if they apply for SFA* and that accommodation is provided to them by the SoS. The declaration begs the question whether the terms of service

require a service person to live in SFA in the first place. Plainly JSP 464 does not. I deal below with the other sources relied upon by the claimants.

281. Furthermore, a clause similar to that declaration was contained in the occupation licences granted to the 6 teachers in the *Fermanagh* case ([1969] 1WLR at p.1713B). The House of Lords held that the clause did not alter the terms of employment or service. Those terms did not require any of the teachers to occupy the house as a condition of his employment. Like the service personnel in the present case, the teachers could choose to apply to live in one of the houses and they could leave the accommodation and live without imperilling their employment (p.1723).

282. Ms. Bhaloo relied upon para. 993 of Chapter 15 of the RAF King's Regulations entitled "Discipline". Sub-paragraph (1) states that service personnel will be required to occupy "public accommodation where this is appropriate for service reasons …" and sub-para. (2) defines certain categories of single and married *unaccompanied* personnel who are to occupy public accommodation. Sub-paragraph (1) is subject to sub-para. (3) by which commanding officers are required to avoid unnecessarily restricting the freedom of choice of their personnel. Paragraph 4c of Appendix H to the ASF notes that there is no evidence that any of the service personnel at the Cranwell site or the Bristol site was subject to paragraph 993 at the relevant time.

283. I agree with Ms. Wicks that these provisions proceed on the basis that there is no general requirement in the King's Regulations for service personnel to live in public accommodation, or more specifically in SFA. Paragraph 993(2) applies to persons who do not appear to be entitled to SFA. The nature of the requirements in paras. 993(1) and (2) suggest that they are not addressed to SFA as opposed to other public accommodation in the form of, for example, barracks. The SFA scheme is for the provision (not imposition) of family accommodation to people who are "entitled" or "eligible" and make an application for that purpose. The whole tenor of the material put before the court is that service personnel are entitled to choose where they live. The claimants have not shown how para. 993 detracts from e.g. para. 20 of App.H to the ASF.

284. I conclude that the terms of service for service personnel do not include a general requirement, or any requirement applicable to the 8 properties, that service personnel live in service accommodation, in particular SFA. The position in *Langley* was very different. There the court found that there was an obligation in the terms of service for each police officer to live where he was directed to live, otherwise he would be obliged to resign ([1976] 3 All ER at pp.411g-412g).

285. Accordingly, the claimants' case fails on the first limb of the two tests that have to be applied and I need not go any further. However, I would say shortly that the claimants' submissions have not persuaded me that, looking at all relevant circumstances, occupation of SFA was for the better performance of duties as service personnel, whether as a generality or specifically in relation to the 8 properties.

286. The parties referred to one case in which it was accepted that a licence to occupy service accommodation is a service licence. *Secretary of State for Defence v Nicholas* [2013] EWHC 2945 (Ch) involved two claims for possession, one relating to a unit of SFA. Given that the statutory protection in the Housing Act 1985 and the Housing Act 1988 did not apply to Crown properties, the case was essentially concerned with defences based on articles 8 and 14 of the ECHR and the Human Rights Act 1998 ("the 1998 Act"). The licence to occupy the property contained the same declaration referring to a service licence as we find in the licences for the 8 houses in this case and which I have already addressed. The defendant argued that the document had in fact created a tenancy ([20(i)]). There does not appear to have been any argument that if that contention should be rejected the contract created a licence rather than a service licence. Burton J rejected the contention that a tenancy had been granted and relied upon the declaration to treat the contract as a service licence (see [21(i)]). The judge identified the test as being whether the contract of employment required the service person to occupy the dwelling for the better performance of his duties ([39(ii)]). But he did not in fact consider the terms of service. He merely relied upon the declaration in the licence. He did not mention the *Fermanagh* case in the House of Lords. The explanation appears to be that these points were not in issue as between the parties.

287. In the Court of Appeal ([2015] 1 WLR 2116) the appellant sought to argue that the legislation exempting Crown tenancies from statutory security of tenure was incompatible with the HRA 1998. But that depended upon the appellant being able to show that her Convention rights had been violated ([17] to [24]). The appellant argued again that her husband had been a Crown tenant rather than a Crown licensee. Lewison LJ stated that that submission was not open to her because there had been no tenancy ([25]). In relation to the discrimination argument under Article 14, the Court took as a comparator a service licence from a private sector provider. That too would not have gained any security of tenure and so the appellant failed to establish a breach of Article 14. Once again there was no issue as to whether the tests for a service licence were satisfied and the Court of Appeal did not decide that point.

288. Accordingly, there is nothing in the decisions in the *Nicholas* case which would alter the analysis set out above. For all the above reasons the contention that service personnel occupy SFA under a service licence must be rejected.

Occupation

289. The SoS provides SFA for use by service personnel as residences. At first blush that could be described as a government purpose. However, it does not follow that the SoS makes physical use of the individual houses or is present in, or controls, or is in occupation of, those properties. That depends upon the terms of the licence and other relevant documents, along with the factual circumstances. Nor does it follow that the occupation was for the purposes of a Government department within s.56(3). That depends upon identifying the occupier and considering the purposes of his occupation from his perspective.

290. The licence is made between the service person, the licensee, and the DIO on behalf of the SoS. The licence gives the licensee the right to occupy the dwelling

for the duration of the licence. Other persons such as the licensee's spouse or civil partner and children may also occupy the property in accordance with JSP 464. The licensee is required to pay a charge for the SFA by a deduction from service pay.

291. By clause 6.1.4 the licensee must only use the property as a single private dwelling for himself, his spouse or civil partner and any dependent children as defined in JSP 464. The licensor must not use the property for any other purpose, nor allow anyone else to do so, without the prior written consent of the SoS. Likewise the licensee must not carry on or allow any person to carry on a trade or a business at the property (clause 6.3.4). But consistent with the user restrictions, a licensee may have "visitors" staying for no more than 28 days in any period of 93 days.

292. Clause 6.3.1 states that the licence is personal to the licensee. He cannot transfer the licence or the rights of occupation, nor share occupation with anyone else (other than the permitted occupants), without prior consent.

293. Turning to the obligations of the SoS, clause 9.1 states that for so long as the licensee complies with the terms of the licence, the SoS will allow the licensee to occupy the property subject to the terms of the licence. This is similar to a covenant for quiet enjoyment.

294. The SoS is liable for the maintenance and repair of the property, including internal and external decoration and installations. But he is not liable for damage to the property caused by the licensee or anyone the latter allows into the house (clause 9.3).

295. The licensee is responsible for negligent, wilful or accidental damage to the property caused by himself or members of the household (clause 6.1.10). The licensee is also liable for maintaining any enclosed gardens of the SFA. The contractor engaged by the MoD is responsible for the maintenance of any front gardens which are unenclosed.

296. The licensee and his family have all the keys to the property and control access thereto (ASF para. 20).

297. Under clause 6.1.9 the licensee must allow access to the property for the SoS's agents and contractors on 24 hours' notice save in an emergency. Ms. Bhaloo relied on a statement in JSP 464 Vol.1 Part 1 para. 0606 about this right of access. The SoS's agents may enter "for legitimate reasons such as repair and renovation, public economy or safety, or for any other legitimate purpose" on 48 hours' written notice, save in an emergency. Ms. Bhaloo accepted that such a provision would be consistent with the grant of a tenancy with exclusive possession if the purpose of the right of access was limited to something in the nature of repairs (i.e. an activity which the licensor is obliged to carry out). But she says that the phrase "any other legitimate purpose" is one indicator that the licensee does not have exclusive possession and that the SoS is in occupation of the dwelling.

298. I disagree. "Legitimate purpose" in that extract from the JSP must be read in the context of the licence as a whole. The phrase does not detract from, for example, the licensee's right to occupy the unit as a private dwelling or his entitlement under clause 9.1 to occupy the property. It is difficult to see how the right of access could go beyond that which is necessary in order for the licensor to comply with his obligations under the licence (or possibly JSP 464) in relation to the property. Neither the word "legitimate" nor clause 6.1.9 are open-ended. Moreover, I accept Ms. Wicks' submission that the reservation of a right of access is generally an indicator that the grantee has been given a right of exclusive possession. I also note that the rights of access reserved in *Street v Mountford* [1985] AC 809, 815, which were just as wide if not wider than clause 6.1.9, were consistent with the so-called "licensee" in that case having exclusive possession.

299. Ms. Bhaloo decided to focus on clause 6.1.2 (Transcript Day 2 p.66) which provides:

> "6.1.2. You must observe and comply with all security or other instructions issued by the Services, Us or by Our representatives or agents and ensure that members of Your household and any visitors also do so."

Ms. Bhaloo submitted that because of the width of the phrase "all … other instructions" this provision was a clear indication that the licensee does not have the right to exclusive possession. But the position here is similar to clause 6.1.9. "Instructions" do not have such a wide ambit as to detract from the licensee's rights to occupy the dwelling property as a private dwelling and under clause 9.1. Neither clause 6.1.2 nor 6.1.9 purport to give the SoS a right to occupy the dwelling or to control the occupation of each SFA unit for the purposes of a dwelling. That would be inconsistent with the rights conferred on the licensee. In my judgment, when read properly in context clause 6.1.2 is an incidental provision which simply concerns matters of security and similar matters or compliance with the licensee's obligations under the licence. Those obligations are compatible with a grant of exclusive possession to the licensee and so is clause 6.1.2.

300. I consider that the control of the duration of stays by visitors and of the parking of caravans on DIO estates and also the provisions dealing with death in service are consistent with the licensee having exclusive possession of a SFA unit. Reference was made to the power to make byelaws under s.14 of the Military Lands Act 1892, but that power has not been exercised in relation to Cranwell or Bristol.

301. The claimants have made vague suggestions that the "command structure" had some bearing on the occupation issue. These were not developed in argument, no doubt a reflection of their lack of merit. Instead, the court was left to consider some references given in the skeleton. In relation to the command structure there are general limits on the lawfulness of orders (*R v Canning* [2022] 1WLR 3729 at [8] *et seq*). But no example has been given of an order which would materially alter a licensee's control of the dwelling in relation to the issue of occupation. The possibility of exclusion of a service person alleged to have committed

domestic abuse does not take the matter any further. The relevant RAF policy refers to exclusion on a temporary basis for up to 28 days. Occupation by the partner and any children would continue during that period. The policy does not lend any support to the contention that the SoS is the occupier of each SFA unit.

302. Negligent or wilful damage to an SFA unit is dealt with by the occupation licence. The fact that it may also be dealt with by the command structure and by service law does not indicate that the SoS rather than the service licensee is in occupation of the property.

303. The claimants made some additional oral submissions in relation to the Cranwell site. Reference was made to a road sign at an unspecified location prohibiting vehicular access; but the parties have agreed that the relevant roads are public highways. The claimants also referred to ASF App.F para. 10 in which it is agreed that the way in which SFA units are used and occupied does not materially differ as between those which are, and those which are not, within "the wire" (a secure perimeter through which access is controlled). That adds nothing on the nature and extent of any control exercised by the SoS in relation to the use and occupation of each dwelling.

304. I conclude that the licensee under the occupation licence for a SFA unit is granted the right of exclusive possession. Furthermore, and in any event, I have reached the firm conclusion that the licensee has exclusive occupation of his or her SFA unit. The premises in question are houses. They are physically used for that purpose by the licensees and their families. The SoS does not have any significant presence in, nor does he make any significant use of, the homes. The SoS does not control the use of the properties as houses to such an extent that he could be treated as occupying them.

305. Given that the licensee of each dwelling is the occupier of that property, the purpose of that occupation should be viewed from his perspective. The licensee occupies the property as a personal residence. He does not occupy it for Government purposes such as the provision of SFA to service personnel. The obligations and rights which go with the licensee's occupation are for the purposes of using the property as a private residence. In these circumstances s.56(3) is not applicable.

306. Under Issue 5(1) I conclude that none of the 8 properties was occupied by the defendant and/or for the purposes of a Government department at the time when each relevant enfranchisement notice was served.

307. The remaining subjects under Issue 5 are concerned with the Cranwell site and not the Bristol site.

Issue 5(2) – Occupied garages at the Cranwell site

308. There are 37 garage units on the Cranwell site, of which 16 or 17 were "let" on the dates of the enfranchisement notices relating to 1 and 3 Sycamore Drive. They do not form part of any SFA unit or of the common parts. The units were available to "occupants of SFA" by a separate written licence agreement (ASF App. F para. 61).

309. Under the standard form agreement the licensee may only use the garage to keep a private motor vehicle or for personal effects and for no other purpose without consent. The licence of a garage terminates automatically when the licensee's licence to occupy a SFA unit ends. Ms. Bhaloo suggested that the licence could otherwise be terminated without any notice. That is incorrect.

310. The claimants said that the garages are sometimes used for service vehicles, relying upon para. 71 of the ASF (Transcript Day 2 p.20 but presumably referring to App.F or App.H). The reference given did not address that point and there does not appear to be any other supporting reference. At all events, in so far as this activity has taken place, the claimants did not suggest that it had been carried on by anyone other than a licensee. They have made no more than a vague unsupported assertion with no real indication of the extent to which this is, or even might be, taking place.

311. The claimants' overall position was that the licensed garage units were occupied for the purposes of the SoS under s.56(3) of the 1954 Act, essentially for the same reasons as they have advanced in relation to the units of SFA (Transcript Day 2 p.20 and p.69). Ms. Wicks submitted that the outcome of Issue 5(2) should be the same as for Issue 5(1), because the same reasoning applies (Transcript Day 4 p.104). I agree with that approach.

312. Under Issue 5(2) I conclude that none of the licensed garages were occupied by the defendant and/or for the purposes of a Government department at the time when each relevant enfranchisement notice was served.

Issue 5(3) – SFA units at the Cranwell site sublet by the Secretary of State to private sector tenants

313. At the time when the two Cranwell enfranchisement notices were served, 12 out of the 97 SFA units were sublet to private sector tenants. Because the Housing Act 1988 does not generally apply to a tenancy where the landlord's interest belongs to the Crown or to a Government department, or is held for the purposes of a Government department, an assured shorthold tenancy cannot be granted. Instead, the SoS grants short common law tenancies.

314. A typical tenancy agreement is for a tenure of 12 months followed by a monthly periodic tenancy. Clause 3.2(a) allows for the SoS to increase the monthly rent up to the market rent 12 months after the start of the tenancy and at 12 monthly intervals thereafter, subject to giving 2 months' notice. If the new rent is not agreed either party may end the tenancy in accordance with clause 10 by serving 2 months' notice. Clause 10.3 also contains a break clause exercisable up to 4 months from the start of the tenancy to bring it to an end 6 months from the commencement of the term.

315. The claimants accept that the SoS is not in occupation of the sublet units. Instead, they are occupied by the subtenants (para. 44 of skeleton). That must be correct. Each of the subtenants has the right to exclusive possession of their dwelling. If the purpose of the occupation is viewed from the perspective of the occupier, the subtenant, plainly it would be for residential purposes and not for the purposes of a Government department.

316. However, the claimants' case involves looking at the purpose of the occupation from the perspective of the SoS instead of the subtenant. They submit that the defendant is not a commercial landlord. He hands back units which are judged to be surplus, but that is subject to retaining a margin of voids to allow for redeployment of service personnel and "resilience." These particular units have not been left as voids and they have not been handed back to APL. Accordingly, the proper inference is that they are considered by the SoS to have a future role as part of the SFA estate, but in the meantime they are sublet in order to generate temporary revenue. The claimants submit that this is a relevant Government purpose falling within s.56(3) of the 1954 Act, relying by analogy upon *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35.

317. As Ms. Wicks pointed out, the claimants' submission on sublet houses depends upon the correctness of their earlier argument that the purpose of the occupation should be considered from the perspective of the MoD as the relevant government department and not from the perspective of the occupier if different.

318. I have already rejected the claimants' submission that where premises are let to a Government department but are occupied by another party, the purposes of that occupation should be determined from the perspective of that department. Instead, those purposes are to be determined from the perspective of the occupier (see e.g. [231] to [235] above). Accordingly, the claimants' case on the sublet SFA units is flawed and fails. I would add one further point.

319. The *Nichols* case does not support the claimants' case. The issue there was whether the Association benefited from the Crown's immunity from the Rent Acts because both (i) it was an emanation of the Crown and (ii) in *letting* the premises it was acting for "Crown purposes" (pp.45 and 47). By definition any entitlement to rely upon Crown immunity could only have been considered from the perspective of the landlord. That issue could not have been answered by looking at the purposes of the occupying tenant. That is why the court distinguished rating cases because there the focus is on the use of property by the occupier (p.48). The *Nichols* case is of no assistance where the law requires the court to determine the purposes of occupation; *a fortiori* where that is be considered from the perspective of the occupier.

320. Under Issue 5(3) I conclude that none of the sublet SFA units were occupied by the defendant and/or for the purposes of a Government department at the time when each relevant enfranchisement notice was served.

Issue 5(4) – Void SFA units and garages at the Cranwell site

321. According to the ASF, on the date of the enfranchisement notice for 1 Sycamore Drive there were 21 void SFA units and 21 void garages and on the date of the notice regarding 3 Sycamore Drive there were 23 void SFA units and 20 void garages. The issue is whether these properties were in the occupation of the SoS so as to attract protection under Part II of the 1954 Act or whether they were unoccupied and therefore falling outside the scope of Part II. The parties agree that the arguments on this issue are the same for all of the units and garages.

322. It is also agreed that the SoS's contractor, Amey, held the keys for the void units. The MoD did not have keys. All white goods (except for the cooker) and any furniture were removed from the houses and put into storage. Amey was required to maintain the void units so that they were at a standard suitable for new residents to move in. The company was to carry out inspections to check that void units were secure and not damaged. The NHPC did not give Amey any right of possession in respect of SFA units or any proprietary interest in them. On the date of the Cranwell enfranchisement notices, 3 Sycamore Drive was a void property (ASF App. F paras. 56 to 57 and Mr. Sewter's first witness statement paras. 10.3 to 10.4). On the date of both notices Amey was responsible for maintaining the void garage units (ASF App. F para. 63).

323. If occupation by the SoS through his agent Amey is established, the claimants submit that it is for the purposes of a Government department, namely maintaining a stock of void units, both SFA dwellings and garages, rather than treating them as surplus to requirements, to allow for flexibility in meeting accommodation needs arising from redeployment of service personnel and maintenance schedules, as well as resilience planning and future demand. However, para. 39 of the claimants' skeleton is based upon a highly selective extract from the SoS's "UK Armed Forces Defence Accommodation Strategy" (October 2022). When the original text (at pp.11 and 22) is read fairly and as a whole, it is plain that the SoS regards the current level of voids (19% of SFA units) as being too high. The MoD is committed to reducing this by about one half to 10% by September 2023 "through an occupancy-led strategy, or a disposal-led strategy if necessary." The MoD will consider setting "an even more stretching target" in the next version of the Strategy if appropriate. In the same vein p.11 of the document refers to "some void properties" being kept deliberately to create the management margin needed. These statements in the October 2022 Strategy accord with similar concerns expressed over the years in other documents before the Court about the excessive level of SFA voids.

324. It follows that it cannot be assumed that all void SFA units, or indeed garages, are being held because they are necessary for the "management margin" or for "flexibility." Some are surplus (c.f. the assertion to the contrary in the claimants' submissions on Day 2 at p.68). On the other hand, there is no material before the court to enable it to say at this stage which properties contribute (or may contribute) to the margin and which do not, or what the relative proportions might be. Accordingly, the surplus point does not assist in the resolution of Issue 5(4) in these proceedings.

325. The issue therefore turns on whether the void properties are occupied or not, in relation to which the parties rely upon the facts summarised above.

326. The claimants seek to gain support from the *Wandsworth* case. There the authority's tenancy related to 500 sq m of public open space which had been used for at least 13 years by local inhabitants for leisure and recreation. The space was enclosed and a gate was used to control access. There were park benches and the authority had made a number of improvements to the planting. They used contractors for regular horticultural work (once a week for 16 weeks in the summer and once a fortnight over a period of 32 weeks). A parks manager also made regular inspections. Plainly the property was not a "void". It was in

active use for its intended purpose, namely recreational open space for the public.

327. The Court of Appeal held that the issue was whether, in a case where the tenant had not parted with exclusive possession to another party, it was physically present on site and exercising control to such an extent as would reasonably be expected for occupation having regard to the nature of the premises, the terms of the tenancy and the purpose of Part II of the 1954 Act (pp.229-230). The court decided that the authority was physically present on and exercised control over the land through their agents as much as would reasonably be expected for the management of open space for use by the public. The court distinguished the decision in *Trans-Britannia Properties Limited v Darby Properties Ltd* [1986] 1 EGLR 151.

328. In *Trans-Britannia* the tenant's business was the letting of lock-up garages. The site in question had 46 garages. Some were sub-let, others were void. The tenant had no offices or living accommodation on site but did occupy one garage as a store. The tenant would visit from time to time to deal with new sublettings and maintenance. The Court of Appeal held that the tenant was not in occupation of the land for the purposes of its business. It provided little in the way of services for the occupied garages. The tenant gained little support from the finding at first instance that it did what was required by the nature of its business. The Court of Appeal stated that the nature of that business and the manner in which it was conducted meant that the tenant's control of the premises was of a very limited nature. Ultimately, the degree of presence and control was insufficient to qualify as "occupation" for the purposes of Part II of the 1954 Act.

329. Ms. Bhaloo sought to make a virtue of the fact that nobody else was in occupation of the void units, suggesting that the requirements for satisfying the occupation test were thereby rendered less onerous than might otherwise be the case (Transcript Day 2 p.68). But, with respect, this bald proposition fails to have regard to the nature of the land use, which is an important consideration. For example, in *Wandsworth* there was no occupation competing with that of the local authority because of the nature of the use being made of the land, that is public open space. In that context no one could sensibly say that members of the public were in occupation of the public open space.

330. Whereas the open space in *Wandsworth* was actually being used for its purpose, the same is not true in the present case. The residential units are not being used as houses. No one is living in them. On the claimants' own case, the houses are simply being maintained in readiness for their potential use in future as houses. If and when that use comes about then, for the reasons set out under Issue 5(1), the occupiers will be the individual residents, not the SoS. It therefore seems perverse to be suggesting that maintenance by the SoS's contractor to enable void homes to be reoccupied in the future is sufficient for the SoS to become protected under Part II of the 1954 Act whilst those properties are not in use as dwellings. He did not have that protection when the houses were previously occupied by service personnel and he will lose that protection again when they are re-used for that same purpose. In those circumstances how can the underlessee be any better off under the 1954 Act when the houses are empty?

The short answer is that the void properties are not being occupied by anyone. They are simply empty.

331. Even looking at the void periods in isolation, I do not consider that, on the evidence before the court, the level of physical presence, activity and control over the empty homes exercised here on behalf of the SoS is sufficient, as a matter of fact and degree, to qualify as occupation for the purposes of Part II of the 1954 Act, whether under s.23 or under s.56(3).

332. Accordingly, I consider that the claimants' case on the void houses does not accord with the purpose for which protection under Part II of the 1954 Act is available, as explained in *Graysim*.

333. It is agreed that there is no material difference in relation to the garages.

334. Under Issue 5(4) I conclude that none of the void SFA units and garages were occupied by the defendant and/or for the purposes a Government department at the time when each relevant enfranchisement notice was served.

Issue 5(5) – Contact Houses at the Cranwell site

335. Two of the SFA units at the Cranwell site, 22 and 24 Sycamore Drive, have been appropriated for use as "contact houses." They are three-bedroom furnished houses available to be booked by service personnel and their families for a fee for short-term stays. They can be reserved for different welfare and community support purposes. The most common use is for divorced or separated service personnel, who do not live in SFA, to spend time with their children.

336. The claimants submit that, as a matter of fact, the contact houses are in the occupation of the SoS for the purposes of administering and maintaining HM's armed forces. The defendant submits that they are in the occupation of a charitable trust, the RAF Cranwell Contact Houses Service Fund ("the CCHSF"), and are not occupied for the purposes of a Government department.

337. The parties have agreed in the ASF a good deal of factual material relevant to this issue. Ms. Wicks said that there are no factual issues in the evidence which the court is asked to resolve. Instead, the difference between the parties concerns the factual inferences which should be drawn from that material. Ms. Bhaloo did not disagree. The parties based their respective oral submissions on relatively small parts of the evidence.

338. Ms. Bhaloo advanced essentially two points. First, paras. 40 to 41 of her skeleton rely upon a number of references which indicate that the "unit in command" at RAF Cranwell is responsible for the properties and designated as a "proxy occupant" and the sole trustee of the CCHSF is the Commandant of RAF Cranwell. The premises are maintained by the defendant, and the keys are kept by the RAF Cranwell guardhouse. Accordingly, it is submitted that the defendant is the occupier of these two properties. Second, even if the CCHSF is the occupier of the two contact houses, the trust has charitable status because its

objects are "wholly or mainly to promote the efficiency and well-being of service personnel", which is a Government purpose.

339. Ms. Wicks particularly relied on the fact that contact houses are a non-public welfare facility as explained by Warrant Officer Shaun Turner of the Air Service Funds Team in his witness statement. As such, the operating costs of the contact houses cannot be funded by the MoD or other public funds. Ms. Wicks submits that the properties cannot be occupied for the purposes of a Government department if that occupation cannot be funded by a Government department.

340. In my judgment, when considering the wide range of material produced on the contact houses, it is necessary to keep firmly in mind three points which the parties have agreed in the ASF App. F:

(i) The Cranwell contact houses are operated and managed by the CCHSF (para. 45);

(ii) Contact houses are a non-public welfare facility, the operating costs of which cannot be met from public funds, such as the MoD (para. 42);

(iii) It is necessary to create a service fund to manage and operate a non-public welfare facility, such as the contact houses at Cranwell (para. 43), hence the establishment of the CCHSF.

341. The Cranwell contact houses are former SFA units which have been "appropriated" by the DIO from their SFA stock for use as a welfare facility (ASF App. F para. 34). Appropriation is described in JSP 464 (Vol.1 Part 1 Chapter 2). The process begins with a request with a business case from the unit at a base. Appropriation may be to:

(i) Single living accommodation as a temporary solution in the form of a mess or barracks where there is a surplus of SFA;

(ii) Welfare accommodation (admissible categories, maintenance and finance are dealt with in Vol.1 Part 2 Chapter 2 Annex C);

(iii) SLA for a seriously injured or disabled single service person. The property is occupied by that person as an entitlement.

342. Where appropriation is agreed the SFA is handed over to an "administering unit" which will act as a "proxy occupant" (JSP 464 Vol.1 Part 1 para. 0211). The parties disagree on who is the proxy occupant for the Cranwell contact houses. The claimants say that that it is "the unit" on behalf of the MoD, the defendant says that it is the CCHSF. But it is necessary to bear in mind (i) that para. 0211 applies to a range of different appropriations, (ii) specific arrangements have been put in place for welfare services, in particular contact houses, and (iii) the agreements between the parties reached in the ASF (see e.g. [340] above).

343. Warrant Officer Turner describes the differences between public and non-public welfare funding in the services. In this context "welfare" refers to "personal and

community support structure that secures and improves the well-being of service personnel and the service community" (witness statement para. 4.2). Given that broad definition, it is unsurprising that in JSP 462 (the "Financial Management and Charging Manual") the MoD divides welfare facilities and activities into two categories:

(i) "Publicly funded welfare" that is paid for from the defence budget approved by Parliament and must be in support of "defence objectives";

(ii) "Non-publicly funded welfare" "that is not in direct pursuit of defence objectives" and cannot be funded from the public purse. This has to be funded by service personnel and their families and/or charitable donations.

344. Where a welfare facility is provided for the benefit of service personnel living at a base the DIO is able to provide infrastructure in the form of a building and furnishings. But the operation of the facility is non-public in that its purpose is for the use and enjoyment of service personnel in their own time and does not further a "defence requirement". A fee is paid to the DIO for the use of the building (Turner witness statement para. 4.8 and see below).

345. It is in this context that the parties have agreed that the contact houses at Cranwell are a non-public welfare facility. Warrant Officer Turner also explains (para. 4.12) that an appropriated house continues to be maintained under the NHPC, just as in the case of SFA units. No doubt it was thought efficient to make use of a resource responsible for sites such as Cranwell in any event. The service fund that operates the contact houses is responsible for paying the operating costs from non-public money. Those costs include the DIO's fee for each day the house is used, adaptations, utilities, cleaning, furniture and grounds maintenance. The contact house fees paid by service personnel are collected by the CCHSF and used to pay the DIO fees and other operating costs. The CCHSF has also received some charitable funding (paras. 4.14 to 4.15).

346. Where a facility is not publicly funded it is necessary for a service fund to be set up to hold funds to pay operating costs. At a base such as Cranwell there are a large number of such funds. Typical examples of non-public welfare facilities requiring the setting up of large service funds are messes, sports clubs, and tea and bar facilities (paras. 5.2 to 5.3). Each fund operates a separate financial account (para. 5.4).

347. At a base like Cranwell there will also be in addition to those large service funds about 100 smaller funds covering a wide range of social and recreational functions, known as "banked funds". Funds for contact houses, such as the CCHSF at Cranwell, are banked funds (para. 5.8).

348. A service fund may qualify as an "excepted charity", and therefore does not have to be registered with the Charity Commission, if *inter alia* it is "wholly or mainly concerned with the promotion of the efficiency of the Armed Forces of the Crown." The fund also has to adopt a service fund constitution. Having done so, the CCHSF is an excepted charity (paras. 5.9 to 5.12). Under the constitution of the CCHSF the objects of the charity include the provision of a welfare

establishment for any service personnel suffering marriage problems, or for single parents to be with visiting children, or for families to visit service personnel, and to provide a comfortable and safe environment to promote the efficiency and well-being of service personnel.

349. Paragraph 41 of the claimants' skeleton states that the Cranwell contact houses are used for "core" and "non-core" welfare functions with the latter not attracting public funding. That observation is based upon the witness statement of Warrant Officer Tracey Kenworthy (the Officer in charge of the Cranwell contact houses). A booking has to be made in accordance with the Terms and Conditions for the contact houses (paras. 5.7 to 5.14). They provide for four levels of priority. Priority 1, the highest, is "Cranwell welfare" and relates to the most serious cases, for example where there is a safeguarding concern or domestic abuse. This is referred to as "core welfare." It appears from the evidence that core welfare cases are infrequent or rare. But if such a case should arise, the DIO waives its fee and no charge is payable to the CCHSF. The other three levels, which include a single parent wanting access to children and service personnel visiting their families, are "non-core welfare" and have to be funded from non-public funds.

350. Details of bookings are sent to the guard room at RAF Cranwell which looks after the keys to the contact houses when they are not in use. Otherwise the keys are held by the service person occupying the home at the time (paras. 5.15 to 5.16).

351. Under the constitution of the CCHSF the Commandant for RAF Cranwell is the trustee of the charity. According to RAF King's Regulations his role is to supervise and control the committees formed for the management of service funds at the base. The contact houses are run by a committee comprising Warrant Officer Kenworthy, a property member, a secretary, a treasurer and three booking clerks. All of the members are volunteers. The treasurer maintains separate accounts for the CCHSF.

352. It is necessary to draw the strings together. The contact houses at Cranwell are operated essentially for non-core welfare services, the operating costs of which have to be non-publicly funded. The funds come from charges paid by individual service personnel and charitable donations. The MoD does not fund those costs. Maintenance is provided under the NHPC but in that respect the position is no different from the arrangements for SFA units, both occupied and void. The Commandant of RAF Cranwell is the trustee for the CCHSF but his role is limited to managing the business of the charity, furthering its objects (clause 5 of the constitution) and supervising and controlling the management committee of the charity.

353. Before they were appropriated to be contact houses, 22 and 24 Sycamore Drive were part of the SFA estate. They would have been in the occupation of any resident or, if void, unoccupied. Either way, the SoS did not through the DIO and its contractors have sufficient presence and control to be in occupation. When the two properties were appropriated to be contact houses, they remained in use as living accommodation for temporary welfare and social purposes, according to demand from individual service personnel. That use does not

further a "defence requirement" (see [344] above). The use has had to be managed and operated separately by the CCHSF as a trust. The use is controlled by the trust through its trustee and committee. On the evidence the SoS did not have at the relevant dates a significant level of presence in, or control of, the contact houses. The Trust was the occupier and not the SoS.

354. I reject the claimants' submission that even if the trust was the occupier, its occupation was for the purposes of a Government department within s.56(3). The issue has to be looked at from the perspective of the trust as the occupier. The occupation of the CCHSF was for the purposes of the charitable objects set out in its constitution. The running of the contact houses in pursuit of those purposes cannot be funded by the MoD or from the public purse. That can only be funded by personal contributions from service personnel and their families and/or charitable donations. For these reasons a service fund structure has to be put in place, as in the case of other social and recreational purposes. The trust is an exempt charity because it is wholly or mainly concerned with promoting the efficiency of any of the armed forces. But that language at such a high level of abstraction does not alter the true nature of the trust's activities, which are to do with the private lives of individual service personnel and their families and the provision of temporary accommodation to meet their individual requirements. That is not a Government purpose.

355. Under Issue 5(5) I conclude that neither of the contact houses at the Cranwell site were occupied by the defendant and/or for the purpose of a Government department at the time when each of the relevant enfranchisement notices was served.

Issue 6 (Ground 2(iii)) – Whether the Secretary of State's underleases were business tenancies (the common parts of the Cranwell site)

356. The common parts of the Cranwell site and the transactions entered into have been summarised at [49] to [54] above. The common parts included 24 off-road parking spaces, 16,269 m^2 of grassed areas with 66 trees, estate roads (which were adopted as publicly maintainable highways), a play area, street lighting and a bicycle rack.

357. The defendant describes the business of DIHL as holding, managing and maintaining the common parts. The defendant accepts that DIHL is not an arm's length company. It is common ground that DIHL is under the absolute control of the SoS. The defendant says that DIHL was created as an SPV to enable the enfranchisement of the Cranwell properties. The defendant's object in relation to the sub-underlease of the common parts was to prevent enfranchisement being excluded by s.1(1B) of the 1967 Act.

358. Mr. Sewter states that the DIO is responsible for managing the SFA. It meets its management and repairing obligations primarily through contracting with private sector providers to service and maintain the estate (para. 5.7 of first witness statement). The NHPC with Amey was one such contract. In June 2021 it was the DIO that decided to replace that contract when it expired the following year (para. 5.10).

359. Under the NHPC Amey contracted with the SoS to provide services for the SFA estate across the country. In relation to the Cranwell common parts, Amey was obliged to carry out regular inspections, maintain and repair the common parts, ensure the safety of the playground, mow and maintain the grassed areas and dispose of refuse. Amey subcontracted much of the work to local contractors, but was still present on an almost daily basis on the Cranwell site. Amey provided an estate manager who was based 12 miles away in Waddington. There was no dedicated site office. The manager would visit the estate several times a week. No doubt these inspections related to all of Amey's responsibilities at Cranwell under the NHPC and not just the common parts the subject of the 2021 sub-underlease. The DIO also carried out "regular" inspections of the common parts at Cranwell to ensure that Amey was complying with its obligations under the NHPC (Mr. Sewter's first witness statement paras. 11.2 to 11.6).

360. Pursuant to the sub-underlease dated 14 December 2021 DIHL covenanted with the SoS to repair and maintain the common parts. Given the well-established and complex arrangements in the NHPC for the carrying out of maintenance, DIHL outsourced its maintenance obligations under an agreement with the SoS made on the same day whereby the latter would provide services in relation to the common parts equivalent to those set out in the NHPC. Amey continued to provide the same services to the SoS. The SoS was to invoice DIHL for those services, which the latter was obliged to pay within 30 days.

Issue 6(1), (3), (4) and (5) – Occupation of the common parts of the Cranwell site

361. It is common ground that the carrying out of maintenance on the common parts of the Cranwell site may amount to a business activity sufficient to support occupation of that land for the purposes of Part II of the 1954 Act. I agree with the parties on this point. Such circumstances may be analogous to those in the *Wandsworth* case. But that still leaves the question whether anyone was in occupation for that purpose and, if so, who? Certainly the parties are agreed that the common parts of the Cranwell site were occupied (see e.g. Transcript Day 4 pp.117-118). But they differ as to the purposes of the occupation and how that affects the identification of the occupier.

362. Ms. Bhaloo submitted that certain rights over the common parts reserved to the SoS in sched.3 of the sub-underlease (e.g. the right to use facilities on the estate designated for use by its residents and licensees) showed that he was in occupation. I disagree. That reservation was simply necessary to enable the SoS's licensees to use those facilities.

363. The SoS has accepted that the sub-underlease and outsourcing agreement are artificial arrangements. The object was to remove any business activity on the common parts from his occupation under the sublease granted in 1996 by making DIHL a business tenant. This model had been suggested by the arbitral tribunal in relation to the hypothetical letting it had to consider in the site rent reviews (see [49] above). The claimants have not contended that the DIHL arrangements would breach or offend any purpose or principle of, or any prohibition or disqualification in, the 1954 Act or the 1967 Act, or any interaction between the two statutes. This is not a case where the *Ramsay* principle could be used to disregard a step in a sequence of transactions when

determining their overall effect as a matter of substance (contrast *Gisborne v Burton* [1989] QB 390). The legislation does not seek to prevent a tenant from arranging his affairs so as to avoid the application of s.1(1B) of the 1967 Act and enable him to make an enfranchisement claim.

364. Ms. Bhaloo sought to draw an analogy with *Rossendale* (see [104]-[105] above). On a purposive construction of Part II of the 1954 Act she submits that "occupation" connotes some actual use of the premises by the tenant for the purposes of his business.[4] Even if a subletting to a SPV might qualify, Part II of the 1954 Act could not apply to a SPV which effectively does nothing in its own capacity and for the purposes of its own business. DIHL's directors are civil servants who are under the complete control of the SoS. It has no employees. It has no funds or bank account. No invoices were rendered or paid. All that the company has done is to outsource at the outset its obligations to maintain the common parts to the SoS under an agreement which relied upon the NHPC to define the extent of the services which the SoS would provide and the fee structure.

365. Ms. Wicks submits that the court must consider the vertical chain by which maintenance services are provided as a whole and the function of DIHL as a SPV. Starting at the bottom there are Amey's subcontractors, then Amey's obligation to provide maintenance services nationally, the SoS and finally DIHL. She says that the court cannot stop at one level in the chain, such as the NHPC between Amey and the SoS. When read as a whole the carrying out of maintenance by Amey and its sub-contractors is to be attributed to DIHL. The defendant's primary submission is that DIHL is the occupier of the common parts for the purposes of its business.

366. But what would happen if the contractor should fail to comply with its maintenance obligations? On the basis of the arrangements being operated when the 8 notices were served, I doubt whether the SoS would enforce DIHL's covenant in the sub-underlease to maintain the common parts of the Cranwell site, or whether DIHL would enforce the SoS's contractual obligations to provide the very same services. In reality the maintenance of the common parts has been, and would be, achieved by the SoS, through the DIO, ensuring that Amey (or its successor) complies with its obligations under the NHPC. But that is an inherent feature of the artificial structure which, the defendant accepts, he has created.

367. I doubt whether the arrangements in place at the time when the Cranwell notices were served resulted in DIHL being in occupation of the common parts if we were to treat its business as being solely concerned with the maintenance of the common parts (see e.g. *Wandsworth* and *Trans-Britannia*). There is little evidence of DIHL taking steps to manage and be responsible for the maintenance of the common parts so as to satisfy the statutory test in s.23(1). However, that particular doubt could be overcome if DIHL's maintenance obligations in the sub-underlease were to be discharged by a separate contract between DIHL and the maintenance contractor. DIHL could be funded by MoD to pay for those services and it, rather than the DIO, could actively be involved

[4] In fact that proposition can be derived from *Graysim* itself (see [200] above).

in managing that contract. Ms. Wicks explained that this was not done at the time because of the complicated nature of the pre-existing NHPC with its national coverage.

368. But dealing with the circumstances as they were when each of the 8 enfranchisement notices was given, "reality" must be considered by reference to all relevant circumstances. The matter must be looked at as a whole. Those circumstances include the SoS's purposes in entering into the arrangements for the common parts of the Cranwell site, the purposes of DIHL and the application of s.56(3).

369. It is unusual for a tenant to create a sub-tenancy of part of the area demised to him in order to attract protection under Part II of the 1954 Act for that sublet part, but to avoid protection for the remainder of his demise. In reality, the additional arrangements relating to the common parts of the Cranwell site have only been made to prevent s.1(1B) of the 1967 Act from applying and to enable the SoS to serve enfranchisement notices in relation to SFA dwellings.

370. In these circumstances, the purposes of the SoS were not only to provide and maintain the Cranwell common parts, but also (a) to sub-underlet those areas to DIHL as a SPV occupying those premises, so that (b) s.1(1B) of the 1967 Act would not apply to the underlease and the SoS could enfranchise the Cranwell properties, without (c) interfering with the operation of the NHPC with Amey. These were also the purposes of DIHL as the occupying SPV. They were its raison-d'être. On this basis I conclude that DIHL was the occupier of the common parts under s.23(1) of the 1954 Act and so the Cranwell underlease is not excluded from enfranchisement by s.1(1B) of the 1967 Act.

371. In her oral submissions Ms. Bhaloo said that s.56(3) applies to DIHL's sub-underlease. It is held by the company on behalf of the MoD and "occupied for its purposes" (Day 2 pp.71 to 73). The sub-underlease is held by "a creature of the department", the directors of which have a duty to act as directed by the SoS. "Regardless of Crown indivisibility" DIHL "is a vehicle of the Crown". "The purpose is enfranchisement" (that is of the SoS's underlease).

372. Ms. Wicks submitted that if Ms. Bhaloo is correct in saying that the sub-underlease is held on behalf of the SoS and DIHL is in occupation of the common parts for the purposes of the SoS and not its own business, then s.56(3) applies to DIHL's sub-underlease (Transcript Day 4 pp.127-128 and 131). But she points out that the effect of s.56(3) is to apply Part II of the 1954 Act to DIHL's sub-underlease, not the SoS's underlease. In other words, the SoS's underlease is not a business tenancy.

373. For the reasons set out in [155] above, I do not accept that DIHL held the sub-underlease of the Cranwell common parts on behalf of a Government department. Accordingly, s.56(3) cannot apply to that interest. But even putting that point to one side, where would the claimants' argument lead? I agree with Ms. Wicks that the consequence of s.56(3) applying to DIHL's sub-underlease would be that Part II of the 1954 Act applies to *that tenancy* by virtue of s.23(1) and not the SoS's underlease.

374. Ms. Wicks submits that consistently with the single business tenancy principle laid down in *Graysim*, the SoS's underlease of the Cranwell site could not also be a tenancy to which Part II of the 1954 Act applies. Accordingly, it is necessary for Ms. Bhaloo to argue that the principle does not apply in s.56(3) cases. She does so on the basis that *Graysim* did not address s.56 directly (which is true) and, more particularly, that the purpose of s.56(3) is different to s.23, namely to protect the position of a Government tenant. She says that it would subvert the purpose of s.56(3) to give protection to a sub-tenant holding from a Government department but not the tenant department itself (Transcript Day 2 p.83).

375. I do not accept Ms. Bhaloo's submission. First, the effect of s.56(3) is to deem that the relevant tenancy (here the sub-underlease) falls within s.23(1). Section 56(3) (and also s.56(4)) does not operate to confer a right to protection under Part II of the 1954 Act independently of s.23 and its related provisions. Second, the single business tenancy principle permeates the 1954 Act. It is also to be found in the deeming provisions in s.23(1A) and (1B), s.41 and s.42 (see [207] to [218] above). Third, there is nothing in the 1954 Act to indicate that the single business tenancy principle does not apply where s.56(3) is engaged. Fourth, it has not been shown that there is any need for more than one business tenancy to be granted where s.56(3) applies in order to protect the tenant department. Here, the sub-underlease held "by or on behalf" of the department is protected for the purposes of the MoD. Fifth, there is no machinery in the Act for dealing with multiple rights to protection in respect of the same area of land. Accordingly, I agree with the defendant's submission that s.56(3) together with s.23(1) applies Part II of the 1954 Act to DIHL's sub-underlease, but not to the SoS's underlease.

Issue 6(2)(ii) – The application of s.23(1A) and (1B) of the 1954 Act

376. Alternatively, if DIHL is in occupation of the Cranwell common parts, the claimant rely on s.23(1A) and (1B) (see skeleton at para. 43). They submit that that provision deems the SoS's underlease to be a business tenancy because occupation of the common parts by DIHL, and/or the carrying on of any business there by DIHL, is to be treated as equivalent to occupation by, and/or the carrying on of a business by, the SoS.

377. For the reasons set out in [213] to [218] above, s.23(1A) to (1B) of the 1954 Act does not apply to occupation by DIHL of the common parts of the Cranwell site for the purposes of the MoD. DIHL's occupation of those parts is pursuant to its own sub-underlease and so those provisions do not apply. Furthermore, s.56(3) applies to that sub-underlease, as the parties agree, which is therefore deemed to be a tenancy to which Part II of the 1954 Act applies.

Issue 6(2)(i) – The indivisibility of the Crown

378. Ms. Wicks submitted, and in my judgment it follows from the above analysis, that the claimants can only succeed under Issue 6 by showing that, by virtue of the principle of Crown indivisibility, DIHL forms part of the Crown or the MoD, with the consequence that the sub-underlease of the Cranwell common parts is

to be treated as if it were held by the SoS and so the exclusion from enfranchisement in s.1(1B) of the 1954 Act applies.

379. I have already analysed the principles regarding Crown indivisibility in some detail at [108] to [139] above. The claimants have not identified any provision in, or purpose of, the 1954 Act which would have the effect of treating DIHL as part of the Crown or the MoD. On my reading of the legislation there is no such provision or purpose.

380. Indeed, the enactment of s.56(3) recognises that property may be held by an entity on behalf of a Government department in circumstances where that entity is carrying out a Government function but does not form part of the Crown as, for example, in *Linden*. It does not appear that Parliament intended to give a wider ambit to the principle of Crown indivisibility for the purposes of the 1954 Act.

Overall conclusion on Issues 5 and 6

381. I conclude that Part II of the 1954 Act does not apply to either the Cranwell underlease or the Bristol underlease and so the exclusion from enfranchisement in s.1(1B) of the 1967 Act does not apply to any of the 8 notices to enfranchise.

Issue 7 (Ground 2(iv) – The *de minimis* principle

382. Issue 7 poses the following question:

> "Whether, if the answer to any issue within §§5-6 above would otherwise be "yes", the answer is different because some relevant occupation falls to be disregarded because of the *de minimis* principle. "

This issue was not developed in any detail. The court's answer is "no".

Issues 8 and 9 (Ground 2(v)) - Section 1AA of the 1967 Act and the adjoining land test

383. The effect of s.1AA of the 1967 Act in relation to this case was summarised at [81] to [83] above. These issues arise solely in relation to the two Cranwell properties. The parties' submissions addressed three matters:

(i) The land which is said to adjoin 1 and/or 3 Sycamore Drive;

(ii) Whether that land is "not occupied for residential purposes";

(iii) Whether the freehold of the house in question is owned together with that land.

Adjoining land

384. Mr. Sefton, on behalf of the claimants, identified two areas of land either of which, he submits, results in the SoS's underlease of 1 and 3 Sycamore Drive being an excluded tenancy, so that the SoS is unable to rely upon the right to enfranchise in s.1AA of the 1967 Act.

385. Numbers 1 and 3 Sycamore Drive are a pair of semi-detached houses located at the eastern end of that road. They are located in the eastern part of the MQE at Cranwell. The SoS has been the registered proprietor of that estate (under title number LL276734) since before 1 April 1997. On 12 February 2021 the SoS transferred part of the freehold LL276734, namely 1 and 3 Sycamore Drive together with their respective rear gardens, to DIHL. That transfer included small strips of grassed areas immediately in front of the southern facades of the houses. To the south of these strips lies an estate footpath (running east west) and some more grassed areas bordering the carriageway of Sycamore Drive, all of which remains in the freehold ownership of the SoS (LL276734). DIHL became registered proprietor of its freehold in relation to 1 and 3 Sycamore Drive under title LL410982 with effect from 16 December 2021 (but after the service of the enfranchisement notice for 1 Sycamore Drive). The freehold LL410982 is surrounded by the freehold LL276734. On 14 December 2021 the SoS granted the sub-underlease of the common parts to DIHL.

386. The first area of land relied upon by the claimants is a grassed area lying immediately to the north of the northern boundary of 1 and 3 Sycamore Drive ("area 1"). That boundary is marked by a tall wooden fence. The eastern boundary of area 1 is formed by North Drive and its western boundary by the gable end wall of a dwelling in Lime Close. Area 1 has about 5 or 6 trees. It lies within freehold title LL276734 and the area sub-underlet to DIHL, as do also the grassed areas between the southern boundary of the Cranwell properties and Sycamore Drive and, indeed, many other areas of amenity land interspersed between dwellings on the estate.

387. The second area ("area 2") is a very small part of the freehold title number LL276115. That title comprises an extensive area, namely that part of RAF Cranwell which lies to the north of Cranwell Avenue. The title includes a grassed airfield, the main buildings of the Royal Air Force College, officers' mess, churches, sports and other facilities. The SoS has been the registered proprietor since before 1 April 1997. The MQE under title LL276734 is inset into the south-eastern part of this vast area. Title LL276115 surrounds the MQE on its western, northern and eastern boundaries. Immediately to the east of the eastern gable end of 1 Sycamore Drive lies a small area of grass land which falls within the freehold title of that property (LL410982). Further to the east there is the freehold ownership of the SoS (LL276734) comprising some more grassed amenity land, an estate footpath and the carriageway of North Drive. That carriageway marks the eastern boundary of LL276734 with LL276115. Area 2 is a small area of woodland running north south to the east of North Drive The western edge of the woodland is said to be about 20m from the boundary of 1 Sycamore Drive.

388. The parties agree that there are no Parliamentary or other materials to help explain the purpose of the excluded tenancy provisions in s.1AA(3). Plainly, Parliament removed the low rent test as a requirement for enfranchisement. But at the same time it excluded from "the additional right" to enfranchise created by s.1AA certain houses in rural areas where the freehold had been owned together with adjoining land since 1 April 1997 and that land is not occupied for residential purposes. Where the freehold of a house is owned together with adjoining non-residential land, the tenant of the house may not enfranchise unless his tenancy passes the low rent test.

389. There is only one authority on s.1AA, *Lovat v Hertsmere Borough Council* [2012] QB 533. The council owned the freehold of a public park which was held for public recreational purposes ([4]). It had granted a long lease of a house within the park together with 1.4 acres of grounds. Those grounds wholly surrounded the house and were in turn surrounded by the park ([5]). The claimant served a notice to enfranchise the house and its grounds. It was agreed that the freehold of the house and its grounds and of the surrounding park was owned by the defendant and have been so since April 1997. It was also agreed that the park was not occupied for residential purposes ([8] and [16]). The Court of Appeal noted that, in terms of s.1(1) and s.2(3) of the 1967 Act, the claimant's grounds, including garden, did not form part of the "house", but did form part of the "premises" let with the house ([9]).

390. The claimant argued that s.1AA(3) refers to the "house" and not "house and premises" and "adjoining" means "touching". Consequently, a tenancy would only be excluded if "non-residential land" touches the house, rather than a garden surrounding the house ([17]).

391. The defendant argued that that interpretation would have absurd consequences which Parliament could not have intended. Most houses in rural areas are likely to have gardens, but tenancies would only be excluded in relatively rare cases where e.g. at least one flank wall of the tenanted house is built hard up against the boundary of the tenanted land so as to adjoin non-residential land. However, where a house is separated from non-residential land by its garden or by a pathway or roadway, the tenancy could not be treated as excluded. So where a terrace of six houses with front and rear gardens is surrounded by non-residential land in a designated rural area and the external flank walls of the end of terrace properties touch that land, the tenancies of those flanking properties would be excluded but not the tenancies of the four intervening dwellings. There was no discernible policy reason for requiring in that example the tenants of the two end of terrace properties to satisfy the low rent test in order to claim enfranchisement, but not the mid-terrace properties ([19]-[20]).

392. The defendant therefore submitted that "house" in s.1AA(3) should be read as referring to "house and premises," so as to include the surrounding garden land. The claimant tenant responded that this approach would still produce anomalies. For example, where a residential estate comprises houses each surrounded by its own garden, and the estate itself is surrounded by non-residential land, tenancies of houses on the periphery of the estate with gardens touching that land would be excluded from s.1AA but not the remainder ([23]). The Court of

Appeal agreed that that would be anomalous and without any obvious policy justification ([26]).

393. The Court decided that the language used in the legislation did not enable "house" in s.1AA to be extended to include "premises" ([27]). Instead, the anomalies and absurdities were to be avoided by interpreting "adjoining" as meaning "neighbouring" and not "touching" ([28] and [39]). Applying that interpretation, there was no dispute that the park was adjoining land in relation to the claimant's house ([40]).

394. Not surprisingly, it is common ground that area 1 is adjoining land in relation to the Cranwell properties. But the parties disagree on whether area 2 is also adjoining land.

395. The ordinary sense of "neighbouring" refers to a person or thing that is near to another, or, as the defendant in *Lovat* expressed the statutory test, "the relevant non-residential rural area … sufficiently close to the house as to be regarded as neighbouring it" ([24]). Similarly, "adjacent" is not confined to places contiguous with another property, but can include "places close to or near". The necessary degree of proximity depends upon the circumstances (Luxmoore J in *Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430, 440-441 and see also *CAB Housing Limited v Secretary of State for Levelling Up, Housing and Communities* [2023] EWCA Civ 194 at [35]). It is a question of fact and degree, a matter of judgment.

396. The issue is not simply a function of distance. It also concerns the nature of the intervening area or areas of land. In *Lovat* there was no difficulty in finding that the surrounding park was "adjoining land" in relation to the house. The only land which separated the two was the garden surrounding the house.

397. Number 1 Sycamore Drive forms part of a residential estate and, like other dwellings there, is surrounded by features of that estate. Area 2 is separated from the house at 1 Sycamore Drive by a grassed area belonging to the house, the eastern part of its rear garden enclosed by a fence, amenity land belonging to the SoS (Title LL276734), an estate footpath and the adopted highway, North Drive. I conclude that area 2 is insufficiently near or close as to "neighbour" the house at 1 Sycamore Drive.

398. Turning to 3 Sycamore Drive, the position is *a fortiori*. That property is additionally separated from area 2 by 1 Sycamore Drive and its enclosed garden.

399. We are not here dealing with a single house and garden which has been let off separately from a park of which it had originally formed a part (see *Lovat* at [4]). Instead, the properties in question form part of a housing estate divided by, *inter alia* informal amenity areas, footpaths, adopted highways and other facilities. *Lovat* warns against the application of the adjoining land test so as to create arbitrary distinctions between different parts of an estate (e.g. [20], [23] and [26]).

400. I conclude that area 2 is not "adjoining land" and so cannot be relied upon by the claimants as excluding the SoS's tenancy of ether 1 or 3 Sycamore Drive from the right to enfranchise under s.1AA of the 1967 Act.

"Not occupied for residential purposes"

401. The next issue is whether the adjoining land at area 1 is "not occupied for residential purposes". Mr. Sefton submitted that the "touchstones" for "residential purposes" include the use of a property for the usual activities of living, such as sleeping, eating and washing. He bases that upon the decision of Mann J in *Westbrook* [2015] 1 WLR 1713 at [183], [187] and [194]. On this approach he submits that area 1 is not occupied for residential purposes, but is simply incidental amenity land.

402. *Westbrook* was concerned with collective enfranchisement under the 1993 Act by the owners of flats in a block. It was not concerned with the enfranchisement of a house under the 1967 Act, nor, in particular, with the exclusion of houses in certain rural areas under s.1AA(3). Section 1 of the 1993 Act confers a right to collective enfranchisement on "qualifying tenants" in "flats" contained in "premises" to which Chapter 5 applies, that is a self-contained building or part of a building (s.3), subject to exclusions in s.4. Section 4 provides, in summary, that Chapter I does not apply to "premises" falling within s.3, if part is neither occupied for "residential purposes" nor comprised in common parts, and the area of that part exceeds 25% of the floor area of the premises. The passages in the judgment upon which the claimants seek to rely ([178] to [195]) are simply concerned with the application of that exclusion in s.4.

403. Accordingly, the statutory context in which *Westbrook* was decided was simply the use of part of a *building* for non-residential purposes. It is unsurprising, therefore, that the judge gained assistance from case law discussing use as "residential *accommodation*" (e.g. [183] to [185], [187] and [194]). The judge declined to formulate a test for "residential purposes." It was sufficient for his decision to apply the concept of usual living activities ([183]) to the areas in dispute ([203] and [206]). That decision is of no assistance in dealing with the occupation for "residential purposes" of "land" adjoining the house the subject of a claim to enfranchise. That land need not be, or form part of, "residential accommodation" or a building.

404. I prefer Mr. Rainey's analysis. The excluded tenancy provisions in s.1AA(3) will apply to a range of situations, including rural housing estates of the kind discussed by the Court of Appeal in *Lovat*. Typically such estates will include areas of landscaping and amenity land for the benefit of residents. Such areas may be used for informal recreation such as dog-walking or children's' games, or may simply provide a green or open setting for built development. In the context of the 1967 Act individual houses are likely to have been leased off and the amenity areas retained by the developer, or a management company. Parliament did not intend that properties within such an estate should be excluded from the right to enfranchise under s.1AA where the estate is surrounded by non-residential land, according to whether individual houses are located on the periphery on in the middle. Likewise, Parliament did not intend that a property within a rural housing estate be excluded from s.1AA because it

is close to a grass verge separating it from an estate road, such as the modest grass verges to the south of the pathway running past the front facades of 1 and 3 Sycamore Drive. Unless such grassed amenity areas are treated as occupied for residential purposes, all properties on a rural housing estate are likely to be disqualified from enfranchisement under s.1AA simply on the ground that they are near to verges or amenity land. There does not seem to be any policy or statutory justification for insisting that such properties satisfy the low rent test simply because of their proximity to amenity areas owned by the developer or an estate management company.

405. I agree with Mr. Rainey that area 1 is occupied in order to provide and maintain that space as ancillary amenity land for the enjoyment of inhabitants of individual dwellings for residential purposes.

406. In my judgment, and as a matter of fact and degree, area 1 is occupied for residential purposes. Accordingly, the claimants are unable to rely upon area 1 as excluding the SoS's tenancy of either 1 or 3 Sycamore Drive from the right to enfranchise under s.1AA of the 1967 Act.

"Owned together with adjoining land" since 1 April 1997

407. On the conclusions I have reached above it unnecessary for me to address this issue, but I will do so briefly given that the matter has been argued. However, I will refrain from addressing certain hypothetical issues which have been raised but which do not arise on the facts relating to the Cranwell properties.

408. Issues have been raised about the nature of the ownership of adjoining land to which s.1AA(3)(b) refers. In my judgment, the structure of that provision comprises three components: -

(i) the freehold of the house is owned together with adjoining land; and

(ii) that has been the case since 1st April 1997; and

(iii) the adjoining land is not occupied for residential purposes.

409. The draftsman did not include any specific language in (i) to indicate flexibility about the nature of the ownership of adjoining land. He made it plain that the property right relating to the house with which the adjoining land must be owned is limited to the freehold estate. The test is not engaged, for example, where adjoining land is "owned" together with a long leasehold interest in the house.

410. Plainly the draftsman packed into s.1AA(3)(b) a number of interconnected requirements. The drafting is compact. In my judgment, the words "the freehold of that house is owned together with adjoining land" is a composite expression, which is to be construed as a whole, and not by interpreting (and applying) separately its constituent parts (see Bennion, Bailey and Norbury at section 22.3 pp.656-659). The focus is on the freehold being owned of the house together with adjoining land. This concept of "being owned together" is then repeated in s.1AA(3)(b) in order to introduce the requirement about length of ownership. The natural reading of the composite expression used by the draftsman is that

the freehold of the house must be owned together with the freehold of the adjoining land. The connecting verb "owned" is consistent with that reading.

411. During the period from 1st April 1997 the freehold of the house and of the adjoining land may have been transferred. Section 1AA(3)(b) does not require the identity of the freehold owner to remain the same throughout the period. But where there is a change of ownership, the criterion that the freehold of the house be owned together with the adjoining land throughout that period will only be satisfied if the successor in title becomes the freeholder of both parcels at the same time.

412. I agree with the claimants that at the moment when the enfranchisement notice for 1 Sycamore Drive was served, the SoS's legal title to the freehold of that property constituted ownership of that freehold for the purposes of s.1AA(3)(b). At that point in time the SoS was also the freehold owner of areas 1 and 2, but for the reasons already given the SoS's tenancy of 1 and 3 Sycamore Drive was not "excluded."

413. I accept Mr. Rainey's submission that the focus of the ownership test in s.1AA(3)(b) is on interests superior to that of the enfranchising tenant. Even if, contrary to my view, ownership of adjoining land need not relate to the freehold for the purposes of para. (b), it would not include a subsidiary interest carved by the enfranchising tenant out of his own tenancy. Furthermore, the sub-underlease granted to DIHL did not exist on 1 April 1997. It was created on 14 December 2021, before any of the enfranchisement notices were served.

414. When DIHL became the registered proprietor of the freehold of 3 Sycamore Drive the SoS ceased to own that freehold together with any other neighbouring freehold which he then owned. I see nothing in s.1AA of the 1967 Act, or any related provisions, which would result in DIHL being treated as part of the Crown or indivisible from the SoS. The SoS is not to be treated as if he had remained the freehold proprietor of the Cranwell properties after that ownership had been vested in DIHL.

415. I conclude that the SoS's tenancy of 1 and 3 Sycamore Drive, Cranwell is not an excluded tenancy for the purposes of s.1AA(1) of the 1967 Act.

Issue 10 – The validity of the 8 enfranchisement notices

416. I conclude that each of the 8 notices to enfranchise served in relation to the Cranwell properties and the Bristol properties was and remains valid and effective under the 1967 Act.

Issue 11 (Ground 3) – Tests applicable to compulsory acquisition

Submissions

417. In their pleaded case the claimants submitted that the defendant's service of the 8 enfranchisement notices amounted to the use by the Crown of a power of compulsory acquisition. They then contended that (i) the SoS had to be satisfied that there was a compelling or overriding case in the public interest for the use

of that power, (ii) the power had to be used for the purposes of the 1967 Act, not for a collateral purpose and (iii) the power could only be exercised as a "last resort". Sir James Eadie said that point (ii) really arises under ground 4 and that is how the defendant has responded to it.

418. In the skeleton argument and in his oral submissions Mr. Maurici did not pursue point (iii). It had been taken from policy guidance on compulsory purchase orders made by public authorities other than Ministers. However, the claimants did pursue point (ii) under ground 4.

419. In relation to point (i), Mr. Maurici contends first that, although enfranchisement does not involve the making of a compulsory purchase order ("CPO"), it does amount to a compulsory acquisition. Second, he submits that it is a principle of our constitutional law that no citizen is to be deprived of his land by a public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands. Third, he points out that where the principle is engaged, the public authority is required to decide for itself whether there is a compelling case in the public interest justifying its proposed action. Consequently, the SoS ought to have applied the public interest test before serving any of the 8 enfranchisement notices. Fourth, Mr. Maurici submits that the SoS failed to do that. The defendant contends that the common law principle is not engaged by a decision to serve an enfranchisement notice.

420. Ground 3 is based upon a common law or judicial principle. At first blush, it would appear to be similar to the second rule in A1P1 which requires *inter alia* that no one is to be deprived of his possessions "except in the public interest" (see ground 6 below). But it is common ground that there is a significant difference. The common law principle requires the acquiring authority as decision-maker to decide whether there is a compelling case in the public interest for the proposed acquisition, subject only to public law principles of judicial review. Under A1P1 a failure by a public authority to apply the public interest test is not in itself a basis for holding that its decision was unlawful. In that event, the court can determine whether the public interest test is satisfied, just as it does in relation to any issue on proportionality. It is this difference which appears to explain why the claimants have relied upon ground 3 in addition to ground 6.

Discussion

421. It is necessary to begin by identifying the circumstances in which the common law principle has been held to apply. In *Prest v Secretary of State for Wales* (1982) 81 LGR 193 the claimant resisted a proposed CPO on his land for a new sewage works. He offered to make two alternative sites available. The Secretary of State rejected those alternatives because of increased construction costs, but failed to consider the additional costs of acquiring the necessary land, whether the CPO land or the alternative sites. The Court of Appeal decided that that was an obviously material consideration which the decision-maker had been bound to take into account. Lord Denning MR stated at p.198:

> "It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by

> Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomsoever it is made – should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid: see *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508."

422. Essentially the same approach has been taken in subsequent cases such as *De Rothschild v Secretary of State for Transport* (1988) 57 P&CR 330, 337 (a CPO for a new road under Highways Act powers), *Chesterfield Properties Plc v Secretary of State for the Environment* (1998) 76 P&CR 117, 127-131 (a CPO for a new shopping centre under planning powers) and *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437 at [10] and [38] to [39] (a CPO for a regeneration scheme also under planning powers). In *Chesterfield* Laws J stated that the law presumes that a constitutional right carries substantial weight, and so it is necessary for the decision-maker to be satisfied that a public interest of greater weight overrides it.

423. Compulsory purchase orders (and development consent orders under the Planning Act 2008) may authorise the expropriation of an existing property interest, such as the freehold or a leasehold, or may require a landowner to create a new right which is then compulsorily acquired by the acquiring authority. Similarly, dedicated legislation relating to energy projects may be used to authorise the compulsory grant of wayleaves in favour of an energy company for overhead lines *(R (Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Energy and Climate Change* [2012] EWHC 46 (Admin)).

424. The approach set out in *Prest* has also been applied where an authority decides to exercise a statutory power of appropriation linked to a provision overriding a restrictive covenant or an easement which would otherwise affect the appropriated land (*R v Leeds City Council ex parte Leeds Industrial Co-operative Society Limited* (1997) 73 P&CR). This overriding of a right inconsistent with the statutory purpose for which land has been appropriated makes it unnecessary for the authority to acquire land compulsorily (e.g. the dominant tenement) in order to overcome that right. But the effect of the appropriation is to deprive a landowner of the benefit of his right compulsorily. It is analogous to a compulsory acquisition of a legal estate. Normally the landowner entitled to the benefit of such a right may obtain compensation for injurious affection (e.g. s.10 of the Compulsory Purchase Act 1965).

425. Appropriation is analogous to compulsory acquisition in a second way. Where a statutory body has acquired land for one purpose, it cannot use the land for a different purpose unless authorised to do so, for example, by a power of appropriation (*Attorney General v Hanwell Urban District Council* [1990] 1 Ch 377). Indeed, where an authority has been authorised by a CPO to acquire land compulsorily for a particular purpose, the court may prevent it from acquiring

or using that land for a different purpose falling outside the scope of the order (*Grice v Dudley Corporation* [1958] Ch 329; *Simpsons Motor Sales (London) Limited v Hendon Corporation* [1964] AC 1088). In *Dowty Boulton Paul Limited v Wolverhampton Corporation (No.2*) [1976] Ch 13, Russell LJ explained at p.24 that where an authority no longer needs land for the purpose for which it had been compulsorily acquired it generally has to be dispose of it to the former landowners (whether under former nineteenth century legislation or the current Crichel Down policy). Statutory appropriation allows an authority to use land for a different purpose, so as to avoid the double step of having to sell the land to former owners and then obtaining further powers of compulsory acquisition for that new purpose.

426. These compulsory acquisition and appropriation procedures do not involve any right or entitlement conferred by Parliament. Instead, a provision for compulsory acquisition generally confers a discretionary power upon a public authority (or upon an acquiring body acting for statutory purposes) within certain important limits. First, the power may only be exercised for the purposes identified in the empowering legislation. It may not be exercised for an irrelevant or collateral purpose. Second, the legislation generally enables affected landowners to object to a proposed CPO. In that event, the merits of a draft CPO are subject to independent scrutiny and ultimately a decision by a confirming authority as to whether the order should authorise the promoting authority to exercise powers of compulsory purchase. It is in that context that the courts in *Prest* and related cases have laid down principles regarding the justification needed for a decision to make a CPO. It is intrinsic to the process of obtaining authorisation for the exercise of a power of compulsory purchase that the merits of the scheme be judged sufficient in relation to the statutory purposes of that power and the public interest, so as to justify the expropriation of private property. Discretionary powers of compulsory purchase do not themselves strike a balance between the constitutional rights of landowners and the public interest for each and every case where such a power may be exercised (contrast [597] – [603] below).

427. Although appropriation generally does not involve an objection process, *Leeds* shows that the authority must satisfy any statutory conditions for the exercise of the power and must consider whether the merits of the proposal make it necessary in the public interest to override any third party rights.

428. How then does a right to enfranchise stand in relation to this analysis of the authorisation of compulsory acquisition and appropriation? Mr. Maurici referred to *James v United Kingdom* (1986) 8 EHRR 123 at [38] where the ECtHR stated that the effect of enfranchisement notices is to deprive the applicants of their possessions within A1P1. In *Methuen-Campbell v Walters* [1979] QB 525 Goff LJ accepted that the 1967 Act was expropriatory and gives a right of compulsory purchase (p. 529G and see also Roskill LJ at p.541G and Buckley LJ at p.542F).

429. Undoubtedly, where a valid notice to enfranchise is served, the 1967 Act compels a landowner to sell his interest to the enfranchising tenant at the relevant statutory price, irrespective of whether he is willing to do so. In that sense the service of an enfranchisement notice results in a form of compulsory

acquisition. But in my judgment the scheme of the 1967 Act is not analogous to powers of compulsory purchase or appropriation in which the principle in *Prest* has been held to be applicable. There are very substantial differences.

430. In *Cadogan v McGirk* [1996] All ER 643 Millett LJ stated at p.648 that while the 1967 Act is to some extent expropriatory of the landlord's interest, it was nonetheless passed in order to confer benefits upon tenants. As Lord Carnwath JSC put it in *Hosebay Limited v Day* [2012] 1 WLR 2884 at [6], the 1967 Act is expropriatory in the sense that it confers rights on lessees to acquire rights compulsorily from lessors, but that does not give rise to any interpretative presumption in favour of lessors.

431. A key distinction between the 1967 Act and powers of compulsory acquisition and appropriation is that the former confers a right to enfranchise on all qualifying tenants, whether private individuals or public authorities. That right is a private law right. According to the language used by Parliament, a tenant, including a public body, only has to satisfy the conditions which give rise to a right to enfranchise. The Act does not confer a discretionary power to acquire land compulsorily as a matter of public law. Nor does it provide that the right to enfranchise can only be exercised for specified purposes or for some reason relevant to the purposes of the legislation. A statutory right of this kind is not analogous to a discretionary power which can only be used for the purposes of the empowering legislation.

432. In the same vein a tenant's exercise of his right to enfranchise is not subject to a requirement for independent authorisation under the 1967 Act. The legislation does not require the "merits" of a notice to enfranchise to be assessed against statutory criteria or purposes. Indeed, in *James* the ECtHR rejected the applicants' complaint that the 1967 Act failed to allow any scope for discretionary and variable implementation of enfranchisement according to the particular circumstances of each individual property and the parties involved (see [68] and [76]).

433. Accordingly, I do not accept the claimants' contention that the *Prest* principle applies where a right to enfranchise is exercised by a public authority. That circumstance does not alter the nature of the statutory scheme or its substantive effect. The ability to enfranchise is one of the incidents of a tenant's rights which Parliament has chosen to confer.

434. Mr. Maurici submits that a public authority in the position of the SoS has a choice as to whether to exercise the right to enfranchise. Furthermore, in the case of the 8 notices served to date, the defendant entered into additional transactions specifically to enable that right to become exercisable. Mr. Maurici submits that a decision to serve a notice to enfranchise is subject to public law principles, notwithstanding that the exercise of the same right by a tenant in the private sector is not. He draws an analogy with decisions by a public authority as landlord to serve a notice to quit (*Cannock Chase District Council v Kelly* [1978] 1 WLR 1) or to refuse consent under a covenant to approve a change of use (*R (Molinaro) v Royal Borough of Kensington and Chelsea* [2001] EWHC (Admin) 896).

435. Mr. Maurici's analysis is correct as far as it goes. Indeed, the defendant accepts that some public law principles are applicable to a decision to serve a notice to enfranchise and therefore such a decision is amenable to judicial review. But that begs the question what principles of public law are applicable to a decision taken by a public authority under a contract or to the exercise of a statutory right as a tenant? Mr. Maurici rightly accepts that there is no authority applying the constitutional principle in *Prest* outside compulsory purchase under a discretionary power (e.g. by CPO) or the exercise of the analogous power to appropriate. The analysis by Lord Sales in *Mauritius* (referred to in [135] above) indicates that the grounds upon which a court may intervene when reviewing a decision by a public authority to exercise a contractual or property right are limited, namely fraud, corruption, bad faith and possibly breach of legitimate expectation (see further under ground 4 below). The suggestion that the constitutional principle in *Prest* applies to a decision to enfranchise is inconsistent with the well-established approach of the courts to public law challenges to the exercise by a public authority of private law rights, *a fortiori* in a commercial context. For these reasons ground 3 must fail. The constitutional law principle in *Prest* does not apply to the exercise of a right to enfranchise by a public body.

436. However, if I had decided that that principle did apply, the claimants have not persuaded me that, as a matter of substance, the SoS failed to comply with it. True enough, Mr. Razzell states that he had not considered the guidance on compulsory purchase and CPOs to be relevant (para. 2.1 of his witness statement). But even without delving into the detail of the pleadings, it is plain that the claimant's case has shifted on this aspect, which no doubt has led to some confusion on how the matter should be handled (including the drafting of issue 11(3)). This aspect of ground 3 has been treated as falling with the improper purpose challenge under ground 4 and the defendant has responded on that basis. Sir James Eadie showed that the decision to serve the 8 notices as test cases was driven by the objectives of achieving VFM for taxpayers and achieving more flexibility in the management of the MQE. They were treated as important matters of public interest. In addition, the defendant had regard to the interference with APL's property rights which would result from enfranchisement. However, I do not find it necessary to base my rejection of ground 3 upon the matters contained in this paragraph.

437. Ground 3 of the challenge is rejected.

Issues 12 to 14 (Ground 4) – Improper motives

Issue 12 – Public law limits on the exercise of the right to enfranchise

438. The claimants submit that even if the criteria for enfranchisement in the 1967 Act were satisfied for each of the 8 notices, a tenant which is a public authority is not in the same position as a private citizen. A public authority must comply with any relevant principles of public law. In particular, the decision to serve an enfranchisement notice must not be taken for an improper motive or purpose.

439. Ms. Carss-Frisk relied upon the judgment of Laws J in *Fewings* (see [133] above). He stated that a public body, such as a local authority, does not have an

unfettered discretion to manage its land as in the case of a private individual. An authority must act reasonably and in good faith and upon lawful and relevant grounds of public interest ([1995] 1 All ER 513, 524c). An authority may take private law proceedings to give effect to its property rights, but, if it acts in good faith, it does so in order to vindicate the better performance of its functions for the fulfilment of which it exists. He regarded this legal analysis as underpinning the principal rules of judicial review. He referred in particular to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 as an example of a statutory power being used for a motive or reason outwith the purposes for which the power had been conferred. Likewise, the central issue in *Fewings* was whether the local authority had decided to ban deer hunting on its land for reasons which were irrelevant to the statutory purposes for which it held that land.

440. *Fewings* is an example of the fundamental principle stated by Lord Bridge in *R v Tower Hamlets London Borough Council ex parte Chetnik Development Limited* [1988] AC 858 at 872. A statutory power conferred for public purposes is conferred as if it were upon trust, not absolutely. That is to say it can validly be used only in the right and proper way which Parliament intended.

441. In *Porter v Magill* [2002] 2 AC 357 the House of Lords accepted that politicians elected to a local authority may legitimately have in mind the effects of their decisions on public opinion. Councillors do not act improperly if, "exercising public powers for a public purpose for which such powers were granted, they hope that they will earn the support of their electorate and thus strengthen their electoral position". "But a public power is not exercised lawfully if it is exercised, not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party". So although the local authority was entitled to exercise a statutory power to dispose of its housing to promote any public purpose for which the power was conferred, it could not lawfully do so to provide an electoral advantage for one of the political parties represented on the council ([21] to [22]).

442. Thus, the relevance of political advantage and reputation is sensitive to the legal context. That is also illustrated by the decision in *Padfield* upon which Ms. Carss-Frisk relied. Under the relevant legislation, a complaint made to the Minister on the operation of the Milk Marketing Scheme could only be considered and reported upon by a committee of investigation if the Minister directed them to do so. If the committee reported that *inter alia* any provision of the scheme was not in the public interest, the Minister was empowered to take remedial action, but not otherwise. Lord Reid stated that Parliament had given the Minister a discretion as to whether to refer a complaint to a committee, with the intention that it be used to promote the policy and objects of the legislation (p.1030). Accordingly, the Minister could not refuse to refer a complaint because if he did so the committee's report might cause him embarrassment (p.1032). Similarly, Lord Upjohn stated that although a Minister might have good "policy reasons" for refusing to refer a complaint to a committee, he could never refuse to do so for "purely political reasons", such as a fear of adverse reaction in Parliament to any remedial action recommended by the committee (pp.1058 and 1061). Thus, the House of Lords did not lay

down a general principle that political embarrassment or harm to political reputation is generally irrelevant to the exercise of a statutory power. Instead, the legal flaw in *Padfield* was that the Minister's concern about the political implications of a complaint being upheld was legally irrelevant to his responsibility to decide whether to refer a complaint under a statutory scheme set up to investigate and remedy potentially legitimate complaints. Those reasons for not taking action under the legislation were irrelevant to the purposes of that statutory scheme.

443. Ms. Carss-Frisk also relied upon *Molinaro*, a case where the claimant challenged the authority's refusal to give its consent to a change of use under a user covenant in a lease. The covenant gave effect to planning policy objectives, so the decision had a sufficient public element as to be amenable to judicial review for abuse of power ([63] to [65]). Elias J (as he then was) stated that powers are given to public bodies to be exercised in the public interest. A public authority's contractual power should not be treated any differently to other powers in relation to judicial review for abuse of power ([67] and [69]). But the judge added that a court may sometimes decide that a public law complaint cannot be advanced because it would undermine private law principles governing the private law relationship between the parties ([69] to [70]). The judge did not discuss that issue any further given that the public law grounds of challenge failed in any event.

444. *Fewings*, *Padfield*, *Chetnik*, *Porter* and *Molinaro* all involved powers specifically conferred on public authorities for a statutory purpose. *Fewings*, *Porter* and *Molinaro* related to the legality of land management decisions. So where land is held for a particular statutory purpose, a judicial review may challenge whether a land management decision was taken for a reason irrelevant to, or outwith, that purpose. That would be an improper motive.

445. The SFA properties, including the Cranwell and Bristol properties, have been acquired and held by the SoS under Part I of the Military Lands Act 1892 and the Defence (Transfer of Functions) Act 1964. In broad terms the land is held for the purposes of the MoD and for the armed forces. But the claimants have not argued that the SoS's pursuit of enfranchisement is *ultra vires* those statutory purposes or his land management powers, so as to provide an additional basis for alleging an improper motive.

446. Instead, the claimants challenge the exercise of a right to enfranchise conferred by the 1967 Act on tenants, whether private individuals or public authorities. Given that the Act confers a right on qualifying tenants in general, and not a discretionary power on public authorities, it comes as no surprise to find that the Act does not identify any statutory purpose to which the exercise of that right must be related. A person exercising a right to enfranchise need not do so for any particular purpose. He merely has to be able to satisfy the statutory conditions for the exercise of that right.

447. The claimants sought to argue that the principle laid down in *Gratton-Storey*, that a subtenant who is also the freeholder cannot serve an enfranchisement notice in order to acquire an intermediate tenancy, in fact represents a purpose of the 1967 Act. They then submit that, in public law terms, it is improper for a

subtenant which is a public authority to seek to circumvent that purpose by transferring its freehold to a SPV. This argument is untenable. *Gratton-Storey* simply identified conditions in which a right to enfranchise either does or does not exist. Neither the court nor the claimants in this case have identified any provision or principle in the 1967 which prohibits or disqualifies arrangements made in order to enable a tenant to acquire intermediate interests. The Court of Appeal referred to the possible use of a nominee arrangement. That is a legitimate mechanism by which a subtenant who owns the freehold reversion of a house can bring himself within the scope of the right to enfranchise conferred by the Act. It is not a device for circumventing any prohibition or disqualification in the Act. There is no such provision. In this context, it has not been suggested that there is any distinction to be drawn between the nominee arrangement suggested by the Court of Appeal and the SPV model used in the present case.

448. Nevertheless, a decision by a public authority regarding the management of its land, or the services it procures, may be struck down because it was based upon a purpose which was plainly extraneous and improper, irrespective of the precise ambit of its powers for managing its land or services. In *Wheeler v Leicester City Council* [1985] AC 1054 the authority held a recreation ground under the Open Spaces Act 1906, which it made available to the city's rugby football club. The Council decided to ban the club from using the ground for a year because it had failed to take sufficient steps to discourage its members from participating in the English RFU's tour of South Africa, which the Council considered to be inappropriate because of the apartheid regime. The House of Lords held that the ban was unlawful. The tour was not unlawful and the Council was not entitled to use its land management powers, or any other statutory powers, in order to punish or sanction the club when it had committed no wrong (p.1080F and p.1081C).

449. The same approach was taken in *R v Lewisham London Borough Council ex parte Shell UK Limited* [1988] 1 All ER 938. The Council's decision to adopt a policy of boycotting Shell's products and to persuade other authorities to follow suit was unlawful because it had been based on an extraneous and impermissible purpose, namely to put pressure on the company to withdraw from South Africa. The Council's decision involved punishing Shell for carrying on trade in South Africa when that was a lawful activity.

450. The defendant accepts that decisions by a public authority regarding the exercise of its contractual or property rights may be amenable to judicial review. The question is in what circumstances may a public law challenge be brought? What potentially may be raised as grounds of challenge?

451. In *Mercury Energy Limited v Electrical Corporation of New Zealand Limited* [1994] 1 WLR 521 a local electricity supply authority sought to challenge the legality of a decision by a state enterprise responsible for generating and distributing electricity throughout the country to terminate an agreement for the bulk supply of electricity. The Privy Council stated that it was unlikely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services would ever be subject to judicial review "in the absence of fraud, corruption or bad faith" (p.529B).

452. The Privy Council revisited this subject in *The State of Mauritius* case. This was in fact concerned with two decisions. The first involved a regulator's refusal to accept that the claimant, a developer of a power station project, had satisfied a condition of the Environmental Impact Assessment licence. That decision had been taken under a regulatory regime and "the usual standards of public law" applied ([42] and [46] to [61]).

453. The second decision, made by a different Minister, involved a refusal to arrange for the Government to enter into an Implementation Agreement with the developer which would include a guarantee by the Government of the price payable by a purchaser for the supply of electricity from the power station. At [43] Lord Sales explained that this decision was amenable to judicial review, but the question of what public law standards would apply was a separate matter:

> "43. The Board also considers that the decision of the Ministry of Energy to refuse to sign the Implementation Agreement is in principle within the scope of the court's judicial review jurisdiction. It is true that a decision whether or not to enter into a contract involves deciding whether to accept obligations sounding in the private law of contract. However, a contract is made between legal persons, and where the person who is a proposed party to a contract is a public authority the way in which it may behave is subject to rules of public law; and whether the public authority has acted lawfully in accordance with those rules is a matter which may be subject to judicial review. The Board would add that the same point about the relevance of rules of public law can be made regarding a decision by a public authority whether and how to exercise rights sounding in private law conferred by a contract into which it has entered: see *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521 (PC), in particular at p 526A-D (decision to give notice to terminate a commercial contract for the bulk supply of electricity). Again, it is a separate question what public law standards apply and whether the Ministry of Energy did anything unlawful in terms of those standards in taking the decision it did: see below."

454. Lord Sales dealt with the standards of public law applicable at [63] to [68]. In [63] he emphasised the legal ability of the Minister to participate in the commercial market in the normal way, through the exercise of full bargaining power in order to secure the best commercial deal possible, so as to promote the public interest (see [135] above). Accordingly, the application of public law standards should not cut down or undermine that bargaining power.

455. In [64] to [65] Lord Sales continued:

> "64. In negotiating a commercial contract on behalf of the Government, the Minister, as a public authority, is not entirely free from constraints arising under public law. He is obliged to comply with *basic public law standards which ensure that he*

> *properly seeks to promote the public interest*. Accordingly, his decision-making as to how to conduct negotiations before a contract is entered into might be brought into question if, by way of purely hypothetical example, he *acted out of personal spite or because he had been bribed*. As a result, the potential counterparty is not exposed to what, if they were negotiating with another private party, might be the pure capriciousness of that private party in deciding whether to enter into the contract and on what terms.
>
> 65. However, when conducting negotiations, the Minister is entitled to have regard to a *wide range of considerations, including political considerations*, which would not typically play a role in negotiations between two private commercial parties. In the present case, for example, entering into the Implementation Agreement would involve a commitment potentially requiring substantial payments of public money. There is inevitably a possible political dimension to such questions which it would be legitimate to take into account. In the present case it appears that the incoming government after the general election in December 2014 may have been less convinced than the former government that the project was a good idea and that the commitment to be given in the Implementation Agreement was justified." (emphasis added)

456. In [66] Lord Sales reaffirmed the guidance given in the *Mercury Energy* case (see [451] above). He added:

> "The limited scope for a judicial review challenge as indicated in this passage reflects the width of the relevant discretion enjoyed by a state enterprise (or … [a Minister]) when exercising its powers to negotiate a commercial contract or how to use its rights under such a contract."

457. In *The State of Mauritius* case the court decided that the Minister's decision had not been affected by fraud, corruption or bad faith. He had been entitled to take the view that the developer did not appear to be a satisfactory contractual party and that it was undesirable to enter into the implementation agreement ([67]). The court left open the possibility that a claim based upon legitimate expectation could in principle be raised, but on the facts of that case no such expectation arose ([68]).

458. In *Dudley Muslim Association v Dudley Metropolitan Borough Council* [2016] 1 P&CR 10 the Council had granted a 99 year lease to enable a mosque to be built. However, if the development was not completed within 5 years the Association had to retransfer the land to the Council with vacant possession. Because it had taken the Association over 5 years to obtain planning permission on appeal and then to resist the Council's unsuccessful legal challenge to that grant of permission, the mosque was not built within the period allowed by the contract. Having regard to the delays caused by the Council, the Association

sought to rely upon a legitimate expectation that it would be allowed to complete the development within a reasonable time frame.

459. Lewison LJ said that in a technical sense the Council had been operating under statutory powers, but that was because, as a statutory body, it could do nothing unless authorised by statute. But the case was about the implementation of a commercial bargain rather than the unilateral exercise by the Council of a statutory power. Where a claim is fundamentally contractual in nature or, I would add, to do with the enforcement of private law rights such as a right to enfranchise, and there is no allegation against the public body of "fraud or improper motive or the like", the parties are generally limited to private law remedies ([22] to [23]). To allow public law remedies in the absence of bad faith or improper motive may place a party contracting with a public body in an unjustifiably more privileged position, and that body in an unjustifiably less favourable position, as compared with contracting parties where no public body is involved ([23]). In this respect, there is no difference in principle according to whether a private party is seeking to enforce a contract or property rights, or to resist enforcement ([28]).

460. *Dudley* is a particularly clear example of a case where the nature of the private law rights and the issues allowed little or no scope for the application of public law principles. Once the date for completion of the development had passed, the Association became subject to an unconditional obligation to transfer the land back to the Council, which was not dependent upon the exercise by the latter of a discretionary or statutory power. Given that the Association did not rely upon a variation of the contract or a promissory estoppel, the contract was enforceable according to its terms. No public law defence based on legitimate expectation or abuse of power was available. If a public authority took a decision to enforce the contract in bad faith, then the court might well quash the decision. But the authority would then be free to retake the decision, and if it reached the same decision in good faith, the contract would be enforceable ([29] to [30]).

461. Here, the issue as to whether the SoS has a right to enfranchise under the 1967 Act depends upon the interpretation and application of that legislation in the circumstances of this case. The existence of, or reliance upon, such a property right does not depend upon the exercise by the SoS of any discretionary power. Whether that right is exercised depends upon a choice made by the SoS, but, as a matter of legal principle, that is not materially different from the decision of the Council in the *Dudley* case to enforce the Association's contractual obligation. Whether a private law right or obligation exists is not to be confused with a decision about whether to rely upon or enforce that matter. *The State of Mauritius* and *Dudley* cases establish that there is only a limited scope for invoking public law grounds of challenge in relation to a decision to rely upon or exercise a freestanding contractual or property right.

462. Ms. Carss-Frisk pointed out that in *Dudley* Lewison LJ referred to the possibility of a public law challenge to a decision to enforce a private law right on the grounds of improper motive as well as bad faith. No authority was cited on what "improper motive" would add to the grounds recognised in *The State of Mauritius* case.

463. De Smith's Judicial Review (8th Edition) states at paras 5-094 to 5-095:

> "5-094. However, the designation of a purpose as "improper" is distinct because of its connotation of *moral* impropriety. In most cases where the term "improper" has been employed the decision-maker either knowingly pursues a purpose that is different from the one that is ostensibly being pursued, or the motive behind the decision is illicit (based for example on personal factors such as financial gain, revenge or prejudice). Because, therefore, of its adverse moral imputation, the notion of improper purposes is more akin to that of bad faith, which will now be considered separately.
>
> **Bad faith and improper motive**
>
> 5-095. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power."

De Smith states that "bad faith" refers to the carrying out of a function in a manner which is not honest and genuine.

464. The claimants have made it clear they do not allege bad faith, fraud or corruption, but rely instead upon "improper motives". It is therefore necessary to be clear about what might be treated as an improper motive in the present case without amounting to bad faith. As Sir James Eadie argued, that becomes even more important when the allegation of improper motive does not relate to the exercise of a discretionary power conferred for a statutory purpose, but to a statutory private law right, the exercise of which is not restricted to any particular statutory purpose. I do not consider that the court is entitled to make a free-wheeling judgment on matters of business ethics or morality in order to decide whether a decision-maker's motive was improper. The claimants have not suggested otherwise. In paras. 75 to 76A of the Amended Statement of Facts and Grounds they have sought to advance criticisms of specific passages in the contemporaneous documents which are said to reveal an improper motive by reference to financial gain, prejudice, hostility, animosity or vindictiveness, concern about political reputation or embarrassment, and punishing a person who has committed no wrong.

465. The court's decisions on these criticisms must be taken in the correct context. The SoS and his officials are clearly of the view that the sale and leaseback arrangements have been a bad deal for the MoD and the taxpayer for a number of years and will continue to be so. Hence, s.5 notices have been served in order to test the merits of enfranchisement as a way of extricating the Ministry from that situation. There is nothing *improper* about a public authority taking such action if it can lawfully do so. As *The State of Mauritius* confirms, the SoS is

entitled to participate in the commercial market in the usual way, that is by exercising the full bargaining power available to him in order to secure the best deal possible. That is a matter of public interest. The court should be careful to ensure that the application of public law standards does not cut down or undermine that bargaining power, or give another party to the contract a negotiating advantage not forming part of the bargain or its statutory context. In addition, the Minister is entitled to have regard to a wide range of considerations, including political considerations. The limited scope for judicial review reflects the width of the discretion enjoyed by the SoS when exercising his powers for negotiating contracts, or using his rights under existing contracts and, in this case, under the 1967 Act. The complaints raised by the claimants must be judged against the principles laid down in *The State of Mauritius* case (particularly at [63] to [66]), *Dudley* and other relevant principles identified above.

466. As for what was included or assumed in the original bargain between the parties, the claimants make the fair point that in 1996 the SoS did not have any right to enfranchise under the statutory framework then in place. In particular, he was unable to satisfy the residence requirement. However, by then the 1967 Act had been amended on a number of occasions, extending the scope of enfranchisement in relation to, for example, rateable value limits and the low rent test. There was plainly a risk that during the course of the 200-year underlease further amendments might be made potentially enabling SFA in the MQE to be enfranchised (see also [588]-[595] below). From the outset the 1967 Act contained provisions rendering agreements void which purported to exclude or modify a tenant's right to enfranchise (s.23). In 2002 the residence test was abolished save in limited circumstances. Thereafter, in 2011 the profit-sharing agreement ceased to apply and from 2016 criticisms of the VFM of the 1996 agreements were being expressed in Parliament. By then the nature of the bargain had been changed by amendments made by Parliament to the 1967 Act.

Issues 13 and 14 (Ground 4) – Whether the defendant's decision to enfranchise was based upon any motive that was legally improper

How the decisions to serve the enfranchisement notices came to be made

467. In their report dated 13 July 2018 the Public Accounts Committee criticised both APL and the MoD for having failed to collaborate to maximise value from the MQE for mutual benefit (see [29] to [30] above). Against that background the parties sought to improve their relationship. In March 2019 the SoS and APL entered into the arbitration agreement for the site rent reviews and the D&H Agreement. The parties issued a joint press statement in which they expressed the hope that the reviews would be determined more quickly and at a lower cost than would otherwise be the case. The parties said that they had agreed a number of terms that would strengthen their relationship, including a mechanism to reduce the number of void properties, as part of a mutual goal of working closer together on the broader estate. The parties saw the agreements as a "productive first step" towards a "closer, more collaborative approach".

468. However, internal MoD briefing dated 5 May 2019 on the rent reviews stated that the 1996 deal represented poor VFM. The MoD was exploring a number of

mitigations to address the risks of the rent review, including increasing the rate of handbacks to APL above the recently agreed level of 500 units a year, a programme of new build homes on MoD land and enfranchisement to buy APL's interest on sites where there was a long-term need and the housing was of appropriate quality. MoD had not previously pursued enfranchisement because of complexity, cost and uncertainty. The Law Commission had made proposals to the Ministry of Housing, Communities and Local Government ("MHCLG") to make the process easier and cheaper for tenants. The MoD, with its interests as a major landowner, was to make representations to MHCLG.

469. On 18 October 2019 officials sent a briefing note to the SoS on the possibility of repurchasing SFA from Annington as one of a number of options. Because there was uncertainty *inter alia* as to the effect of the rent reviews on future levels of rent, it was difficult at that stage to show that buying back properties from APL would represent VFM. In addition, some of the estate was reaching the end of its economic life. Accordingly, the SoS was advised that it might be more economical for him to terminate many of the underleases with APL and to build new homes on MoD land.

470. Officials had a meeting with the SoS on 5 May 2020. The SoS recognised that the 1996 deal with APL was not a good one and was keen to explore how the MoD could get out of the arrangement, including the use of enfranchisement. Officials referred to the high number of void properties which was partly the result of a lack of funding for dilapidation payments. There were 7,769 void properties costing £40m in rent and £4m in maintenance each year. The MoD would hand back to APL 3,500 of these properties over 7 years under the D&H Agreement saving £17m a year in rent. If all of the remaining 4,269 void properties were to be handed back to APL there would be further savings of £21m rent and £2m maintenance each year, but the additional dilapidations cost would be £62m and the process would be complex. Once the voids were cleared and the outcome of the site rent reviews known, the MoD would be able to assess on a site by site basis whether it would be economic to continue to rent properties from APL or whether it would be better for the MoD to re-provide housing by buying or building its own housing.

471. In a briefing to the SoS and the MinDP dated 20 May 2020 officials stated that enfranchisement was a potential tool for the MoD either to negotiate better terms with APL or to buy out its interest. If the outcome of the rent review process should be adverse to the MoD, enfranchisement might be a critical component of the Ministry's mitigation strategy.

472. Following the arbitral tribunal's third award (18 June 2020), officials provided briefing to the SoS on 22 September 2020. Officials advised that a SPV be set up to which the SoS would transfer the freehold of the sites to be enfranchised. By this stage the MoD had become aware that Terra Firma was taking steps to prepare an initial public offering for the refinancing of APL, but APL had not disclosed to the market "the risk of MoD enfranchising the estate at a substantial discount to open market value". The note continued:

> "We would therefore recommend that MoD establish a SPV and notify AHL of the intention to enfranchise at the earliest possible

> opportunity. We could make such steps publicly known in order to disrupt AHL's IPO process. This will create commercial leverage that has hitherto been absent in MoD's relationship with AHL."

473. On 7 October 2020, the day after the fourth award of the arbitral tribunal, officials put a submission to the Permanent Secretary of the MoD as the Accounting Officer. This sought his approval, subject to the agreement of HM Treasury, to establishing a SPV so that the SoS could pursue an enfranchisement claim. The note recorded that in 1996 the SoS had sold 999 year leases of SFA to APL for £1.662 billion, since when the value had increased to nearly £8 billion, without the SoS being able to capture any part of that increase. In the course of the rent arbitration it had become clear that the SoS could enfranchise so as to buy out APL's interest, potentially at a substantial discount to open market value. In discussing the financial benefits of an enfranchisement claim at Cranwell the briefing stated:

> "Executing this transaction would create intense commercial leverage over Annington Homes; merely holding the threat of this could force Annington's valuers and auditors to write down its book value. Such a threat would be of considerable benefit to MoD as it is in the process of arbitrating the rent for the next 15 years; the NPV of the rent is up to £13bn so it is incredibly important for MoD to exercise any leverage it can"

474. The Accounting Officer Assessment said in relation to meeting standards on propriety that Parliament, the NAO and commentators had often criticised the transfer of value from the public purse to APL and enfranchisement would help to remedy that. The initial proposal was to enfranchise only one or two of the SFA units "in order to gain proof of concept." The Permanent Secretary approved the Accounting Officer Assessment and the proposal as meeting the required standards in "Managing Public Money" of "regularity, propriety, value for money and feasibility".

475. On 14 October 2020 similar briefing was provided to the MinDP to ask for his approval to set up the SPV. On 22 October 2020 the MinDP approved the proposal. But he asked whether it would be appropriate for MoD to hand back properties to APL under existing arrangements for no value (and with associated costs) if enfranchisement would represent VFM for the MoD. In a response the following day officials advised the MinDP that if the MoD were to suspend the handback programme it would be giving up an estimated £25m of relief against the cost of dilapidations and then:

> "Given the nascent stage of the enfranchisement process, there is insufficient information to enable a recommendation in this regard. The test case, as designed, is intended to flush out any impediments to enfranchisement and demonstrate VFM. Until we have the results of the test case, VFM cannot be conclusively demonstrated."

(see also Ms. Harrison's first witness statement at paras. 13.6 to 13.9).

476. On 16 October 2020 Mr. Razzell sent an internal email to colleagues in which he proposed 1 and 3 Sycamore Drive, Cranwell for enfranchisement because in its fourth award the arbitral tribunal had determined new rents for those properties. He added that the subject was obviously sensitive and should not be communicated to APL in advance of the SoS serving notices to enfranchise.

477. On 18 December 2020 the MinDP asked the Chief Secretary to the Treasury to approve the setting up of the SPV and to proceed with a test case. That approval was given on 1 February 2021.

> "I reserve judgment on the overall Value for Money of any potential of the entire …. APL estate. This will be judged based on legal risks, your plans for the estate and impact on Public Sector Net Debt (PSND). Therefore, this SPV must be used as a 'proof of concept' only. If you seek to enfranchise further properties, you will need to seek approval from HM Treasury."

478. An internal email of 28 January 2021 noted that the MinDP was "keen to minimise handbacks to only those that are absolutely necessary in the light of the potential to enfranchise at scale". He did not wish APL to benefit from sales that MoD might be able to carry out itself.

479. On 24 March 2021 officials provided a briefing note to the MinDP in which they explained that the VFM of enfranchisement claims would be improved if the D&H Agreement were to be modified before any claims were made by halving the rate at which dwellings would be handed back from 500 to 250 a year. Officials advised that the enfranchisement test cases should be paused until the conclusion of commercial discussions with APL on the D&H Agreement. That advice was accepted and on 30 March 2021 the application to HM Land Registry to register the transfer of the freehold of 1 and 3 Sycamore Drive was withdrawn.

480. In his first witness statement, Mr. David Thomas describes the strain under which the parties had been working on the rent review process. It had become "a source of considerable friction" and hugely expensive. By March 2021 the rents on only 12 out of 27 representative sites had been determined and the remaining process was expected to take until 2023 to complete. In April 2021 Mr. Hands wrote to Mr. Razzell to propose that the parties agree a much simpler solution for the site rent reviews and address other points of contention, with a view to starting "a fresh relationship which works better for both sides."

481. On 11 May 2021 officials briefed the MinDP on this development. Although they considered that the likelihood of reaching an agreement with APL was "slim", there was an opportunity to agree modifications to the D&H Agreement and to address other issues. The time pressures on the enfranchisement test cases were not acute and it was sensible to defer that action whilst negotiations proceeded. The delay would enable the MoD to have a fully thought through strategy for deploying enfranchisement and to achieve greater clarity on long-term strategic aims for the provision of SFA under the emerging draft Defence Accommodation Strategy.

482. In June 2021, in an internal briefing note to Mr. Charlie Pate (the MoD's Director General of Finance), Mr. Razzell recorded that the parties had agreed to take part in discussions 2 weeks after the publication of the fifth arbitral award (which was published on 5 July 2021). He advised that if the negotiations were unsuccessful there would be no reason not to proceed with the test cases. But if successful those cases should still proceed "based on duty to deliver value for money." The test cases would inform a technical decision on how to finance the SFA estate, whether through the existing lease structure with APL or outright ownership, having regard to the impact on the PSND. Mr. Razzell described the existing relationships as "highly transactional." APL did not provide any kind of service to the MoD, and there were almost no areas where the MoD relied upon APL's goodwill. Mr. Razzell described APL and Terra Firma as "exceptionally difficult to do business with."

483. On 4 June 2021 Mr. Dalton (the CEO of the DIO) informed Ms. Harrison about the meeting he had had the previous day with Mr. Ian Rylatt, the CEO of Annington Limited. Mr. Rylatt had said that Annington was "in a fund to 2022, at which point Terra Firma will sell, or will transfer to a new vehicle."

484. Between June and July 2021 Terra Firma and UKGI exchanged emails on their respective positions, seeking to establish a framework for a negotiated settlement (Mr. Thomas's first witness statement paras. 5.3 to 5.6).

485. On 19 July 2021 officials provided further briefing to the MinDP. Under the heading "Timing Imperative" they advised:

> "Annington is held by Terra Firma in a closed fund. The fund's end date is understood to be in the second half of 2022, the tenth anniversary of the acquisition of Annington by Terra Firma from Nomura. Therefore Terra Firma will either need to sell its interest in Annington, or place Annington in a new or continuity fund, before this point in time.
>
> Triggering Sycamore after any sale of Annington by Terra Firma would be undesirable:
>
> - A scenario in which MoD waited for Guy Hands to crystallise a very significant profit, walk away, and then MoD decided to exercise its rights against the new owner, (which may well be a socially responsible investor such as a pension fund, or indeed shares might be publicly traded further to an IPO exit) would be reputationally very damaging for MoD; and
>
> - There is a likelihood that purchasers will borrow to finance the purchase and that this debt load will be borne by Annington, thus reducing room for manoeuvre in any eventual settlement or negotiation.
>
> Similarly, even if Annington was not sold, given the relatively conservative financing structure in place (gearing <50%), the

> transfer of Annington into a new fund would represent an opportunity to increase debt to fund a dividend recapitalisation and enhance distributions to investors, which have been relatively modest since 2012.
>
> On the assumption that Sycamore is legally viable, any enfranchisement claim by MoD should immediately sterilise any potential sale or refinancing by Terra Firma.
>
> Therefore our advice is that MoD should ensure that it triggers Project Sycamore no later than the end of Q2 2022."

As for APL's possible reaction to enfranchisement, the Minister was advised that both parties "simply administer the lease," there were no concessions or goodwill from APL in the operation of the estate and there was very little downside risk as regards the relationship. Once again this relationship was described as "highly transactional" and "often confrontational". In a similar vein, an internal note for a discussion with the MinDP on 29 July 2021 said there was very little hope of an improved relationship with APL and, thus, nothing to be lost by launching the enfranchisement test cases.

486. That note also suggested that if the test cases produced successful results, MoD would consider enfranchising sites which it wishes to retain or must retain because of their condition or location (e.g. housing located within secure perimeters). In relation to other sites, it would continue to handback properties in the short term, but it would then begin to consider the implications of enfranchising and selling properties as opposed to handing them back, so that APL could sell at a profit. Such profits could be reinvested in the upgrading of retained SFA (see also Ms. Harrison's first witness statement at paras. 13.2 to 13.5). The Permanent Secretary's statement that enfranchisement of the *whole* of MQE appeared to be "a marginal call in value for money terms" (quoted by Mr. Thomas in his first witness statement at para. 6.30) is consistent with the MoD's preference for selective enfranchisement.

487. On 18 August 2021 Mr. Hands set out a proposed framework for a settlement and suggested that the parties agree to a structured mediation. On 6 September 2021 the MoD responded that it did not think that mediation would be appropriate given the low prospects of success and the costs involved (Mr. Thomas's first witness statement paras. 5.8 to 5.10).

488. On 27 September 2021 Annington Funding plc issued an Offering Circular for a future issue of bonds under its 2017 programme for £4bn of unsecured notes (of which £3bn had already been issued in 2017). Annington considered it appropriate to identify enfranchisement as a potential risk to the payment of sums due under the Notes:

> "***The group's business, results of operations and financial conditions could be adversely affected if some or all of the Group's properties are compulsorily purchased by the Government***

> Any property located in the United Kingdom may at any time be compulsorily acquired by certain public authorities possessing compulsory purchase powers if it can demonstrate that the acquisition is required. Alternatively, the Government may seek to expropriate the MQE or it may seek to restructure its interest in the leases in order to facilitate an attempt to enfranchise any or all of the Units which comprise the MQE, although there are certain obstacles to such an approach which would make it difficult. As a general rule, in the event of a compulsory purchase order being made in respect of all or any part of any property, the enfranchisement of units being effected, or expropriation of an asset in part or in whole, compensation would normally be payable on the basis that it be broadly equivalent to the open market value of all owners' and tenants' proprietary interests in the property subject to the order, enfranchisement or expropriation. However, any compulsory purchase, enfranchisement, or expropriation of all or any significant portion of the Group's properties, or the payment of compensation that does not reflect the value to the Group of affected land, could have an adverse effect on the Group's business, results of operations and financial condition." (original emphasis)

Briefing to the MinDP on 28 September 2021 shows that officials were already looking at the implications of this circular.

489. Mr. Thomas says that APL did not consider at the time that the MoD realistically could or would enfranchise (paras. 4.38 to 4.39 of first witness statement). This needs to be read in the context of paras. 47 to 55 of the ASF. The residence requirement in the 1967 Act had been abolished for most purposes by s.138 of the 2002 Act. In February 2005 the claimants received legal advice on the risk of the SoS pursuing an enfranchisement claim. In 2012, 2017 to 2019 and 2021 the claimants received legal advice on the possibility of the SoS seeking to enfranchise in the context of the site rent review (ASF para. 48). The claimants have relied upon their privilege in relation to that advice. In June and July 2018 the claimants liaised with their valuers (Allsops) and property advisers (Savills) on the impact of the SoS enfranchising all of the MQE (assuming he was able to do so) on the book value of the estate. At that stage their estimate of the cost of enfranchisement exceeded the valuation of the whole MQE. However, on 29 October 2020, following the arbitral tribunal's fourth award dated 6 October 2020 (which determined the site rent for batch 1 of the representative sites), APL was advised by its valuer that in view of the rent levels being indicated through the arbitration process, enfranchisement would be more attractive to the SoS, if that option were to be available "in the real world". He added that enfranchisement looked "like a potentially compelling route for the MoD".

490. In 8 October 2021 officials provided further briefing for MinDP seeking his approval to proceed with the test cases and to note a "Commercial Strategy" which was appended. In relation to the new accounting standard IFRS 16, which was to come into effect on 1 April 2022, officials advised that a capital credit

against expenditure limits would arise upon termination of APL's lease if the SoS's liability under the lease exceeded the cost of enfranchisement. The credit could be used in the purchase of APL's interest, public sector debt would be reduced and VFM would be improved.

491. The Commercial Strategy described the "overall picture" as follows:

> "The 1996 sale and leaseback deal is openly acknowledged to be a bad deal for the taxpayer. The NAO's 2018 report estimates that it represents a transfer of value from the public sector to the private sector of over £4bn. Furthermore, the nature of the private sector counterparty gives rise to additional presentational difficulties for MoD. APL is owned by Terra Firma. Terra Firma has restructured Annington's holding company as a 'Collective Investment Vehicle', an aggressive form of restructuring which has avoided nearly £800m of capital gains tax liability which would otherwise would be payable by APL to HMRC as and when it disposes of properties. This is a source of ongoing embarrassment for MoD."

The document described APL's confrontational stance (as seen by MoD officials) in relation to the site rent reviews and various aspects of handback. APL was said to have been inflexible on handbacks as regards liability for dilapidations (seen as a tortuous process resulting in MoD having to engage experts), unwillingness to accept certain houses with sitting tenants and strict adherence to contractual requirements for handbacks to be in contiguous plots. The Strategy described how attempts to gain leverage or to improve the relationship had failed and the issues which "ideally" an improved relationship with Annington would address.

492. The MoD's future Strategy was set out as follows:

> "Having due regard to:
>
> - The increasingly poor value for money of the sale and leaseback arrangements for MoD;
>
> - The aggressive tax avoidance employed by Terra Firma;
>
> - The lack of commercial levers MoD has to improve VFM;
>
> - The lack of latitude shown by APL in administering the arrangements, and
>
> - The ongoing inability of MoD to remedy or re-set the relationship, despite its best efforts,
>
> the overriding commercial strategy remains unchanged: to exit the arrangements with Annington as far as is possible. The chart below shows the methodology we are using to determine which

> properties currently owned by Annington we would like to retain."
>
> "Ideally a constructive, affordable and strategic relationship would support us in retaining [certain] properties … but as set out above we must consider the possibility that this will not be achievable and therefore consider options for exit. On the assumption that there persists an ongoing policy objective to provide homes for service families, there are two methods for exit:
>
> 1. Terminating the leases over a period of time, accompanied by re-provision. This was the strategic ambition which underpinned the 2019 Handback Agreement and the commitment to hand back no fewer than 500 units a year.
>
> 2. Buy back the units, either at open market rates (which is the only basis on which APL would sell them), or via enfranchisement. This latter option would be subject to successful execution of the Sycamore test case."

493. Similar briefing was provided to the SoS on 12 October 2021. The MinDP and SoS approved the pursuit of the test cases.

494. On 20 October 2021 Terra Firma sent a settlement offer to the MoD. It was important to the company to achieve greater certainty in relation to the rent reviews given the upcoming sale of APL (Mr. Thomas's first witness statement paras. 5.11 to 5.12). The offer proposed to agree an "adjustment factor" from market value for the remaining sites based upon the arbitrators' awards to date, the postponement of the next rent review from 15 years' time to 30 years' time, and a reduction in the annual rate at which units would have to be handed back.

495. On 17 November 2021 the MinDP held a meeting to discuss the settlement offer. Officials advised that they had been monitoring the City and there were no signs at that stage of any on-sale by APL. They also confirmed that any bidder in such a sale would be expected to carry out due diligence with the sole tenant, the SoS. The risk of an on-sale without a bidder doing due diligence with the MoD was said to be low. There followed some negotiations with Annington on the terms of the settlement and the MinDP approved the settlement on 24 November 2021.

496. On 2 December 2021 officials briefed the MinDP on the relationship between the timing of the settlement agreement and the service of the enfranchisement notices in the first test cases:

> "5. The Minister is aware that Terra Firma has been anxious to secure a rapid settlement of the arbitration. It might be assumed that this anxiety is driven by some form of pending sale or change in ownership structure, UKGI colleagues have had discreet conversations with a number of City contacts and there is no word of a transaction. However it is quite possible that

> some form of deal has been lined up which is contingent on settlement of the arbitration.
>
> 6. Ideally, MoD will not wish to be in a position whereby it settles with Annington, Terra Firma then sells its interest in Annington, and then MoD launches Sycamore. Any purchaser is likely to be more highly leveraged than Terra Firma thus reducing room for manoeuvre; Annington as currently structured has gearing of c50%, furthermore, it exposes MoD to questions as to why Terra Firma was able to crystallise such significant profits.
>
> 7. Subsequent to settlement, any sale process by Terra Firma could move rapidly.
>
> It is therefore recommended that MoD serves notices of its enfranchisement claim **immediately after** the legal advisers have confirmed that the settlement agreement has been satisfactorily executed, either the same day or no later than the next working day." (original emphasis)

497. The briefing suggested how the MinDP should deal with various questions in relation to the service of the enfranchisement notices. For example, APL had not previously been made aware of the SoS's intention to enfranchise "for commercial reasons." If the test case were to be successful a decision on whether to enfranchise any further properties would be made on a site by site basis taking into account the MoD's ongoing requirements for SFA and the economic case for enfranchisement which would differ as between sites. It was not possible to say at that stage how many sites would be enfranchised.

498. In an email on 4 January 2022 (following the settlement agreement on 15 December 2021 and the service of the first enfranchisement notice the following day) the MinDP referred to media coverage stating that APL was planning a sale and said that he was relieved to have notified them of the enfranchisement test cases because he did not see "how they could fail to release that information to any buyer."

499. In a review note for the DIO dated 13 January 2022 Ms. Harrison stated:

> "1. In December 2021, the arbitration with Annington Homes Limited (AHL) was brought to a conclusion following the agreement of a revised global discount rate to open market rents and other favourable terms to MoD. With a risk that this would be followed by a sale of AHL by Terra Firma, its parent company, notice was immediately served on AHL of MoD's intention to enfranchise a property rented from AHL in a test case to establish the ability of the Department to enfranchise a large number of the houses leased from AHL."

Paragraphs 5 and 6 of the note stated:

> "5. Following the agreement reached with AHL as set out in the Review Note at Reference D, [redacted] it was decided that the proposed test case to enfranchise two properties should be accelerated in case Terra Firma had put in place plans to sell AHL on the strength of the Settlement Agreement. AHL is held by Terra Firma in a closed fund. The fund's end date is understood to be the second half of 2022, the tenth anniversary of the acquisition of AHL by Terra Firma from Nomura. Terra Firma will either need to sell its interest in AHL, or place AHL in a new or continuity fund, before this point in time.
>
> 6. If MoD decided to exercise its rights against a new owner this could have been potentially reputationally damaging for the Department. A buyer (which could be a socially responsible investor such as a pension fund) acting in good faith could subsequently find that the value of AHL was impacted by potential enfranchisement."

500. The MinDP made a written ministerial statement on 27 January which said:

> "Given our obligations to secure value for money, we have reviewed MoD's current arrangements with Annington and now set out the steps that MoD is taking to deliver greater value for money for the taxpayer in relation to Service Family Accommodation.
>
> First, MoD engaged highly experienced advisers and counsel to deliver a settlement with Annington in the site rent review process. This settlement achieves value for money, and removes ongoing uncertainty for the Department; we believe it to be a good outcome and a fair settlement. The settlement resulted in a change in the overall adjustment to open market rents from 58% to 49.6%.
>
> Secondly, MoD continues to reduce the number of untenanted properties which it holds since these otherwise represent a liability for the taxpayer, by returning these to Annington under the terms of the lease.
>
> Thirdly, MoD can confirm that the Department will explore the exercise of its statutory leasehold enfranchisement rights to buy out Annington's interest in the homes and gain full ownership rights. Initially, the MoD has made a single claim for one house, with the intention to submit a further claim in respect of another house in the near future. It is hoped that this test case will establish certain key principles. The cost of enfranchising these houses will be in accordance with the statutory enfranchisement formula, fixed at the date of the notice of claim, and the price will be agreed between the parties or determined by an independent Tribunal. If the cost of recovering full ownership of the units from Annington is less than the present value of MoD's

> ongoing liabilities, such a transaction is likely to represent good value for money. The MoD would then benefit from any future appreciation in value of the units. Accordingly, the MoD has served notice on Annington under Section 5 of the Leasehold Reform Act 1967 of its desire to enfranchise a house currently leased from Annington. Annington, through its lawyers, has notified the MoD that it is considering the impact of the claim and has put the MoD on notice of a potential dispute.
>
> A successful enfranchisement programme would also provide the MoD with more flexibility in the management of its estate to the benefit of Defence, tenants, and potentially wider Government objectives."

Analysis of the Secretary of State's purposes

501. Paragraph 13 of the Agreed List of Issues identified a number of purposes which the claimants say motivated the defendant's decision to proceed with the test cases and, subject to the legal and economic outcome of those cases, potentially to pursue enfranchisement on a wider scale. The claimants say that those purposes can be identified from the internal documents disclosed by the defendant. Ms. Carss-Frisk points out that the claimants pleaded their case on this ground of challenge in some detail (see the Amended Statement of Facts and Grounds) and that the SoS has not filed any evidence in reply dealing with those matters. However, it is common ground that it is for the court to assess what inferences can properly be drawn from the documents before the court.

502. Ms. Carss-Frisk emphasised certain paragraphs or sentences in particular documents but it is, of course, essential to read all the relevant material as a whole and to identify the context in which particular passages appear.

503. In some instances Ministers and officials have made criticisms of the way in which APL and Terra Firma have conducted themselves. The claimants dispute those criticisms. It is unnecessary in this claim for judicial review for the court to decide the rights and wrongs of those issues. The claimants have clearly stated that they do not allege bad faith on the part of the defendant, the MinDP or their officials. I therefore proceed on the basis that the views expressed by Ministers and officials were ones which they genuinely and honestly held.

504. By 2019 the SoS had formed the view that the agreements with APL in 1996 were a bad deal, poor VFM and against the public interest. Plainly the criticisms of the deal made by the NAO and the Public Accounts Committee had influenced that thinking. The MoD had expected APL to achieve a nominal rate of return of about 9.7%, whereas the actual rate of return achieved had been 13.4%, which was judged to be significantly out of line with the distribution of risk between the parties. The SoS is responsible for maintenance and the cost of void properties. APL provides no services to the SoS. APL's role is essentially to collect rent from the SoS. Both parties had participated in the risk of changes in market value. But the SoS is liable for increases in rental values and has not shared in capital appreciation beyond the initial 15 year profit-sharing

agreement. The underleases would continue for a further 175 years. The MoD has already lost between £2.2 billion and £4.2 billion through the 1996 agreements compared to the position it would have been in if it had not sold off the MQE to APL.

505. The 1996 agreements have not led to a reduction in the proportion of the MQE which is vacant. The MoD receives only a nominal sum for handing back property to APL but is liable for dilapidations. Given budgetary constraints, that has operated as a disincentive to hand back empty properties, albeit that the SoS continues to be liable for the rent.

506. The 1996 agreements have represented increasingly poor VFM. That expression does not refer solely to the impact on taxpayers. Public funding is a finite resource which is subject to competing needs, within and without the MoD. Excessive SFA costs may result in less funding being available either for the MoD or for other Government functions.

507. Ministers and officials considered that they have no real leverage under the agreements to negotiate changes to their terms or waivers in particular cases. The commercial relationship was regarded as unsatisfactory.

508. In such circumstances, it is unsurprising that the SoS should wish to extricate his Ministry from the agreements with APL. If he could do so by lawful means, I do not see how the court could possibly say that that motive was improper. We are here dealing with a commercial relationship where the SoS is entitled to make legitimate use of such bargaining power as he has. If the SoS sought to terminate or modify the 1996 agreement through purely commercial negotiations, the principles in *The State of Mauritius* at [63] would be applicable. As a matter of principle, the position is no different in so far as the SoS is entitled to exercise a property right, namely a right to enfranchise under the 1967 Act. That is one legitimate tool that he is entitled to use in order to buy out APL's interest in SFA.

509. In this case enfranchisement is only one of the options that the SoS has been thinking of using. On several occasions officials have advised that it might be more economical in some cases for the SoS to carry on paying rent under the 1996 underlease than to enfranchise. Alternatively, in some instances the SoS might consider it preferable to hand back particular properties and/or to build new housing on MoD land. Decisions need to be taken on a site-by-site basis. In this context the SoS sees his ability to enfranchise as helping to create leverage in any negotiations with APL. I see no legal basis upon which the court could say that that was a legally improper purpose.

510. The considerations I have described above in [504] to [509] were all legitimate matters to which the SoS was entitled to have regard in the public interest. They are compatible with the principles laid down by the Privy Council in *The State of Mauritius* case (particularly at [63] to [66]) and in the *Dudley* case. In my judgment, these matters were the main drivers of his decision to serve the enfranchisement notices and, subject to the legal and economic results of that process, to contemplate the merits of enfranchising SFA properties more widely.

511. This is the context in which the specific criticisms now made by the claimants fall to be considered.

512. Firstly, I have previously rejected the claimants' complaint that it was improper for the SoS, as a public authority who already owned the freehold of the SFA units, to seek to "circumvent" the decision in *Gratton-Storey* by transferring the freehold to a SPV (see [446] to [447] above; see also [612] below in the discussion under ground 6 of "legitimate aim" for the purposes of A1P1). The claimants have failed to justify their assertion that the SoS's status as a public authority made it improper for him to act in that way, in contrast to the position of a private individual or company. In my judgment the SPV arrangements he made fell well within the parameters set out in *The State of Mauritius* case.

513. Secondly, the claimants submit that it was improper to serve enfranchisement notices in order to override the settlement agreement made on 15 December 2021 and prior agreements.

514. In my judgment there is no merit in this complaint for a number of reasons. Plainly, it is not improper to use a right to enfranchise to acquire APL's interest in the 999 year headlease as such. That is simply the consequence of the right being exercised. The headleases were subject to any such right on the part of the underlessee as might exist from time to time. The subsequent agreements also have to be seen in that context.

515. The claimants complain that while the parties were seeking to agree the terms of the settlement agreement so as to strengthen their relationship for the future, the SoS was planning to serve the first enfranchisement claim and to pursue other such claims. But the settlement agreement had to be subject to any right to enfranchise. Clause 6.3 declared that the terms of the headleases and underleases "and all rights existing out of the same" remained in full force and effect, except in so far as expressly varied by the agreement. Those rights included any statutory right to enfranchise. The settlement agreement did not contain any provision purporting to exclude enfranchisement. In any event, any such provision would have been void by virtue of s.23 of the 1967 Act. It is clear from the contemporaneous material that, irrespective of whether the settlement agreement was entered into, the SoS considered that enfranchisement would improve VFM in appropriate cases, as compared with the agreements with APL. The claimants were aware of the risk of enfranchisement being pursued. They obtained advice on the subject in 2005, 2012, between 2017 and 2019 and in 2021.

516. How far the SoS may pursue enfranchisement was and remains uncertain. He and his officials have identified a number of alternative options which would require a site-by-site assessment. For example, in some cases it might be preferable for the SoS to continue to rent SFA pursuant to an existing underlease from APL. In any event both parties were obliged to conclude the rent review process and they both recognised the advantages of resolving that issue more efficiently through the settlement agreement. The decisions taken by the SoS do not override that agreement, which will continue to be in force unless and until, and save to the extent that, rights to enfranchise are exercised.

517. Then the claimants say that the defendant acted improperly in relation to the settlement agreement by not disclosing his intention to enfranchise in the first test case until the day after the agreement was concluded. The claimants also criticise the MoD for making considerable efforts to maintain secrecy on the subject (para. 81N of the Amended Statement of Facts and Grounds). The implication is that the defendant did not reveal his hand earlier in case APL should refuse to enter into the settlement agreement on the terms which were being discussed, or at all.

518. This issue is dealt with in para. 5.26 of Mr. Thomas's first witness statement. He asserts that if APL had known about the intended enfranchisement it would not have entered into the agreement on its terms *or at all*. But the proof of the pudding is in the eating. Mr. Thomas says that "the hearings under the arbitration agreement would have continued and we would have fought hard to make it clear that the rental result produced by the panel needed to protect APL from an enfranchisement risk." The claimants have not sought to explain this statement any further, but it simply does not make sense. The settlement agreement was reached because both parties were under a mutual obligation to comply with the site rent review process, yet neither wished to continue with the hugely expensive arbitration. In addition, Terra Firma wanted to avoid the delay that that would involve. The conclusion of the rent review process was a pre-requisite for the sale of the Annington Group which Terra Firma had intended to complete before the end of 2022. Furthermore, the arbitrators were only concerned to assess rental value under a series of hypothetical lettings. It has not been suggested that they had any power under the terms of the arbitration to "protect" that assessment from a risk of enfranchisement. Not surprisingly, the defendant criticised this evidence. Mr. Thomas returned to the subject in his third witness statement, but did not make any material improvement in the claimants' case.

519. Accordingly, in so far as the decision to enfranchise has the effect of overriding or undermining any of the agreements referred to, I conclude that that was not a legally improper purpose.

520. Thirdly, the claimants say that it was an improper purpose for the SoS to seek to undercompensate the claimants for their property by pursuing enfranchisement, thereby causing them significant economic harm. There is no merit in this complaint. The defendant's consideration of the enfranchisement option proceeded on the basis that it would improve VFM for the MoD and the public purse if the compensation paid to APL should be less than the market value of its interest in the SFA sites. If that is the effect of enfranchisement, that will simply be because of the statutory code which Parliament has chosen to enact for assessing the price a tenant has to pay. Where a public authority seeks to enforce its right to enfranchise, it cannot be said to be improper for that body to rely upon an advantage conferred by that code.

521. I reject the claimants' fourth complaint that it was improper for the SoS to treat enfranchisement as a means of putting commercial pressure on APL. His judgment was that the MoD had no leverage in any negotiations with APL. It was not improper for him to see the risk for APL of enfranchisement through

the proper operation of the 1967 Act as a negotiating tool creating leverage for the MoD in its relationship with APL.

522. The fifth improper purpose alleged by the claimants is that the SoS sought to prevent the claimants from proceeding with the sale of APL or from realising profits from that sale. This is related to the timing of any service of a notice to enfranchise. The SoS and his officials were concerned about the possibility that that notice might be served after Annington's interest had been sold in the market. There were three aspects to this:

(i) That timing would allow Terra Firma to crystallise a very significant profit and walk away leaving the purchaser to face a significant loss in value from the price they would have paid. The MoD's reputation might be damaged for failing to let it be known in the market before the sale that it had plans to enfranchise SFA subject to "proof of concept";

(ii) It was considered likely that borrowing used to finance the purchase of APL would increase the company's debt level and so reduce its financial room to manoeuvre or be flexible in any negotiation and further agreement with the MoD;

(iii) The SoS was concerned that with the expiry of the profit-sharing agreement in 2011, the MoD had subsequently been unable to obtain any of the increase in capital value upon the disposal of SFA units.

523. On the first aspect, the service of enfranchisement notices was inevitably going to reduce the value of APL's interests in the MQE whenever they were served. Ms. Carss-Frisk went so far as to suggest that the effects of the timing of the notices on other parties was irrelevant. She submitted that it was not the business of the MoD to choose the timing of the notices so as to inform or warn the market. The market should have been left to assess the risk of enfranchisement for itself (Transcript Day 2 pp.125-126). Of course, if the notices were served before the sale, the market would have become informed, not least because of the requirements for due diligence. So the implication of the claimants' argument is that either the SoS should have delayed serving notices until after the sale had taken place, so that Annington could maximise and lock in its profits without loss, or the SoS should have in effect tossed a coin. The claimants have not put forward any legal principle which would have justified or required the SoS to take the former course. If the claimants are correct in saying that it was irrelevant for the SoS to take into account the effect on a purchaser of the notices being served after a sale, then it would have been no more relevant to delay serving the notices in order to protect the financial interests of the Annington group. But in my judgment, the SoS was not obliged to disregard market effects and, in effect, to toss a coin.

524. The context in which the SoS was making his decision to serve enfranchisement notices in the test cases was a view shared with the Public Accounts Committee that APL was making excessive returns which involved an unreasonable transfer of value from the public purse to APL. The returns were much greater than had been assumed in 1996 by the MoD and significantly out of line with the relatively limited risks taken on by APL. To delay the notices until after the

sale had taken place would have been inconsistent with that assessment, which was one of the reasons why enfranchisement was being considered. Whereas APL has had the benefit of the 1996 agreements for 26 years, the purchaser would sustain reductions in the value paid for APL almost immediately. The SoS's approach accorded with propriety and did not involve an improper purpose. Indeed, had he acted as the claimants' argument suggests, he would have been open to legitimate criticism.

525. I see no basis for criticising the SoS's approach on the second aspect (see [522] above). He was entitled to have regard to the risk that a purchaser would take on more debt with the consequence that there would be less scope for the SoS to achieve a successful re-negotiation. Reading the contemporaneous material fairly and as a whole, I consider that officials referred to effects on book value and on the IPO process in the context of seeking to create bargaining power for the SoS and remedying the longstanding problems resulting from the 1996 agreements. Those references are not to be treated as seeking to punish or sanction APL for acting lawfully in accordance with those agreements or for doing so successfully. The SoS's purpose was not improper.

526. I also see no basis for criticising the SoS's approach on the third aspect (see [522] above). The Public Accounts Committee criticised the agreements with APL. By 2018 the MoD was between £2.2 billion and £4.2 billion worse off than if it had retained the MQE. The MoD had failed to protect long-term VFM, and profit-sharing or clawbacks from increases in the value of the housing had ceased after 15 years. Those were some of the reasons why the agreements with APL were widely recognised as being a bad deal for the public purse. It was in that context that the SoS considered that the MoD ought to be able to dispose of SFA units itself so as to benefit from any capital gains. In the light of the case law to which I have referred, I do not see why it was legally improper for the defendant to have been motivated by these economic concerns which plainly are of national importance.

527. The sixth improper purpose alleged by the claimants was to escape from a commercial agreement which had long been, and still was, considered to be a source of political embarrassment and reputational damage. In my judgment, in the context of the present case, this aspect cannot be described as extraneous or improper. The embarrassment and reputational damage simply related to the reasons why the 1996 agreements were considered to represent a bad deal for the MoD and taxpayers. The NAO and the Public Accounts Committee had expected the SoS to take whatever action was possible and appropriate. As the SoS put it crisply "as Ministers we have a duty to fix historical messes" (email dated 27 December 2021). There is no parallel between the circumstances of this case and those in *Padfield*. In *Padfield* concern about political reputation was irrelevant because it was relied upon by the Minister to prevent the investigation of a complaint, which was incompatible with one of the central purposes of the legislation.

528. The seventh improper purpose alleged by the claimants is animosity towards Annington and/or a desire to punish them for their economic and business success. I have already identified the main passages upon which the claimants rely. In my judgment, read fairly and as a whole, they do not reveal animosity

or malice against the claimants or a desire to punish them in relation to lawful conduct.

529. I appreciate that the Commercial Strategy prepared by officials for briefing on 8 October 2021 refers to the capital gains tax that Annington would save (estimated at £800m) through an "aggressive form of restructuring" as a source of embarrassment for the MoD. There is no suggestion that Annington's arrangements were anything other than legitimate.

530. But the comments made on 8 October 2021 need to be seen in context. The SoS was considering enfranchisement as an option from 2019. The MinDP approved the setting up of the SPV in October 2020 and the Cranwell properties had been identified as initial test cases. The freehold of those properties was transferred to DIHL on 12 February 2021. The registration of that transfer and the service of s.5 notices was paused while the MoD sought to renegotiate the rate of handback under the D&H Agreement. In July 2021 officials advised Ministers that the MoD should seek to exit the relationship with APL because it was transactional, without services, and often confrontational. They also advised that test cases be pursued before Q2 2022. Ministers approved the enfranchisement of the Cranwell properties in October 2021. There is no indication that the tax issue played any part in the development of the SoS's policy to pursue enfranchisement as a possible option. There are simply two brief references in one document relatively late in the process and thereafter no further references to the subject. The tax saving mentioned was considerably less than the loss which the MoD had already sustained and could continue to sustain. The bad nature of the deal for the public purse was the key driver and the comment on tax should be seen in that context. Even if it be assumed that the tax treatment was irrelevant, it is impossible to say that it had a substantial or material effect on the decision to pursue enfranchisement as an option (see eg. *R v Broadcasting Complaints Commission ex parte Owen* [1985] QB 1153).

531. Ms. Carss-Frisk also relied upon the fact that the MoD made some brief submissions to the MHCLG on possible legislative reform of the 1967 Act following publication of a report by the Law Commission. There was nothing improper about the representations that were made. In any event, this complaint leads nowhere. The MHCLG decided not to take the matter any further. Even if the MHCLG had done so, the decision on whether to amend the 1967 Act and, if so, how, would ultimately have been for Parliament.

532. For these reasons ground 4 must be rejected.

Issues 15 to 18 (Ground 5) – Breach of legitimate expectations

Submissions

533. The claimants seek to rely upon two legitimate expectations which, they say, have been breached by the service of the enfranchisement notices. First, the claimants rely upon the contractual framework created by the sale agreement in 1996, including the terms of the headleases and underleases, the arbitration agreement dated 7 March 2019, the D&H Agreement dated 7 March 2019, which set an agreed annual rate for the release of SFA units, and the settlement

agreement dated 15 December 2021, which determined the basis for calculating rent payable by the SoS to APL for the SFA units remaining in the MQE over the next 30 years. The claimants say that they had a legitimate expectation that the legal relationship between the parties established by those agreements would endure. Clause 2 of each of the headleases granted by the SoS in 1996 had stated that APL would hold the demised properties for a term of 999 years.

534. Second, the claimants rely upon the Guidance issued in January 2016 by the Crown Estates Commissioners on the operation of the undertaking they had given to Parliament to provide "similar benefits to", or to act "by analogy with" the 1967 Act, other than in certain "excepted areas". The Guidance states that it cannot oblige third parties to abide by its policy. So, for example, if the Crown Estate is not the immediate landlord of a tenant, that tenant may not be able to enfranchise. The claimants say that this guidance reflects their interpretation of s.88(2)(c) of the 1993 Act. But even if they are wrong about that, they say that the 2016 Guidance constitutes a clear, unambiguous and unqualified statement that there can be no enfranchisement in respect of Crown land without the consent of any intermediate landlord.

535. The claimants submit that (a) the decisions to serve the 8 enfranchisement notices and (b) the SoS's scheme to enfranchise a wider range of SFA units, breaches both of the alleged legitimate expectations, first the contractual framework which was expected to endure and second, the effect of the 2016 Guidance that the consent of intermediate landlords (and therefore APL) would be necessary for enfranchisement to take place.

Discussion

536. A legitimate expectation can arise from an express promise or representation that is clear, unambiguous and devoid of relevant qualifications or from a past practice which was so unambiguous, so well-established and so well-recognised as to carry within it a commitment that it should continue to apply (see e.g. *Re Finucane's application for judicial review (Northern Ireland)* [2019] 3 All ER 191; *R (Davies) v Revenue and Customs Commissioners* [2011] 1 WLR 2625 at [49]).

537. In this case the claimants are contending for a substantive, and not merely a procedural, legitimate expectation. In *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755 Laws LJ warned at [35] that the notion of a promise or practice of present and future substantive policy (or obligation) risks proving too much. The doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy or practice over an appreciable period. Rather, it must constitute a specific undertaking, directed at a particular individual or group, by which the continuance of the policy or practice is assured, or conduct equivalent to a breach of contract or breach of a representation ([43]). Laws LJ also referred to "the pressing and focused nature of assurance required if a substantive legitimate expectation is to be upheld and enforced" ([46]).

538. In the present case there was no promise or representation by the SoS that, for example, the headleases would endure for 999 years or that any right to

enfranchise would not be exercised. Ms. Carss-Frisk also referred to the contemporaneous lease back arrangements by which APL would receive net rent from the SoS for 200 years and the handback provisions. The term of 999 years in the headleases, and other similar provisions, simply formed part of the private law rights defined and granted to APL. Such rights are enforceable in private law by private law remedies. Ms. Carss-Frisk did not cite to the court any authority to show that the grant by a public body of rights of this nature also creates a public law right, a substantive legitimate expectation, although her submission would generally have that consequence. There is a critical difference between a public authority granting a private law right and that authority making a promise to the grantee that it will not rely upon any existing or subsequent private law provision which would entitle it to override, modify, or acquire that right.

539. The grant of a lease is subject to any legislative regime which may be applicable from time to time and which may alter the terms of that lease (e.g. rent controls) or whether the lease continues to subsist or may be bought at a price. In 1996 the SoS did not have a right to enfranchise. When the 2002 Act came into force he did. Thereafter, the parties entered into agreements in 2019 and 2021 which were consistent with the continuation of their existing property law and contractual relationship within its agreed timescale. But that is not materially different from the legal effect of the grant of a term of 999 years in the first place. The creation of such private law rights and obligations did not involve the making of any statement or representation (or involve conduct amounting to a statement) that a right to enfranchise would not be exercised at any time, let alone a clear and unambiguous statement (or conduct) to that effect. The SoS was silent about his intention to test the concept of enfranchisement. APL did not raise the issue, for example, before entering into the settlement agreement, albeit that it had identified and been advised upon the risk of enfranchisement, which included the advice in 2020 that enfranchisement was becoming a more compelling option for the SoS. Instead, APL simply had the benefit of the contractual terms that had been agreed without any assurance that the right to enfranchise would not be exercised.

540. That is sufficient to dispose of the first alleged legitimate expectation. However, even if there had been an assurance or something sufficient to found a substantive expectation that a right to enfranchise would not be exercised, the question would then arise whether any such expectation was legitimate. An agreement to exclude or modify a right to enfranchise would be rendered void by s.23 of the 1967 Act. I find it difficult to see how an expectation to the same effect based, for example, on a representation or assurance, could be regarded as any more legitimate. Although s.23 operates as a matter of private law, it seems to me that there is an analogy to be drawn with the public law principle that an expectation is not legitimate if it would conflict with the relevant statutory scheme or its purposes (see e.g. *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115). However, there was not full argument on this point and so I do not base my decision upon it.

541. I also reject the legitimate expectation said to be based upon the 2016 Guidance from the Crown Estate Commissioners. That guidance only purports to apply

where a tenant is relying upon the Commissioners' undertaking to abide by the 1967 Act. In that event s.88 of the 1993 Act is applicable. I have already decided that, whether under the first or third limbs of s.33(1), the SoS was entitled to rely upon a right to enfranchise under the 1967 Act without the consent of any intermediate landlord, just as would be the case where a subtenant does not hold from the Crown. The Guidance does not purport to say that as a matter of policy the consent of an intermediate landlord must be obtained before a subtenant can exercise a right to enfranchise conferred by virtue of s.33(1) of the 1967 Act. The effect of the legislation is plain. No such consent is required.

542. I do not see how a mere policy document intended to operate outside the ambit of the 1967 Act could alter the rights conferred on a sub-tenant by that statute.

543. The claimants' legitimate expectation arguments fail at the first hurdle. I intend no disrespect, but I do not think it necessary or appropriate to address submissions made on other issues. They do not arise.

544. For these reasons, ground 5 must be rejected.

Issues 19 to 20 (Ground 6) – Whether there has been a breach of Article 1 of the First Protocol to the ECHR.

545. A1P1 provides:

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 the ECHR stated that the second sentence of A1P1 ("the second rule") is concerned with whether there has been a taking or expropriation of a "possession" including a *de facto* expropriation, looking at the substance of the matter. The first sentence ("the first rule") is concerned with whether there has been an "interference" with a right to property, something less than a deprivation or expropriation of property. The second rule should be considered before the first ([57] to [63]).

A summary of the parties' submissions

546. The claimants submit that the acquisition of APL's interest in the Cranwell and Bristol properties is a deprivation within the scope of the second rule of A1P1. They also submit that the notices and the scheme of which they form a part

interfere with their rights to property in breach of the first rule in a number of respects. If the notices are upheld as valid then, subject to the determination of price under the 1967 Act and the defendant's view of the relative merits of other options and VFM considerations, there is presently a significant risk of a large number of SFA units being enfranchised. This represents an interference with (a) APL's contractual rights under the D&H Agreement in 2019, as amended by the settlement agreement in 2021, to acquire for a nominal sum the SoS's freehold interest in MQE units at a minimum annual rate (until all units are eventually released to APL), (b) APL's marketable goodwill and (c) AHGL's 100% shareholding in APL. It is said that uncertainty about the extent to which the SoS will seek to enfranchise SFA units and the timing of any further enfranchisement in the future has interfered with the ability of AHGL to deal with its shareholding in APL and caused loss. The claimants rely upon *inter alia* *Breyer Group Plc v Department of Energy and Climate Change* [2015] 1 WLR 4559 and *Solaria Energy UK Limited v Department for Business, Energy and Industrial Strategy* [2021] 1 WLR 2349.

547. In submitting that there has been an "interference" for the purposes of the first rule in A1P1, the claimants rely upon *Sporrong* at [58] to [60]. In that case the applicants complained about the blighting effect upon their ability to deal with their properties caused by expropriation permits and prohibitions on construction which had been in existence for a considerable number of years. The ECtHR decided that although the permits and prohibitions had left intact the applicants' legal right to use and dispose of their properties, in practice they significantly reduced the possibility of their exercise. The expropriation permits "affected the very substance of ownership in that they recognised before the event that any expropriation would be lawful and authorised the [authority] to expropriate whenever it found it expedient to do so."

548. Ms. Carss-Frisk pointed out that in *James* the applicants' complaint arose out of 80 enfranchisement notices served by different individuals. It was not concerned with actions taken by a public authority. Accordingly, the applicants' case had related to the compatibility of the 1967 Act with the ECHR. The claimants clearly stated that they do not contend that the 1967 Act as amended is incompatible with A1P1. But Ms. Carss-Frisk submitted that this did not preclude a challenge to an individual decision under the statute by a public authority, relying on *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129 at [44] and *R (Mott) v Environment Agency* [2018] 1 WLR 1022 at [19], [23], [32] to [33] and [36] to [37].

549. Ms. Carss-Frisk submitted that if the claimants were to succeed on all or any of grounds 1 to 5, it would follow that the defendant has acted contrary to law and therefore in breach of A1P1 in relation to the enfranchisement notices affected by that conclusion. In such circumstances it would be unnecessary for the court to go further and consider justification, proportionality and whether a fair balance had been struck (*Iatrides v Greece* (2000) EHRR 97; *R (Infinis plc) v Gas and Electricity Markets Authority* [2013] J.P.L 1037).

550. Ms. Carss-Frisk confirmed two points. First, in relation to A1P1 the claimants do not allege any additional unlawfulness not already advanced under ground 1 to 5. Second, the only practical effect of the claimants succeeding under ground

6 would be the relief to which they may become entitled, namely damages under s.8 of the 1998 Act.

551. The claimants submit that the defendant has not demonstrated that the service of the 8 notices (or the SoS's wider scheme) pursued a sufficient legitimate aim in the public interest. They submitted that the purposes of the enfranchisement do not accord with what they describe as the "social justice" aims of the legislation identified in *James*. It is not legitimate for a public authority to use the 1967 Act to benefit itself for purposes very different from those identified in *James* and to do so, not in order to acquire the freehold but, by using a device, to acquire APL's intermediate leasehold interest. However, I interpose to record that the submissions provided little analysis of the aims identified in *James*, or the aims of subsequent changes to enfranchisement legislation, and how the enfranchisement proposed by the SoS compares to those aims in the context of the legal structure which the parties have created.

552. Ms. Carss-Frisk submitted that in the case of A1P1 proportionality is often expressed as a requirement that there be a "fair balance" between the demands of the general interest of the community and the requirements to protect an individual's fundamental rights. The balance will not be fair if that person has to bear "an individual and excessive burden" (*James* at [50]) and see also Lord Reed JSC in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 at [70]). In applying this test, it is necessary to consider the reality of the situation, taking into account all relevant circumstances, including the conduct of the parties, the means employed by the state and the implementation of those means (*NKM v Hungary* (2016) EHRR 33 at [62]). In summary, the claimants rely upon the following matters as showing that the balance is unfair in relation to them: no thought was given by the defendant to the balance under A1P1, clear promises were made by the defendant in the original and subsequent agreements, the defendant's aim is not to remedy social injustice or to acquire the freehold, the defendant acted for improper motives and APL's consent ought to have been sought to avoid them being treated differently from tenants on the Crown Estate. In addition, the claimants say that any inability to compensate them under the 1967 Act for being unable to obtain handback of further SFA units, or for loss of value in relation to marketable goodwill and shares in APL held by AHGL, reinforces their case that the balance is unfair.

553. Sir James Eadie emphasised that the claimants do not challenge the compatibility with A1P1 of the statutory scheme conferring rights to enfranchise and setting the basis for the price and compensation to be paid by a tenant. In relation to the 1967 Act Parliament has created a scheme which, it has been decided, satisfies the requirements of A1P1, such that there is no need for the circumstances of individual cases to be evaluated against that provision. So, for example, there is no need for a case-specific proportionality assessment.

554. He submits that where certain conditions are satisfied, the legislation confers rights to enfranchise on private persons, companies and public authorities alike, subject to the tenant's obligation to pay a price for the interests acquired determined in accordance with the scheme. Merely because the right to enfranchise has to be exercised by the tenant does not mean that where that right is exercised by a public authority there must be an assessment of compatibility

with A1P1 in the individual circumstances of each case (see e.g. *Belfast City Council v Miss Behavin' Limited* [2007] 1 WLR 1420 at [84] to [87]). The decision to serve an enfranchisement notice does not engage the exercise of a freestanding discretionary power or function, such as the licensing regime in the *Belfast City Council* case. Instead, the public authority is simply exercising a property law right conferred by statute, analogous to the exercise of a contractual right or the carrying out of contractual negotiations, and therefore subject to judicial review on only limited grounds, whilst having regard to the public interest in public authorities being able to participate in the commercial market in the usual way (*The State of Mauritius* case).

555. Sir James Eadie also submits that APL's assets or interest in a particular site have existed subject to the 1967 Act and the right to enfranchise conferred by that scheme (referring to *Wilson v First County Trust Limited (No. 2)* [2004] 1 AC 816 and *In re T&N Limited* [2006] 1 WLR 1728 at [165] to [169]).

556. However, the defendant also submitted that, even on a case-specific basis, there is no breach of A1P1. The decision to serve the 8 enfranchisement notices was for a legitimate aim in the public interest and accords with the approach in *James* at [46]. It is said that the same applies to any future consideration of enfranchisement on other properties. A wide margin of appreciation should be accorded to the implementation of social and economic policies. The protection of public finances is one such legitimate aim (see Re-Amended Detailed Grounds of Resistance at paras. 154 to 158). The decision to enfranchise has not been taken for improper purposes.

557. In relation to "the fair balance" test, Sir James Eadie submitted that a failure on the part of a decision-maker to assess proportionality in relation to a Convention right, whilst a relevant factor to which the court may have regard, is not a freestanding basis for finding a breach of a right such as A1P1 (see the *Belfast City Council* case at [12] to [13], [37], and [44] to [47]). He went on to submit that in substance the defendant did strike a proportionality balance weighing in favour of serving the enfranchisement notices, which took into account the effect of the notices on the claimants and on the book value of APL's interests, the conditions in the legislation entitling the SoS to enfranchise and the reasons for taking that action.

558. In relation to the factors in the balance referred to by the claimants, Sir James Eadie relied upon submissions made previously on other grounds of challenge. As for the aims of the 1967 Act discussed in *James*, he pointed out that Parliament has since chosen to widen the ambit of the right to enfranchise, for example, by removing in most cases firstly, the requirement that a tenancy be at a low rent and secondly, the residence test.

559. The defendant referred to the need for procedural rigour discussed in *R (Dolan) v Secretary of State for Health* [2021] 1 WLR 2326 at [117] and *R (Nazeem Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54 at [54] to [56]. During the hearing the claimants stated that ground 6 adds nothing to the public law grounds 3 to 5, other than to provide a basis for claiming damages under s.8 of the 1998 Act. Although the Amended Statement of Facts and Grounds seeks various items of relief, including "any other such relief that

the Court considers appropriate", it does not include a claim for damages. *Dolan* states that such a claim should be properly pleaded and particularised and should set out, at least in brief, the principles applied by the ECtHR. That has not happened here. In addition, there are likely to be issues on the amount of "compensation" payable for the enfranchisement which will have to be resolved by the First-tier Tribunal and/or the Upper Tribunal. Any differences between compensation which a tribunal may award and a properly pleaded claim for damages in relation to an alleged breach of A1P1 cannot be identified and therefore cannot be weighed in the "fair balance" at this stage.

Deprivation and interference

560. I did not understand the defendant to challenge the claimants' case that enfranchisement pursuant to the 8 notices involves a "deprivation" engaging the second rule in A1P1. However, the defendant makes the point that the deprivation stems from the exercise of a statutory right or incident of the defendant's underleases and not the exercise of a statutory power.

561. I turn to the claimants' submissions that the risk of the SoS serving further enfranchisement notices on a wider scale involves an interference under the first rule in A1P1 with the right to peaceful enjoyment of the claimants' possessions as summarised in [546] above.

562. In *Sporrong* the ECtHR accepted that although the expropriation permits and the prohibitions on construction left intact the owners' right to use and dispose of their possessions, in practice they nevertheless significantly reduced the possibility of its exercise and affected the very substance of ownership. The applicants' right of property had become precarious and defeasible ([60]). But there was no formal or *de facto* deprivation of possessions so as to engage the second rule in A1P1. The matter fell to be dealt with under the first rule in A1P1. The rights in question had lost some of their substance but had not disappeared. They were still capable of being sold in the market ([62] to [63]). But, applying the fair balance test, the interference with possessions did violate the first rule because the landowners were not able to seek a reduction in the duration of the permits and prohibitions and they were not entitled to *any* compensation for their loss ([73]).

563. Plainly the present uncertainty as to whether any further enfranchisement notices will be served by the SoS does not involve any interference with possessions of the kind which occurred in *Sporrong.* In that case the permits authorised expropriation at any time of the authority's choosing within a time limit lasting up to 25 years. Here there has been no decision to serve any more notices. Similarly, if the SoS had simply told APL that he *intended to serve* 8 enfranchisement notices and then consider wider enfranchisement at some time in the future, that information would have led to the same kind of uncertainty and loss upon which the claimants now rely.

564. Such effects are similar to those which can occur when a public authority has adopted a policy or makes an announcement that it will, if necessary, seek powers of compulsory purchase to carry out a project at some future time. This may cause blight to many properties and businesses affected by uncertainty.

Where such properties can only be sold at a substantially reduced value, domestic blight legislation (e.g. Chapter II of Part VI of the Town and Country Planning Act 1990) may require the authority to purchase properties and to pay compensation to the owners in advance of any compulsory purchase order procedure. But generally such regimes only apply to less valuable properties defined by reference to a rateable value ceiling. There does not appear to be any case law to the effect that whenever such blight occurs, the effect of A1P1 is that the landowner has a freestanding right to compensation, irrespective of the value of his property. Certainly the claimants did not cite any such authority. The decision in *Sporrong* does not cover that situation.

565. The claimants rely upon *Breyer*. There the Government had published a proposal to bring forward the date when electricity tariffs for small-scale generating systems would be reduced. Subsequently the Court of Appeal decided that the proposal was unlawful and so it was never implemented. But in the meantime the proposal itself had caused many projects to be abandoned. The Court of Appeal held that the proposal had interfered with the A1P1 rights of the claimants in that case, because it had had an immediate and serious adverse impact upon their businesses such that they were no longer viable at all. Lord Dyson MR stated that whether a mere proposal has the effect of interfering with possessions under A1P1 depends upon the nature of that proposal. Many proposals do not because they do not lead to a "concrete decision" having a material effect on property rights. Lord Dyson recognised that from time to time public authorities consult on proposals where the mere fact of consulting can affect the value of individuals' land or businesses. He was prepared to treat that as an interference for the purposes of A1P1, but said that it would almost always be possible for the authority to justify that interference as being in the public interest, bearing in mind the wide margin of discretion allowed for the implementation of social and economic policies ([2015] 1 WLR at [71]-[73]). I note that Lord Dyson's conclusion was not dependent upon the owner of the land or business being entitled to compensation.

566. That last point is important because, as I have said, Ms. Carss-Frisk made it plain that the sole significance of ground 6 is that a breach of A1P1 would give rise to a claim for damages.

567. I am doubtful as to whether the possibility of the SoS making further enfranchisement claims of itself constitutes an interference with the claimants' possessions for the purposes of A1P1. No decision has been made to serve any more s.5 notices. The defendant has simply said that, depending upon the outcome of the present test cases, including the assessment of prices, further enfranchisement will be considered. But that is contingent upon assessing such matters as which sites the defendant wishes to retain, the relative merits of alternative options and VFM considerations. I doubt whether it can be said that the defendant has made a proposal of a kind which *Breyer* would treat as an interference with A1P1 rights. For example, there has not been a "concrete decision" as referred to in that authority. Instead, the claimants have relied upon the uncertainty as to what the defendant may do.

568. However, there has not been full argument on the point, particularly from the defendant. Putting my doubts to one side, in this judgment I will assume,

without deciding, that the risk of further enfranchisement notices being served by the SoS amounts to an interference with the claimants' possessions for the purposes of the first rule in A1P1.

The decision in James and the purposes of the legislation on enfranchisement

569. In order to address the claimants' submission that the purposes of the SoS's decisions do not fall within the aims of the 1967 Act, which were only to do with "social justice", it is necessary to identify the key issues and conclusions in *James*.

570. The application by the Westminster Estate arose out of 80 claims to enfranchise properties in Belgravia. In 15 cases the tenants sold their leases with the benefit of the right to enfranchise. In 25 cases the tenants sold their property within a year of acquiring the freehold. Those tenants had made substantial profits, in one case a profit of 636% ([29]).

571. The case considered the 1967 Act as amended up until 1984 ([20]). The legislation applied to properties with a rateable value up to £1000 in Greater London and up to £500 elsewhere. In 1974 more valuable properties were brought within the scheme by increasing those limits to £1500 and £750 respectively, but in those cases the basis of valuation was more favourable to the landlord ([20] to [23]).

572. The ECtHR was informed that there were two principal forms of long lease of residential property ([12]): (a) "a building lease" typically for 99 years under which the tenant pays a ground rent (i.e. a low rent fixed by reference to the value of the bare site) and undertakes to build a house on the site and to deliver it up in good repair at the end of the term; and (b) a "premium lease" where the tenant pays the landlord a premium for a house provided by the landlord and thereafter a rent. The premium would take into account the building cost, a profit element and the length and terms of the lease. Under the lease the tenant is responsible for repairs ([12]). In the case of the Belgravia leases the tenant paid the full market rent split between a periodic rent and the capitalised value of the balance of that market rent over the whole of the term ([27]).

573. At the end of the term, Part I of the 1954 Act allowed the lessee to remain in occupation of the house under the Rent Act paying a "fair rent." It was considered to be unfair that the lessee who had been responsible for building the house, the costs of the building and maintenance costs over a long period, did not become the owner of that property at the end of the term. In 1967 the solution was to enable him to buy out the freeholder's interest ([18]).

574. During its passage through Parliament the 1967 Bill was criticised for failing to require a determination by a court or tribunal as to whether it was reasonable for the tenant in each case to be allowed to enfranchise. That criticism had been rejected on the grounds that it would result in considerable uncertainty, delay and litigation and would discourage enfranchisement ([19]).

575. The Westminster Estate submitted that the 1967 Act violated A1P1 because *inter alia* it interfered with agreements which had been freely made with tenants,

frustrated the applicants' expectations based on those agreements, deprived the applicants of their property at a price always below, and often far below, market value, enabled tenants to sell houses for large profits, and provided no machinery to enable the applicants to challenge the justification for the deprivation ([34]).

576. The Court focused on the terms and conditions of the 1967 Act to determine whether that legislation was compatible with A1P1. The case did not relate to the manner in which the 1967 Act was administered by a state authority, whether judicial or administrative. The 80 transactions were simply illustrative of the impact in practice of the reforms introduced by the 1967 Act ([36]).

577. It was common ground that enfranchisement deprived the applicants of their possessions ([37] to [38]).

578. The ECtHR then considered whether under the second rule in A1P1 the 1967 Act satisfied the "public interest" test for deprivation of possessions in the second rule of A1P1. It decided that a deprivation of property effected for *no reason other than* to confer a private benefit on a private party could not be in the public interest ([40]). But the taking of property under a policy to enhance social justice or fairness in a system of law governing the contractual or property rights of private parties may qualify as being in the public interest, even if the public at large has no direct use, or enjoyment of, or benefit from, the property taken. A taking of property in pursuance of legitimate social, economic, or other policies, including the "equitable distribution of economic advantages", may be in the public interest ([41] to [45]). The Court then went on to consider whether the aim of the 1967 Act was legitimate, as a matter of principle and on the facts, and whether there was a reasonable relationship of proportionality between the means employed and that aim ([46] to [69]).

579. The ECtHR stated that the notion of "public interest" is necessarily extensive. A decision to enact laws expropriating property will commonly involve political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The margin of appreciation available to the legislature in implementing social and economic policies is wide. Consequently, the court will respect the judgment of the legislature (or a decision-maker) on what is in the public interest unless that judgment be manifestly without reasonable foundation ([46] and see also *Lindheim vNorway* (2015) 61 EHRR 29 at [96]).

580. The aim of the 1967 Act was to reform the law so as to remedy the injustice to tenants by the operation of the long leasehold system of tenure, giving effect to what was perceived as a tenant's "moral entitlement" to ownership of the house. It was legitimate to take the view that the regulation of housing is a prime social need which should not be entirely left to market forces and to enact legislation aimed at securing greater social justice in that context ([47]). Basing itself on the earlier analysis of building leases and premium leases, the Court accepted that a long-leasehold tenant will have invested over the years a considerable amount of money in his home (through building costs and/or premium, repairs and improvements), whereas the landlord will normally have made no contribution towards its maintenance since granting the lease. The UK

Parliament had therefore pursued legitimate aims ([49]). Accordingly, the aims of the 1967 Act accepted by the ECtHR were not limited to social justice. They involved considerations of economic fairness or the fair distribution of economic advantage as between landlord and tenant.

581. The court then dealt with the means chosen to achieve those aims and the fair balance test, examining each of the criticisms made by the Westminster Estate ([50] to [69]).

582. The perceived injustice on which Parliament acted went to the very issue of ownership. Accordingly, a mechanism for the compulsory transfer of the freehold of the house and the land to the tenant in return for financial compensation for the landlord was not in itself disproportionate to meet the identified concern ([51]).

583. The ECtHR considered whether the availability and amount of compensation are relevant under the second rule of A1P1. The Court decided that the taking of property without any compensation could only be justified in exceptional circumstances. Compensation terms are relevant to the fair balance test, but A1P1 does not guarantee a right to "full compensation" in all circumstances. Legitimate objectives of public interest, in for example measures of economic reform or to achieve greater social justice, may call for less than reimbursement of full market value. In this regard also, the state has a wide margin of appreciation ([54]).

584. The basis for the assessment of compensation in the 1967 Act as originally enacted was that the tenant should pay the landlord site value but nothing for the buildings on the site, which clearly and deliberately favoured the tenant. The objective was to prevent a perceived "unjust enrichment" accruing to the landlord on the reversion of the property. Given that legitimate objective, the measure of compensation accorded with the fair balance test ([56]).

585. The applicants criticised the means chosen to achieve Parliament's aim because it lacked independent consideration of the reasonableness of each proposed enfranchisement. They pointed to evident differences between leaseholders of modest housing in South Wales and better-off tenants in Belgravia. In general, the latter could not be treated as needy or deserving of protection. The ECtHR said that that approach had been rejected by Parliament, which had chosen to lay down "broad and general categories" within which the right to enfranchise was to arise. This was to avoid the uncertainty, litigation, expense and delay which would result from individual examination of many cases. "Expropriation legislation of wide sweep, in particular if it implements a programme of social and economic reform, is hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned." The system chosen by Parliament was not inappropriate ([68]).

586. With regard to evidence on the 80 transactions in Belgravia, the view taken by Parliament as to the tenant's moral entitlement to ownership of the house, applied equally to properties in that area. An inevitable consequence of the basis of compensation in the 1967 Act as originally enacted was that a tenant would be bound to make a gain. The making of "windfall profits" by tenants who

purchased end-of-term leases at the right time was unavoidable. Neither the risk of there being some undeserving tenants, nor the scale of the anomalies revealed by the evidence on the Belgravia transactions, made the legislation unacceptable under A1P1 ([69]).

587. Accordingly, the terms and conditions of the 1967 Act did not involve a breach of A1P1 ([72]).

Developments since James

588. Parliament has considerably widened the ambit of the right to enfranchise since 1967. Notwithstanding those changes, the claimants accept that the legislation in its current form remains compatible with A1P1. That acceptance includes the two changes which enabled the SoS as the tenant holding under the 1996 underleases and public authorities in general to gain rights to enfranchise.

589. The underleases granted to the SoS on 5 November 1996 do not satisfy the "low rent" test which formed part of the 1967 Act as originally enacted (s.1(1) and s.4). The rent payable pursuant to each underlease was not a ground rent (as described in *James*) but was based on a rack rent. However, the Housing Act 1996 received Royal Assent on 24 July 1996, before the sale agreement was executed between the parties on 24 September 1996. Section 106 inserted s.1AA into the 1967 Act so as to create a right to enfranchise where a failure to satisfy the low rent test was the only reason why the lease could not be enfranchised. The parties have not been able to discover any explanation of the rationale or aim underlying the effective abolition of the low rent test. But plainly, the reform of the long leasehold market was no longer limited to remedying the social and economic injustice of the building lease and premium lease models.

590. At all events, in September 1996 the parties would have transacted on the basis that although the low rent test was not a bar to enfranchisement by the SoS, at that stage the residence test was.

591. Section 138 of the 2002 Act removed the residence test in the 1967 Act. So the moral right to acquire the freehold of a house ceased to be restricted to a tenant's home. Lord Carnwath referred to the rationale for this change in *Hosebay* at [3] to [5]. In relation to the enfranchisement of flats under the 1993 Act, the view was taken that the residence test was too restrictive, for example, by excluding someone subletting a flat or occupying a flat as a second home. However, in order to restrict the scope for short-term speculative gains, a rule was introduced requiring the tenant to have held his lease for at least two years. Parliament took the same approach to the enfranchisement of houses by amending the 1967 Act (see s.1(1)(b)). It was also said that a tenant who leases a house through a company should be able to enfranchise.

592. The removal of the residence requirement has also had the effect of extending the right to enfranchise to companies and public authorities. However, this does not include buildings occupied for purely non-residential purposes. By s.1(1B) of the 1967 Act a tenant of a house to which Part II of the 1954 Act applies does not have a right to enfranchise unless he satisfies a residence test.

593. By definition a company or public authority will not be exercising a right to enfranchise in order to acquire the freehold of a home in which it resides. They may exercise such rights for commercial or financial reasons. Consequently, it may be a relevant aim of a public authority to enfranchise in order to exercise bargaining power, or to secure the best commercial arrangement possible in the public interest (see *The State of Mauritius* case at [63] – see para. [135] above).

594. Despite the widening of the ambit of the 1967 Act (and related schemes in the 1993 Act) the courts have maintained that *James* remains an obstacle for incompatibility arguments based on A1P1 (see e.g. Lord Walker in *Earl Cadogan v Sportelli* [2010] 1 AC 226 at [47] to [48]).

595. Parliament has not only widened the scope of the right to enfranchise, it has also widened the scope of the landlord's entitlement to compensation as compared with the measure originally provided by the 1967 Act. In the present case any enfranchisement would take place under s.1AA of the 1967 Act, which engages the right to compensation under s.9(1C). The measures of compensation are summarised in [92] above.

Whether APL's interest was delimited by the 1967 Act from the outset

596. I do not consider that the defendant's submission that APL's interest existed subject to the 1967 Act (see [555] above) is dispositive of the claimants' case based on A1P1. The case law cited in *T&N* makes it plain that the critical question is whether the legislation in question delimited or qualified the property right at the moment it was created. If the answer to that question is no, A1P1 does not cease to be engaged merely because the general law applicable at that time would bring that property right to an end in certain circumstances which have subsequently occurred. The position in the present case is clear. When the underleases were granted to him the SoS was not able to satisfy the residence test, but the position has altered because of a subsequent change in the law and the exercise of the right which then came into being.

Whether individual cases need to be evaluated against A1P1

597. It is well-established that it is open to Parliament to create a statutory scheme compliance with which is to be treated as compatible with a Convention right in all cases. In other words it is open to Parliament to adopt a general measure which is to be treated as having struck the proportionality balance in relation to a Convention right sufficiently for all cases, so that a case-specific justification for any interference with a Convention right is inappropriate, even in relation to criminal offences (see e.g. *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 and *Perincek v Switzerland* (2015) 63 EHRR 6). This may be the case although Parliament has not itself considered the issue of proportionality when a Bill was before it (see *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [163] to [185] and *Attorney General's Reference on a Point of Law (No.1 of 2022)* [2023] 2 WLR 651 at [59] to [62]). The Supreme Court has recently re-emphasised these principles in *In Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] 2 WLR 33 at [29], [34] to [38], [46] to [49] and [65].

598. In *James* the ECtHR rejected the applicants' argument that the 1967 Act was incompatible with A1P1 because it failed to provide for an independent assessment of the reasonableness of each enfranchisement, in order to avoid injustice for the landlord as well as the tenant. The Court accepted that it had been reasonable for Parliament to decide to reject that option because of the uncertainty, delay and expense it would entail. Given that the social and economic reforms applied to a large number of cases and diverse circumstances, the legislation should not be expected to do "entire justice" in all circumstances ([68]). The redistribution of interests achieved by the 1967 Act meant that some anomalies, for example tenants not meriting the benefits conferred by the Act or making windfall profits, were unavoidable ([69]). Enfranchisement does not take place automatically upon the satisfaction of certain conditions. It depends upon a qualifying tenant choosing to serve an enfranchisement notice under s.5. But although the material before the ECtHR pointed to anomalies resulting from the timing of such a notice, the Court did not consider it necessary for the 1967 Act to require the circumstances of individual cases to be considered to determine whether the right to enfranchise should be exercisable.

599. In *James*, the ECtHR concluded that the 1967 Act was compatible with A1P1 although the Act operated as a general measure which might result in individual hard cases (see also *In Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] 2 WLR at [35]). The Court accepted that the 1967 Act struck a fair balance between landlords and tenants as a general measure.

600. The decision in *James* was given in 1986. Since then Parliament has had the opportunity to revisit proportionality and the conclusions of the ECtHR on several occasions. Despite the widening of the ambit of the right to enfranchise, Parliament has not seen fit to introduce a requirement that the merits or demerits of enfranchisement be assessed in individual cases. The reasoning of the ECtHR applies to the 1967 Act in its current form with no less force. The claimants did not suggest otherwise.

601. As Sir James Eadie submitted, the 1967 Act sets out conditions upon satisfaction of which a right to enfranchise may be exercised, whether by a private citizen or a public authority. But the exercise of that right is not dependent upon the merits or the impacts of enfranchisement in that case. Likewise, the Act allows no general discretion as to the manner in which the right may be exercised or the price payable. The mere fact that the right has to be exercised by the tenant choosing to serve a s.5 notice does not mean that each such decision taken by a public authority has to be individually assessed for compatibility with A1P1.

602. There was no material change in the substance of the statutory scheme, or the nature of the right to enfranchise, when it became possible for that right to be exercised by public authorities as well as companies. The ability of a public authority to enfranchise does not depend upon the exercise of any additional discretionary power or function. The authority simply exercises a property right. That decision is subject only to the limited grounds of judicial review referred to in *The State of Mauritius* case, recognising the public interest in authorities being able to participate in the commercial market in the usual way, through the exercise of the full bargaining power available to them (see [554] above).

603. For these reasons I accept the defendant's submission that the 1967 Act is a general measure which satisfies the fair balance test required by A1P1, so that no case-specific assessment under that provision is necessary when a right to enfranchise is exercised by a public authority. However, in case I am wrong about that conclusion, I will make an assessment for this case.

Whether the decisions were "provided for by law"

604. I have rejected the private law arguments under grounds 1 and 2 that the notices were invalid and the public law challenges under grounds 3 to 5. Ms. Carss-Frisk confirmed that no additional error of law was being advanced under ground 6, other than the alleged breach of A1P1. Accordingly, the decisions were "provided for by law".

The public interest and whether the decisions pursued a legitimate aim

605. As the decision in *James* illustrates ([39] to [45] and [46] *et seq*), the public interest test can be applied by considering the legitimacy of the aims (of the decision-maker) and the means employed (see also *NKM v Hungary* at [55] to [59]).

606. The decision in *James* dealt with the 1967 Act as originally enacted and amended up until 1984. In the context of traditional forms of building leases and premium leases, the legitimate aims were concerned with remedying a social and economic injustice: in view of the tenant's "moral ownership" of a house in which he had invested so much, the freehold should belong to him rather than the landlord. Parliament sought to address what was described as the "unjust enrichment" of a landlord in relation to the ownership of the house.

607. Since *James* the right to enfranchise has been extended to include leases where the tenant pays rent greater than a "low rent" or ground rent, or does not reside in the house himself. In some cases, such as the present one, the compensation payable to the landlord under s.9(1C) is more favourable than the original measure when the 1967 Act was enacted. The court has not been provided with an authoritative restatement of Parliament's legislative aims, but they still appear to involve giving priority to the investment made by a lessee in his house and the judgment that he should be entitled to own that property.

608. The claimants assert that the purpose of the enfranchisement in this case does not accord with the legislative aims identified in *James.* I disagree. It is necessary to begin with the leasehold structure created by the sale and leaseback entered into by the parties in 1996. For each site APL was granted a 999 year lease. The company made a substantial capital payment. The freehold reversion is somewhat vestigial. The 200 year term granted by underlease to the SoS is of a comparable duration to that held by many enfranchising tenants. Where the SoS enfranchises one of the SFA units he is acquiring an interest held by APL falling not far short of a freehold. In economic terms the acquisition of APL's 999 year lease is analogous to the acquisition of a freehold reversion under the 1967 Act.

609. The underleases in the present case did not involve the type of payments made under a traditional "building lease" or a "premium lease". The SoS was responsible for the costs of building (or initially acquiring) the SFA units. Having sold 999 year leases to APL for £1.662 billion, the SoS is paying a rent for the units based upon market value (rather than a ground rent) over a period of 200 years, unless and until he exercises a break clause. As Mr. Razzell says (para. 5.8 of his witness statement):

> "The MoD would still be in the highly unusual position of paying a market rent on a very long lease of residential property. In nominal terms, if it holds the properties to term, the MoD will pay many times the value of these properties in rent."

In addition the SoS remains responsible for the cost of repairs throughout the term of each underlease. When handback takes place the SoS is liable to APL for dilapidations. From APL's perspective the lease arrangements represent an investment in a reliable income stream. APL provides no services to the SoS, but simply collects the rent payable by the SoS. There are therefore similarities between the circumstances of the present case and the justification accepted in *James* in terms of the "equitable distribution of economic advantages" in the public interest (see [569] to [571] above).

610. Alternatively, and in any event, I accept the defendant's submission that he does not need to demonstrate that his objectives fell within the precise aims of the 1967 Act as originally enacted and discussed in *James*. Since then the ambit of the right to enfranchise and the aims of the legislation have been widened considerably (see e.g. [579] to [585] above). A wide or "particularly broad" margin of appreciation is accorded to a state, and thus the court, when deciding on socio-economic issues engaging A1P1. The notion of "public interest" is "necessarily extensive" and includes the protection of the public purse (*James* at [46]; *NKM v Hungary* at [49], [51], [55] and [59]).

611. The SoS and his officials, acting in good faith, have proceeded on the basis that the lease arrangements have resulted in excessive or unreasonable rates of return for APL. The arrangements were and still remain a bad deal for the MoD, its SFA estate and the public purse. The defendant has concluded that it is in the public interest that he should pursue enfranchisement where it will provide VFM and is preferable to other options, in order to buy out APL and regain ownership and/or to increase leverage on APL in a situation where he currently has little or no bargaining power. In this case the protection of public finances and achieving VFM in public expenditure on the provision of SFA, bearing in mind other demands upon the public purse, were legitimate aims for the SoS when deciding to exercise his right to enfranchise.

612. I do not accept the claimants' contention that the SoS's aim was not legitimate because, referring to *Gratton-Storey*, he was not seeking to acquire the freehold but only the intermediate interest of APL. It is common ground that a sub-tenant who owns the freehold can overcome the effect of the ruling in *Gratton-Storey* by transferring his freehold interest to a nominee before serving an enfranchisement notice (see [37] above). Such action does not conflict with the 1967 Act or any legal principle. It is compatible with the Act. I do not see why

the analysis should be different because similar action (e.g. a transfer to a SPV) is taken by a public authority, or why, because of his status as a public authority, the SoS's aim should not be treated as legitimate. Similarly, in so far as it is necessary for the SoS to serve a notice under s.33(1)(b) of the 1967 Act to make the Act binding upon a mesne landlord, APL, that does not render the SoS's otherwise legitimate aims illegitimate. In any event, the acquisition of the 999 year leases falls not far short of an acquisition of the freehold (see [608] above).

613. I have already summarised the various documents in which the SoS and his officials have considered it to be in the public interest to serve the 8 enfranchisement notices. Depending on the outcome of this case, the assessment of compensation payable and VFM, the SoS may consider it to be in the public interest to pursue that enfranchisement to completion and to serve more notices, possibly a large number of them. That option is said to be in the public interest because it will extricate the SoS from what is widely considered to be a bad deal for the public finances and the provision of SFA, and will likely continue to be so. Whether such action is taken will depend upon the relative merits of the other options which will be open to the SoS. One such option is to use any leverage which results from establishing a right to enfranchise in order to improve his bargaining position in negotiations with APL. The public interest lies in the SoS taking remedial action with regard to a commercial relationship which involves the use of public funds to provide what is judged to be an unreasonably high rate of return to an investment vehicle providing no services to the MoD.

614. In my judgment the defendant has amply demonstrated that his decisions pursue legitimate aims in the public interest for the purposes of A1P1.

The fair balance test

615. The evidence before the court suggests that the SoS did not explicitly carry out an exercise striking the balance required by A1P1. But the absence of any such exercise does not in itself amount to an error of law or breach of A1P1 (the *Belfast City Council* case). In any event, the court must determine the matter for itself. It is a question of law, not pure fact, for the court (*In Re Abortion Services* [2023] 2 WLR at [30]).

616. However, the SoS did have regard to the effect on the claimants of serving the enfranchisement notices and the possibility of serving notices on a much larger scale. He had regard to the legal right to serve enfranchisement notices and the reasons for taking that action. He treated the service of the notices for those reasons as being very much in the public interest. The clear implication is that the SoS attached such importance or weight to those public interest considerations as justified the decision to serve the 8 enfranchisement notices. Plainly, any decision on whether to extend that exercise will depend on the outcome of the test cases, including the assessment of compensation and its implications for VFM on a wider scale. For obvious reasons the SoS has not yet committed himself to a wider programme of enfranchisement. The information he obtains on the overall outcome of the test cases will inform the future judgment he will reach on whether to pursue any such programme.

617. As to the alleged promises based upon the agreements between the parties, I have rejected the claimants' reliance upon legitimate expectation under ground 5. This line of argument does not attract significant weight in the A1P1 balance. When the 1996 agreements were entered into, enfranchisement was only excluded for so long as the residence test continued to be a requirement. That was generally abolished in 2002. The agreements in 2019 and 2021 modified the terms of the long-term relationship established in 1996, but they did not amount to promises that any right to enfranchise would not be exercised.

618. Under ground 4 I have rejected the claimants' case that the SoS has acted, or is acting, for improper motives.

619. I also see no merit in the claimants' argument that in failing to obtain the consent of APL to enfranchisement, the defendant has treated APL differently from a mesne landlord on land held from the Crown Estate Commissioners. I have rejected the claimants' contention under ground 1 that s.88 of the 1993 Act required the SoS to obtain the consent of his landlord APL to enfranchisement. The 2016 Guidance from the Commissioners only applies where a tenant or subtenant needs to rely upon their undertaking to abide by the 1967 Act; that is where the party concerned has no statutory right to enfranchise.

620. For the reasons given under ground 1, where s.33(1)(b) of the 1967 Act applies, as in the present case, the subtenant has a right to enfranchise which is binding upon intermediate landlords. The difference in treatment is the direct consequence of the legislation enacted by Parliament, whereas the 2016 Guidance is a Crown Estate undertaking which covers an extra-statutory situation. The claimants' submissions touched very lightly upon this subject and did not develop the allegation of discrimination. In any event, the claimants' argument overlooks an important feature of the 1967 Act, namely that where there is no Crown interest in land, a subtenant has a right to enfranchise without obtaining the consent of a mesne landlord (see [170] above). I attach no weight to the claimants' suggestion that the SoS's claim involves treating APL differently and unfairly in comparison with a mesne landlord of Crown Estate property.

621. Lastly, there is the issue of loss and compensation. The claimants did not develop their arguments on this subject in detail. They referred to potential losses in relation to marketable goodwill, the value of shares held in APL and the cessation of the handback of SFA units. They also refer to the uncertainty about the extent and timing of any further enfranchisement claims, together with the losses which this uncertainty is causing through the sale of the Annington companies being delayed.

622. In the present case, the court's decision that the SoS was entitled to exercise a right of enfranchisement in respect of the 8 test cases means that there will be a deprivation of APL's interest in those properties once the compensation has been assessed, unless the SoS withdraws his s.5(1) notices. He may exercise his right to withdraw a notice up to one month from the Tribunal's determination of the price payable (s.9(3) of the 1967 Act).

623. The claimants say that there are issues as to whether they will be compensated for all their losses flowing from the SoS's decisions to pursue or consider enfranchisement. Here it should be recalled that A1P1 does not guarantee a right to full compensation in all circumstances (*James* at [54]). Furthermore, the claimants do not criticise the compensation code in the 1967 Act as rendering the legislation incompatible with A1P1.

624. In any event, the basis for, and the amount of, statutory compensation is ultimately a matter to be determined by the First-tier Tribunal and/or the Upper Tribunal. No proceedings under s.21 of the 1967 Act have yet been commenced and no particulars of such losses have been given. Furthermore, the claimants have not particularised a claim for damages in this court under s.8 of the 1988 Act. Consequently, there has been no material for the defendant to respond to, setting out the extent to which he accepts or disputes that any item of loss claimed falls within the ambit of the compensation code and, in so far as it does, the extent to which quantum is agreed or disputed. The extent of any shortfall, if there be any, has not been indicated. Any dispute about the compensation payable as the result of each of the 8 notices would have to be resolved in due course by the appropriate tribunal. The court is in no position to say at this stage whether there would be any shortfall in compensation to meet losses identified by APL and, if so, how large or small that might be. I consider that no significant weight should be attached to this factor at this stage.

625. Even if the statutory compensation for enfranchisement were not to cover all the losses alleged by the claimants, that compensation might still provide the Annington companies with a reasonable rate of return on their investment in the SFA, commensurate with the level of risk for their rights and obligations under the agreements made with the SoS. The claimants have not put forward a case that any such return would be inadequate or that they would make a loss. Of course the adequacy of the return would depend upon (a) the conclusions reached by the tribunal on the Cranwell and Bristol properties, (b) the extent to which those conclusions are applicable more widely to other SFA units which might be enfranchised and (c) any further findings of the tribunal in other cases which might be necessary for this purpose. Although this subject might turn out to be a significant factor in the application of A1P1, it cannot be pursued further without that information and therefore is not a matter to which significant weight can be given at this stage, whether for or against the claimants' case.

626. On the issue of uncertainty, the SoS has not yet decided to go ahead with enfranchisement. He may decide to withdraw the existing s.5 notices and/or not to serve any more enfranchisement notices.

627. Mr. Leung has explained why the uncertainty created by the test notices and the possibility of enfranchisement on a wider scale has caused the sale of the Annington companies to be deferred. The value of APL's interest in the 999 year leases is driven by the entitlement to a steady income stream from the rent payable by the SoS and the opportunity to make capital gains on the handback of premises for a nominal price of £500 (with payments by the SoS for dilapidations). Mr. Leung says that the value of APL's shares is reduced because the company is less attractive to institutional investors or bidders with a low cost of capital looking to obtain a relatively low-risk income stream. Whether

or not such parties would bid, the increase in the risk relating to the income stream, and hence the discount rate used to arrive at the present capital value of APL's future profits, would attract only lower bids (first witness statement paras. 4.11 and 4.15). Mr. Leung has updated the position in his second witness statement. In APL's annual revaluation, the SoS's decisions are said to have resulted in the addition of a risk premium of 0.25% to the discount rate applied to cashflows from the MQE over the next 50 years. It is said that this has reduced the overall capital value of the MQE by 5%, suggesting a loss in the region of £415 million (Mr Leung's second witness statement para. 3.2). These references to the MQE make it plain that the alleged loss reflects the possible implications of enfranchisement on a wider scale, not just the Cranwell and Bristol properties. In addition, I note that the delay to the refinancing of £300m of unsecured bonds meant that the new Notes had to be issued at a higher rate of interest than would otherwise have been the case.

628. In summary, the claimants say that the effect of the test cases and the risk of enfranchisement has caused a reduction in the value of Annington. As we have just seen, the claimants do not suggest that the assets of the Annington companies cannot be sold or have become unmarketable. Instead, the claimants refer to a current loss of value. They have decided to defer the sale, presumably in order to see whether enfranchisement can be defeated, alternatively full market value obtained through the compensation code, in order to overcome the alleged loss of value.

629. Significant weight should be attached to the effects of uncertainty about whether further enfranchisement notices will be served But, for the reasons given above, I do not attach significant weight to the possibility of statutory compensation being inadequate to cover losses sustained because of the risk of further notices being served.

630. In the other side of the balance, there are the reasons previously set out as to why the SoS has considered that it is in the public interest to serve the 8 test notices and, in the light of the results of those notices, to consider the possibility of enfranchising SFA units more widely. Those reasons include the following:

(i) The SoS seeks to address the effects of the 1996 agreements, which represent a bad deal for the MoD, the MQE and the public purse. Those agreements have resulted in an excessive transfer of value from the MoD to APL and the company receiving an excessive rate of return relative to its contractual obligations, rights and risks;

(ii) It has been estimated that by 2018 the deal with Annington had caused a loss to the MoD of between £2.2 billion and £4.4 billion;

(iii) The SoS is liable to pay rents based on market values which may increase over the remainder of the 200 year terms;

(iv) The MQE is substantially larger than the MoD requires. The SoS has to pay rent on empty properties, but on handback the SoS has to transfer freehold title for nominal sums and pay for dilapidations. This has operated as a disincentive to the handing back of void properties;

(v) On handback, APL is able to sell on and realise the whole of any capital appreciation. The SoS considers that the MoD should not continue to be excluded from any appreciation in the value of SFA. Realising capital appreciation would help to reduce the PSND;

(vi) The test cases are necessary to enable the SoS whether he is entitled to enfranchise SFA units and, once prices have been determined, whether this option represents VFM for the MoD;

(vii) In so far as the compensation payable to APL on enfranchisement is significantly less than the value of SoS's liability to APL under the existing lease arrangements, there will be VFM and funding for the acquisition costs;

(viii) The SoS needs to decide which SFA sites he should retain and, in relation to those sites, decide which method of financing would provide better VFM: leasing from APL or outright ownership through enfranchisement, bearing in mind that APL provides no services to the MoD;

(ix) In relation to those properties which the SoS decides he should no longer retain, he will decide whether it is VFM and in the public interest to hand back units to APL, or to enfranchise so that the SoS can realise capital appreciation;

(x) The current arrangements with APL offer little or no flexibility to MoD. Under those arrangements SoS has no commercial levers to use in negotiations with APL. Enfranchisement would provide MoD with such levers and an ability to negotiate better terms with APL as a possible alternative to enfranchisement;

(xi) Given Annington's timescale for refinancing or sale, it was necessary to serve the test case notices. Refinancing would be likely to result in APL's debt increasing and therefore less headroom for MoD to renegotiate better terms from APL. The SoS was also entitled to take the view that the potential bidders in the market should be aware of his intentions to test the merits of enfranchisement.

631. On all the material before the court, the balance comes down firmly in favour of the SoS's decisions. Looking at the circumstances as a whole, neither the enfranchisement notices already served nor the risk of further claims being made imposes a disproportionate or excessive burden upon APL or the other claimants.

632. Ms. Carss-Frisk referred to case law applying a *restitutio in integrum* approach to the assessment of damages "to afford just satisfaction" (s.8 of the 1998 Act). I need not refer to those authorities because they are only relevant where a breach of A1P1 is found to have occurred and damages fall to be assessed, which is not the case here.

633. For those reasons I reject the claimants' contention that the SoS's decisions have violated A1P1 and I reject ground 6.

Issues 21 to 22 – The challenge to a wider scheme

634. For the reasons set out above I do not accept that the SoS has already decided to proceed with a wider scheme of enfranchisement. His decision-making to date has gone no further than to give serious consideration to a wider scheme, depending upon the overall outcome of the test cases, the relative merits of other options and VFM. The test cases have been approved by Ministers solely as a "proof of concept" at this stage. The highly contingent nature of the SoS's approach to the service of more s.5 notices show that no further decision has been made which could be amenable to judicial review. But in any event, even if it be assumed that there is a reviewable decision in relation to a scheme, I have explained why none of the grounds of challenge succeed in relation to that aspect.

Conclusions

635. In the proceedings in the Chancery Division the defendant is entitled to a private law declaration that each of the 8 notices relating to the Cranwell and Bristol properties is a valid notice exercising a right to enfranchise under s.1AA of the 1967 Act.

636. The claims for judicial review in CO/889/2022 and CO/2389/2022 are dismissed.

Annex A: the Agreed List of Issues.

A. THE CHANCERY PROCEEDINGS / GROUNDS 1 AND 2 JR1/JR2

Application of leasehold enfranchisement legislation to premises in which there is a Crown Interest

1. Whether section 88 of the Leasehold Reform, Housing and Urban Development Act 1993 prevents the Defendant from acquiring the freehold of: (a) the two properties in Cranwell and (b) the six properties at a site in Bristol (the "Properties") under Part I of the Leasehold Reform Act 1967 (the "1967 Act") without the agreement of the Claimant? Which also raises the following issues:

> (1) Is the effect of s.33 of the 1967 Act and s.88 of the Leasehold Reform Housing and Urban Development Act 1993 (the "1993 Act") to make any right which the Defendant relies upon to enfranchise subject to the consent of Annington Property Limited ("APL") ?
>
> (2) Does the principle of legality require that s.33 of the 1967 Act and s.88 of the 1993 Act be read so that any right which the Defendant relies upon to enfranchise is subject to the consent of APL not specifically responded to in the DGRs)?

The effect of the decision in *Gratton-Storey v. Lewis & Anor* [1987] 2 EGLR 108

2. It being agreed that, to the extent it is not distinguishable, this Court is bound by the decision of the Court of Appeal in *Gratton-Storey v. Lewis & Anor* [1987] 2 EGLR 108:

> (1) whether the Defendant is precluded from making a claim pursuant to Part I of the 1967 Act in relation to any house of which it remained, as at the date of service of a s.5 notice, the registered freehold proprietor but in relation to which Defence Infrastructure Holdings Limited ("DIHL") was in equity the freeholder and entitled to be registered as legal proprietor by virtue of a transfer of the freehold which had been executed but which had not yet been completed by registration; and
>
> (2) whether the Defendant is precluded from making a claim pursuant to Part I of the 1967 Act in relation to any house of which, as at the date of service of a s.5 notice, DIHL was the registered freehold proprietor on the grounds that (i) by reason of the indivisibility of the Crown, the Defendant and DIHL are to be treated as the same entity for the purposes of the application of Gratton-Storey v. Lewis, and (ii) consequently at the relevant times the Crown was and remained the registered freehold proprietor of both 1 & 3 Sycamore Drive for those purposes.

Application of Part II of the Landlord and Tenant Act 1954 (the "1954 Act") to the Underleases

3. Whether, as at the date of each Enfranchisement Notice, the land demised by the Underlease of RAF Cranwell dated 5 November 1996 (the "Cranwell Underlease") and/or the land demised by the Underlease of Belvedere Road, Bristol dated 5 November 1996 (the "Bristol Underlease"), or any part of it, was occupied for any purposes of a Government department within the meaning of s.56(3) of the 1954 Act. This issue raises the following sub-issues:

4. Whether, within s.56(3), land "occupied for the purposes of a Government department" means land "occupied by a Government department".

5. Whether, on the date of each relevant Enfranchisement Notice, some or all parts of the premises demised by the Bristol Underlease or the Cranwell Underlease were "occupied for the purposes of a Government department", namely for the Defendant's purposes in the defence of the Realm, because, regardless of who was actually in occupation, that occupation of those parts of the demised premises was occupation for the Defendant's purposes. In particular:

(1) Whether the Units (including gardens) resided in by Service personnel and their families upon Service licences at the date of each relevant Enfranchisement Notice, forming the whole of the land demised by the Bristol Underlease and part of the land demised by the Cranwell Underlease, were occupied by the Defendant and / or for any purposes of a Government department within the meaning of s.56(3) of the 1954 Act.

(2) Whether the garages which were used by Service personnel and their families upon garage licences at the date of each relevant Enfranchisement Notice, forming part of the land demised by the Cranwell Underlease, were occupied by the Defendant and / or for any purposes of a Government department within the meaning of s.56(3) of the 1954 Act.

(3) Whether the Units which were sublet on the open market at the date of each relevant Enfranchisement Notice, forming part of the land demised by the Cranwell Underlease, were occupied by the Defendant and / or for any purposes of a Government department within the meaning of s.56(3) of the 1954 Act.

(4) Whether the Units and/or garages which were void (i.e. empty) at the date of each relevant Enfranchisement Notice, forming part of the land demised by the Cranwell Underlease, were occupied by the Defendant and / or for any purposes of a Government department within the meaning of s.56(3) of the 1954 Act.

(5) Whether the two Units used as contact or welfare houses, forming part of the land demised by the Cranwell Underlease, were, at the date of each relevant Enfranchisement Notice, used by the Defendant and / or for any purposes of a Government department, within the meaning of s.56(3) of the 1954 Act.

6. In relation to the land forming part of the land demised by the Cranwell Underlease and sublet to DIHL pursuant to the Common Parts Lease, at the date of each relevant Enfranchisement Notice:

(1) What (if any) parts of the land demised to DIHL were occupied by DIHL or the Defendant:

(2) Whether the Defendant is to be taken to be in occupation of any part of the Cranwell site which was in fact occupied by DIHL:

(i) because, by virtue of the indivisibility of the Crown, DIHL and the Defendant are to be treated as the same entity for the purposes of the 1954 Act;

(ii) because occupation of any such part and/or the carrying on of a business by DIHL is to be treated as equivalent to occupation and/or the carrying on of a business by the Defendant by virtue of s.23(1A) and s.23(1B) of the 1954 Act, or whether those provisions have no application either because (a) DIHL has its own business tenancy or (b) s.23(1A) does not apply to s.56(3).

(3) Whether any land occupied by DIHL (and not by the Defendant) is occupied "for any purposes of a Government department" because the purposes of DIHL's occupation are all or any of the Defendant's purposes.

(4) Whether, if DIHL has its own business tenancy (pursuant to s.23 or s.56) that prevents the Defendant from having a business tenancy under s.56.

(5) Whether, if DIHL's purposes are only those of DIHL's own business, any land occupied by DIHL (and not by the Defendant) is nevertheless occupied "*for any purposes of a Government department*".

7. Whether, if the answer to any issue within §§5-6 above would otherwise be "yes", the answer is different because some relevant occupation falls to be disregarded because of the de minimis principle.

Excluded Tenancy (Designated Rural Area Exclusion) – Cranwell only

8. It being agreed that:

(1) by s.1AA of the 1967 Act the right of a tenant to acquire the freehold of a house is excluded where at the relevant time:

(i) the house is within an area designated by the Defendant as a rural area pursuant to s.1AA(3)(a);

(ii) the freehold of the house is owned together with adjoining land which is not occupied for residential purposes, and has been so owned since 1 April 1997 (the "Adjoining Land Test"); and

(iii) the relevant tenancy of the house (in right of which the claim is made) was granted on or before 1 April 1997.

9. For the purposes of the Adjoining Land Test, the issues are:

(1) Which land is "adjoining" 1 and/or 3 Sycamore Drive;

(2) Whether at the relevant times any part of the land on the Cranwell Site (other than 1 or 3 Sycamore Drive) or any other adjoining land owned by the Defendant at the relevant times was "not occupied for residential purposes" and if so, which part(s);

(3) Whether at the relevant time in respect of 1 Sycamore Drive, the bare legal title to the freehold of 1 Sycamore Drive retained by the Defendant sufficed to constitute "ownership of the freehold… together with adjoining land";

(4) Whether, for the Adjoining Land Test to be satisfied, it is necessary for the freehold of the subject property to be owned together with adjoining land by a single freeholder, and for the relevant adjoining land to be owned in the same capacity for the whole period from 1 April 1997, or whether it is sufficient that, for the whole period, the freehold was owned by a person or successive people who also owned adjoining land together with it;

(5) Whether DIHL's tenancy of the common parts of the Cranwell Site, pursuant to the Common Parts Underlease, amounted to (i) ownership of adjoining land (ii) together with the freehold of 1 and/or 3 Sycamore Drive;

(6) Whether, by reason of the indivisibility of the Crown, DIHL and the Defendant should be treated as the same entity for the purposes of the Adjoining Land Test, and consequently whether for those purposes at the relevant times the Crown:

(i) was and remained the registered freehold proprietor of both 1 & 3 Sycamore Drive;

(ii) was and remained the registered freehold proprietor of the other land demised by the Cranwell Underlease, and of the remainder of the land comprising RAF Cranwell;

(iii) was and remained the tenant of the whole of the Cranwell Site pursuant to the Underlease; and

(iv) was by virtue of the Common Parts Underlease, also the tenant of the common parts of the land demised by the Cranwell Underlease.

(7) Accordingly, whether at the relevant times the Adjoining Land Test was satisfied in respect of 1 and/or 3 Sycamore Drive.

Validity of Notices / Right to Enfranchise

10. Does the Defendant have the right to enfranchise the Properties under the 1967 Act? In the premises, whether each of the following notices served by or on behalf of the Defendant pursuant to section 5 of the Leasehold Reform Act 1967 was valid and effective or void and of no effect:

(1) Notice dated 16 December 2021 and relating to 1 Sycamore Drive, Cranwell, Sleaford NG34 8HP;

(2) Notice dated 28 January 2022 and relating to 3 Sycamore Drive, Cranwell, Sleaford NG34 8HP;

(3) Notice dated 8 April 2022 and relating to 16 Belvedere Road, Bristol BS6 7QJ;

(4) Notice dated 8 April 2022 and relating to 17 Belvedere Road, Bristol BS6 7QJ;

(5) Notice dated 11 April 2022 and relating to 18 Belvedere Road, Bristol BS6 7QJ;

(6) Notice dated 11 April 2022 and relating to 19 Belvedere Road, Bristol BS6 7QJ;

(7) Notice dated 11 April 2022 and relating to 20 Belvedere Road, Bristol BS6; and

(8) Notice dated 13 April 2022 and relating to 21 Belvedere Road, Bristol BS6 7QJ.

B. GROUND 3 JR1/JR2

11. Whether the Defendant may only enfranchise a leasehold property pursuant to the 1967 Act where certain legal preconditions, said by the Claimants to arise in all cases of compulsory acquisition by the Crown, are satisfied. Specifically:

(1) Is the exercise of statutory leasehold rights by the Defendant, either generally or on the facts of this particular case, to be regarded as a form of compulsory purchase or acquisition? Alternatively, is it to be regarded as equivalent to such (see, e.g. Re Leeds CC, ex p Leeds Industrial Cooperative Society Ltd (1997) 73 P&CR 70)?

(2) If so, is the Defendant's exercise of those rights subject to a requirement to demonstrate that (i) there was a compelling case in the public interest for the exercise of the right, (ii) the right has been exercised for the legislative purpose and not a collateral purpose, and (iii) the right was exercised as a last resort?

(3) In circumstances where the Defendant does not contend that he met those conditions, has the Defendant acted lawfully in seeking to exercise his powers or rights in this case?

C. GROUND 4 JR1/JR2

12. Whether, if the criteria for enfranchisement in the 1967 Act were satisfied in respect of the Properties, there was no further limit on the purposes for which the Defendant could seek to enfranchise.

13. Whether (as alleged by the Claimants) the Defendant had any of the purposes set out below and, if so, whether any such purpose was the true or dominant purpose for which the Defendant exercised the right to enfranchise, or was sufficiently material to the decisions, or was so intertwined with any lawful purpose as to be inseparable from it (it being common ground that the Claimants are not alleging bad faith). The alleged purposes are:

(1) To override the Settlement Agreement and prior agreements entered into between the Defendant and APL;

(2) To use the 1967 Act not to obtain the freehold, but to defeat APL's intermediate leasehold interest;

(3) To undercompensate the Claimants for the taking of their property, thereby causing them significant economic harm;

(4) To provide the Defendant with leverage over the Claimants;
(5) To prevent the Claimants from proceeding with the proposed sale and making profits from that sale;

(6) To escape a commercial arrangement which had long been, and still was, widely considered to be a source of political embarrassment and reputational damage; and

(7) Out of animosity towards the Claimants and/or a desire to punish the Claimants for their economic and business success.

14. If so, whether the relevant purpose was not a proper purpose for which the Defendant's right could lawfully be exercised, and whether the fact that the Defendant acted with that purpose is sufficient to render the decision improper.

D. GROUND 5 JR1/JR2

15. Whether, by agreeing to the terms of the 1996 Agreement and subsequent agreements between the parties (as pleaded at JR2 SFG §86), the Defendant made a promise or representation that was clear, unambiguous and devoid of relevant qualification and/or by entering into and performing pursuant to the terms of the 1996 Agreement and subsequent agreements for over 25 years, the Defendant had an unambiguous, well-established and well-recognised past practice, sufficient to give

rise to a future commitment that the Claimants would continue to do business with the Defendant on the basis of the agreed contractual framework.

16. Whether the terms of the Crown Estate's 2016 Guidance that there can be no enfranchisement in respect of Crown land without the consent and permission of an intermediate landlord are a clear, unambiguous and unqualified statement that APL's consent would be required if the Defendant sought to enfranchise properties within the Married Quarters Estate.

17. If the answer to either of the issues at §§15, 16 above is "yes", whether the Claimants relied upon either or both of those representations and/or past practices, and to what extent reliance is relevant to the existence of a substantive legitimate expectation?

18. If there is a finding as to the existence of either or both legitimate expectations, whether in overriding any such expectation, the Defendant has frustrated the Claimants' substantive legitimate expectations so unfairly as to amount to an abuse of power and/or a disproportionate response that cannot be objectively justified, including by reference to an alleged "compelling reason in the public interest", namely the protection of the interests of taxpayers?

E. GROUND 6 JR1/JR2

19. If the Defendant has the right to enfranchise the Properties, has the Defendant acted in a manner which constitutes an unlawful interference with the Claimants' right to peaceful enjoyment of their possessions as protected by Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") ?

20. Specifically, as regards each of (i) APL's leasehold interest in the MQE, (ii) APL's contractual rights to Released Units, and (iii) APL's marketable goodwill and legitimate expectations and the value of the shares held by AHGL:

(1) Do the Claimants have relevant "possessions" for the purposes of A1P1?

(2) If so, has the Defendant committed an actionable interference with any of the Claimants' possessions?

(3) If so, is any such interference subject to the conditions provided for by law?

(4) If so, does any such interference pursue a legitimate aim in the public interest?

(5) If so, is any such interference disproportionate?

F. THE ALLEGED "SCHEME"

21. Did the Defendant adopt a wider scheme to override the terms of the contractual agreements between APL and the Defendant, of which the purported notices form a part?

22. If so, was the wider scheme unlawful on any or all of the six grounds, and points identified by the Parties, above (see the references to the SFG and DGR set out above)?